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Illustration: The case of *Houss v. Meyer* is in Pac. Rep., vol. 35, p. 303. It can be cited as from the State Report by giving opposite "303" (Reporter page column) in this table, i. e., "100 Cal. 592."

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THE
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SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON,
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MEXICO, OKLAHOMA, AND COURT
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GIBSON CLARK.

¹Term expired Jan. 1, 1894.²Appointed Jan. 29, 1894.

RULES OF COURT.

SUPREME COURT OF THE TERRITORY OF ARIZONA.

Rule I.

Transcripts.

I. All transcripts of record in civil cases brought to this court on appeal or writ of error shall be printed on white paper, eight inches by ten inches in size, in a neat and workmanlike manner, with pica type, or in typewriting, leaving a sufficient margin to permit its being bound together in book form; that is to say, fastened together only on the left-hand side, and shall be so fastened. Each tenth line thereof shall be plainly and consecutively numbered as a folio on the left margin of the page.¹

II. The transcript shall be chronologically arranged; shall be prefaced with an alphabetical index of its contents, specifying the folio of each separate paper, order, and the testimony of each witness; and shall have a cover.

III. Bills of exception and statements of facts may be consolidated into one and the same paper; but in all cases the same shall be in narrative form, tersely and succinctly stated. Copies of all papers, vouchers, exhibits, motions, pleadings, and orders shall omit the venue of the court, the title of the cause, and the signature thereto; the object hereof being to discard unnecessary matter. For example, in incorporating a motion for a new trial or other paper, the form that is herein recommended to be followed is as follows: "And thereupon, on —, 188- defendant filed his motion for a new trial, as follows;" and then insert the reasons assigned in the motion. All motions and demurrers that are inserted in transcripts of the record shall only contain the reasons assigned in such motion or demurrer. The body of all pleadings shall be copied in the transcript of the record totidem verbis, but the venue of the court, the title of the cause, and the signature thereto shall be omitted. Whenever any objection is made to evidence or to any question propounded to a witness, in every such case the question and answer of the witness shall be inserted totidem verbis.

IV. If the transcript be printed, there shall be six copies thereof filed with the clerk. If it be in typewriting, there shall be four copies filed with the clerk.

V. Whenever a map or survey forms part of the transcript it shall not be necessary

to furnish more than one copy thereof, which shall be annexed to the transcript filed with and certified by the clerk, and reference thereto shall be made in the other copies.

Rule II.

Motions.

I. All motions relating to informalities in the manner of bringing a case to this court shall be filed with the clerk on or before the second day of the term in which the transcript is filed, a copy thereof being served on opposing counsel on or before the same day; otherwise, the ground of the objection shall be considered as waived, if it can be waived.

II. Motions to dismiss for want of jurisdiction of this court, and for such defects as defeat the jurisdiction in the particular case, that cannot be waived, are recommended to be filed on or before the second day of the term, a copy thereof to be served on the opposite party; but such motion may be made at any time, and shall be entertained by the court, after such notice to opposing counsel as the court may deem proper to be given under the circumstances.

III. Motion made either to sustain or defeat the jurisdiction of the court, dependent on facts not apparent in the record, and of which the court cannot take judicial notice, must be supported by affidavit or other satisfactory evidence, copies of which must be served on the opposing counsel.

IV. Motions will be called for hearing on the third day of the term, and be disposed of in their order.

V. No oral arguments will be heard on motion, except in such cases as the court may direct.

VI. The clerk, upon filing a motion, shall docket the same in his docket, to be known as the "Motion Docket," together with the name of the attorney who makes the motion, and the kind of motion made. Any opposition in the way of answer to said motion shall be filed, and shall in like manner be numbered and noted in the motion docket, together with the names of the respective attorneys making and opposing any such motion.

VII. There shall be no oral argument on motions for rehearing unless such argument is requested by the court.

VIII. No motion for rehearing shall be amended, except by leave of the court.

¹ See amendment to rule I, subd I, post, p. viii.

Rule III.

Briefs and Arguments.

I. For the appellant or plaintiff in error, and for the appellee or defendant in error, there shall be filed six copies of a brief, or a brief and argument, with the clerk of the court. All briefs in civil cases shall be printed in pica type, on white paper, in size eight inches wide and ten inches long, with an unprinted margin of not less than one and one-half inches in width.¹

II. The brief shall contain, in the order here stated:

1. A concise statement, or statement of the case, presenting succinctly the questions involved, and the manner in which they are raised.

2. A specification of the errors relied upon, particularly and separately stated, setting out each error asserted and intended to be urged. When the error alleged is to be the admission or the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be to the instruction given, or to the instruction refused. When the error alleged is to the finding of a court, the specification shall allege the finding, and a sufficient statement of the evidence that is pertinent thereto as will make clear the reasons for or against the finding.

3. A brief of the argument, exhibiting a clear statement of the points of law or facts to be discussed, with a reference to the folios of the transcript of the record that are pertinent thereto, and the authorities relied upon in support thereof.

III. The brief of the appellee or defendant in error shall be of a like character with that required of the appellant or plaintiff in error, except that no specification of error shall be required and no statement of the case, unless that presented by the appellant or plaintiff in error is controverted.

IV. Whenever an appellant or plaintiff in error is in default, the appeal or writ of error may, on motion, be dismissed; and, whenever an appellee or defendant in error shall be in default, he will not be heard except on consent of his adversary or by request of the court.

V. Within thirty days next after the appeal or writ of error is perfected, and the statement of facts and bill of exceptions have been made a part of the record in the case, the appellant shall serve upon the attorney of the opposite party a copy of his brief, prepared in conformity with rule II. of this article; and, within thirty days next thereafter, counsel for appellee or defendant in error shall serve upon the counsel for appellant or plaintiff in error a copy of his answer thereto; and, within fifteen days next

thereafter, the counsel for the appellant or plaintiff in error shall serve upon the counsel for appellee or defendant in error his reply thereto, if one be filed.

VI. Six copies of these briefs, so made and served, shall be filed with the clerk of this court, on or before the first day of the term to which such appeal or writ of error is returnable.

VII. If the time given by rule V. of this article in which to make, serve, and file such briefs will not expire before the first day of the term of this court to which the appeal or writ of error is returnable, then, in every such case, either party to such appeal or writ of error may serve the other with written notice that such appeal or writ of error will be urged to a submission at the term to which it is returnable, in which event counsel for appellant or plaintiff in error shall make and serve his brief, as hereinbefore required, within fifteen days next after the service of such written notice; and counsel for appellee or defendant in error shall have a like time thereafter in which to make and serve his answer thereto; and counsel for appellant or plaintiff in error shall have five days next thereafter in which to make and serve his reply. And, in all such cases, six copies of such brief, answer, and reply shall be filed with the clerk of this court, on the day succeeding that on which said reply is due to be served, unless such day shall fall on a holiday, and in that event the same shall be filed on the day following.

VIII. In case any brief, answer, or reply shall not be served as provided in this article, or shall not be served in the time specified, then the court may on motion strike such brief, answer, or reply from the files of the court, and consider and decide the case as though such defaulting party had made no appearance in the case, or may, in proper cases, dismiss the appeal or writ of error for want of due prosecution of the same.

IX. In all cases where the briefs hereinbefore provided for shall have been filed, either party will be heard orally for such time as may be fixed by the court, not to exceed one hour.

Rule IV.

Service.

Attorneys and guardians ad litem in the court below will be deemed attorneys and guardians ad litem of the same parties in this court until a substitution of record is made; and service of all papers, notices, briefs, etc., may be made on such attorneys or guardians ad litem that were such in the court below until such substitution is made, and notice thereof given to opposing counsel.

Rule V.

Diminution of Record.

For the purpose of correcting any error or defect in the transcript, either party

¹ See amendment to rule III., subd. I., post, p. viii.

may suggest the same in writing, and, upon good cause being shown, obtain an order that the proper clerk certify to this court the whole or any part of the record as may be required, or may produce the same duly certified without such order. If the attorney of the adverse party be absent, or the fact of the alleged defect be disputed, the suggestion, except when a certified copy of the omitted record is produced at the time, must be accompanied by an affidavit, showing the existence of the defect alleged.

Rule VI.

Assignment of Errors.

I. All assignments of errors must distinctly specify each ground of error relied upon, and the particular ruling complained of. If the particular ruling complained of has been embodied in a motion for a new trial with other rulings, or in any motion, or in a bill of exceptions, or in a statement of facts, or otherwise in the record, it must, nevertheless, be referred to in the assignment of errors, or it will be deemed to be waived.

II. If the assignment of error be that the court overruled a motion for a new trial, and the motion is based upon more than one ground, the same will not be considered as distinct and specific by this court, unless each ground is separately and distinctly stated in the assignment of errors.

III. An objection to the ruling or action of the court below will be deemed waived here, unless it has been assigned as error, in the manner above provided.

IV. If the assignment of error be to the giving of instructions to the jury by the lower court, the appellant must state whether the instruction complained of is erroneous in its statement of the law applicable to the case, or to any particular fact or facts thereof.

V. If the refusal to give an instruction asked for by the appellant in the court below be assigned as error, the assignment must state the applicability of such instruction to the fact or facts of the case.

VI. Assignment of errors shall not be amended in this court.

Rule VII.

Costs.

Costs shall be allowed to the successful party by this court, as follows:

For transcript of the record, the amount paid therefor to the clerk of the district court from which the transcript comes, and the expense of printing or typewriting the copies thereof; the costs of the clerk of this court; and the sum of one dollar per page of the brief of the successful party, not exceeding twenty dollars in any one case.

Rule VIII.

Appearance Fee.

In all civil cases the appellant or plaintiff in error shall deposit with the clerk of this court ten dollars, and the appellee or defendant in error five dollars. The clerk of the court will not be compelled to docket any case, nor to file any paper, until such appearance fee is paid. As soon as the amount so deposited shall not equal the costs in this court of the party so depositing the same, then, and in every such case, the clerk of this court may call upon such party to make an additional deposit of a like amount, and, until such additional amount be deposited, the clerk will not be compelled to file any paper, or do any other thing in said case for the party that is so in default.*

Rule IX.

Files.

No paper shall be taken from the office of the clerk of this court except by order of the court.

Approved: A. C. BAKER, C. J.
RICHARD E. SLOAN, A. J.
JNO. J. HAWKINS, A. J.
OWEN T. ROUSE, A. J.

Monday, January 29th, 1894.

* See amendment to rule VIII., post, p. viii.

AMENDMENTS TO RULES.

(See original rules, ante, p. v.)

SUPREME COURT OF THE TERRITORY OF ARIZONA.

Amend rule I., subdivision I., so as to read:

"All transcripts of record in civil cases brought to this court on appeal or writ of error shall be printed on white paper, eight inches by ten inches in size, in a neat and workmanlike manner, with pica type, or in typewriting, not exceeding a second impression, and leaving a sufficient margin to permit its being bound together in book form; that is to say, fastened together only on the left-hand side, and shall be so fastened.

"Each tenth line thereof shall be plainy and consecutively numbered as a folio, on the left margin of the page."

Amend rule III., subdivision I., so as to read as follows:

"For the appellant or plaintiff in error, and for the appellee or defendant in error, there shall be filed six copies of a brief, or a brief and argument, with the clerk of the court, which shall be either printed or typewritten, and all briefs in civil cases, when printed, shall be in pica type, on white paper, not to exceed in length nine and one-eighth inches,

and in width six inches, with unprinted margin of one and two-eighths inches. Typewritten briefs shall be of the same size, and shall not exceed second impression copies. All briefs shall be in pamphlet form, and with covering upon the back only."

Amend rule VIII. so as to read:

"In all civil cases the appellant or plaintiff in error shall deposit with the clerk of this court twenty dollars, and the appellee or defendant in error ten dollars.

"The clerk will not be compelled to docket any case, nor to file any paper, until such appearance fee is paid. As soon as the amount so deposited shall not equal the costs in this court of the party so depositing the same, then, and in every such case, the clerk of this court may call upon such party to make an additional deposit of a like amount; and, until such additional amount be deposited, the clerk will not be compelled to file any paper, or do any other thing in said case for the party that is so in default."

March 8, 1894.

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[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in 28 and 34 Pac. This list does not include cases where an opinion has been filed on the denial of the rehearing.]

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MORRISON v. MORRISON.

(Supreme Court of Montana. Jan. 2, 1894.)

DIVORCE — VIOLENCE AND CONTINUED DRUNKENNESS — CONDONATION — FAILURE TO SUPPORT — SPECIAL FINDINGS OF JURY.

1. Code Civil Proc. § 275, which provides for the submission of special findings to be returned by the jury, applies to divorce suits.

2. For several years a husband had been guilty of acts of violence to his wife, and of continued drunkenness. A final separation occurred in January, 1889. The wife began suit for divorce in April, 1889; and, just before she did so, the husband, armed, intoxicated, and threatening to kill her, broke into her house, and drove her therefrom. *Held*, that the husband's offenses were not condoned by the cohabitation of the wife with him till October, 1888.

3. In a divorce suit against a husband for continued drunkenness and acts of violence, evidence of his failure or neglect to support his wife is admissible to show the general tenor of his conduct towards her, but not as a ground of divorce.

Appeal from district court, Silver Bow county; William Y. Pemberton, Judge.

Bill by Lillie Morrison against Alexander M. R. Morrison for divorce. From a decree for plaintiff, and an order denying a new trial, defendant appeals. *Affirmed*.

Thompson Campbell, for appellant. J. S. Shropshire, for respondent.

HARWOOD, J. Plaintiff sought and obtained a divorce from the bonds of matrimony existing between herself and defendant, and also the custody of four infant children of said marriage, ranging in age from two to eight years, together with alimony and costs of suit. The grounds alleged for such divorce are habitual drunkenness on the part of defendant for a period of more than one year immediately prior to the commencement of the action, and extreme cruelty in the treatment of plaintiff by defendant through his threats of violence towards her, and false accusations charging her with infidelity to her marriage vows, all of which is particularly alleged; and by reason thereof plaintiff alleges that she has suffered great mental and physical distress; that her health

has been greatly injured, her happiness and peace of mind destroyed; and that her personal safety in longer living with defendant in the bonds of matrimony is endangered. Wherefore her prayer for divorce therefrom, and alimony and costs of suit. Plaintiff's allegations were put in issue by defendant's answer, and the court proceeded to try the cause with a jury, the result of which was a finding in favor of plaintiff by both general and special verdict; whereupon judgment was entered dissolving the bonds of matrimony existing between plaintiff and defendant, and awarding plaintiff the sole care and custody of said infant children, and alimony for counsel fees in the sum of \$250; and, it having been made to appear that defendant was the owner of 100,000 shares of capital stock of the Golden Gate Mining Company, a corporation organized and existing under the laws of the state of Montana, it was decreed that defendant should transfer and deliver to plaintiff 50,000 shares of said capital stock as permanent alimony to be used by plaintiff towards the support and education of said children. Defendant prosecuted this appeal from the judgment and from an order overruling his motion for a new trial, but presents no brief of points and authorities relied upon to obtain a reversal of the conclusion reached by the court below. The statement of the case on motion for new trial, however, contains certain specifications of alleged errors and irregularities.

First, it is specified that "the court erred in permitting the jury to pass on special findings presented to them in this case. The verdict of the jury should have been general." It appears from the record that the jury returned a general verdict in favor of plaintiff, but also returned special findings on several propositions submitted. There is no statute forbidding special findings in such a case, nor has appellant cited any authority to support his contention. Moreover, the statute of this state provides for submission of special findings to be returned by the jury, (section 275, Code Civil Proc.) and there is no exception made as to divorce suits. Indeed, the divorce statute provides that the

same rules of proceeding shall prevail "as in other cases in chancery;" and special verdicts are common in chancery practice. We find no merit in the first specification.

Nor is there any logical coherency in specifying that the court erred in allowing the jury to return anything more than a general verdict; and, secondly, specifying that the general verdict in favor of plaintiff ought to be vacated because the jury did not answer all the special questions propounded. In the second specification it is argumentatively urged that the general verdict should be set aside, because the jury did not find whether or not plaintiff and defendant cohabited together up to the 1st of October, 1888; that, if the parties cohabited together up to that time, it would manifest condonation. The jury did not so find, and there is no ground for claiming forgiveness or condonation of any of defendant's offenses against his marriage vows alleged in this case. The history of his conduct towards plaintiff, as shown by the evidence, is that of continued drunkenness, acts of violence, false accusations, threats, and abuse of plaintiff for several years past during their residence about mining camps in this state, with frequent abandonment of plaintiff and said children for considerable periods of time, and final separation in January, 1889, followed by this suit for divorce, instituted by the wife in April, 1890. And as appears from the evidence in the record, defendant continued his habits of drunkenness as well as his acts of cruelty towards plaintiff up to near the time of commencing this suit, and the same seem from the evidence to have increased in intensity and aggravation, rather than to have abated in any degree, as time went on. Shortly before commencement of this suit plaintiff was driven from her house by defendant's last visit, when he broke in the door, armed with a pistol, threatening to kill plaintiff. He was then in an intoxicated condition. Plaintiff sought refuge and a hiding place in a neighbor's house to escape from the abuse and threatened assault and injury by defendant, which plaintiff testified she feared. There is no ground to claim condonation under the facts shown in this case.

The third specification is to the effect that the court erred in allowing proof of defendant's neglect to provide necessities for the support of plaintiff, but left her and said children destitute thereof, and thereby cast upon her the whole burden of the care and support of said children. It appears that plaintiff was without means of support, and that she maintained herself and said children by employment at teaching school and otherwise. Objection was made to the introduction of this evidence, on the ground that such neglect is not made by statute cause for divorce in this state. The evidence of defendant's delinquency in this respect appears to have been admitted to throw light upon his

conduct towards plaintiff, alleged in the pleadings and supported by proof, and not as ground of divorce; for the court instructed the jury that "neglect or refusal of defendant to support plaintiff is not ground of divorce under the laws of this state." And by the observations of the court when that testimony was admitted it was to be confined to showing the general tenor of defendant's conduct towards plaintiff; and, thus confined by the observations of the court when that testimony was admitted, and also curtailed in its effect by the instruction mentioned, we think there was no error in admitting the proof of such delinquency on defendant's part. The duty to support the wife and child as comfortably and according to their station in life, or as comfortably as the husband is able to provide, is not the least among the duties assumed by him in the marriage bond. Possibly, however, in this case, it was the least among defendant's offenses against his marital duties. Neglect to support the wife, although not ground for divorce here, is made so by statute in several states, thus showing that it is considered an offense of no light character, where the wife is without means for maintenance; and we think proof of such neglect, confined as it was in this case to an interpretation of defendant's other conduct and disposition towards plaintiff, was not error, especially where the record shows that the case was fully made out on other grounds.

The other specifications go to the point that the evidence is insufficient to support the verdict. The jury in the court below found the contrary, and the record shows abundant support for their view. The order denying a new trial and the judgment are therefore affirmed, with costs.

PEMBERTON, C. J., concurs.

DE WITT, J., having been counsel for one of the parties in the commencement of this case did not engage in the foregoing consideration.

MONTANA CATHOLIC MISSIONS, S. J., v. LEWIS AND CLARKE COUNTY et al.

(Supreme Court of Montana. Dec. 20, 1893.)

TAXATION—EXEMPTIONS—CHARITIES.

Const. art. 12, § 2, and Revenue Act 1891, § 2, (Acts 2d Sess. p. 73,) passed in pursuance thereof, which exempt from taxation the property of the state and federal governments, and "such other property as may be used exclusively" for certain societies, "and institutions of purely public charity," do not exempt purely public charitable institutions, as such, from the payment of taxes, but only such of their property as is used exclusively for charitable purposes; and a mere intention of such an institution to use its property for charitable purposes at some time in the future is not sufficient to entitle it to exemption.

Appeal from district court, Lewis and Clarke county; William H. Hunt, Judge.

Action by Montana Catholic Missions, S. J., against the county of Lewis and Clarke and R. P. Barden, to enjoin the collection of taxes. From a judgment for defendants, plaintiff appeals. Affirmed.

Statement of the case by the justice delivering the opinion:

This action was brought by the plaintiff against the county of Lewis and Clarke and the treasurer thereof, praying for a judgment that the assessment of general taxes against certain real estate of plaintiff, and the levy of said taxes, be adjudged to be void, and that the said treasurer be enjoined from selling said property for said taxes. The plaintiff set up in its complaint that it was an institution of purely public charity, and that it was the owner of certain lands in Lewis and Clarke county, describing them. It is not set up in the complaint that this land is now being used by the plaintiff in any manner. It is alleged in the complaint that the lands are held for the purpose of erecting buildings for certain purely charitable purposes, unsectarian in character. Upon these lands, the general taxes were assessed and levied by the county of Lewis and Clarke for the year 1892. The plaintiff claimed, before the board of equalization, that it was exempt from this taxation, but the board refused to allow said claim, except as to 20 acres of the tract above described, upon which is being built an asylum for orphans. A general demurrer to the complaint was sustained, and judgment thereon entered for defendants. The plaintiff appealed.

The appeal brings up for a construction the following provisions of the constitution and laws: "The property of the United States, the state, counties, cities, towns, school districts, municipal corporations, and public libraries, shall be exempt from taxation, and such other property as may be used exclusively for agricultural and horticultural societies, for educational purposes, places for actual religious worship, hospitals and places of burial, not used or held for private or corporate profit, and institutions of purely public charity, may be exempt from taxation." Const. § 2, art. 12. In pursuance to this provision of the constitution, the legislature enacted as follows: "The property of the United States, the state, counties, cities, towns, school districts, municipal corporations, public libraries, and such other property as is used exclusively for agricultural and horticultural societies, for educational purposes, places for actual religious worship, hospitals and places of burial not used or held for private or corporate profit, and institutions of purely public charity, are exempt from taxation; provided, no more land than is necessary for said purposes shall be exempt." Section 2 of "An act concerning revenue," (page 73, 2d Sess. 1891.)

T. J. Walsh, for appellant. Henri J. Haskell, Atty. Gen., and C. B. Nolan, for respondents.

DE WITT, J., (after stating the facts.) The contention of appellant is that section 2, art. XII., of the constitution, and section 2 of the revenue act of 1891, exempt from taxation the real estate described in its complaint. It is fully conceded by the complaint that the real estate is not used by the plaintiff exclusively, or at all, for an institution of purely public charity. It is alleged that it is intended to be so used. For the purposes of this decision, it may be considered that the plaintiff is an institution of purely public charity. It is observed that the section of the constitution cited describes two classes of property. We will notice the distinction as to these two classes: First, it names the United States, the state, counties, cities, towns, school districts, municipal corporations, and public libraries. It is not left to the legislature to say whether or not the property of these institutions shall be exempt. The constitution, in itself, settles that it shall be. Nor is the test of exclusive use mentioned. The constitution says, simply, "the property" of these institutions shall be exempt. Then the section of the constitution advances to another class of property, and describes it as "property as may be used exclusively for" certain purposes, and defines the purposes, and, among them, names "institutions of purely public charity." This class of property is not exempt from taxation under the constitution, but may be made so by the legislature. The legislature has acted. Revenue Act 1891, § 2. It has therein declared to be exempt, such property as is used exclusively for the purposes mentioned in the section of the constitution, supra; and redescribes those purposes in the exact language of the constitution, making only the appropriate changes in the mood of the verbs. So, with the constitution and the law together, we have this condition: Property of certain entities, as the state, cities, etc., is exempt, and property exclusively used for certain purposes is exempt. The property in question falls within the second class, as the plaintiff is not one of the institutions mentioned in the first class, as the state or a city, etc., but is an "institution of purely public charity." And we find from the complaint that the property is not used exclusively, or at all, by such "institution of purely public charity." The most that the complaint alleges is that the property is intended to be so used. Such intention is not sufficient to constitute the use contemplated by the constitution and the law. Green Bay & M. Canal Co. v. Outagamie Co., (Wis.) 45 N. W. 536. In Pennsylvania, the court went further than we do, or need to, and held that the exemption would not apply to premises on which a church was in process of erection. Mullen v. Commissioners, 85

Pa. St. 288. How much stronger against the appellant is the fact that in its case there is not even a commencement of the alleged intended use. See, also, *Detroit Y. M. Soc. v. Mayor, etc., of Detroit*, 3 Mich. 172; *Mulroy v. Churchman*, 60 Iowa, 717, 15 N. W. 583; *Redemptorist Fathers v. Boston*, 129 Mass. 178; *Washburn College v. Commissioners*, 8 Kan. 344. We are therefore clearly of opinion that, as the property in question is not at all used for an "institution of purely public charity," it is not exempt from taxation.

This must be held unless a construction of the constitution and the law which appellant urges, and which we will now examine, is to be adopted. It contends that the language does not mean that the property used by such institution shall be exempt, but rather that the institution, as such an association or corporation, shall be exempt from paying taxes on its property. The conclusion would be that such institution is exempt from paying taxes upon any of its property. Appellant contends that the word "institution," used in the statute, means the association, the corporation, or the concern, whatever it may be. Concede that such is the meaning, still we are of opinion that the section is describing property that is or may be exempt, and not the institution which is the owner of property. The whole sense of the section is that it describes property,—the property of the United States; the property of the state, of cities, etc.; property used exclusively for— For what? For the following purposes, (then setting forth the purposes.) The word "for" is not repeated before each described purpose, nor does grammatical construction or perspicuity require it. Its sense is carried over to each mentioned purpose. The intention is just as clear that the section means "used exclusively for institutions of purely public charity," as it is that it means "used exclusively for agricultural societies." We adhere to the view that the language intends to describe the property used, and not the concern using it, as being exempt. This view is in accord with the grammatical construction of the language, with the context of the section, and the general intent expressed therein. To adopt appellant's construction would be to hold, if an institution were simply of the character described in the constitution and law, that, as far as the revenue laws are concerned, it might hold exempt from taxation all property of any character, and of any amount in value, whether it used such property exclusively, or at all, for purely public charity. Against this view are the decided cases, (*supra*.) reason, the context of section 2, art. XII, and the spirit of the constitution on the subject of taxation. That instrument provides: "All property shall be assessed in the manner prescribed by law, except as otherwise provided in this constitution." Article 12, § 18. So, appel-

lant seeks to bring itself within an exception to the constitutional rule that "all property shall be assessed." Upon this subject, Mr. Justice Brewer, as a member of the supreme court of Kansas, appropriately remarked: "All property receives protection from the state. Every man is secured in the enjoyment of his own, no matter to what use he devotes it. This security and protection carry with them the corresponding obligation to support. It is an obligation which rests equally upon all. It may require military service in time of war, or civil service in time of peace. It always requires pecuniary support. This is taxation. The obligation to pay taxes is coextensive with the protection received. An exemption from taxation is a release from this obligation. It is the receiving of protection without contributing to the support of the authority which protects. It is an exception to a rule, and is justified and upheld upon the theory of peculiar benefits received by the state from the property exempted. Nevertheless, it is an exception; and they who claim under an exception must show themselves within its terms." *Washburn College v. Commissioners*, 8 Kan. 344. Appellant herein seeks to bring itself within the exception by a strained and unnatural construction of the constitution, as above shown. The district court held against it, in which that court was correct. Its judgment is therefore affirmed.

PEMBERTON, C. J., concurs.

HARWOOD, J., (concurring.) I concur in the foregoing conclusion, on the ground that the legislature, in exercising the power delegated to it by the constitution, of providing, among other things, exemption from taxation of property "used exclusively" for "institutions of purely public charity," has especially provided, as to exemption of land, that "no more land than is necessary for said purpose shall be exempt." The contention involved in this case relates entirely to the question of exempting land, and it seems clear to me, under the provisions of the law, that land, although held by such institutions, but not in use for the purposes of such charity, cannot claim exemption from taxation. It will be noticed that the legislature made the clause above quoted relate specifically to land, and the observations in the treatment of this case must be confined to the question of exemption of that character of property; and broader implications, as governing the construction of the provisions respecting other classes of property, should not be indulged to determine future cases. Involving the question of exemption of other classes of property held by such institutions, dedicated irrevocably to the use upon which the exemption is declared, although not actually converted into active use at the moment it was sought to be taxed.

BOERNER et al. v. McKILLIP.

(Supreme Court of Kansas. Dec. 9, 1893.)

STREETS AND ALLEYS—DEDICATION.

1. No one but the owner of the land can dedicate it to public uses.

2. An expression of a purpose or intention to dedicate a strip of ground as an alley, by a person seeking to become the owner of it, where such purpose is abandoned and renounced before title is obtained, does not constitute either a valid dedication, or an estoppel in favor of the purchaser of an adjoining lot, who has notice of such change of purpose, and thereafter, without objection, receives a deed describing his lot by number, after an unacknowledged map showing the adjoining parcel of ground to be a lot has been filed for record, and which map is soon thereafter duly acknowledged and recorded.

(Syllabus by the Court.)

Error from district court, Thomas county; Charles W. Smith, Judge.

Action by James A. McKillip against Ernest Boerner and others to restrain defendants from obstructing an alley. There was judgment for plaintiff, and defendants bring error. Reversed.

The other facts fully appear in the following statement by ALLEN, J.:

The facts in this case fully appear from the findings of the trial court, which are as follows: "(1) That on the 14th day of April, 1885, the land upon which the city of Colby, Thomas county, Kansas, now stands, was the property of the Union Pacific Railway Company. (2) That on that date the Colby Town-Site Company was duly incorporated under the laws of the state of Kansas, and that the directors for the first year were D. D. Hoag, D. M. Dunn, S. C. Mills, H. Wallace Miller, M. Donelan, J. B. McGonigal, and Winfield Freeman. These were also the incorporators. (3) That the purpose of this incorporation was the location and laying out of a town site, and the subdividing of such town site into lots and blocks and other subdivisions, and streets and alleys, and for the purchase of such property; and this included the right to dedicate portions of the land that they might occupy and use for town-site purposes to the public for its use. (4) That the said Colby Town-Site Company adopted certain by-laws; that they thereby or therein created an executive board, or committee of three, consisting of the president and two directors, who were to be chosen by the board of directors, whose duty it became under their by-laws to determine the selling price of lots, etc., and the terms of payment, and the purchase of materials for the construction of buildings, purchase of lots, contract for labor, etc.; and they were also constituted an auditing committee for the purpose of auditing the financial concerns of the committee, and they were empowered to do such other things as they were required to, presumably by the board of directors. (5) The court further finds that the persons constituting this Colby Town-Site Company, some time prior to the incorporation of the same, and in March,

1885, decided to purchase the land on which the town of Colby now stands, and to lay it out into a town; that soon thereafter they entered into negotiations with the Union Pacific Railway Company for the purpose of purchasing the land in question; that they obtained title to this land from the railway company by deed dated June 9, 1885, and delivered about July 20, 1885; that this deed was recorded July 20, 1885, at 7:20 in the morning, in the office of the register of deeds of Sheridan county, Kansas. (6) That at this time Thomas county, Kansas, was unorganized, and was attached to Sheridan county for judicial purposes. (7) That, prior to the receipt of the said deed of the railway company, said Colby Town-Site Company had surveyed and platted the land described in said deed and conveyed thereby, and that they had entered into contracts for the sale of lots; that such contracts, many of them, were made before the receipt and recording of the said deed. (8) That the original survey was made by one W. C. McGonigal; that he made a plat or map of his said survey, showing the streets and alleys, lots and blocks, in the city, or the proposed city, and that the property in dispute was shown in said map to be an alley. (9) That the first plat or map of the town—that is, the one made by W. C. McGonigal, surveyor—was made on or about the 10th of April, 1885; that from that time the Colby Town-Site Company assumed to exercise ownership over the land in question, and to contract for the sale of lots in the town site. (10) That the contract by which the Colby Town-Site Company held the premises prior to the deed was simply a verbal contract of purchase. (11) The court further finds that on the 10th day of April, 1885, lot nine, (9,) of block twenty-five, (25,) in the city of Colby, was bargained to be sold and conveyed by the Colby Town-Site Company to Walker, Youssee & Smith. (12) That, on or about that time, D. M. Dunn, who was the president of the Colby Town-Site Company, and J. B. McGonigal, who was secretary, in connection with the negotiation of said lot, represented to the purchaser thereof, and to others, that the strip of land in dispute was intended to be an alley. (13) The court further finds that the said Colby Town-Site Company took the surveyor's map heretofore referred to, and from it procured to be made a lithographed plat of the town site of Colby; that these were the first lithographed plats of the town site; that these maps showed the strip of land in dispute to be open, and an alley, and not a lot. These lithographed maps were executed in Kansas City, and were conveyed from Kansas City to Colby, and given into the possession of the said Colby Town-Site Company some time during the month of May. (14) That this map had certain defects and irregularities in it, which caused the Colby Town-Site Company to refuse to accept it as a true map or plat of the town site, which irregularities consisted in

the wrong numbering of blocks, and some others; but the court finds that this map showed this specific strip of land to be open and an alley was not an error, and the map was not rejected for that reason. (15) The court further finds that after the receipt of the map, and on or about the middle of May, 1885, the said Colby Town-Site Company decided that it would close up this strip of land as an alley and convert it into a lot, as well as certain other supposed alleys on Franklin avenue, in said city; that at a meeting of the executive committee that change was decided upon and made, and that that act became the act of the company, they thereafter recognizing the change, or the act of the executive committee, as a valid act; that the change made by them in closing up of those heretofore alleys included the strip of land in question. (16) That thereafter the second set of lithographed maps were procured, showing the corrections as to the numbering of the lots and numbering of the blocks. (17) The court further finds that the original lithographed plats that were received by the company, and which they claim to be erroneous, were never destroyed nor returned to the lithographer, but were kept in the office of the secretary of the company; that many of those plats were in circulation throughout the town, and were distributed to various portions of the country. (18) The court finds that J. B. McGonigal, the secretary, was the agent for the sale of the property of the town-site company, or lots in the said town site of Colby, and that after the order of the executive committee of the company he attempted to close up this strip of land as an alley, and convert it into a lot; that all sales of lots made by him from any plat, or with reference to any plat, were made with reference to the plat showing the closing up of this alley, but that the plats originally made, and that were claimed to be erroneous, were negligently permitted to get into circulation by the company. (19) The court further finds that during the months of April and May, 1885, and prior to the date of the said meeting and decision of the said executive committee concerning this strip of land, the officers of the said company and its agents were permitted to, and did, hold out to the public that this particular strip of land would be treated as an alley, and was so regarded by them, and that other similar tracts were so regarded by them; in other words, that they represented to the public, generally, that block 21, and other blocks opening on Franklin avenue and Main street in said city, had alleys running through them from east to west, this strip of land in dispute being one of those alleys. (20) The court further finds that on the 20th day of July, 1885, and at the time that the deed from the Union Pacific Railway Company conveying this land to the Colby Town-Site Company was placed on record in Sheridan, that accompanying it was a plat of the town

site of Colby, which plat was filed for record on the same day, which plat showed on its face that the particular strip of land in dispute, and other similar strips in the blocks on Main street, were closed, and were lots marked by letters; that said plat, at the time of its filing for record, was unacknowledged; that soon after its deposit there for record it was returned to the Colby Town-Site Company to be by it acknowledged, when it was duly acknowledged and returned to the register of deeds of Sheridan county, and deposited for record on or about the 5th day of August, 1885. (21) The court further finds that a record of such plat in the office of the register of deeds of Sheridan county was made by the pasting of a plat on the plat book, and not by recording, and that the plat so pasted on the plat book showed this strip of land in dispute to be an open, and an alley, while the plat itself as filed for record showed said strip of land to be closed, and a lot. (22) The court further finds that lot No. 9, in block No. 21, in the city of Colby, being the land of the plaintiff in this action at this time, was conveyed by deed of the said town-site company to Walker, Yousse & Smith on the 31st day of July, 1885. (23) The court further finds that the plaintiff in this action obtained title by general conveyance from the said Walker, Yousse & Smith. (24) The court further finds that the deed of conveyance from the said town-site company to Walker, Yousse & Smith was made pursuant to an agreement to convey the same lot, made on the 18th day of April, 1885, the consideration for said lot being the erection of the building thereon. (25) The court further finds that at the time the executive committee of the said Colby Town-Site Company decided to make the changes in the findings hereinbefore noted,—changing this from an alley to a lot, on this particular lot 9,—there had been erected a cellar preparatory to building of a house thereon, and that prior to the building of the house, and immediately after such decision by the executive board, the secretary of the company, J. B. McGonigal, notified Mr. Walker of said decision and change, to which Walker made no objection or assent. (26) The court finds that the defendants the Boerner brothers, on December 17, 1887, purchased and procured to be conveyed to them by a warranty deed the title to the strip of land in question in this action, paying therefor the sum of \$450, the conveyance being made by James S. Warden and R. S. Newell. Prior to that time, in the year 1886, said Warden & Newell obtained title to the same land by a deed from the Colby Town-Site Company. (27) The court further finds that at the time of the institution of this suit the defendants had built a sidewalk across this strip of land, whereby they obstructed the free access to it of the plaintiff. (28) The court further finds that the plaintiff's lot No. 9 lies along and immediately north of the strip of land in question. (29) The court

further finds, as to the question of the dedication, that prior to May, 1885, it was the intention of the Colby Town-Site Company to dedicate this strip of land to the public for use as an alley. (30) The court further finds that at the time heretofore referred to in these findings, when the executive committee of the said town-site company decided to change the plat and close the alley, that the title to the land in dispute was in the Union Pacific Railway Company, but that it was under contract to convey the same to the Colby Town-Site Company, and in furtherance of that contract was conveyed by deed as herein found; that on this date, which was some time in May, 1885, the said Colby Town-Site Company decided to close up said alley, or intended alley, and make a rededication; and that in carrying out that intent they filed for record the plat heretofore referred to, and which was filed for record July 20, 1885, and afterwards refiled on the 5th day of August, 1885. (31) The court further finds that the plat filed for record on July 20, 1885, and refiled on August 5, 1885, and described in these findings, was never correctly recorded by the register of deeds of Sheridan county, Kansas, until about the 5th of June, 1889. (32) The court does not find from the evidence that the Colby Town-Site Company, or any one representing it, procured the record of the plat so filed to be recorded as it was. (33) The court further finds that there was no statutory dedication of the town site of Colby prior to the 5th day of August, 1885." As conclusions of law the court finds "that this was and is an alley, and the judgment of the court is that the plaintiff should recover in this action." Thereupon the court rendered a judgment in favor of the plaintiff, granting a perpetual injunction, and defendants below bring the case here for review.

E. A. McMath and W. S. Willcoxson, for plaintiffs in error. H. A. Brant and Joseph A. Gill, for defendant in error.

ALLEN, J., (after stating the facts.) The sole contention in this case is as to whether the piece of land in controversy is the property of the plaintiffs in error, or an alley in the town of Colby. It clearly appears from the findings of the court that there was no statutory dedication as an alley, but that the map executed and filed by the town-site company showed the ground in controversy as a lot. It is claimed, however, that there was an actual dedication of the land, which is good at common law. About March, 1885, the persons who afterwards formed the Colby Town-Site Company entered into negotiations with the Union Pacific Railway Company for the purchase of the lands which were thereafter platted for the town site of Colby. The company was incorporated on the 14th of April, 1885. The company caused a lithographed plat of the land to be made,

and on the 10th of April sold lot 9, in block 21, to Walker, Youssef & Smith, the consideration being the erection of a building thereon, and at the time of this sale the president and secretary of the town-site company represented to the purchasers that the strip of land in controversy was intended to be an alley. The lithograph map was referred to in making the negotiations. After that time, and on about the 10th day of May, the town-site company changed its plan, and decided to make a lot of this piece of ground instead of an alley, and immediately after that decision notified Mr. Walker of the intended change, to which he made no objection or assent. On the 20th day of July, 1885, the town-site company received its deed from the railway company, and thereafter, on the same day, filed for record its unacknowledged plat of the town site of Colby, showing the land in controversy as a lot. Afterwards, on the 31st day of July, 1885, it conveyed lot 9 to Walker, Youssef & Smith, pursuant to the agreement theretofore made. Can it be said that these facts show a dedication of this piece of land as an alley? Most of the authorities cited by the defendant in error are not applicable to the case under consideration. There is no question that a street may be dedicated to the public in other ways than by acknowledging and recording a plat. The fundamental difficulty in this case is that at the time it is claimed that the town-site company dedicated the ground as an alley it had no title, and was not the owner of it. It could not then make a valid dedication. In the case of *Hagaman v. Dittman*, 24 Kan. 42, it was held that an attempted dedication, by a person who was acquiring a homestead, of a portion thereof, for a public burial ground, which was ratified and confirmed after he obtained the patent to the land, was good where the public had accepted and continuously used the ground for burial purposes from year to year, both before and after the patent was issued. And in the case of *City of Cincinnati v. White*, 6 Pet. 431, while the parties laying out the town had only an equitable title at the time the plat was made, after the legal title was obtained they ratified and confirmed the first appropriation of the ground to public uses. It will be observed in this case that not only was there a want of any ratification of the original plat of the strip as an alley after the town-site company obtained the title to the land, but that within about a month after the contract was made with Walker, Youssef & Smith for the sale of lot 9, and when they had only made a cellar thereon, the town-site company changed its plan and notified the purchaser of that change, to which he did not dissent. Afterwards, the town-site company received its title, filed its map, and executed and delivered to Walker, Youssef & Smith a deed to lot 9. This deed must be held to refer to the legally executed and recorded map, which

showed a lot, not an alley, adjacent thereto. It does not appear that any objection was made by Walker, Youssef & Smith to the form of their deed, or to the closing of the alley. It then cannot be claimed in this case that there was any ratification of an intended dedication as an alley after the town-site company became the owner of the land, but, on the contrary, there was an express renunciation of that purpose, which was brought directly to the knowledge of plaintiff's grantor. In order to sustain a dedication, then, we must first hold that persons having only a parol contract for the purchase of land may dedicate it to public uses so as to estop them and their grantees after acquiring a legal title. The authorities hold the reverse of this proposition. In *Lee v. Lake*, 14 Mich. 12, it was held that "the dedication of premises to public purposes, in a plat acknowledged and recorded by one who did not own the property at the time, cannot have the effect of a conveyance, although he afterwards purchase it, and, in the absence of subsequent facts and circumstances which would constitute an estoppel, he may reclaim the premises." See, also, *Nelson v. City of Madison*, 3 Biss. 244; *McShane v. City of Moberly*, 79 Mo. 41; *Bridge Co. v. Bachman*, 68 N. Y. 261; *Holdane v. Cold Spring*, 21 N. Y. 474; *Bushnell v. Scott*, 21 Wis. 457. In *Brooks v. City of Topeka*, 34 Kan. 277, 8 Pac. 392, it was said: "No one other than the owner, or some one authorized to act for him, can plat or lay out a town, or an addition thereto, so as to convey to the public for its use the streets and alleys designated on such plat." In *Smith v. Smith*, 34 Kan. 293, 8 Pac. 385, it was said: "We do not think that a person who is occupying government land, and occupies the same under the pre-emption or homestead laws, can dedicate it, or any portion thereof, for a public road, until he has done all that he is required to do to obtain the title to the land under such laws." In that case it appeared that the person who it was claimed had made the dedication afterwards acquired full title to the land. See, also, *Armstrong v. City of Topeka*, 36 Kan. 432, 13 Pac. 843; *State v. O'Laughlin*, 19 Kan. 504. The findings in this case show an expression of intention on the part of the town-site company to dedicate, rather than an actual dedication. Both of the parties in this case claim title derived from the Colby Town-Site Company through deeds executed by its officers after the corrected map had been filed for record. The plaintiff below was interested in the lands in controversy only by way of easement appurtenant to the lot he purchased. On the other hand, the defendants below (plaintiffs here) bought the ground, and paid \$450 therefor, the record showing a perfect title in their grantor. No strong equity urges the relief sought by the

plaintiff. On the other hand, the defendants appear to have the better claim. We think the law is clearly with them. The case is reversed, with directions to render judgment on the special findings of fact in favor of defendants for costs. All the justices concurring.

POLLEY v. JOHNSON et al.

(Supreme Court of Kansas. Dec. 9, 1893.)

CONVEYANCE IN TRUST — RIGHTS OF GRANTOR'S CREDITORS—ATTACHMENT OF GROWING CROPS.

1. Where land is conveyed by the owner to another in trust to reconvey to the grantor's wife, or such person as the grantor may thereafter designate, and the grantee has no interest in the lands, but afterwards executes such trust by a conveyance to the grantor's wife, as between grantor and his creditors such lands will be treated as his property until reconveyed by the trustee; and the fact that such trust rests in parol, and is therefore not enforceable under the statute concerning trusts and powers, does not change the rule.

2. Annual crops which are the product of industry and care, sown by the owner of the soil, are, while growing and immature, personal property subject to attachment and sale for the debts of the owner.

(Syllabus by the Court.)

Error from district court, Lincoln county; W. G. Eastland, Judge.

Action by Edward E. Johnson and others against J. A. Polley for an injunction. There was judgment for plaintiffs, and defendant brings error. Affirmed.

David Ritchie, for plaintiff in error. C. B. Daughters, for defendants in error.

ALLEN, J. Defendants in error, as plaintiffs below, brought their action against plaintiff in error to enjoin him from harvesting and carrying away about 90 acres of wheat, grown on a quarter section of land in Lincoln county. The wheat was sown in the fall of 1888 by H. H. Meer, who then owned and occupied the land as his homestead. On the 4th day of October he executed a deed for the land to Edward H. Thuse. His wife was in the insane asylum at the time, and he signed the deed also as her guardian. On the 22d day of October an attachment issued in a suit against Meer by a justice of the peace, was levied on the crop of wheat, and on the 11th of December, 1888, the constable sold the same to the plaintiffs. Thuse conveyed the land on January 5, 1889, to Emma Meer, wife of H. H. Meer. He testified on the trial that he paid nothing for the farm, and was to deed it back to Meer's wife, if she got well, or any other party he traded with or sold to. On January 31, 1889, Meer and wife conveyed the land to defendant Polley.

Two questions are raised by the plaintiff in error: (1) Was there anything that could

be taken under the order of attachment issued against Meer, by which the court could obtain jurisdiction? It is contended that the farm was the homestead of Meer, entirely exempt from the payment of his debts; that his creditors could not look, in any event, to this land for the satisfaction of their claims; that, as against them, the conveyance to Thuse passed a full title, notwithstanding the want of consideration, and the secret understanding that Thuse was to hold it for the plaintiff and subject to the control of Meer; that, as the trust under which Thuse held was created wholly by parol, it could not be enforced; that under the authority of *Gee v. Thrailkill*, 45 Kan. 173, 25 Pac. 583, Thuse acquired the absolute title to the land, which carried with it the crop of growing wheat; that, when the constable levied the attachment, Meer had no property either in the land or the growing wheat; and that he therefore at that time had no property in the wheat to be attached. Various cases are cited in support of the proposition that a conveyance of lands carries title to all growing crops thereon. There can be no question as to the correctness of this as a general proposition, but we think that this case clearly shows that Thuse never had any real interest in the land. But assuming that it did pass the legal title to Thuse, and, further, that the trust thereby created could not have been enforced in an action against him, yet as he has seen fit to recognize and execute the trust so created, and has in fact conveyed the land in accordance with the parol understanding between himself and Meer, we think the equitable title must be held to have never been transferred, and that the land and the wheat thereon was just as much the property of Meer after the execution of the conveyance to Thuse as before. *Harrison v. Andrews*, 18 Kan. 535. We think this case must be considered as though no change of title occurred until the execution of the deed by Meer and wife to Polley, which was after the sale of the growing wheat.

The second contention is that growing wheat sown by the owner of the soil is a part of the realty until ripe and ready to sever from the soil, and therefore is not subject to attachment as personalty. In support of this proposition, Washb. Real Prop. (2d Ed.) p. 4; *Burleigh v. Piper*, (Iowa,) 2 N. W. 520, and *Ellithorpe v. Reidesil*, 32 N. W. 238, are cited. The last of these authorities, which is a case decided by the supreme court of Iowa, fully sustains this contention; and it is said in the opinion: "The whole proceeding was on the theory that the crops were personal property, and could be levied on and sold as such; but while they remained immature, and were being matured by the soil, they were attached to and constituted part of the realty; they could no more be levied upon and sold on execution

as personalty than could the trees growing upon the premises. This doctrine is elementary, and it has frequently been declared by this court. *Downard v. Groff*, 40 Iowa, 597; *Burleigh v. Piper*, 51 Iowa, 650, 2 N. W. 520; *Hecht v. Dettman*, 56 Iowa, 679, 7 N. W. 495, and 10 N. W. 241; *Martin v. Knapp*, 57 Iowa, 336, 10 N. W. 721." It must be conceded that there is much force in the reasoning to sustain this position. It is a well-established rule that a conveyance of land, either by voluntary deed or judicial sale without reservation, carries all growing crops with the title to the land. *Garancio v. Cooley*, 33 Kan. 137, 5 Pac. 766; *Smith v. Hague*, 25 Kan. 246; *Chapman v. Veach*, 32 Kan. 167, 4 Pac. 100. The value of the growing crop depends upon the soil for its support and nourishment, and if disconnected at once, in a case like this, would be nothing. A levy and sale usually affords but little return to the creditor, while it is a serious loss oftentimes to the debtor; but, whatever may be our individual views as to the policy of the law, we must be governed by it as we find it. In the case of *Beckman v. Sikes*, 35 Kan. 120, 10 Pac. 592, it was held that a sale under a mortgage foreclosure carried to the purchaser growing crops planted after the decree of foreclosure was entered as against a purchaser, who bought from the mortgagor the growing crop one day before the sale by the sheriff. In the opinion the court says: "The lien of the mortgage and the judgment, however, attached to the growing crops until they were severed, as well as to the land. The mortgagor planted the crop, knowing that it was subject to the mortgage, and liable to be divested by the foreclosure and sale of the premises. Any one who purchased said crops from him took them subject to the same contingency, as the recorded mortgage and the decree of foreclosure were notice to him of the existence of the lien. If the land is not sold until the crops ripen and are severed, the vendee of the mortgagor would ordinarily get a good title; but if the land was sold and conveyed while the crop was still growing, and there was no reservation, or waiver of the right to the crop, at such sale the title to the same would pass with the land." *Goodwin v. Smith*, 49 Kan. 351, 31 Pac. 153, holds: "The purchaser at a judicial sale of mortgaged premises is entitled to the growing crop of wheat on the land against the tenant of the mortgagor, who took a lease of the land after a suit for foreclosure had been commenced, and planted the wheat after judgment had been rendered in the foreclosure action; the purchaser having acquired a sheriff's deed on the 2d day of February, and the wheat not ripening and being ready for harvesting until the 20th day of June." See, also, *Land Co. v. Barwick*, 50 Kan. 57, 31 Pac. 685. In *Caldwell v. Alsop*, 48 Kan. 571, 29 Pac.

1150, "an owner of mortgaged land leased the same to another, and reserved as rent a share of the crop. He was in default in the payment of the mortgage, and insolvent. After default was made, and after the leasing of the premises, but before the rent was due, he sold his share of the crop rent to one who had notice of the mortgage and of the default. After the crop had fully matured, but while it was standing upon the land, foreclosure proceedings were begun, and a receiver of the land appointed, but the court refused to authorize the receiver to take possession of the crop. Held, that the order of refusal was not error."

It will be observed that the decisions in all these cases relate to the rights of mortgagors, mortgagees, and parties claiming under them. In this case we have a different question to consider. There is no question here as to the effect of a voluntary incumbrance on the land, nor of a decree of foreclosure and sale thereunder. We have here the bare question as to whether immature growing crops are a part of the realty, as between debtor and creditor, or are personal property, subject to attachment and sale for debt. In *Caldwell v. Custard*, 7 Kan. 303, it was said "that growing crops are personal estate." In 1 *Freem. Ex'ns*, § 113, it is said: "Crops, whether growing, or standing in the field ready to be harvested, are, when produced by annual cultivation, no part of the realty. They are therefore liable to voluntary transfer as chattels. It is equally well settled that they may be assigned and sold under execution. At common law, *fructus industriales*, as growing corn or other annual products, which would go to the executors upon death, may be taken upon execution." The author cites a long list of authorities in support of his position. In 3 *Washb. Real Prop.* p. 367, the author says: "But although a sale of growing crops of annual culture not yet mature would seem to carry with it an interest in land, since a crop must stand upon and draw nutriment from the soil until it shall have grown and matured for the harvest, the cases appear to be quite uniform in holding that the property in the crop would pass, with a license to enter and sever the same; and some of the English cases put it upon the same ground as that by which one may hold emblements growing upon the soil of another. An attempt to sum up the results of the decisions, although they are not wholly harmonious, may be made as follows: *Fructus industriales*, as has been previously said, are, at common law, chattels, and are governed by the seventeenth section of the statute of frauds. This seems to be agreed by all the cases, though it is often difficult to decide what are *fructus industriales*." In *Benj. Sales*, p. 128, it is said: "As to artificial or annual crops, *fructus industriales*, the law is quite clear that a sale thereof,

in whatever state of maturity, and however long they are to remain in the soil in order to complete their growth, is a sale of personal property, and not of an interest in land." In *Ayers v. Hawk*, (N. J. Ch.) 11 Atl. 744, two judgment creditors levied on what they both claimed to be a growing crop of corn, one making his levy after the corn was put in the ground, but before it had made its appearance above the surface. The other levied after such appearance. Held, that the first was a valid levy, and entitled to priority. We think the authorities greatly preponderate in support of the proposition that annual crops, fruits of the labor of the tiller of the soil, are personal property, subject to levy and sale as chattels for the debts of the owner. *Lindley v. Kelly*, 42 Ind. 204; *Pierce v. Roche*, 40 Ill. 292; *Johnson v. Walker*, (Neb.) 37 N. W. 640. For further citations bearing on this question, see, particularly, *Freeman on Executions*, above cited. The statutes of this state also seem to recognize this rule. The sixth subdivision of paragraph 2998 of the General Statutes of 1889, concerning exemptions, exempts "the necessary food for the support of the stock mentioned in this section for one year, either provided or growing, or both, as the debtor may choose." Paragraph 2824: "The emblements or annual crops raised by labor, and whether severed or not from the land of the deceased at the time of his death, shall be assets in the hands of the executor or administrator, and shall be included in the inventory." Paragraph 2825: "The executor or administrator, or the person to whom he may sell such emblements may, at all reasonable times, enter upon the lands to cultivate, sever and gather the same." Paragraph 5008, (being part of the procedure before justices of the peace:) "In all cases where any lands may have been let, reserving rent in kind, and when the crops or emblements growing or grown thereon shall be levied on or attached by virtue of any execution, attachment or other process against the landlord or tenant, the interest of such landlord or tenant against whom such process was not issued, shall not be affected thereby; but the same may be sold, subject to the claim or interest of the landlord or tenant against whom such process did not issue." While these sections do not reach the case we have under consideration, we think they show a recognition of what we regard as the settled doctrine of the common law,—that such growing crops are personal property, subject to sale on execution for the debts of the owner; and, were we to hold a different rule to apply in this case, the only class of debtors benefited thereby would be those owning both the soil and the crop, for the section of the justice's act just quoted renders the shares of landlord and tenant, where that relation exists, both subject to levy and sale. It cannot be

presumed that the legislature would intentionally exempt crops raised by the labor of the owner of the land, and at the same time subject to execution those raised by a tenant entitled to a share, only, for his labors. However much we may disapprove of the policy of the law, we are constrained to hold that the growing wheat attached in this case was subject to levy, and to affirm the judgment. All the justices concurring.

NORWEGIAN PLOW CO. v. MUNGER et al.

(Supreme Court of Kansas. Dec. 9, 1893.)

ACTION ON NOTE—EVIDENCE—NOTICE OF EQUITABLE DEFENSE.

1. Immaterial errors, not prejudicial to the rights of the defeated party, are no ground for a new trial.

2. Where a banker doing business in this state, having in his charge collections for a corporation located at Dubuque, Iowa, corresponds through the mails with such corporation about the notes and orders in his hands for collection, and in reply to his letters receives through the mails, from Dubuque, Iowa, answers to his letters purporting to come from the company, and dictated by its secretary, but written with a typewriter, *hild*, such letters were properly received as prima facie evidence, as having come from the company.

3. A corporation which receives a note, before its maturity, from a person acting as its agent, and having attached thereto the following memorandum: "Accept order on Borders Town Company, and turn note over to J. J. Munger,"—is charged with notice of the equities of the makers, who agreed with the person acting for the company that, upon the delivery of an order of the town company of the amount of the note, the note was to be returned to the makers.

(Syllabus by the Court.)

Error from district court, Finney county; A. J. Abbott, Judge.

Action on a promissory note by the Norwegian Plow Company against John J. Munger and Charles S. Desky. There was judgment for defendant Munger, and plaintiff brings error. Affirmed.

The other facts fully appear in the following statement by HORTON, C. J.

This was an action brought on the 20th day of December, 1888, by the Norwegian Plow Company, upon a promissory note for \$325, due 30 days after date, executed by John J. Munger and Charles S. Desky to one J. J. Johnson, and by him indorsed to the Norwegian Plow Company. Munger answered, admitting that he signed the paper sued on, with following memorandum or indorsement upon the note: "Accept order on Borders Town Company, and turn note over to J. J. Munger,"—but denied that there was any consideration for his signing or delivering the same, and set up that the note was given in lieu of an order to be issued by the Borders Town Company, and to be delivered in lieu of the note. The trial was had before the court without a jury, and upon the findings of facts and conclusions of law the court rendered

judgment in favor of Munger, and against the plow company, from which judgment this appeal is prosecuted by the company.

H. R. Boyd, for plaintiff in error. Hopkins & Hoskinson, for defendants in error.

HORTON, C. J., (after stating the facts.) Numerous errors are alleged, but, as many of them are trivial and unimportant, we refer to three only.

1. It is insisted that the trial court erred in permitting agency to be shown by the declarations of Mr. Bish, an alleged agent. This was in no wise prejudicial, because, although Mr. Bish was the assistant cashier of the First National Bank at Garden City, yet he is the party who received the note from Johnson, the payee, in the presence of John J. Munger, with the following memorandum or indorsement attached thereto: "Accept order on Borders Town Company, and turn note over to J. J. Munger." Whether he was agent of the Norwegian Plow Company is immaterial. He acted as such agent, and the company received the note with the memorandum attached. Therefore, it accepted the note with full notice of the conditions upon which it was given.

2. It is next insisted that the trial court erred in admitting in evidence two letters from the Norwegian Plow Company. It appears from the record that Mr. Patton was officially connected with the First National Bank at Garden City, and that, as an officer of the bank, he had collections to make for the company. He corresponded through the mails with that company, which was located at Dubuque, Iowa, relative to the \$325 warrant or order of the Borders Town Company referred to in the memorandum. In answer he received the letters by mail purporting to come from the company, and dictated by C. W. Mitchell, as the secretary of the company, but written with a typewriter. Under these circumstances, there was a sufficient identification of the letters to permit them to be introduced as prima facie evidence.

3. It is further insisted that the tender of \$325 and interest, in an order of the Borders Town Company, was not sufficient for a return of the note. The note was dated November 3, 1887. It was due 30 days after date. This action was commenced on the 20th of December, 1888. Some time in January, 1889, in accordance with the memorandum on the note, an order of the Borders Town Company was offered to take up the note. When the answer was filed, on the 15th of May, 1889, this tender was renewed, and the order of the Borders Town Company deposited in court for the plaintiff. It was decided in *Logan v. Hartwell*, 5 Kan. 640: "Where an answer admits a certain amount to be due the plaintiff, and where the sum is paid into court upon the filing thereof, and where, upon the trial, the plaintiff does not show himself to be entitled to a greater

amount, judgment should be rendered for plaintiff for only the costs accruing up to the filing of the answer." The trial court made the following findings of fact: "The note copied in the petition was executed by the defendants on the 3d day of November, 1887. The note was executed by Munger and Desky to secure the plaintiff until an order on the Borders Town Company could be procured. The Borders Town Company was the party beneficially interested. The note and the memorandum of the contemporaneous agreement were executed at the same time. The note remained in possession of the Norwegian Plow Company until the order from the Borders Town Company was procured and tendered in exchange, according to the agreement evidenced by the memorandum. The indorsement on the note (the memorandum) was, in substance, 'Accept order on Borders Town Company, and turn note over to J. J. Munger.' The agreement which was evidenced by this indorsement was, in substance: 'That the note should be held by Mr. Bish until the order could be procured, and was then to be turned over to Mr. Munger on the tendering of such order.' The note never went into innocent hands. Defendant Munger was not indebted to John Johnson, in any sum whatever, at the time of giving the note in question. Although the order of the Borders Town Company was not tendered until after the commencement of this action, yet, upon the findings of fact supported by the evidence, the plow company was not entitled to anything but that order, and the costs accruing up to the tender. It seems, however, that the attention of the court below was not directed to the question of costs, and no motion was made to retax the costs. The judgment, therefore, of the district court, will be affirmed. All the justices concurring.

MCCORMICK HARVESTING MACH. CO. v. LEWIS.

(Supreme Court of Kansas. Dec. 9, 1893.)

CONDITIONAL SALE—WHEN TITLE PASSES.

A sale of property was made upon credit, and a note taken from the vendee, which contained a stipulation that the title to the property for which it was given should remain in the vendor until the note was paid; and afterwards the vendor, recognizing title in the vendee, applied for and obtained from the vendee a mortgage upon the same property to secure the payment of the note. *Held*, that the parties thereby elected to treat the sale as absolute, and that the ownership of the property was in the vendee, subject to the mortgage lien which he had given.

(Syllabus by the Court.)

Error from district court, Russell county; A. L. Voorhis, Judge pro tem.

Action on a promissory note by the McCormick Harvesting Machine Company against

Nathan Lewis. There was judgment for defendant, and plaintiff brings error. Reversed.

H. L. Pestana, for plaintiff in error. H. G. Laing, for defendant in error.

JOHNSTON, J. This was an action upon a promissory note for \$310.11, given by Nathan Lewis to the McCormick Harvesting Machine Company for a binder. The note contained a stipulation that the title to the binder would not pass to Lewis until the note and interest were paid in full. The machine had been purchased several years before, and the note in question was in renewal of one previously given. Two days after the note was executed, Lewis, at the request of the company, executed to it a chattel mortgage upon the binder and other property to secure the payment of the note. The note was not paid at maturity, and a short time afterwards, possession of the mortgaged property was taken by the company under the mortgage, and some, if not all, of it was sold at public sale. Lewis defends against a recovery upon the note, insisting that, by a condition which it contained, he never obtained the ownership of the property or anything else for the note, and hence had nothing to mortgage or convey. The stipulation in the note reserving title in the company evinced an intention of both parties to treat the sale as conditional, rather than absolute. If nothing more appeared, it would necessarily be held that a conditional sale was intended, and that the ownership of the property had never passed from the company. The possession of the property was in Lewis, and it was competent for the parties to treat the sale as absolute, and that the title had vested in the purchaser. Their action is wholly inconsistent with ownership in the company. Lewis assumed to have title by mortgaging the same to the company, and in applying for and accepting the mortgage the company recognized such title. The validity of the mortgage was subsequently recognized by Lewis when he purchased back at the mortgage sale a portion of the property which he had mortgaged. Under this view the company was entitled to recover all that remained unpaid upon the note. Proper credits should be given for the proceeds of the mortgaged property. There is some dispute in the testimony as to the sale of the property and the amount realized thereon. For this reason we are unable to direct the judgment that should be entered. If the parties are unable to agree what the credits should be, a new trial will be necessary. The judgment will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed. All the justices concurring.

GUINN v. SPILLMAN et al.

(Supreme Court of Kansas. Dec. 9, 1893.)

EJECTMENT—ADVERSE POSSESSION—PROVINCE OF JURY.

C. obtained a tax deed, which was defective, conveying a tract of wild land situate in a new and sparsely-settled region, most of which was prairie, and the remainder timber land. For three years during his ownership, the land was uncultivated, and there were no fences or permanent improvements thereon, but he leased it to others, from which to cut hay. Large quantities of hay were cut and stacked thereon, and there is evidence that the prairie land was best adapted and could be more profitably used for this purpose than any other; and, further, that such land in that vicinity was similarly used. He engaged others to guard the land from trespass, and to protect the timber; while he employed still others to cut timber thereon, and deliver the wood to him. These things were done in good faith by C. as acts of ownership, and with a view of taking and holding possession of the land. His claim of title was open and public, and no one disputed his possession or right of possession. He paid all the taxes charged against the land until he conveyed it to G., who at once entered and resided upon the land, where he made improvements of a substantial character. G. paid the taxes every year, and his possession was not challenged until more than 16 years after C. began to exercise control and dominion over it. An action by other claimants was begun against G., who claimed title by adverse possession for the statutory period of limitation. *Held*, that there was sufficient evidence of adverse possession to carry the case to the jury, and that the action of the court in directing a verdict in favor of the plaintiffs was reversible error.

(Syllabus by the Court.)

Error from district court, Chase county; Frank Doster, Judge.

Action by William D. Spillman and others against Robert W. Guinn to recover land. Plaintiffs had judgment, and defendant brings error. Reversed.

Redden & Schumacher, for plaintiff in error. Gillett & Sadler, for defendants in error.

JOHNSTON, J. This was an action by William D. Spillman, Margaret Spillman, Fannie J. Hickey, Ella Greer, and Joseph W. Robertson, heirs of N. J. Spillman, deceased, to recover from Robert W. Guinn a 240-acre tract of land in Butler county. The claim of title of the plaintiffs below was based on patents from the United States, one of which was dated April 1, 1861, and the other May 1, 1862, both of which had been issued upon entries made with bounty land warrants assigned to N. J. Spillman. After the decease of Spillman, his widow, Mary Ann Spillman, who became administratrix of the estate of the deceased, located the warrants, and the government granted the lands to her as administratrix of the estate, and to her heirs and assigns. Guinn rested his claim of title upon a sale of the land for taxes in 1869, to the county of Butler; an assignment of the interest of the county to W. J. Cameron, J. D. Connor, and W. S. Fenno, upon the pay-

ment by them of all the taxes and charges existing against the land to the time of assignment; a tax deed executed by the county clerk of Butler county on May 5, 1872, to Cameron, Connor, and Fenno; a conveyance from Connor and Fenno to W. J. Cameron, dated April 18, 1874; and a conveyance by warranty deed from W. J. Cameron and wife to Robert Guinn, dated February 12, 1875,—together with the claim of actual, open, continuous, and exclusive possession of the land by the grantors of the tax deed, and those holding under them, from 1872, until August 28, 1888, when this action was commenced. At the trial, the plaintiffs below introduced an exemplification of the records of the general land office showing the acquirement, assignment, and location of the land warrants, and the issuance of the patents.

Some objections were made to the admission of their testimony, but we see nothing substantial in them. The principal and controlling question in the case is as to the character of the possession of the land by Guinn and his grantors, and whether it is such as will give title at the end of the statutory limitation. After the testimony relating to the possession was introduced, the court held it to be insufficient, and took the case from the jury, by directing a verdict in favor of the plaintiff below. It appears to be conceded that the tax deed to Cameron and his associates, and which constitutes color of title in favor of Guinn, was defective and invalid. The question we have to decide, then, is, whether the testimony offered by Guinn, and against which there was little counter proof, tended to sustain the claim of adverse possession for the requisite length of time. The possession of Guinn from the time of his purchase was undoubtedly actual, notorious, and exclusive. He paid full consideration for the land; continuously resided upon it; made improvements of a substantial character, such as the construction of a house, barn, and corrals, building fences, breaking prairie; and, further, he paid the taxes levied against it from the time of his purchase till the commencement of the action. Neither the plaintiffs nor any one else questioned his right nor disturbed his possession. There can be no doubt that his possession was adverse, but, as it continued less than 15 years, the character of the possession of those under whom he holds becomes important in determining whether, when coupled with his own, it is sufficient to give him title. There is testimony that W. J. Cameron had charge and control of the land on behalf of himself and associates until they conveyed to him. It was known as the "Cameron Land," and he was recognized as the owner by persons living in the vicinity. In 1872 he leased the land to one Thompson, who made hay from all parts of the prairie land which was suitable for haying, and stacked the hay upon the land. There was a growth of timber on

a portion of the land, and Thompson was employed to guard the timber land, and prevent any one from trespassing thereon or from cutting timber. In the fall of that year he granted to one Rose the privilege of cutting some wood from the timber land. In 1873 Cameron granted to one Bauman the right to cut grass on the land for that and the subsequent year. He made hay on all the land that was fit for haying in both years, and stacked the hay upon the land. He cut about 200 tons in 1873; and the subsequent year, being a dry year, only about 40 tons were obtained from the land. In 1872, Rose, in accordance with his employment, cut timber upon the land, and delivered a portion of it to Cameron. In 1873, Cameron engaged one Jackson to guard the timber land, and he states that, while it was conceded to be Cameron's land, one person was detected taking wood therefrom, who afterwards settled with Cameron for that which had been taken. Another neighbor, named Bishop, whose land adjoined that of Cameron's, was placed in charge of the timber for one year; and it appears that all the parties so employed did protect the timber, and prevent the intrusion of trespassers upon the land. The acts of Cameron in leasing the land, cutting and stacking hay thereon, and the cutting and protection of the timber, as well as the guarding of the land from trespass, were all done for the purpose of taking possession of the land, and to assert ownership and dominion over it. No one interfered with his possession, nor disputed his claim of title, during this time. He frequently went upon the land, and took parties upon it with a view of selling it. He paid the taxes levied against it for the years 1872, 1873, and 1874, and since that time the taxes have been paid by Guinn. In those years that region of country was sparsely settled, and there is testimony to the effect that the land in the vicinity was largely unoccupied and untilled. It was then regarded that it could be more profitably used for grazing or the cutting of hay thereon. The land was not inclosed during Cameron's ownership, but the herd law had been adopted in that county in 1872, and the order has continued in force since that time.

The court, after hearing this evidence, determined that it did not tend to sustain the claim of adverse possession, and therefore refused to submit it to the jury. Was there sufficient evidence to take the case to the jury? We may lay aside any conflicting testimony, as the court had nothing to do with that. If the evidence, though weak, fairly tended to sustain the claim of adverse possession, the court was required to submit it to the consideration and judgment of the jury. The action of the court in directing the verdict cannot be sustained unless it can be said that, admitting every fact proven in favor of Guinn, and every fact which the jury might fairly and legally infer from the

evidence favorable to him, still he failed to make out some one or more of the material facts of his claim. Measuring the evidence in accordance with this well-known rule, we think Guinn was entitled to have the case submitted to the jury. When the acts of ownership and possession are considered in connection with the condition of the country, the purposes for which such land was adapted, and the fact that it was used, and treated much the same as were the adjoining lands of other owners, and used in the most profitable manner then in vogue, we cannot say that the possession was not adverse. We think the claim of absolute title, the undisputed control, the leasing, guarding, and protecting of the land, the cutting and stacking of hay thereon, the care and cutting of the timber, and the payment of taxes, tended to establish open, exclusive, and adverse possession. It seems to have been the theory of counsel that, because Cameron had not cultivated, inclosed, or erected permanent improvements upon the land, there was nothing to indicate an attempt to found a hostile title by possession. None of these things are absolutely essential in order to establish title by adverse possession. In *Gilmore v. Norton*, 10 Kan. 506, it was held that it is not necessary that a person should always be actually upon real estate, nor that he should actually reside thereon, neither that there should be any improvements upon the property, in order that he may be in the actual possession of the same. There may be an actual possession of uninclosed, unimproved land. No rule of general application as to what will constitute adverse possession can be safely laid down, as much necessarily depends upon the character and situation of the land, and the uses to which it is adapted; and so it is frequently said that the rule requiring actual and visible occupancy should be more strictly construed in an old and well-settled country, where the land is improved, than in a new country, where the land is only partially improved. *Gildehaus v. Whiting*, 39 Kan. 706, 18 Pac. 916, is much relied on by defendants in error as an authority to show that the facts in this case do not constitute adverse possession. It was there held that the recording of a conveyance by a grantor who had no title, the payment of taxes for a number of years by the grantee, and a public claim of title to vacant lots, was not conclusive evidence of an adverse holding and of ownership. It was strongly urged in that case that, although the lots were vacant, these acts of ownership were sufficient to establish an adverse possession; but the court was unable to yield its assent to that view, not because those acts were not some evidence of ownership and possession, but rather because the trial court had held that, under the circumstances, they were insufficient to constitute adverse possession. If the finding of the

trial court in that case had been to the contrary, a different result might have been reached in this court. That case, however, recognizes that some of the facts existing in this case constitute evidence of possession and ownership which would require a submission to the jury. In that case, and those therein cited, it is held that the payment of taxes is prima facie evidence of ownership, and that where the land claimed is subjected to the will and dominion of the claimant, manifested in some appropriate manner, residence upon the property is not essential, and that in such case an inclosure is unnecessary. In the case of grazing land, in a grazing country, herding sheep upon it would seem to be an appropriate use, according to the locality and quality of the property. Accordingly, we find that in two cases pasturage of cattle within an inclosure was held to be sufficient against intruders, and it was held that pasture without an inclosure was sufficient, the cattle being confined to the land by herders. *Webber v. Clarke*, 74 Cal. 11, 15 Pac. 434, and cases there cited. See, also, the following authorities, cited and commented on in *Gildehaus v. Whiting*, supra: *Ellicott v. Pearl*, 10 Pet. 412; *Ewing v. Burnet*, 11 Pet. 41; *Langworthy v. Myers*, 4 Iowa, 18; *Draper v. Shoot*, 25 Mo. 191; *Ludlow v. McBride*, 3 Ohio St. 241. In a recent case, involving facts somewhat similar to those in the present case, this court sustained the finding of adverse possession. *Goodman v. Nichols*, 44 Kan. 22, 23 Pac. 957. In *Curtis v. Campbell*, 54 Mich. 340, 20 N. W. 69, it was held that "an owner of out lots, which he does not fence or cultivate, may establish an adverse possession by cutting grass and timber, ditching, paying general and special taxes, and openly and notoriously claiming and using the land." See, also, *Sparrow v. Hovey*, 44 Mich. 63, 6 N. W. 93. In *Lantry v. Parker*, (Neb.) 55 N. W. 962, it is said that "the protection of grass during the growing season, and the cutting, curing, and disposal of the hay at the proper periods, constitute actual possession in the defendant, especially when taken in connection with his using it in like manner as the surrounding land and his acts to prevent its use by others." In *Finn v. Land Co.*, (Wis.) 40 N. W. 209, it was held that where plaintiff went upon the land a number of times every year, to see whether trespass was being committed thereon, to look over the timber, and to run out lines on which to build roads to get out some of the timber, and that the roads were built, and timber was cut, during each winter, to be used for fence rails and firewood on plaintiff's farm, which adjoined the land, and for other purposes, and where his occupancy during the winters was not accidental, but was open, notorious, and continuous, and in the usual manner that timber lands were occupied, the possession was adverse, and that the land was at no time "vacant" or

"unoccupied," within the meaning of the statute. In *Clement v. Perry*, 34 Iowa, 564, it was held that, "where a person claiming land exercises acts of ownership over it by the use of it for the purposes to which it is adapted, his possession will be regarded as actual and adverse. So held in respect to uninclosed timber land on which the person claiming to be the owner cut wood and timber for ordinary purposes during the period of his ownership." In *Forey v. Bigelow*, 56 Iowa, 381, 9 N. W. 313, it was decided, "where lands are open and uninclosed, but it appeared that defendant, and those under whom he claimed, had for more than ten years claimed and exercised the exclusive right to cut timber and grass therefrom, and had at various times sold the right to cut grass to others, that such possession was effectual as actual inclosure of the land." In the same line, see *Murray v. Hudson*, (Mich.) 32 N. W. 889; *Cooper v. Morris*, (N. J. Err. & App.) 7 Atl. 427; *Fisher v. Bennehoff*, 121 Ill. 426, 13 N. E. 150; *Stephenson v. Wilson*, 50 Wis. 95, 6 N. W. 240; *Baum v. Shooting Club*, (N. C.) 2 S. E. 673. These authorities strongly sustain our view that there was sufficient evidence to carry the case to the jury, and from which the jury might have found adverse possession from 1872, such as would confer title upon Guinn. Whether this evidence would have been satisfactory to this court upon that question as an original question it is unnecessary to determine. For the present, the only inquiry is whether it was sufficient to require a submission of the same to the jury. We are clearly of opinion that it was, and hence we are unable to sustain the ruling of the court. In view of the conclusion that we have reached, the other questions suggested need not be decided. The judgment of the district court will be reversed, and the cause remanded for another trial. All the justices concurring.

KANSAS FARMERS' FIRE INS. CO. v. SAINDON.

(Supreme Court of Kansas. Dec. 9, 1893.)

INSURANCE — MISTAKE IN DESCRIPTION OF PREMISES — CONDITIONS OF POLICY — AGENCY — ESTOPPEL.

1. A ruling of the trial court, not prejudicial to the party complaining, cannot be regarded as reversible error.

2. Where a dwelling house is insured, and the policy by mistake misdescribes the land on which the house is situated, this will not of itself affect the risk, or render the policy void; and it is not necessary to reform the policy, in case of a loss, to recover thereon.

3. The cases of *Sullivan v. Insurance Co.*, 8 Pac. 112, 34 Kan. 170, and *Insurance Co. v. Gray*, 23 Pac. 637, 43 Kan. 497, followed.

4. A provision in an insurance policy against future incumbrances without the consent of the secretary of the insurance company, indorsed thereon, is not broken, where the property is already mortgaged at the time of the application for the insurance and the

issuance of the policy, by the subsequent renewals of the prior mortgages with accrued interest.

5. Where a person claiming to be the solicitor or agent of a fire insurance company, and having in his possession blank applications of the company, receives and forwards to the company an application indorsed by him as the solicitor for the company, and the company accepts such application from such person, and pays him for his services as solicitor, and returns and delivers to him for the insured the policy applied for, and receives the premium on the policy through such solicitor, less his charges for commission, *held*, in an action on the policy, that the insurance company, having enjoyed the benefits of the acts of the alleged solicitor, and having paid him as solicitor, cannot deny that he was its agent for the purpose of soliciting and delivering such policy.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturges, Judge.

Action on a policy of insurance by Ben Saindon against the Kansas Farmers' Fire Insurance Company. Plaintiff had judgment, and defendant brings error. Affirmed.

The other facts fully appear in the following statement by HORTON, C. J.:

This action was commenced by Ben Saindon against the Kansas Farmers' Fire Insurance Company upon an insurance policy dated the 1st day of April, 1887, for damage sustained by reason of a fire which occurred November 6, 1888, and during the term of the policy. Among other things contained in the petition was the following: "And plaintiff further says that said defendant, at the time it issued said policy of insurance to the plaintiff, that they did not properly describe the real estate on which said dwelling house was situated, and that the answers to certain questions in the application and transcribed on said policy are not the answers of the plaintiff to the questions as they appeared on said policy of insurance. That when he received said policy, and discovered said errors, he returned the same to said insurance company for correction, and asked to have said erroneous description corrected, so as to properly describe the real estate on which said dwelling house was situated; and to correct the other erroneous answers to questions, as they appeared on said policy to have been falsified; all of which said company, by their authorized agent, agreed to do, and received from said plaintiff his said policy herein described for that purpose, who kept and did not return the said policy to him until after his said loss by fire, when the same was returned to him without any correction having been made. That said error in said description and answers was not the plaintiff's, but the defendant's, and which error it, the defendant, should have corrected, as was their place to do when notified and directed." The answer contained a general denial. The second defense was that at the time of the fire the plaintiff below was not the owner of the property destroyed by the fire, or the property described in the policy. In the

fourth defense the defendant set out the written application made by Saindon for the policy, alleging specifically that the application, by the terms of the policy of insurance, was a warranty on the part of Saindon, and that the policy contained conditions providing any false representations upon the part of the assured in his application should render his policy of insurance void, and that the application contained false statements,—among others, that the assured represented that he was the owner of the premises upon which the property was situated, and that it was unincumbered, when in fact the property was mortgaged for a very large amount, about \$14,000. In the fifth defense the company pleaded the clause in the policy that if the property described in the policy of insurance should be sold, transferred, or incumbered, in whole or in part, before or after the loss, without the consent of the secretary of the defendant company indorsed thereon, then the policy of insurance should be void; and alleged that plaintiff below, at divers times after receiving the policy, had mortgaged the insured property, and that for this reason the policy was wholly void. The reply was as follows: "Comes now the plaintiff, and for reply to the several paragraphs of defendant's answer herein denies each and every allegation therein contained. And for a further and more complete reply herein to defendant's answer says that he never executed or delivered the pretended application for insurance set forth in defendant's answer, and marked 'Exhibit A.' That he never, either directly or indirectly, made any representations to defendant that his real estate mentioned was or was not mortgaged or incumbered; neither did he ever authorize the same to be made to defendant, or to any one acting for and in behalf of said defendant. That E. D. Pelletier, the solicitor for said insurance company, defendant, desiring to insure the house and furniture of the plaintiff, represented to the plaintiff that he was the agent of the insurance company, defendant, and that all the company desired was the size of the house, and when built. That E. D. Pelletier, for said defendant, took a blank piece of paper, and took down the size of the house, and when built, turned to the plaintiff, and said: 'That is all. When you come in again, your policy will be ready.' That the plaintiff soon thereafter called, paid the full premium thereon, to wit, thirty-seven dollars and fifty cents, and, being unable to read or write, took the policy home. That he never signed any application of any kind or description to said defendant; neither did he ever authorize any one in his behalf to sign such application. That his application for the insurance was oral, and was not reduced to writing by the defendant. That in obtaining the insurance policy he did not conceal or attempt to conceal any debt or lien against him. That E.

D. Pelletier, who was acting for and on behalf of the insurance company, defendant, and from whose hand he received the policy, had personal knowledge of the financial condition of the plaintiff at the time of the issuing and delivering of the insurance policy, and for a long time prior thereto." The reply was not sworn to. The trial commenced on the 10th of January, 1890. The jury returned a verdict for the plaintiff, and assessed his damages at \$2,664.16, being \$1,900 for loss on house, with interest of \$124.76, and \$600 for loss on personal property, with \$39.40 interest. Subsequently judgment was rendered thereon in favor of the plaintiff and against the defendant upon the verdict. The insurance company excepted, and brings the case here.

Stambaugh, Hurd & Dewey, for plaintiff in error. Pulsifer & Alexander, for defendant in error.

HORTON, C. J., (after stating the facts.) The insurance company moved to require plaintiff below to make his petition more definite and certain by stating specifically what answers to questions in the application, which had been transcribed on the policy, were false, and not his own answers. This motion the court denied. It is doubtful whether the exception of the company can be considered, because the petition in error does not specially assign this ruling as error; but, if it were considered, the reply subsequently filed cured the indefinite or defective allegations of the petition, as it set forth specifically all the facts claimed by the plaintiff below concerning the application and the answers to the questions therein stated. All of the pleadings may be considered together if any allegation in the petition is urged as insufficient. Therefore, if any error was committed in the ruling referred to, in view of the reply it cannot be regarded as prejudicial.

2. Upon the trial, after the jury was impaneled, and when plaintiff below offered his first witness, objection was made to the introduction of any testimony under the petition, for the reason that it did not state facts sufficient to constitute a cause of action. The principal contention was that the petition itself disclosed the fact that the policy did not properly describe the real estate upon which the dwelling house was situated. The land was misdescribed in the policy, but this misdescription would not affect the risk, or render the policy void. *Insurance Co. v. McLanathan*, 11 Kan. 533; *Mumper v. Kelley*, 43 Kan. 256, 23 Pac. 558; *Insurance Co. v. Schreck*, (Neb.) 43 N. W. 341-344; *Insurance Co. v. Gebhart*, (Neb.) 49 N. W. 333.

3. It is next contended that, as many of the answers concerning other insurance, prior incumbrances, and stove pipes, in the written application, were untrue, the policy was ren-

dered void thereby. It appears from the evidence that the plaintiff below could not read or write; that the application was signed with a mark only; that the applicant made no false statements or answers; that the application was filed in by E. D. Pelletier, who sent the same to the insurance company, and received the policy from defendant below. Therefore, if Pelletier was the agent of the company, and made or filed in the false answers without the knowledge or consent of the plaintiff, the company cannot avoid the payment of the loss on account of them. *Sullivan v. Insurance Co.*, 34 Kan. 170, 8 Pac. 112; *Insurance Co. v. Gray*, 43 Kan. 497, 23 Pac. 637. In this connection it is suggested that the trial court committed error in permitting plaintiff below to testify that he never signed the application. The question was not objected to, but the company moved to strike out his answer after it had been received. The execution of the application, as it was submitted to the jury, was not in issue. The court, in its instructions, treated the application as if it had been signed, and informed the jury that, "if such agent relied on the representations of the plaintiff, if he made any, and such representations were false, and deceived the agent as to the true condition of the property, whether with reference to incumbrances or otherwise, and a loss occurred, the plaintiff could not recover. But if the plaintiff stated all the answers truthfully, and the agent wrote them falsely, or if the agent, by his own examination, knowledge, or information of the premises, without reference to the statements of the plaintiff, if any, filled out the application, then the company is bound thereby, whether the application was truthful and correctly filled out or not; for, being the act of the company, through its agent, if not correct, the company, and not the plaintiff, must bear the loss."

4. It is further contended that, as the property insured was mortgaged during the term of the policy and before the loss, without notice to or the consent of the company, the policy, by the terms thereof, became void. It appears from the evidence that the subsequent mortgages were given to the officers of the bank who held the original mortgages, and were simply renewals of, or in lieu of, mortgages in existence at the time the application was taken and the policy issued, with additional interest. Such renewals did not vitiate the policy, nor cause any breach of its condition. There was a conflict in the evidence whether the mortgages were renewals only, but the jury were the judges of the weight and credibility of the witnesses, and under instructions of the court have settled that matter in favor of the plaintiff below. *Bowlus v. Insurance Co.*, (Ind. Sup.) 32 N. E. 319-321; *Russell v. Insurance Co.*, (Iowa,) 32 N. W. 95, 42 N. W. 654; *Association v. Holberg*, (Miss.) 8 South. 175; *McNamara v. Insurance Co.*, 47 N. W. 238.

5. It is also contended that Pelletier was not the agent of the insurance company, as his agency had terminated in February, 1887, before the application for the policy was taken. Therefore that the trial court committed error in instructing the jury that "the company, having issued its policy on the application taken by Pelletier, made him its agent for that purpose, even if he was not so before." At one time E. D. Pelletier was the solicitor for the insurance company. After his agency terminated he retained printed blanks of the company, which had been furnished him while he was solicitor. On the back of the application filled up was indorsed, "E. D. Pelletier, Solicitor." Pelletier requested the plaintiff to insure, fixed the amount of premium, made inquiries relative to the dwelling house, and transmitted the application to the company. The company issued the policy, and paid Pelletier a commission of 25 per cent. for his services. The policy was sent to him for delivery. The acts of Pelletier in soliciting the insurance and taking the application on a blank of the company having been clearly accepted by the company, is such a ratification as is equivalent to full authority in the first instance. Having accepted Pelletier's services as solicitor, and having paid him for the same, the insurance company cannot now disown his agency. *Babcock v. Deford*, 14 Kan. 408; *Waterson v. Rogers*, 21 Kan. 529; *McArthur v. Association*, (Iowa,) 35 N. W. 480; *Abraham v. Insurance Co.*, 40 Fed. 717. The trial court committed no error in refusing the two instructions prayed for. The first instruction omitted all reference to the false answers having been written in the application by Pelletier without the knowledge or consent of the plaintiff. The second instruction, concerning the subsequent mortgages, was faulty in not excepting renewals of prior mortgages. There are some other matters referred to in the briefs, but they do not merit discussion. The judgment will be affirmed. All the justices concurring.

CHICAGO, K. & W. R. CO. v. NASHUA SAVINGS BANK.

(Supreme Court of Kansas. Dec. 9, 1893.)

CONDEMNATION OF RAILROAD RIGHT OF WAY OVER MORTGAGED LAND — RIGHTS OF COMPANY AS AGAINST MORTGAGEE.

The cases of *Railway Co. v. Meyer*, 31 Pac. 700, 50 Kan. 25; *Rand v. Railway Co.*, 31 Pac. 683, 50 Kan. 114; *Goodrich v. Board*, 27 Pac. 1006, 47 Kan. 355,—followed.

(Syllabus by the Court.)

Error from district court, Kingman county; S. W. Leslie, Judge.

Action by the Nashua Savings Bank against Joseph Thomas, the Chicago, Kansas & Western Railroad Company, and others, to foreclose a mortgage. Defendant railroad company resisted the action on the ground that its right of way over the mort-

gaged premises was not subject to the mortgage, and from an adverse judgment it brings error. Reversed.

Following is the material part of the agreed statement of facts on which the case was tried: "It is hereby stipulated and agreed by and between the plaintiff and the defendant the Chicago, Kansas & Western Railroad Company that the only question in dispute, and the only question to be settled by the court, in this case, is as to whether the plaintiff herein is entitled to a judgment herein barring the rights of the defendant the Chicago, Kansas & Western Railroad Company in the foreclosure proceedings instituted by the plaintiff in this action. It is further stipulated and agreed by and between the plaintiff and the defendant herein that the following shall be treated and considered as all the facts in this case: (1) That on the 16th day of September, 1885, the defendant Joseph Thomas was the owner of the following described real estate, situated in the county of Kingman and state of Kansas: The southwest quarter of section twelve, (12,) and the northwest quarter of the northwest quarter of section thirteen, (13,) all in township thirty, (30,) range seven (7) west of the 6th P. M., except ten (10) acres, in a square form, in the southwest corner,—and that on said 16th day of September, 1885, said Joseph Thomas and his wife executed to the Lombard Investment Company their mortgage on said land to secure their note for the sum of \$1,100, and that the amount now sought to be recovered in this action by the plaintiff, who is now the owner of said note and mortgage, is the amount now due and unpaid thereon, and that said mortgage is now in full force and effect, and that said note and mortgage were duly assigned to plaintiff prior to the condemnation proceedings hereinafter mentioned, and that said mortgage was duly recorded, as in said plaintiff's petition alleged. (2) That said Joseph Thomas continued to own said real estate and was the owner of the same, up to and including August 30, 1886. (3) That the defendant the Chicago, Kansas & Western Railroad Company was at all times hereinafter mentioned a railroad corporation duly organized and existing under and by virtue of the laws of the state of Kansas for the purpose of constructing, operating, and maintaining a line of railroad into and through the county of Kingman and state of Kansas, and as such corporation it had the power to exercise the power of eminent domain in the manner and form as by law provided. (4) That on the 21st day of July, 1886, the defendant the Chicago, Kansas & Western Railroad Company made application for the appointment of commissioners to condemn the right of way over and across the above-described real estate; that said commissioners were duly appointed; that said land was duly

condemned, to the extent of a right of way 100 feet wide across the same; that the award was duly paid into the hands of the proper officer, and drawn out by Joseph Thomas; that the award was made to Joseph Thomas, who was the only person the condemnation commission found to be the probable owner of said premises; that no award was made to the plaintiff in this action, or to its assignor; that all the proceedings in connection with the condemnation were regular in detail, and that said right of way was condemned in full compliance with the statute in such cases made and provided; and that the court, in passing on this case, is to treat the condemnation proceedings as regular, without any evidence to establish that fact. * * * (7) It is contended by the defendant the Chicago, Kansas & Western Railroad Company that the condemnation proceedings above referred to bar the right of the plaintiff to a judgment of foreclosure, so far as the right of way condemned is concerned."

A. A. Hurd and Robert Dunlap, for plaintiff in error. D. H. Ettien, for defendant in error.

PER CURIAM. No brief has been filed upon the part of the defendant in error. Upon the matters presented the cases of *Railway Co. v. Meyer*, 50 Kan. 25, 31 Pac. 700; *Rand v. Railway Co.*, 50 Kan. 114, 31 Pac. 683; *Goodrich v. Board*, 47 Kan. 355, 27 Pac. 1006,—are decisive against the plaintiff below. Upon the agreed statement of facts the judgment of the district court will be reversed, with direction to the court to enter judgment for the railroad company, decreeing its right of way to be superior to and free from the mortgage.

STATE v. PIERCE et al.

(Supreme Court of Kansas. Dec. 9, 1893.)

PURCHASE OF BRIDGES BY COUNTY—"TRUE VALUE"—UNLAWFUL ISSUE OF COUNTY WARRANTS—PUNISHMENT OF OFFICERS FOR.

1. Under the provisions of chapter 61, Sess. Laws 1891, the county commissioners of Barber county, in this state, have no power to purchase any bridge built upon the public highways of that county, unless they pay for the same in county bonds, or the proceeds thereof.

2. "True value," in said chapter 61, Sess. Laws 1891, cannot be construed to mean the original cost of a bridge permitted to be purchased thereby, when such bridge, at the time of the proposed purchase, is about seven years old, and actually worth about one-sixth, only, of the original cost of construction.

3. Where no account, claim, or demand is filed or presented against the county, and the board of commissioners unlawfully issue a county warrant or order, in violation of paragraph 1888, Gen. St. 1889, such action is an offense, within the meaning of the statute, and the members of the board may be punished therefor, under paragraph 1889, *Id.*; Gen. St. 1868, p. 296, § 8.

4. To issue county warrants or orders means "to send out, to deliver, or to put into circulation."

(Syllabus by the Court.)

Appeal from district court, Barber county; G. W. McKay, Judge.

D. L. Pierce and James Stranathan, commissioners of Barber county, were informed against for certain misdemeanors in office, and found guilty. Defendants appeal. Reversed in part.

The other facts fully appear in the following statement by HORTON, C. J.:

In 1891 the legislature passed the following act: "Section 1. That the county commissioners of Barber county, Kansas, are hereby authorized to purchase at their true value any or all bridges built upon the public highways of said county by any township or private person or persons, and pay for the same in county bonds. Said bonds not to draw over 6 per cent. interest, and made payable not under ten years; or said bonds may be sold at not less than par and the proceeds applied to the payment of said bridges." Chapter 61, Sess. Laws 1891. On the 7th day of July, 1892, the board of county commissioners of Barber county made and entered of record the following order: "Under and by virtue of the power and authority vested in the board of county commissioners of Barber county, Kansas, by an act of the legislature approved March 6, 1891, being an act entitled 'An act concerning bridges in Barber county, Kansas,' it is hereby ordered by said board as follows: That the following named and described bridges, situate and being in said county of Barber, be, and they are hereby, purchased at the prices and sums following, that is to say: The bridge across the Medicine river near the town of Kiowa, and known as the 'Kiowa Bridge,' at the sum of twenty-three hundred dollars; the bridge across the Medicine river near the town of Sun City, and known as the 'Sun City Bridge,' at the sum of twenty-six hundred dollars; and the bridge across the Medicine river near the town of Lake City, and known as the 'Lake City Bridge,' at the sum of twenty-six hundred eighty and 93-100 dollars. And whereas, the first two-named bridges are township bridges, for which the bonds of the respective townships are outstanding and unpaid, it is ordered that hereafter the payment of such bonds, and accruing interest hereon, shall be assumed and provided for by the county, according to the true tenor and effect of such bonds, and the treasurer of said county is hereby authorized and directed to make such payment out of such funds as may be provided for that purpose. And whereas, the Lake City bridge was built by private persons, the amount of whose subscription and payments thereto, respectively, is satisfactorily proven and shown to the board to be as follows, [here appear, in the order, the names of seventy-eight persons who had sub-

scribed various sums towards the building of the Lake City bridge, aggregating, in all, \$2,680.93,] and it is therefore ordered that warrants be drawn and issued, and delivered to such persons, for said sums, respectively, and hereafter said bridge shall be treated as the property of the county, and cared for accordingly, or that bonds of the county be issued for said Lake City bridge. D. L. Pierce. Attest: F. A. Lewis, County Clerk. James Stranathan." James Reagin, one of the commissioners, voted against the purchase of the bridges, and also against the order adopted by a majority of the board. Before the order was made, Lyman W. De Geer, the county attorney of Barber county, filed with the county clerk of that county his written opinion, which concluded as follows: "That you may avoid personal liability, and that the county may avoid the expense of future litigation, I respectfully submit this opinion, and briefly recapitulate as follows: (1) You can only pay up to an amount equal to the true value of the bridges. (2) You can only purchase such as were built on the public highways of Barber county. (3) You can only pay for them on bonds, or the proceeds of bonds, to be issued by you for that purpose, and sold at not less than par. (4) Said bonds can only be issued by you when 'ordered by a vote of the legal electors' of Barber county. (5) A board of county commissioners can only issue bonds 'in a sum not greater than 5 per cent., inclusive of all other indebtedness, of the taxable property of their county.'" This opinion was read to the board before action by them, and, before the order was made, J. M. Reagin, commissioner of the first district, moved that the opinion be accepted. This motion was voted down, J. M. Reagin being the only commissioner voting in favor thereof. Thereupon D. L. Pierce, commissioner from the third district of the county, and the chairman of the board of the county commissioners, moved that the county buy the Lake City bridge, and issue county scrip to pay for the same. This motion was seconded by James Stranathan, county commissioner from the second district. The motion was carried by the vote of Pierce and Stranathan, but J. M. Reagin, one of the county commissioners, voted against the motion. About this time, an order of injunction in the case of *The State of Kansas ex rel. v. D. L. Pierce, James Stranathan, and J. M. Reagin*, the Board of County Commissioners, was personally served upon each member, prohibiting them from purchasing any bridge in Barber county, or from paying for any bridge with county scrip, warrants, or bonds, and also prohibiting them from taking any steps towards the purchase of any bridge for the county. The next morning, — July 8th, — at the request of D. L. Pierce, the county clerk commenced filling up and signing scrip for the various subscribers for the Lake City bridge. An order or warrant up-

on the county treasurer was signed, in favor of R. Lake, for \$1,738.68. D. L. Pierce had a written order from R. Lake for this warrant, and the county clerk delivered the same to him for Mr. Lake. It was taken by Pierce out of the office, and delivered to Lake. There were also nine other orders or warrants in favor of persons appearing upon the subscription list of the Lake City bridge, filled in by the county clerk, and signed by D. L. Pierce, as chairman of the board of county commissioners; but at the time of the trial these were in the office of the county clerk, and had not been delivered to any person. The only order or warrant upon the county treasurer that was actually issued or delivered under the order of the 7th of July, 1892, was the one in favor of R. Lake, for \$1,738.68. On the 30th day of July, 1892, Lyman W. De Geer, as county attorney of Barber county, filed in the district court of that county an information charging D. L. Pierce and James Stranathan, members of the board of county commissioners of the county, with certain misdemeanors in office. The information contained 11 counts. The first count of the information charged that the defendants unlawfully and fraudulently committed a fraud in their official capacity, and under color of their offices, as members of the board of county commissioners, in unlawfully and fraudulently allowing greater sums on accounts, claims and demands against Barber county than the amounts actually due thereon, dollar for dollar, according to the legal and ordinary compensation for prices and services rendered, salaries and fees of officers, and materials furnished, to wit, claims in favor of R. Lake, J. H. Vinson, T. S. Updyke & Co., Noah & Buck, John Andrews, James Nurse, J. K. Garton, H. M. Buck, Charles D. Nelson, A. Feltner, and other parties. It was alleged that said accounts were allowed in an order made on the 7th day of July, 1892, by the board, said order being one to purchase the Lake City bridge. The second, third, fourth, and fifth counts of the information charged the defendants with allowing accounts in favor of R. Lake, J. H. Vinson, T. S. Updyke & Co., and Noah & Buck, respectively, without said accounts being made out in separate items, and without having been verified by affidavit setting forth that the same were just, correct, and remained due and unpaid. The sixth, seventh, eighth, ninth, tenth, and eleventh counts charged the unlawful issuance of county warrants to R. Lake, A. Feltner, C. D. Nelson, H. M. Buck, J. K. Garton, and James Nurse, respectively, without an account containing the several items thereof, verified by affidavit setting forth that the same were just, and remained due and unpaid, and that the amounts claimed thereon were actually due according to the legal and ordinary price of services rendered and materials furnished, having first been presented to the board of county commissioners. De-

defendants filed a motion to quash the information upon various grounds, which was overruled by the court, and excepted to at the time. A trial was had at the May term, 1893, of the court, and Pierce was convicted on the eleven counts of the information, and Stranathan upon the first five counts of the information. Motions for a new trial and in arrest of judgment were made, which were overruled and excepted to, and the defendant Stranathan was sentenced to pay a fine of \$50 on each of the first five counts of the information, and Pierce was sentenced to pay a fine of \$50 on each of the eleven counts of the information. Both defendants appeal.

E. Sample, R. A. Cameron, and Chester I. Long, for appellants. John T. Little, Atty. Gen., Lyman W. De Geer, and C. W. Ellis, for appellee.

HORTON, C. J., (after stating the facts.)

1. It is contended that chapter 61, Sess. Laws 1891, may be construed to permit the county commissioners of Barber county to purchase the bridges upon the highways of that county for county warrants or orders, and also that "true value" may be interpreted to mean the original cost or subscription price of the bridges. It is expressly provided therein that the bridges are to be paid for in county bonds, or their proceeds, the bonds not to draw over 6 per cent. interest, and payable not under 10 years. Chapter 61 also expressly provides that the purchase of the bridges, if made, was to be at their "true value." The Lake City bridge, which was attempted to be purchased, was about seven years old at the time of the order of the 7th of July, 1892. Its "true value" at the time was about \$400. Its original cost was \$2,680.93. In view of the express provisions of chapter 61, the county board had no authority to pay for the bridges with county warrants or orders, as there were no county bonds issued for that purpose, or any proceeds thereof to use. The board had no authority to buy the bridges at the original cost of their construction,—an amount largely in excess of their "true value." The proceedings of the board on the 7th day of July, concerning the purchase of the Lake City bridge at its original cost, and paying therefor by the issuance of scrip, was wholly outside of the act referred to; therefore, the defendants cannot invoke that statute for their protection.

2. It is next contended that the defendants ought not to be held personally or criminally responsible, because they claim they acted upon the advice of R. M. Cameron and A. J. Jones, two lawyers whom they consulted. The statute provides that "the county attorney shall, without fee or reward, give opinions and advice to the board of county commissioners and other civil officers of their respective counties, when requested

by such board or officers, upon all matters in which the county is interested, or relating to the duties of such board or officers. In which the state or county may have an interest." Paragraph 1798, Gen. St. 1889. *Commissioners v. Brewer*, 9 Kan. 317; *Huffman v. Commissioners*, 25 Kan. 64. The commissioners of a county have general charge of its business, but, under the statute, the county attorney is required to advise the board relating to their duties upon all matters in which the county has an interest. It seems that the advice of the county attorney of Barber county was not requested by the board; yet it was given to them, and subsequently an injunction was served, prohibiting the members of the board from purchasing, or attempting to purchase, any county bridge. *State v. Pierce*, 51 Kan. 241, 32 Pac. 924. This was done, as appears from the record, before any county warrant or order was issued to pay for the Lake City bridge. It has been decided by this court that "when the commission of an act is made a crime by statute, without any express reference to any intent, then the only criminal intent necessarily involved in the commission of the offense is the intent to commit the interdicted act; and in such a case it is not necessary to formally or expressly allege such intent, or any intent, but simply to allege the commission of the act, and the intent will be presumed." *State v. Bush*, 45 Kan. 139, 25 Pac. 614. This case, upon a rehearing, was modified, but only to the extent "that a slight departure from a directory provision of a statute, without any fraudulent intent, and which cannot injure any one, or defeat the purpose of the statute, is not unlawful." *State v. Bush*, 47 Kan. 201, 27 Pac. 834. See, also, 4 Amer. & Eng. Enc. Law, 690; Whart. Crim. Law, (9th Ed.) para. 84, 1582. Under these circumstances, we are unwilling to say that the advice of the two attorneys, holding no official relation to the county board, relieved the members of the board from all personal or criminal responsibility. We do not think the trial court erred in refusing to instruct the jury to acquit the defendants if they "had reason to believe that the advice and counsel upon which they relied were honestly and conscientiously given." In *State v. Scates*, 43 Kan. 330, 23 Pac. 479, Mr. Justice Valentine, concurring in the prevailing opinion, observed: "If the members of the board had been prosecuted under section 3 of the act to restrain the issuing of county warrants, and found guilty, they would and should, in my opinion, have been removed from office."

3. The further contention, against the form of the information, and the evidence in supporting the counts thereof, is more serious. We do not think that when no account is filed or presented, and a county warrant or order is unlawfully issued, such unlawful act may be divided into three or four distinct offenses. In this case, no account,

claim, or demand for any sum was filed or presented to the board of county commissioners for allowance. Without any written proposition being presented, or any one appearing at the meeting of the board for the subscribers to the Lake City bridge, the order complained of was made. Strictly speaking, the order was not the allowance of an account, claim, or demand. It was merely an offer by the board to purchase the bridge from private persons, some 78 in number. No acceptance of this offer was filed by the subscribers to the Lake City bridge, and the only person who seems to have been benefited by the order is R. Lake. Under these circumstances, we do not think any offense was established against either of the defendants, upon the evidence introduced, for the allowance of excessive sums on an account, claim, or demand, under paragraph 1888¹ or for the allowance of an unverified account, under paragraph 1647. It is suggested, however, that the first count of the information states an offense under paragraph 1888 and other sections. It is not usual to describe, in the same count, an offense under different sections. The offense charged in the first count, in our opinion, was attempted to be brought within the terms of the first clause of paragraph 1888. If that count had contained the allegation that the county board had issued the county warrants or orders therein provided for, and thereby completed the fraud, we think both of the defendants might have been punished under paragraph 2346. But in that case there could have been one conviction, only, for the unlawful act or fraud of the defendants. The information, however, seems to have charged the defendants in seven counts under the differ-

¹ The paragraph provides: "It shall be unlawful for any board of county commissioners to allow any greater sum on any account, claim or demand against the county, than the amount actually due thereon, dollar for dollar, according to the legal or ordinary compensation or price for services rendered, salaries or fees of officers, or materials furnished, or to issue county warrants to orders upon such accounts, claims or demands, when allowed for more than the actual amount so allowed, dollar for dollar; and no county warrant or order shall be issued unless an account containing the several items thereof, verified by affidavit, setting forth that the same is just and correct, and remains due and unpaid, and that the amount claimed thereon is actually due, according to the legal or ordinary price for the services rendered or materials furnished, as the case may be, shall have first been presented to the board of county commissioners, and allowed as hereinbefore: provided, that the county board may adopt such measures as they may deem proper to liquidate claims against the county for rents, fuel, lights, and stationery." Gen. St. 1868, p. 295, § 2.

Paragraph 1889 reads as follows: "Any board of county commissioners, or any county commissioner, or county clerk, who shall violate any of the provisions of this act, or neglect or refuse to perform any duty herein imposed, shall be deemed guilty of a misdemeanor and upon conviction thereof, in a court of competent jurisdiction, shall be subject to a fine of not less than ten dollars nor more than ten thousand dollars, and shall, moreover, be removed from office." Gen. St. 1868, p. 296, § 3.

ent provisions of paragraph 1888, and in four counts under the provisions of paragraph 1647.

4. The sixth, seventh, eighth, ninth, tenth, and eleventh counts charged the unlawful issuance of county warrants or orders without a verified or other account having first been presented, as prescribed by paragraph 1888. To issue county warrants or orders means: "To send out; to deliver; to put forth; to put into circulation; to emit,—as, to issue bank notes, bonds, scrip," etc. A county warrant or order is "issued" when made out, and placed in the hands of a person authorized to receive it, or is actually delivered or taken away. So long as a county warrant or order is not delivered or put into circulation, it is not "issued," within the terms of paragraph 1888. If a warrant or order unlawfully directed to be issued by a board of county commissioners remains in the hands of the county clerk, and is not delivered, or sent out, or put into circulation, by the county clerk or any one else, the wrong attempted by the unlawful act does not succeed, because there is no actual issuance of the warrant or order. The trial court, therefore, should have given the instructions prayed for concerning the nondelivery and noncompletion of the county warrants or orders: but the refusal of those instructions was not prejudicial to D. L. Pierce, under the sixth count of the information, because the evidence is undisputed that the warrant or order to R. Lake was actually delivered. F. A. Lewis, the county clerk, called by the state, testified as follows: "Q. Now I'll ask you what was done after that, concerning the purchase of these bridges, if anything? A. I don't think there was anything more done that day. Q. What was done after that? A. The next morning I commenced drawing scrip for the bridge. Q. At whose instance did you commence drawing scrip for the bridge? A. At the request of D. L. Pierce. Q. What time in the morning was this? A. Some time between the hours of eight and nine o'clock in the morning. Q. Now, Mr. Lewis, you testified that, after the signing up by defendant Pierce of this scrip for \$1,738.68, he presented an order to you, signed by R. Lake, for the scrip; that he immediately took this scrip, and left the office. That is right, is it? A. Yes, sir. Q. Now you may state what other warrants were signed by D. L. Pierce, as chairman of the board of county commissioners. A. If I remember right, there were nine others that were written up and signed, just as they appear on that subscription list. Q. Were they the nine succeeding the name of R. Lake, as appears upon that omnibus order marked 'Exhibit B'? A. The nine succeeding amounts there. Q. Were each of those warrants signed by D. L. Pierce, chairman of the board of county commissioners? A. Yes, sir. Q. Where are those warrants now, if you know, Mr. Lewis? A. I have the re-

mainder of them in my office,—the nine. Q. The R. Lake warrant was the only warrant, then, that ever was taken away from your office? A. Yes, sir. Q. The amount of that was how much? A. \$1,738.68, I believe." As the only warrant or order for the purchase of the Lake City bridge ever delivered or put in circulation was the warrant or order for R. Lake, the only count in the information, concerning the unlawful issuance of a county warrant or order, supported by the evidence, is the sixth count thereof. Our conclusion, upon the whole record, is that the only offense in the information, which is sustained by the evidence, is the charge of the unlawful issuance of the county warrant or order in favor of R. Lake, for \$1,738.68, without any account having been presented, as prescribed by the statute, to the board of county commissioners. In our opinion, upon the allegations of the information, the evidence does not support the conviction of James Stranathan for unlawfully allowing accounts, claims, or demands, or for allowing excessive sums thereof, for the reasons before stated. It appears from the record that the state dismissed all the counts, after the fifth, against Stranathan. Upon the sixth count, D. L. Pierce was properly convicted upon the admitted facts. Upon such conviction, he was subject to a fine of not less than \$10, or more than \$10,000. He was sentenced, however, to pay a fine of \$50 only. The judgment of the district court will be reversed as to James Stranathan, and the judgment against D. L. Pierce will be modified, affirming his sentence upon the sixth count, and reversing all the other sentences. The costs against Pierce will be retaxed. All the justices concurring.

In re CLYNE.

(Supreme Court of Kansas. Dec. 9, 1893.)

CRIMINAL PROSECUTION — WHEN COMMENCED — STATUTE OF LIMITATION—DELAY IN MAKING ARREST—RES JUDICATA.

1. A criminal prosecution is commenced when a warrant is duly issued, and placed in the hands of a proper officer to be executed, in good faith and with due diligence, and if so issued within the time limited by law for the commencement of such criminal prosecution, and executed thereafter without unnecessary delay, even though the arrest be made after the statutory limitation has run, the prosecution will still be deemed to have been commenced in time.

2. Where a warrant is so issued, and where the sheriff has frequent opportunities for arresting the defendant, but fails for nearly five months to make the arrest, and the delay is at the request of the prosecuting officer, *held*, that the time of such unnecessary delay should be computed as a part of the period of limitation prescribed by the statute.

3. A discharge under a writ of habeas corpus of a defendant who has been committed for trial for a criminal offense, is not a bar to a subsequent prosecution for the same offense, supported by the same and other newly-discovered evidence.

4. Where application was made, by a defendant committed for trial for a felony, for a discharge under a writ of habeas corpus, to a judge of the district court, who heard and considered the evidence presented, and thereupon refused to discharge the prisoner, *held*, that this court, in its discretion, will generally decline to review the evidence and determine as to the existence of probable cause for the prosecution, but where important questions of law are presented, which must necessarily be passed on at the trial, and are decisive of the case, the court will consider and decide them. (Syllabus by the Court.)

Original application in habeas corpus by Joseph Clyne for release from custody on a criminal charge. Denied.

J. W. Rose and B. F. Simpson, for petitioner. Valentine, Harkness & Godard and O. C. Jennings, for respondent.

ALLEN, J. On the 18th day of March, 1892, a complaint was filed before a justice of the peace of Stafford county, charging the petitioner and other persons with burglariously breaking and entering the office of the county treasurer of Stafford county on the 25th day of January, 1891. The complaint contained five counts, charging burglary and grand larceny in different forms. A warrant was issued on this complaint, and the petitioner arrested, and taken before the magistrate who issued the warrant. Thereupon, a preliminary examination was held, and Clyne was required to give bond for his appearance for trial, in default of which he was committed to jail. Thereafter, on the 5th of April, 1892, a petition was presented to Hon. J. H. Bailey, judge of the district court, by Clyne, asking discharge from custody. The hearing was had, and the petitioner discharged, for the reason that the evidence was insufficient to show probable guilt of the accused. Afterwards, on the 23d day of January, 1893, another complaint was filed before a different justice of the peace, charging the defendant and others with conspiring together to burglariously break and enter the county treasurer's office, and that in pursuance of such conspiracy they did so break and enter it on the 25th day of January, 1891, and did feloniously steal money and records then kept and deposited in said office, the property of Stafford county. The second count charges a similar conspiracy and burglary, at the same time, to have been committed in the county clerk's office. The third count charges the larceny of the sum of \$6,000, the property of Stafford county; and the fourth count, the larceny of books from the county treasurer's office. On this complaint a warrant was issued on the same day, and delivered to the sheriff. Clyne was out of the state from the 8th to the 23d of January, 1893. He returned to Stafford on the 23d. The warrant was not served until the 16th day of June, 1893, although the defendant was in Stafford county, where the sheriff could

have taken him, on almost any day. At the time the warrant was issued, the county attorney supposed that Clyne was out of the state, and he directed the sheriff to hold the warrant until he saw him again. It appears from the evidence of the sheriff that he saw Clyne frequently while he had the warrant in his possession, and could have made the arrest, and it further appears that the county attorney wished the sheriff to delay service of the warrant in order that he might find more testimony before another examination should be held. After the arrest was made under the warrant last issued, another preliminary examination was had, and the defendant again held for trial. On this examination, three witnesses not introduced on the hearing before Judge Bailey gave the most damaging testimony which was at any time produced against the petitioner. The petitioner was committed to the jail of Reno county, there being no sufficient jail in Stafford county, and thereafter he made application to the Honorable F. L. Martin, judge of the ninth judicial district, for his discharge under habeas corpus proceedings. A full hearing was had on this application, and the petitioner was remanded to the custody of the sheriff. On his petition filed in this court, another writ has been issued, and it is sought to again inquire into the legality of his restraint.

It is contended by counsel for the petitioner, first, that the prosecution under which he is now held, is barred by the statute of limitations; that, notwithstanding the fact that the warrant was issued within two years after the commission of the offense, it was not followed up with service, or an attempt at service, as the law directs. The statute requires criminal prosecutions of this kind to be commenced within two years after the commission of the offense. It also provides that, if the person committing the offense conceals the fact of the crime, the time of concealment is not to be included in the period of limitation. The legislature has nowhere provided what shall be deemed a commencement of a criminal prosecution. It was held in *Re Griffith*, 35 Kan. 377, 11 Pac. 174, that the mere filing of a complaint before a magistrate, charging the party with the commission of the offense, was not such a commencement of the prosecution as to prevent the running of the statute. It was intimated in that case that the filing of the complaint, and the issuing of a warrant thereon in good faith, and the delivery to an officer to execute, was a sufficient commencement of the action to prevent the bar of the statute; but in this case we have the further question to consider, whether the filing of the complaint, and issuing a warrant thereon, with a direction on the part of the county attorney, who represents the state, to the sheriff, not to make present service, and where it appears that the defendant is

in the county, and frequently seen by the sheriff, who has frequent opportunities to make the arrest, yet makes no attempt to do so, can, after the lapse of nearly five months, be taken into custody, and prosecuted. The command of the warrant, if in the form prescribed by statute, is that the sheriff shall forthwith arrest the defendant. May he then, at the instance of the prosecuting attorney, disobey the command of his writ until such time as the prosecutor may feel prepared to proceed with the examination, and then make the service? Can the sheriff, merely by neglecting to promptly perform the duty enjoined upon him by law, extend the period of limitation prescribed by the legislature? And, if so, where is the limit of his authority? We have examined the cases cited by counsel for the state, and... while we find language in some of them which seems to be broad enough to cover this case, they yet are hardly in point. We certainly are not satisfied with any such construction of the law. We think the better rule is that the complaint must be filed and the warrant issued within the period limited by the statute; that it must be issued in good faith, and with the intention that it be presently served, and that the officer must proceed to execute it according to its command; that he must make the arrest within a reasonable time, and at the first reasonable opportunity offered him. Neither the county attorney nor the sheriff, nor both together, can, by any voluntary act, or by any neglect of official duty, extend the limit of the law. This is the logic of the opinion in *Re Griffith*, above cited, and is sustained by the weight of authority. *Ross v. Luther*, 4 Cow. 158; *Clark v. Slayton*, (N. H.) 1 Atl. 113; *People v. Clement*, 72 Mich. 116, 40 N. W. 190; *Burdick v. Green*, 18 Johns. 14; *Mason v. Cheney*, 47 N. H. 24.

On behalf of the state, it is contended that the fact of the commission of the crime was concealed by the defendant until the 24th of November, 1891. It appears from the testimony that the fact that a burglary was committed was as well known on the morning of January 26, 1891, by the officers, as it is now. The crime of burglary, if burglary was committed, was not concealed. The exceptions in the statute refer—First, to the absence from the state, or concealment, of the person committing the offense; second, to the concealment of the fact that a crime has been committed. They have no reference to concealment of the connection of the party sought to be prosecuted, with the crime. It is almost the universal rule that parties guilty of burglary or larceny conceal their connection with the crime, as far as possible.

In this case the defendant is charged with the crime of burglary, and also with grand larceny. The person who was county treasurer at the time of the alleged offense is also charged in the complaint as having been

a party to the crime. While the marks on the building and the drill holes in the county wife, indicating that a burglary had been committed, were at once discovered, the fact that a large sum of money had been taken was not discovered until late in November thereafter. It is contended by counsel for the petitioner that this case falls within the rule declared by this court in the case of *State v. Colgate*, 31 Kan. 511, 3 Pac. 348, in which the syllabus is as follows: "Where a grist-mill and all its contents, including the books of account of the owners of the mill, are destroyed by one single fire, and the defendant is prosecuted criminally for setting fire to and burning the mill, and on such charge is acquitted, held, that such acquittal is a good defense to a subsequent prosecution for setting fire to, and burning, the books of account." It will be observed that in that case there was but one act constituting the offense, and that was setting fire to the building. It was one fire. The burning of the contents of the building, including the books, were but incidents thereof. The burned books but added so much fuel to the general conflagration, and their burning followed as one of the consequences of the act of setting fire to the mill. This case has two possible aspects,—one, that the burglary and larceny were committed at the same time, and as a part of the same transaction, and, if so, were connected together in such manner that if one is barred by the statute the other is, also; and the other, that the crime, and the only crime, really and in fact committed, was the larceny of the money; that a conspiracy was formed and entered into by the petitioner, the county treasurer, and others, to steal the county funds; and that the burglary was a mere pretense for the purpose of concealing the larceny. If the county treasurer was in fact implicated in such a crime, and if he voluntarily opened the doors of his office, and of the safe in which the money was kept, and, in company with his confederates, took the county money, and then, for the purpose of creating a false impression, they did those acts which indicated that a burglary had been committed, and the county treasurer, in pursuance of the conspiracy, denied that any county money had been taken, and supplied a spurious draft, to be counted as money in his possession, for the purpose of further concealing the fact of the crime, we think a prosecution for the larceny can be maintained at any time within two years after discovery of the fact that the money had been taken. The question as to whether a prosecution for a crime is barred by the statute of limitations is one of fact, to be determined by the jury, and should be submitted to them, under proper instructions, with other questions in the case.

Counsel for the petitioner further contends that the discharge of the prisoner by Judge Bailey under the first writ of habeas corpus

constitutes a bar to any further prosecution. Authorities are cited to sustain this proposition. There may be cases where the decision of a court of controversies presented in habeas corpus cases amounts to an adjudication, but, where a prisoner is discharged from custody for want of sufficient evidence showing probable cause for his trial for an offense with which he stands charged, such decision goes no further than a determination of the matter on the evidence then presented; and, if other evidence of the defendant's guilt is afterwards found and produced, he may still be prosecuted, and the former proceeding constitutes no bar. *Weir v. Marley*, 99 Mo. 484, 12 S. W. 798; *Whart. Crim. Pl.* § 1011; 1 *Bish. New Crim. Law*, § 1014. Counsel for the state suggest that while a decision of the judges before whom this matter has been heard does not constitute a bar to the proceeding in this court, yet that, where all of the facts now presented for our consideration have been presented to a district judge, having concurrent jurisdiction with this court of habeas corpus cases, we should decline to enter into a consideration of the merits of the case. It is not claimed that it is absolutely incumbent on us to do so, but that, in the exercise of a sound discretion, we should do so. We think, as to all questions of fact presented on the hearing before Judge Martin, and passed on by him, this practice should be followed; and, as the testimony here is precisely the same as that considered by him, we shall not enter into a close examination of the facts of the case. As, upon the trial, it will be necessary for the court to pass on the questions of law above discussed, we have thought it necessary to consider and dispose of them. We abstain from any discussion of the evidence presented, bearing on the guilt or innocence of the petitioner. All the many hearings before examining magistrates, and under writs of habeas corpus, have been merely preliminary to determine whether the defendant should be put on trial. It is only necessary that the fact that a crime has been committed, coupled with probable cause for believing the defendant guilty of it, should be shown, in order to authorize holding him for trial. We see no valid ground for his discharge, and he is therefore remanded to the custody of the sheriff of Reno county. All the justices concurring.

CITY OF CLAY CENTER v. MYERS.

(Supreme Court of Kansas. Dec. 9, 1893.)

LIMITATION OF ACTIONS—FRAUD.

Where an action is brought to impose a trust upon the entire assets of one who has wrongfully or fraudulently converted public funds, the action must be brought within two years, under the provisions of subdivision 8, § 18, of the Civil Code.

(Syllabus by the Court.)

Error from district court, Clay county; R. B. Spilman, Judge.

Action by the city of Clay Center against D. H. Myers, assignee of John Higginbotham, insolvent, to recover the amount deposited with insolvent in trust. There was judgment for defendant, and plaintiff brings error. Affirmed.

F. L. Williams, C. C. Coleman, and B. B. Tuttle, for plaintiff in error. Harkness & Godard, for defendant in error.

HORTON, C. J. As was said in *Myers v. Board*, 51 Kan. —, 32 Pac. 658, the moneys sought to be recovered in this action "were school funds collected and held for specific public purposes, and the bank, its owner and manager, all knew of the trust character of the funds, and hence there is no excuse for their misappropriation." It was found by the trial court "that Spicer, the treasurer of the city of Clay Center, was never authorized to deposit the funds coming into his hands as treasurer in the Clay Center Bank, and the officials of the city had no knowledge that it was so deposited until the bank ceased to do business." It was charged in the petition "that John Higginbotham, the owner of the bank, at all times knew and was well advised that the money deposited by Spicer belonged to the city, but received the same, and merged it into his own assets, with full knowledge of the fact that it was plaintiff's money, and had come into Spicer's hands as a public trust, by virtue of his being city treasurer." This action was not commenced until two years and three months after the property of John Higginbotham, including the bank assets, came into the hands of his assignee. The trial court held that the two-years statute of limitations had barred the right of the city, as cestui que trust, to reclaim the funds misappropriated.

It was observed in *Myers v. Board*, supra, "that the confusion of trust property wrongfully converted does not destroy the equity entirely, but when the funds are traced into the assets of the unfaithful trustee, or one who has knowledge of the character of the funds, they become a charge upon the entire assets with which they are mingled." "Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. 1 Story, Eq. Jur. § 187." "Constructive fraud consists in any act of omission or commission contrary to legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience, and operates to the injury of another. The former implies moral guilt; the latter may be consistent with innocence." Black, Law Dict. 517. Equity is invoked by the plaintiff to charge the assets of John Hig-

ginbotham, in the hands of his assignee, with the trust funds wrongfully converted. The wrongful conduct or fraud of the bank is the gravamen of this action, but, as more than two years have elapsed, the plaintiff's right of recovery was barred under the provisions of subdivision 3, § 18, Civil Code. *Main v. Payne*, 17 Kan. 608; *Kennedy v. Kennedy*, 25 Kan. 151. The plaintiff attempted to follow the trust funds. It did not pursue its claim as a general creditor upon an implied contract. It voluntarily delayed too long in commencing its action to impose a trust on account of the wrongful or fraudulent conversion of its moneys. The judgment will be affirmed. All the justices concurring.

BAYS v. TRULSON.

(Supreme Court of Oregon. Dec. 11, 1893.)

ESTOPPEL BY RECORD — PLEADING — MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — NON-PAYMENT OF ASSESSMENTS — VALIDITY OF SALE — RETURN OF OFFICER — PAROL TESTIMONY.

1. In ejectment under a tax deed of land sold for a local improvement tax, plaintiff cannot estop defendant from denying the validity of the assessment by evidence of a judgment to which defendant was a party, and which established the validity of the assessment, where defendant alleged its invalidity as a defense, and plaintiff failed to plead the judgment as an estoppel by record.

2. Portland City Charter, in providing for assessments for local improvements, and for enforcement of payment, does not provide that a tax deed to land sold for nonpayment of an assessment shall be prima facie evidence of the regularity of the proceedings. *Held*, that plaintiff in ejectment cannot establish title under such a tax deed without proof of compliance with every requirement of the charter, and that defendant may introduce in evidence the whole or any part of the record of the proceedings, from the assessment of the property to its sale.

3. Where it appears from the return of the officer on the warrant for the sale of assessed lots that the lots were sold en masse, parol testimony is inadmissible to show that they were sold singly, as it varies a record which the law required to be made.

4. Portland City Charter, § 107, provides that a warrant for the collection of a delinquent assessment shall be enforced as an execution against real property; and Hill's Code, § 292, provides that real property consisting of several known lots may be sold on execution, separately or otherwise. *Held*, that sections 106 and 126 of the charter, which require the officer to whom a warrant is addressed to levy on the lot or a part thereof, and to specify in his return the amount for which each lot or part thereof sold, are exceptions to the general law referred to in section 107.

5. Portland City Charter, § 126, which requires a return of the amount for which each lot or part thereof was sold, is mandatory on the officer executing the warrant, and a failure to make such a return renders the sale, and the deed executed in pursuance thereof, void.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by John Bays against Swan Trulson to recover the possession of land. Judgment for defendant. Plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by MOORE, J.:

This is an action to recover the possession of lots 5 and 8 in block 87 of Couch's addition to Portland, in which the plaintiff claims title by virtue of a deed from the chief of police of said city upon a sale of said lots for an alleged delinquent assessment; and the defendant, by mesne conveyances from the United States. The facts show that the city of Portland constructed what is known as "Tanner Creek Sewer" from North Fourteenth and B streets to low-water mark in the Willamette river. That an assessment for the cost thereof was on August 20, 1887, entered in the docket of city liens. That the lots in question, then owned by Thomas Brasel, were assessed at \$18.75 each as the property of Thomas Brasel, and that warrants for the collection of said assessments were issued to, and placed in the hands of, the chief of police. That on December 3, 1887, John Paulsen and others, among whom was said Thomas Brasel, commenced a suit in department No. 2 of the circuit court of Multnomah county, against the city of Portland and others, to enjoin the collection of the assessments, and for the cancellation of the entries thereof in the docket of city liens, and obtained a temporary injunction, which was on February 20, 1888, by decree of said court, made perpetual. The defendants took an appeal from said decree to this court, where it was reversed, (*Paulsen v. Portland*, 16 Or. 450, 19 Pac. 450;) and on November 17, 1888, upon a mandate from this court, a decree was entered in the court below dismissing the suit. The plaintiffs thereupon appealed to the supreme court of the United States, where, on April 17, 1893, the decree of this court was affirmed. *Paulsen v. Portland*, 149 U. S. 30, 13 Sup. Ct. 750. That on November 30, 1888, warrants, including the one involved in this action, were again issued to, and placed in the hands of, the chief of police, to collect said assessments, and that officer, by virtue thereof, levied upon the said lots, and on February 18, 1889, after due notice, sold the same to the plaintiff for \$45.05, and on the next day executed and delivered to him a deed therefor. That on January 3, 1889, Thomas Brasel conveyed said lots to one Betty Farmer, and she, on October 16, 1890, to defendant, both conveyances being by warranty deed.

Plaintiff originally commenced three actions against the tenants of the defendant, who was substituted for them, and the actions were thereupon consolidated by order of the court. The complaint is in the usual form, and the material allegations therein are denied by the defendant, who, for a separate defense, sets out the alleged defects in the proceedings upon which plaintiff claims title, from the entry of the assessment in the docket of city liens to the execution and delivery of plaintiff's deed. The reply

denied the allegations of new matter in the answer, and the cause, being at issue, was tried by the court without the intervention of a jury, resulting in a judgment for the defendant, from which the plaintiff appeals.

Watson, Beekman & Watson, for appellant.
U. S. Grant Marquam and C. J. McDougall, for respondent.

MOORE, J., (after stating the facts.) This appeal presents several questions, but we do not deem it necessary to consider all of them. The bill of exceptions shows, among other alleged errors, that the plaintiff offered in evidence the judgment roll in the case of *Paulsen et al. v. Portland et al.* to show that the defendant's grantor, Thomas Brasel, had been a party plaintiff in said suit, and that the defendant was estopped from questioning the validity of the assessment by the decree therein, to the introduction of which the defendant objected, and, the court having sustained the same, the plaintiff excepted, and his exception was noted and allowed, and he now contends that this was error. The decree in *Paulsen et al. v. Portland et al.* is not pleaded as an estoppel. The rule is well settled that an estoppel by deed or record, to become available as a cause of action or of defense, must be pleaded. The party is entitled to know from the pleadings the nature and character of the cause of suit, action, or defense, that he may be prepared to meet the issue. *Bigelow, Estop.* 697. If the rule were otherwise, pleadings would, in many cases, impart little or no information to the adverse party of the real cause of action or defense, and would, as a consequence, become a trap to catch an unsuspecting party relying upon the apparent issue presented therein. At common law it was unnecessary to plead an estoppel in pais, (*Id.* 699,) but this court, careful of the interests of litigants, and desirous of protecting them from surprise, has wisely held that even an estoppel in pais, to be available, must be pleaded, (*Rugh v. Ottenheimer*, 6 Or. 231; *Remillard v. Prescott*, 8 Or. 37.) The rejection of the said judgment roll was therefore not error.

The defendant offered in evidence the return of the chief of police upon the warrant for the sale of the property in question, from which it appeared that said lots were sold en masse, to the introduction of which the plaintiff objected; and, the court having overruled the same, his exception was noted and allowed. The plaintiff contends that this was error, and that the return could not be introduced in evidence to defeat his deed. Section 105 of the charter of said city (*Sess. Laws 1882*, p. 168) provides that if the sum assessed upon any lot, or part thereof, is not wholly paid, the council may order a warrant for its collection. The other sections of said charter, applicable to the case at bar, are as follows: "Sec. 106. Such warrant must require the person to whom it is di-

rected to forthwith levy upon the lot or part thereof upon which the assessment is unpaid, and sell the same in the manner provided by law and to return the proceeds of such sale to the city treasurer and the warrant to the auditor, with his doings endorsed thereon, together with the receipt of the city treasurer for the proceeds of such sale as paid to him. Sec. 107. Such warrant shall have the force and effect of an execution against all real property, and shall be executed in like manner, except as in this chapter otherwise specially provided. Sec. 108. The person executing such warrant shall immediately make a deed for the property sold thereon to the purchaser, stating therein that the same is made subject to redemption, as provided in this chapter. Within three years from the date of such sale the owner, or his successor in interest, or any person having a lien by judgment, decree or mortgage on the property or any part thereof separately sold, may redeem the same upon the terms and conditions provided in the next section." "Sec. 126. The deed to the purchaser must express the true consideration thereof, which is the amount paid by the purchaser, and the return of the person executing the warrant must specify the amount for which each lot or part thereof sold, and the name of the purchaser." The charter nowhere provides that such deed shall be prima facie evidence of the regularity of the proceedings. "It must be conceded," said Thayer, J., "that, if there were no statute creating a presumption in such cases, the holder of a tax deed could establish no title to the premises, by virtue thereof, without proof that every requirement of the statute concerning the assessment of the tax and enforcement of its payment had been complied with." *Strode v. Washer*, 17 Or. 50, 16 Pac. 926. Hence, the defendant had the right to offer in evidence the whole or any part of the record of the proceedings, from the assessment of the property to its sale.

The plaintiff asked leave to have the return of the officer amended, and offered to show by the testimony of the chief of police and his clerk that said lots were sold singly, and not in gross; but the court, upon the objection of the defendant, denied the application, and rejected the evidence, to which ruling the plaintiff excepted, and his exception was allowed, and this is assigned as error. The rule is that where the law does not require a record to be made, but one is kept, it may be explained or supplied by parol testimony, but, where the statute requires it, parol evidence cannot be received to contradict or vary the record made. 20 Amer. & Eng. Enc. Law, 511. In *Cartwright v. McFadden*, 24 Kan. 662, the defendant, for the purpose of sustaining his tax deed, offered to prove that the sale of lots was not made in gross, but that each lot was sold separately, to which the plaintiff objected, and the evidence was rejected. The court held that it

was properly excluded, as it attempted to contradict the recitals of the deed. "The highest consideration of public policy requires that the officer himself, to whom the law has intrusted the performance of a public duty, and of the fulfillment of which a record has been made, should not be permitted to open his mouth to impeach it, and thus admit himself guilty of official misconduct or crime." *McMicken v. Com.*, 58 Pa. St. 214. There was no error in rejecting the evidence offered, or in denying plaintiff the right to have the return amended.

The record discloses that the property in question was entered in the docket of city liens as separate lots, and an assessment of \$18.75 was assessed against each; that the return made by the chief of police upon the warrant commanding the sale thereof shows that the property was sold as one entire tract, to the plaintiff, for the sum of \$45.05; and that the deed executed and delivered in pursuance of such sale recites the same facts; and for this reason, among others, the trial court held that the sale and deed failed to convey title to the property. It is a well-recognized principle that the sale of property for the payment of delinquent taxes should be made of the parcels of land as they appear in the assessment roll, and to group lands in the sale which are assessed as separate tracts, even though owned by the same person, will render the sale ineffectual to convey the title. *Cooley, Tax'n*, 493; *Burroughs, Tax'n*, 302; *Blackw. Tax Titles*, (5th Ed.) § 526. The appellant contends that this general rule is not applicable to the case at bar, and that under the charter of the city a sale en masse was within the discretion of the chief of police. Section 107, supra, provides that the warrant for the collection of a delinquent assessment shall be enforced in the same manner as an execution against real property; and section 292, *Hill's Code*, provides that real property consisting of several known lots or parcels shall be sold upon execution, separately or otherwise, as is likely to bring the highest price. This leaves the sale of real property, consisting of several known lots, entirely to the discretion of the sheriff, as to whether he will sell it in separate parcels or not. *Griswold v. Stoughton*, 2 Or. 62; *Dolph v. Barney*, 5 Or. 192; *Bank v. Page*, 7 Or. 454. Section 106, supra, provides that the warrant must require the person to whom it is directed to forthwith levy upon the lot or part thereof upon which the assessment is unpaid, and sell the same in the manner provided by law; and section 126, supra, provides that the return of the person executing the warrant must specify the amount for which each lot or part thereof sold. If these sections required the officer to whom the warrant was directed to levy upon the property upon which the assessment remains unpaid, and make his return of that sold, then and in that case the plaintiff's contention might be

tenable; but since they require him to levy upon the lot or part thereof, and specify in his return the amount for which each lot or part thereof sold, these requirements should have been observed as exceptions to the general law referred to in section 107, *supra*.

Section 135 of the charter provides that, in case of a delinquent tax levied upon real property in the name of an owner unknown, the warrant shall be executed by levying upon each lot or part thereof of said property for the tax due thereon, and for the sale of such lots or parts thereof separately. Appellant contends that this section provides, by implication, that when the owner is known, as in the case at bar, a separate levy and sale are not required. It is unnecessary to pass upon this question, since section 135, *supra*, applies to the collection of a delinquent tax levied for general or municipal purposes only, and not for the collection of an assessment for local improvements. The reason usually assigned for the separate levy and sale of property for delinquent taxes is that it inures to the benefit of the owner, so that he can redeem a part of the property sold in case he is not able to redeem the whole,—a right which he could not exercise if the property were sold en masse. The reason for the rule being so patent, any exception thereto should appear by legislative enactment, and not by judicial construction; and, inasmuch as the charter does not positively provide for such an exception to the general rule, it ought not to be applied in this case. The Code of West Virginia required the sheriff, in making sales of real property for delinquent taxes, to certify to the recorder, within 10 days after such sale, a list of property sold to the state for want of other purchasers; and it was made the duty of the recorder, within 20 days after the return, to record the same, and transmit the original to the state auditor. In *De Forest v. Thompson*, 40 Fed. 375, it appeared that a sheriff, after having made such sales to the state, failed to return the list within 10 days, and that the recorder failed to note the time when the return was made. Mr. Justice Jackson, in deciding this case, said: "The neglect of the officers to comply with either is such an irregularity as tends to prejudice the rights of the owner whose lands have been sold. He had a right to call at the office, and demand the production of the officers' report for his examination. If he discovered it was not there within the prescribed time, or, being there, had not been filed within the time prescribed by the statute, or that the recorder had failed to note the filing of the same, he could rest upon his rights, feeling assured that the steps taken to sell his realty did not divest him of the title to it." The requirement of section 126, *supra*, to return the amount for which each lot or part thereof was sold, was mandatory upon the person executing the

warrant, and a failure to do so rendered the sale and deed executed in pursuance thereof void. *De Forest v. Thompson*, *supra*; *Simpson v. Edmiston*, 23 W. Va. 675. The judgment will therefore be affirmed.

LESTER v. ELWERT.

(Supreme Court of Oregon. Dec. 26, 1893.)

ABANDONED APPEAL—AFFIRMANCE—DAMAGES.

1. On motion to affirm a judgment on an abandonment of the appeal, damages must be denied respondent where affidavits presented by him to show appellant's bad faith in taking the appeal were not served and filed with notice of the motion, so that appellant could prepare to meet the statements in the affidavits, if she so desired.

2. Respondent's refusal to accept an offer, made by appellant before the time in which to perfect her appeal had expired, to pay the amount of the judgment, is further ground for denying damages, since, in such case, there was no need to bring the case to the supreme court, and thus increase the costs.

Appeal from circuit court, Multnomah county; H. Hurley, Judge.

Action by F. W. Lester against Jacobena Elwert. There was judgment for plaintiff, and defendant appealed. The appeal was abandoned, and plaintiff moves the supreme court for an affirmance of the judgment. Damages denied.

N. D. Simon, for appellant. S. H. Gruber, for respondent.

PER CURIAM. The appeal in this case having been abandoned, the respondent, on October 5, 1893, served a notice upon the attorney for appellant that on the 16th of the month he would move this court for an affirmance of the judgment. No showing was made, or attempted to be made, at the time the notice was served, or at any time before the hearing, that the appeal was not taken in good faith, nor was appellant notified in any way that the motion would be supported by affidavits at the hearing. However, two days before the time fixed for the hearing, the appellant served upon respondent, and filed in this court, her own affidavit, in which she states that the appeal was taken in the utmost good faith, and only abandoned on the advice of her counsel that the amount involved would not justify the expense of an appeal; and also the affidavit of her counsel, in which he states that he offered to pay the full amount of the judgment and costs before the time for filing her transcript on the appeal had expired, and before any transcript had been made or ordered by respondent, but that counsel for respondent would not accept the same unless he would also pay 10 per cent. on the amount of the judgment, as damages for the delay, and \$15 for attorney's fees, which he refused to do; that on the following day, and before the transcript was made or ordered, he paid to the sheriff the full amount of the judgment,

costs, and disbursements, and the costs on execution. At the hearing, the respondent, for the first time, filed several affidavits tending to show that the appeal was taken for the purpose of delay, and with no intent of being prosecuted, and that the payment by Mr. Simon to the sheriff was made after the transcript had been made and filed in this court by the respondent; but Mr. Gruber, the attorney for the respondent, admits and avers in his affidavit that Mr. Simon offered to pay him the full amount of the judgment and costs on October 4th, before the transcript was ordered, and that he demanded 10 per cent. on the judgment as damages, and an additional sum of \$15 for his services as attorney in "preparing cross bill of exceptions," and, because Mr. Simon refused to pay these additional amounts, he brought the case here for affirmance. After hearing the argument of counsel, the court decided the motion orally, holding: (1) That the affidavits presented by respondent, showing, or tending to show, that the appeal was taken for the purpose of delay, and not in good faith, came too late at the hearing, but should have been served and filed with the notice of the motion for affirmance, so that the appellant could have come prepared to meet the statements in the affidavits, if she had desired to do so; and that, in view of the rule that the court would not presume bad faith in the appellant, the respondent was not entitled to damages. *Hawkins v. Jones*, 21 Or. 502, 28 Pac. 548. (2) The affidavits show, and it is admitted by respondent, that appellant, before the time in which to perfect her appeal had expired, and while she yet had a right, under the law, to file her transcript in this court, offered to pay to the respondent all that was due on the judgment, but which respondent refused to accept, and hence there was no necessity of bringing the case to this court, and making additional costs. Since this decision, a petition for rehearing, accompanied by various and sundry additional affidavits, letters, petitions, etc., has been filed; but we see no reason to depart from the conclusions already reached, but, because the prior decision was oral, make this memorandum of the grounds thereof.

BLOCH v. MULTNOMAH COUNTY.

(Supreme Court of Oregon. Dec. 26, 1893.)

JUROR'S FEES.

Under Code, § 2348, allowing a juror two dollars per diem for attendance on a court of record, and providing that a talesman shall be entitled to the same, a person summoned on a special venire, who attends court in obedience to the process, is entitled to juror's fees, though he does not serve.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by M. M. Bloch against the county

of Multnomah for juror's fees alleged to have been earned by him. There was judgment for defendant, and plaintiff appeals. Reversed.

E. B. Williams, for appellant. John H. Hall, for respondent.

BEAN, J. The only question for consideration in this case is whether a person summoned on a special venire from the body of the county to complete a jury in a case on trial, who attends court in obedience to the process, is entitled to juror's fees, under the statute, if he does not serve on the jury. The statute provides that a juror's fees for attendance upon a court of record shall be two dollars per day, and that a talesman acting as a juror is entitled to the same per diem as one regularly summoned. Code, § 2348. It will be observed that the law does not require that a talesman shall serve on a jury before he is entitled to the per diem, but that acting as a juror shall be sufficient. The contention for the defendant is that, although a person summoned from the body of the county on a special venire may attend court in obedience to its process, he does not act as a juror unless he is accepted and sworn in the particular case for which he has been summoned. But we are unable to concur in this view. The law authorizes the court, if a sufficient number of jurors cannot be obtained from the regular panel, to order the sheriff to summon as many qualified persons as may be necessary to complete the jury, either from the bystanders or the body of the county. When a talesman is thus summoned from the bystanders, it is manifest he can in no sense be said to be acting as a juror unless he is accepted and serves on the jury. His presence in court is his own voluntary act, and not pursuant to any process of the court, nor by its order. He is not deprived of any time, nor caused any loss or damage, by simply being called and examined on his voir dire; but, when he is summoned from the body of the county on a special venire, he is compelled to neglect his own private business to attend court as a juror only in obedience to its order, however inconvenient it may be to him, and often at considerable trouble and expense, and when he does so we think he is acting as a juror, within the meaning of the law, and entitled to compensation as such, although he may not actually serve on the jury. Citizens are not infrequently summoned on a special venire for jury duty from distant parts of a county, and compelled, at considerable expense and loss of time, to attend court, and there remain until excused, and it is but a matter of simple justice that they should be paid a reasonable compensation for their services; and, in the absence of an express declaration of the statute, we are unwilling to hold that such persons are not acting as jurors, within the meaning of section 2348.

and not entitled to compensation as such. The judgment of the court below will therefore be reversed, and the cause remanded.

NICKUM v. GASTON.

(Supreme Court of Oregon. Dec. 26, 1893.)

APPEAL—HARMLESS ERROR—PRESUMPTION—EXCEPTIONS TO INSTRUCTIONS—SUFFICIENCY.

1. Where a series of instructions in effect asserts but one proposition of law, the exception to such instructions need not point out distinctly the particular portion excepted to.

2. Where an instruction is challenged as not the law as applied to the facts of the case, a general exception thereto is sufficient.

3. An erroneous instruction will not be presumed to be harmless from the fact that all the instructions given are not in the record, but it must be affirmatively shown that it was harmless.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

On rehearing. Petition overruled.

For report of decision on appeal, see 33 Pac. 671.

P. L. Willis and Seneca Smith, for appellant. A. H. Tanner, for respondent.

BEAN, J. In order that the questions presented on this rehearing may be fully understood, it is necessary to set out more at length than was done in the former opinion the facts in this case. The record recites that: "After some instructions had been given by the court, Mr. Tanner, attorney for the plaintiff, addressing the court, said, 'I think there is one matter your honor has not instructed the jury upon, and that is the question about the arrangement between Laura Bennett and Lucy Mason about the payment of the mortgage.' Whereupon the court instructed the jury as follows, to wit: 'When fraud is charged, it ought to be clearly made out. It is charged here there was a fraudulent combination between Lucy Mason, by her agent and father, O. P. Mason, and Laura Bennett and J. A. Bennett, to have this land sold for taxes in order to escape the claims of Susannah Nickum under her mortgage. The effect which any such combination would have might be very easily defeated, or it might be made of very little avail, by the mortgagee paying the taxes herself. Our law provides that the mortgagee may pay any taxes levied upon the land upon which he holds a mortgage, himself, if the mortgagor neglects it, and then may tack the amount so paid as taxes to his debt, and have it refunded to him when the mortgage is paid off. But nevertheless it is held that when parties occupying such relation as vendor and purchaser, mortgagor and mortgagee, —when parties occupying that position conspire together to have the land which is mortgaged, and upon which the mortgagor ought to pay the taxes, sold for taxes, and the mortgagor, or some person engaged in the conspiracy, bid it in, such a sale amounts

to nothing, so far as conferring any title upon the purchaser, but simply stands as payment of the taxes. It has no further effect. Question is made here whether such combination existed or not in this case, and this question I submit to you to find. If you find that there was such combination, agreement, or arrangement for the purpose of defeating this mortgage if they could, then the tax sale is of no avail, except to pay the taxes which had been levied.' Mr. Tanner, then, again addressing the court, said, 'I suppose, if the jury should find that this scheme was entered into, and that buying in could only act as payment of the taxes, that then this three-years limitation would not apply.' Whereupon, the court then further instructed the jury as follows, to wit: 'I don't see any application at all. It could not be used for any other purpose except to pay the taxes.' To each of which instructions, defendant Tiny Gaston, by her counsel, then and there duly excepted, and the exceptions were allowed by the court." From the foregoing it appears that the effect of the instructions of the court was that if the fraudulent combination between Lucy Mason and Laura Bennett, referred to, in fact existed, the tax sale amounted to nothing so far as conferring any title upon the purchaser, but simply stood as a payment of the tax, and could have no further force or effect; and this we have held to be error, as applied to the facts of this case. The respondent insists, upon the rehearing, that the exceptions do not present for consideration in this court the question as to the effect of the tax sale, because (1) they do not point out particularly the portion of the charge excepted to; (2) they do not state the grounds of the objection and exception; (3) the instructions are at most only defective in form, or deficient in fullness, and the attention of the court should have been particularly called to such defect, so that it might have corrected the error into which it had fallen; and (4) that, inasmuch as the entire charge is not in the record, we must assume that the court, in some other portion of it, gave the law correctly as to the rights of a bona fide purchaser under the tax deed. And of these objections in their order:

1. We agree with counsel for respondent that an exception to a charge of the court must point out distinctly the particular portion excepted to, and that a general exception to the entire charge, or to a series of propositions, if any one of them is correct, is insufficient. But in this case the exceptions show distinctly that appellant excepted to particular portions of the charge, which, in their entirety, we have held erroneous, as applicable to the facts of this case. The instructions excepted to, if they may be considered as a series of instructions, amount in effect to asserting but one proposition of law, namely, that, if the jury should find

from the evidence that a fraudulent combination between Mason and Bennett for the sale and purchase of the property in controversy for delinquent taxes existed, such purchase, and the sheriff's deed acquired in accordance therewith, conveyed no title whatever. This being the case, we think the exceptions are clearly sufficient.

2. It is also contended that the exceptions are insufficient because they do not state the grounds of the objection. But, when an instruction is challenged on the ground that it is not the law as applied to the facts of the case, we understand a general exception is sufficient. We know no rule of law requiring counsel, in such case, to embody in his objection an argument, or the reason for his contention. It is sufficient to notify the court that he challenges the correctness of the law as stated by it in its instructions. When the charge, without asserting an erroneous proposition of law, as applied to the case, is ambiguous or deficient in fullness, or does not go far enough, or is not sufficiently explicit, the party excepting should call the attention of the court to the particular grounds upon which he objects, so it may be corrected. *Kearney v. Snodgrass*, 12 Or. 317, 7 Pac. 309. But when an erroneous proposition of law is asserted, as applied to the case on trial, it is sufficient to except generally, because in such case the supposition is that the question has been previously fully argued and presented, and the court's opinion formed, and that it would not be modified or changed by again calling its attention to the particular reasons or grounds upon which counsel contends the instruction to be erroneous. In the case at bar the court asserted what we conceive to be an erroneous proposition of law, as between the parties to the record, and under the issues in the case. Hence, the rule invoked does not apply.

3. Again it is urged that, inasmuch as the entire charge is not in the record, we must assume that the court did particularly instruct the jury as to the rights of the defendant as a bona fide purchaser, but there are two sufficient reasons why this position is not well taken. In the first place, it does affirmatively appear from the record that the portion of the charge excepted to is all the court said upon the effect of the alleged fraudulent combination; and, second, the attempted application of the well-known rule invoked by counsel in this case, that error will never be presumed, but must affirmatively appear, is answered by *Strahan, C. J.*, in *Du Bois v. Perkins*, 21 Or. 190, 27 Pac. 1044, in this language: "While it is true that error will never be presumed, the converse of the proposition is equally true. When error does affirmatively appear, it will not be presumed that it was rendered harmless, or removed. If it were so, the respondent must see to it that the matter which ren-

ders it harmless, or removes it, is made to affirmatively appear in the bill of exceptions." When error affirmatively appears upon the face of the record, which is prejudicial, as it does in this case, we cannot assume that it was harmless. In consequence of these views, the former judgment is adhered to.

STATE v. KOSHLAND.

(Supreme Court of Oregon. Dec. 26, 1893.)

STATUTES—TITLE OF ACTS—WAREHOUSEMEN—CRIMINAL LIABILITY—INDICTMENT.

1. The fact that a statute entitled "An act to regulate warehousemen, * * * and to declare the effect of warehouse receipts," and making it a crime to issue warehouse receipts for goods not in store, provides for a penalty for its violation, does not render it obnoxious to the constitutional prohibition against acts embracing subjects not expressed in the title.

2. An indictment charging defendant with operating as owner a warehouse, and with being a warehouseman, and that as such he issued a warehouse receipt for sheepskins not in store, but which does not allege that he operated a warehouse for the storage of sheepskins or other commodity, is demurrable, as it cannot be determined whether the warehouse was within the statute, (Hill's Code, § 4201,) which specifies warehouses "where grain, flour, pork, beef, wool or other produce or commodity is stored."

3. Under Hill's Code, § 4201 et seq., requiring warehouse receipts to bear the date of issuance, and to state from whom the commodity is received, the number of sacks, bushels, or pounds, the condition or quality, and the terms of storage, and, after prescribing such requisites as to form, providing that all receipts are hereby declared negotiable, and may be transferred by indorsement of the party "to whose order" they are issued, a receipt need not be negotiable in form in order that a warehouseman may be criminally liable under the subsequent provisions of the act for issuing it for goods not actually in store.

Appeal from circuit court, Multnomah county; M. G. Munly, Judge.

M. Koshland was convicted of issuing a warehouse receipt for goods not in store, and appeals. Reversed.

Whalley, Strahan & Pipes, for appellant. Geo. E. Chamberlain, Atty. Gen., W. T. Hume, Dist. Atty., and Henry E. McGinn, for respondent.

LORD, C. J. The defendant was indicted for the crime of issuing a warehouse receipt for goods not actually in store. So much of the indictment as is necessary to a proper understanding of the case is as follows: "The said M. Koshland, on the 28th day of February, in the year 1893, in the county of Multnomah, and state of Oregon, was then and there engaged in keeping, controlling, managing, and operating, as owner, a warehouse, and was then and there doing business as such warehouseman, under the name of Koshland Bros., and, being such warehouseman as aforesaid, he, the said M. Koshland,

did then and there unlawfully and feloniously issue and deliver to the Bank of British Columbia, a corporation, then and there the owner of the sheepskins described therein, a warehouse receipt, of which the following is a copy, to wit: 'No. 786. Koshland Bros.' Warehouse, Portland, Oregon, Feb'y 28, 1893. Received of the Bank of British Columbia, in good order, thirty-six thousand nine hundred and fourteen sheepskins, marked * * *, for account of the bank of British Columbia, on the following conditions: Held for storage at the rate * * *. For any fractional part of a month the charge for storage will be the same as for a whole month. Loss or damage from fire, flood, rats, other animals, insects, or the elements, if any, at owner's risk. No delivery to be made until this receipt is returned properly indorsed. [Signed] Koshland Bros.' That in truth and in fact, at the time of the issuance of said receipt as aforesaid by the said M. Koshland, the said M. Koshland had not actually in store 36,914 sheepskins, as provided for in said warehouse receipt, nor had he actually in store, at the said time, any greater amount of sheepskins, as provided for in said warehouse receipt, than 3,665 sheepskins; all of which acts were then and there done by the said M. Koshland with intent on his part to injure and defraud the Bank of British Columbia, a corporation as aforesaid, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon." To this indictment the defendant demurred, alleging insufficiency of its facts to constitute a crime, and, the demurrer being overruled, the defendant entered a plea of not guilty. A trial was thereupon had, resulting in a verdict of guilty as charged in the indictment, upon which the court sentenced him to pay a fine of \$4,000, or stand committed until such fine was paid.

The record discloses that a number of objections were taken to the indictment, and exceptions to the admission of testimony, to the instructions of the court, and to the refusal of the court to give the instructions asked by the defendant. At the outset it is claimed that the act under which the defendant was indicted, tried, and convicted is contrary to section 20, art. 4, of the state constitution, which provides that "every act shall embrace but one subject and matters properly connected therewith, which subjects shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title;" and is therefore unconstitutional and void. It is entitled "An act to regulate warehousemen, wharfingers, commission men and other bailees, and to declare the effect of warehouse receipts." The ground of this objection is that neither the penalty nor the civil remedy provided by section 7 of the act is

mentioned in the title, and hence that such section should be eliminated from the act, because it embraces matters not expressed in the title. This court, as well as the courts of all the states where a like constitutional provision exists, have given it a very liberal interpretation, and have endeavored to avoid that strictness of construction which would unnecessarily limit or cripple legislative enactments, and defeat the beneficial purposes for which such provision was adopted. Its object was to prevent the blending of incongruous subjects in the same act, and using the title as a deception. *David v. Portland Water Committee*, 14 Or. 98, 12 Pac. 174. This object is attained if the subject-matter of the statute is germane to the title. "The insertion in a law of matters," said Gilfillan, C. J., "which may not be verbally indicated by the title, if suggested by it, or connected with, or proper to the more full accomplishment of, the object so indicated, is held to be in accordance with its spirit." *State v. Kinsella*, 14 Minn. 525, (Gil. 395.) Hence, if the matters embraced in the act are congruous, and have a proper relation to each other, and are not foreign to the subject expressed in the title, the requirements of the provision are not violated. The object of the statute, as expressed in the title, is "to regulate warehousemen," etc., "and to declare the effect of warehouse receipts." The act prescribes and regulates the duties of warehousemen, and to secure performance of such duties so as to promote honesty and prevent fraud it provides by section 7 a penalty for the violation of its provisions. That section, therefore, is not only germane to and connected with the subject of the act, but is essential to the accomplishment of the object indicated by the title; hence such section is not within the evil which the constitutional provision was intended to exclude.

It is also claimed that the indictment is defective for the further reason that the term "warehouse," as used, is not of itself a sufficient description of the place of storage to bring the defendant within the statute as a warehouseman. The first section of the statute is as follows: "Sec. 4201. It shall be the duty of every person keeping, controlling, managing or operating, as owner or agent or superintendent of any company or corporation, any warehouse, commission house, forwarding house, mill, wharf, or other place where grain, flour, pork, beef, wool, or other produce or commodity is stored, to deliver to the owner of such grain, flour, pork, beef, wool, produce, or commodity a warehouse receipt therefor, which receipt shall bear the date of its issuance, and shall state from whom received, the number of sacks, if sacked, the number of bushels or pounds, the condition or quality of the same, and the terms and conditions upon which it is stored." Hill's Code. In view of this lan-

guage it is claimed that the defendant should be charged in the indictment with being a warehouseman who kept a warehouse "where grain, flour, pork, beef, wool, or other produce or commodity was stored," so as to show that the alleged warehouse which the defendant kept came within the specification or descriptive words of said section, and that he was a warehouseman within the purview of the statute, and as such became subject to the duties imposed, and to the penalty prescribed for a violation of its provisions; for it is argued that it is not to be intended as a matter of law that a warehouse is a place where all or any of these particular products or commodities are stored, and therefore, before the defendant can be made subject to the duties imposed by the statute, the indictment must allege such a description of the place of storage as will constitute him a warehouseman within the meaning of the statute. An indictment should charge the crime of which the defendant is accused with such precision and fullness as to inform him of the nature of his offense. Its allegations should make it certain that the act charged is forbidden by the statute. A statute prescribing what shall constitute an offense must necessarily be in general terms, and the office of the instruction is to make an application of its provisions to the case in hand. As a general rule, an indictment is sufficient if it follows the language of the statute, and clearly apprises the accused of the offense charged. *State v. Shaw*, 22 Or. 287, 29 Pac. 1028. The indictment charges the defendant with operating as owner a warehouse, and with being a warehouseman, and that as such he issued the warehouse receipt for the sheepskins, as set out therein, when in fact at the time of its issuance he did not have them actually in store, nor any part thereof, except as alleged. But it does not charge the defendant with operating a warehouse for the storage of sheepskins or other commodity. It is true that one who operates, as owner, a warehouse, is a warehouseman. The law defines a warehouse to be a building or place adapted to the reception and storage of goods and merchandise, and a warehouseman to be one who receives such goods and merchandise to be stored in his warehouse for compensation or profit. But while the law defines what is a "warehouse," and necessarily what constitutes a "warehouseman," this does not relieve the state of the necessity of specifying that the warehouse which the defendant is charged with operating as owner was for the storage of sheepskins and other commodities for which it is alleged he gave a warehouse receipt. All the law intends is that a "warehouse" is a place for the storage of goods, but what kind of goods or produce or commodity for which it is kept or used as a place of storage by a party is not within its intentment. We cannot, therefore, intend, as a matter of law, that the

defendant kept or operated a warehouse for the storage of sheepskins or any other particular commodity. That is a matter to be specified, and, when so specified, the face of the indictment will disclose whether the alleged warehouse which the defendant is charged with operating was for the storage of any of the commodities enumerated in the statute. The statute makes it the duty of one who keeps a warehouse for the storage of grain, flour, or other commodity to deliver to the owner of such grain or commodity a warehouse receipt therefor, which duty he violates when he issues such receipt for goods not actually in store; so that when a defendant is charged with operating a warehouse, whether for the storage of grain, sheepskins, or other commodity, the indictment should so specify, in order to apprise him—other sufficient allegations appearing—of the nature of his offense. If the defendant kept a warehouse for the storage of sheepskins, and it was so alleged, then the question of whether the word "commodity" in the statute is broad enough to include "sheepskins" would be properly before the court for its determination. As the warehouse which the defendant is charged with operating as owner is not alleged to be a warehouse for the storage of grain, flour, or other commodity enumerated in the statute, we think the demurrer on this point was well taken.

Another question raised by the demurrer is as to whether it is the intention of the statute to make such receipts negotiable without regard to form. Upon this question the trial court held that the statute did not require such receipts to have a negotiable quality, and therefore that such receipt, although not negotiable in form, was sufficient, or within the statute. Section 4201, *supra*, among other things, provides that warehouse receipts delivered to the owner of the commodity stored "shall bear the date of its issuance, and shall state from whom received, the number of sacks, if sacked, and the number of bushels or pounds, the condition or quality of the same, and the terms and conditions upon which it is stored." It will be observed that there is nothing in these requirements to indicate that such receipts shall have a negotiable quality. Section 5 of said statute (being section 4205 of the Code) provides that "all checks or receipts given by any person operating any warehouse or commission house, etc., are hereby declared negotiable, and may be transferred by endorsement of the party to whose order such check or receipt was given or issued, and such endorsement shall be deemed a valid transfer of the commodity represented by such receipt and may be made in blank or to the order of another." It thus appears that the statute, after prescribing that the receipt shall contain certain requisites or characteristics, none of which are of a negotiable character, proceeds to declare that such re-

ceipts are negotiable, and that they may be transferred "by indorsement of the party to whose order" such receipt was given or issued. There can be no doubt that, if this section was cut short after declaring such instrument negotiable, it would have impaired the quality of negotiability to them without regard to their form. But it is the use of the subsequent language in that connection, "to whose order such receipt was issued," which indicates that they must be negotiable in form. Such language assumes that the receipt given by the warehouseman to the owner of the commodities stored is subject to his order. Upon this implication it is assumed that it was intended such warehouse receipts should be negotiable in form, otherwise the language of the statute would be that such receipts may be transferred by the indorsement of the party to whom they were issued, instead "of the party to whose order they were issued." It is insisted that this language means something, and is intended to have some effect, and that to give it the effect which its legal meaning imports the conclusion is inevitable that such receipt must be negotiable in form, in conformity with the rule that paper, to be negotiable, must contain negotiable words. The argument for the defendant, then, may be thus summarized: That warehouse receipts or bills of lading which the statute declares to be negotiable are the same instruments which are made transferable by the indorsement of the party to whose order they are issued, and that, as those latter words imply that such receipts or bills of lading should be negotiable in form, their identity is fixed as the same instruments which are claimed to be negotiable; hence the statute only contemplates the issuance of warehouse receipts or bills of lading that contain negotiable words, or are negotiable in form. Without doubt, the rule is well settled that every word and clause of a statute should, if possible, have assigned to it a meaning, leaving no useless words; but its application is always subordinate to the legislative intent, and is only to be followed so far and when it contributes to such result. Bish. Writ. Law, § 82. The words of a statute must always yield to its manifest purpose. Words loosely or unnecessarily used cannot change such purpose where the true intent is manifest in the statute itself. It will always be presumed that the legislature intended exceptions to its language when in conflict with the general object of the statute. The reason of the law in such case should prevail over the letter. The object of the statute, as declared in its title, is "to regulate warehousemen, wharfingers, and other bailees," and "to declare the effect of warehouse receipts." As warehousemen, wharfingers, etc., were enabled, after they had obtained possession of goods, or other commodities, and

thus the indicia of ownership, to transfer them in fraud of the rights of the owner, there was a necessity for the regulation of the business in which such persons were engaged, and to declare the effect of the receipts or checks which they issue to such owner. There was, then, an existing evil, which needed to be remedied by such legislative regulations as would prevent the issue of false receipts or checks, and punish fraudulent transfers of property by warehousemen, wharfingers, and others. To aid in effecting this object, and to facilitate the transfer of stored goods or commodities, all warehouse receipts are declared to be negotiable. The statute requires warehousemen or wharfingers to issue receipts or vouchers for goods or commodities stored, containing certain requisites specified, none of which include the quality of negotiability; and, after prohibiting them from issuing any false receipts or vouchers, or for goods not actually in store, etc., it declares such receipts so issued by them to be negotiable and transferable by indorsement. In declaring such receipts to be negotiable the statute necessarily meant and referred to the receipt or voucher which the warehouseman or wharfinger had issued to the owner of the goods or commodities stored. This receipt is made transferable by indorsement of such owner to whom issued, and, as it is not required to have any negotiable quality, it is immaterial whether or not it be negotiable in form. Such receipts may be transferred by indorsement of the party to whom or "to whose order" it was issued; and is within the statute. They are required to be the true representatives of goods or commodities actually in store, and their issuance is prohibited under any other conditions or circumstances. The aim of the statute was to facilitate the transfer of stored goods, and its purpose was to protect the holders of warehouse receipts from imposition and fraud. It was designed to protect the community, as well as the holder of such receipts or vouchers. By making such receipts issued by warehousemen negotiable and transferable by indorsement of the party to whom they are issued, a valid transfer of the property represented in such receipt is effected; and, as such indorsement may be in blank, or to the order of another, they may thus pass from hand to hand. Hence the implications arising from the words "to whose order" do not limit the statute to such receipts as are only negotiable in form, when its clear purpose was to make any receipt issued by a warehouseman or wharfinger for the storage of grain or other commodity negotiable without regard to form. For the reasons, however, suggested, the judgment is reversed, and the cause remanded for such further proceedings as may be just and proper, not inconsistent with this opinion.

STATE v. ADAMS.

(Supreme Court of Oregon. Dec. 26, 1893.)

SEDUCTION—UNDER PROMISE OF MARRIAGE.

A man who prevails on a woman to have intercourse with him on the promise that, if she become pregnant, he will marry her, does not "seduce her under promise of marriage."

Appeal from circuit court, Multnomah county; M. G. Munly, Judge.

A. J. Adams, convicted of seduction under promise of marriage, appeals. Reversed.

M. L. Pipes, for appellant. Geo. E. Chamberlain, Atty. Gen., and W. T. Hume, Dist. Atty., for the State.

BEAN, J. The defendant brings this appeal from a judgment of conviction of the crime of seduction under promise of marriage. The evidence shows that the prosecutrix, who is about 27 years of age, came to Portland in January, 1891, from Council Bluffs, in Iowa, where some 2 years before she had been acquainted and had kept company for a few months with defendant. In April or May after her arrival in Portland, she again met the defendant on several occasions at the home of a mutual friend, where she was accustomed to visit, and was frequently accompanied by him on her return after these visits to the place where she was working as a domestic. On one of these occasions, in either April or May, 1891, the defendant solicited her to go with him to Portland Heights, to which she first objected, but finally consented, and, after arriving at the end of the car line, they walked around the heights, and what occurred, as told in her own language, is that "he teased me and teased me until he induced me to give up to him. He said, if he hurt me in any way, he would see me through and marry me. If he got me in a family way, he would marry me. I told him my intention was not to marry at all. He promised, if he hurt me, if he got me in any different way, he would see me through, or see that I was cared for, and do what was right; promised just as much as to say, 'I will marry you.' Said he never would hurt me. He promised both before and after that, if he hurt me in any way, he would see me through, and see that I was taken care of; just as much as to say, 'I will marry you.'" The immoral relations thus established continued at frequent intervals until a few months before the trial, in July, 1893, and resulted in pregnancy, and the birth of a stillborn child on the 4th of May, 1893. The only evidence given on the trial of a promise of marriage or of the seduction was that of the prosecutrix, as above detailed, and which defendant contends is insufficient to prove the crime charged, because, as he contends, seduction accomplished under a promise of marriage, to be performed only on condition that pregnancy resulted from the intercourse,

is not within the statute. The statute provides that "if any person, under promise of marriage, shall seduce and have illicit intercourse with any unmarried female of previous chaste character, such person, upon conviction, shall be punished, etc. And a subsequent marriage of the parties is a defense to the violation of this section."

It will be observed that mere illicit intercourse is not an offense under this statute, nor is seduction alone made a crime, but the seduction under a subsisting promise of marriage of an unmarried woman of previous chaste character. The gist of the offense is that the seduction shall be accomplished under or by means of a promise of marriage which is unfulfilled. Without the promise there can be no crime under this statute, however reprehensible the conduct of the man may be. A promise of marriage, and her reliance upon it, must be the means of inducing the woman to surrender her virtue. She must be drawn aside from the path of virtue she is then pursuing, and induced to yield to the solicitations of her seducer, by means of and under the influence of a promise of marriage, upon the performance of which she in good faith had a right to rely. Nothing less will satisfy this statute. Its object is not to punish illicit intercourse, but the seducer who by means of a promise of marriage destroys the chastity of an unmarried female of previous chaste character, and who thus draws her aside from the path of virtue and rectitude, and then fails and refuses to fulfill his promise. It is, however, not necessary that the promise should be so technically valid as to sustain a civil action for breach of promise; and although it may be conditioned upon immediate intercourse, thus rendering it void in a civil proceeding, because founded upon an immoral consideration, it is still held sufficient to sustain a criminal prosecution if the woman in good faith relied upon it and was thereby deceived. *Kenyon v. People*, 26 N. Y. 203; *Boyce v. People*, 55 N. Y. 644; *Callahan v. State*, 63 Ind. 198; *People v. De Fore*, 64 Mich. 693, 31 N. W. 585. In such case, the mutual promise of the woman is implied from her yielding to the solicitations of her seducer under his promise of marriage, and the promise becomes absolute. But when the seduction is accomplished by means of a promise of marriage, to be performed only upon the condition that the intercourse results in pregnancy, no promise of the woman can be implied from such yielding, and it seems to us the contract smacks too much of a corrupt and licentious bargain to fall within the statute. How can it be claimed that a pure-minded woman is led astray and her ruin accomplished under a promise of marriage which, with her assent, amounts to nothing more than a mutual agreement to engage in illicit relations so long as pregnancy does not result, and which neither

party expects nor intends shall be fulfilled except upon the happening of an event which may never occur? Take the case of a woman who yields under a promise of marriage by a married man, to be performed on the death of his wife, could it be seriously contended that such a case would be within the statute? And yet it is difficult to conceive any difference in principle between the case suggested and the one at bar. The statute is not intended as an act to punish a man who prevails upon a woman to gratify his lust by a promise of marriage of such a character. Its plain object is to protect the innocent and confiding from being betrayed, and surrendering to her destroyer all that is estimable in woman, under the belief, based upon what she supposes to be an honorable proposal of marriage, to be performed in any event, that to yield is but to anticipate the time when the act will be lawful. Its design is to protect the chaste woman from the assaults of a wicked and designing man, who makes use of the most potent of all seductive arts to win the love and confidence of a woman by professions of love and marriage, and not one who is willing to gratify her own lustful desires, stipulating only that, if her shame is likely to become exposed, it shall be shielded by marriage. It recognizes that a woman, confiding in what she supposes to be an honorable promise of a future marriage, and relying upon it, is peculiarly defenseless against the solicitations and persuasions of him to whom she is betrothed, and has consequently provided for the punishment of him who, by means of such a promise, is guilty of betraying that confidence to the utter ruin and disgrace of the female, and the scandal of society. It was passed in the interest of good morals, and not as a cover for licentiousness. The words, "under promise of marriage, seduce," it seems to us, manifestly contemplate that the seduction must be accomplished by means of an absolute promise of marriage, or one which becomes absolute the moment the woman yields. Any other construction would defeat the purpose of the statute, and render it a cover for licentiousness. In this case the improper relations continued between the prosecutrix and defendant, apparently without objection on her part, for more than a year after she is alleged to have been seduced, and yet during all that time there was no subsisting promise of marriage. The defendant, under such circumstances, was guilty of no crime for which he could be punished under the statute, for the condition upon which his promise was to be performed had not happened, and there was consequently no broken promise for which he could be punished. The object of the statute is not to punish a man who seduces a woman, and then marries her, but to punish one who uses the promise as a means of inducing the woman to

submit to his lustful desires, and, after his purpose is accomplished, abandons his victim to her disgrace and shame. If the prosecutrix was seduced at all, it was at the time the first connection took place, but there was no promise of marriage then, for the contingency upon which it was to become absolute did not happen until long after, and consequently the promise did not precede the intercourse, which is essential to constitute the crime.

The only case cited, or which we have been able to find, on the question presented by this record, is *People v. Hustis*, 32 Hun, 58, in which two of the three judges of the second department of the supreme court of the state of New York, in a very brief opinion, held that seduction accomplished under a promise of marriage conditioned on pregnancy resulting thereafter is within a statute similar to ours. This decision seems to have been based upon the proposition that the question had already been decided by the court of appeals in *Kenyon v. People*, supra, and in *Boyce v. People*, supra; but neither of these cases go to the extent of holding the doctrine for which they are cited, but only that a promise of marriage on condition of immediate intercourse is sufficient, because the law implies a mutual promise by the woman from her yielding, and, the condition being thereby fulfilled, the promise becomes absolute. But when the promise is conditional, depending on pregnancy, the condition may never happen, and consequently the defendant may never be under any obligation to marry the prosecutrix. He is not under a promise to marry at the time of the seduction, and may in fact never be. And hence it seems to us the cases referred to do not sustain the doctrine announced in *People v. Hustis*, and we are unwilling to regard that case as controlling authority. This conclusion renders unnecessary an examination of any of the other questions raised on this appeal, and the judgment of the court below is therefore reversed, and the cause remanded for such further proceedings as are not inconsistent with this opinion.

WILLMAN v. FREIDMAN.

(Supreme Court of Idaho. Dec. 21, 1893.)

ATTACHMENT—FOR SECURED DEBT—BOND.

1. Where W. sold to F. certain real estate upon executory contract, F. going into possession, but title remaining in W. until purchase price is paid by vendee, vendor has such a lien as bars him from resorting to attachment, under the statutes of Idaho, for the recovery of the unpaid portion of purchase price.

2. Where plaintiff had procured by assignment, a few days prior to commencing his suit, two small claims against defendant, which claims were unsecured, the plaintiff cannot, by uniting such claims with his secured claims in his complaint, secure the benefit of the attachment laws for any portion of the claims sued for.

3. The attachment law of this state vests a large discretion in the clerk of the district court in the matter of taking undertakings, and in the exercise of that discretion it is advisable that the clerk should always require an undertaking at least equal to the amount stated in the affidavit.

(Syllabus by the Court.)

Appeal from district court, Alturas county; C. O. Stockslager, Judge.

Action by Alexander Willman against S. M. Freidman. From an order discharging the attachment issued, plaintiff appeals. Affirmed.

A. F. Montandon and J. J. Burt, for appellant. Brown, Angel & Bruner, for respondent.

HUSTON, C. J. This is an appeal from an order of the district court of Alturas county discharging an attachment. The plaintiff filed his complaint in the district court, which complaint contained several causes of action, separately stated. The first cause of action, as set forth in the complaint, arose upon a promissory note made by the defendant, and (as is alleged in the complaint) "one Myers Cohn also wrote his name thereon, as surety, thus: 'Myers Cohn.'" It is further alleged, in regard to said note, "that Fred. J. Keisel & Co. indorsed the same by writing and indorsing their names on the back thereof, thus: 'Fred. J. Keisel & Co.'" Then follows, in the complaint, the allegation of three other causes of action upon three several notes for the sum of \$900 each, executed and delivered by defendant to plaintiff, and also a further allegation of the cause of action upon a contract alleged to have been entered into by plaintiff and defendant on the 15th day of July, 1891, by the terms of which, it is alleged, defendant agreed to pay plaintiff the interest on the three notes mentioned in the second, third, and fourth causes of action set forth in the complaint, "and also on two other notes for \$900 each,—one to become due May 15, 1893, and the other July 15, 1893." Then follows in said complaint, for a sixth cause of action, an allegation of an indebtedness due from defendant to the firm of Whenton & Luhrs for the sum of \$61.30, for merchandise sold and delivered by said firm to defendant, and which claim is alleged to have been assigned to the plaintiff on May 3, 1893. Then follows another,—the seventh and last cause of action alleged in the complaint,—which is a claim due from defendant to the California Powder Works, for the sum of \$206.55. This last claim was assigned to plaintiff on May 4, 1893. This suit was commenced May 10, 1892. Affidavit for attachment was filed May 10, 1893. Undertaking on attachment was filed May 10, 1893, and writ issued on the same day. On May 16, 1893, motion to discharge attachment was made. On May 17, 1893, hearing was had, on motion to discharge attachment, before district judge at chambers, and on this same day the judge

made his order discharging attachment, from which order this appeal is taken.

It will be seen from the record that only the first cause of action had accrued when the suit was instituted. The affidavit for attachment bears date May 10, 1893. Section 4302, Rev. St. Idaho, provides that "the plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached." etc. We cannot, therefore, infer that there is any mistake as to dates, and cannot refrain from admonishing attorneys to be more careful in the preparation of their appeals than is evidenced in this one. It does not appear from the record upon what papers, records, or proofs the motion to discharge attachment was heard before the district judge. There is no evidence before us that any of the papers appearing in the record were before the district judge on the hearing of the motion. There can be no excuse for such laches. The order of the district judge discharging the attachment is based upon the ground that the affidavit for attachment is not true, in that said affidavit states, as required by statute, that the alleged indebtedness from defendant to plaintiff, for which attachment is sought, "was not secured by any mortgage or lien upon real or personal property, or any pledge of personal property; whereas, in truth and in fact, it appearing to my satisfaction that the greater portion of said indebtedness was secured by a subsisting lien upon real estate," etc.

There appears in the record what is denominated a "memoranda of agreement," made and entered into between plaintiff and defendant on the 31st day of July, 1891, by the terms of which plaintiff, for a consideration therein expressed, agrees to sell and convey to defendant certain real estate in the town of Hailey, Alturas county, Idaho, for the sum of \$4,500, to be paid in five installments of \$900 each, at various dates, with interest. It is further agreed that the title papers for said real estate shall be deposited in escrow with the First National Bank of Hailey, Idaho, to be delivered by said bank to said defendant upon and after performance by him of the matters and things by him to be performed, as provided in said memoranda of agreement. The five promissory notes for \$900 each, mentioned and set forth in the complaint, were the consideration for said real estate. Under this agreement, defendant went into possession of the real estate described in the complaint. The question, and about the only one, discussed in this case, is: "Does the reservation of title in the vendor create such a lien in his favor as to disbar him from invoking the remedy by attachment under our statute?" Why was the title to this real estate reserved in the plaintiff? Defendant went into possession under the contract, and made partial payments of the purchase price. If the reservation of title in the plaintiff was

not for the purpose of security, we cannot imagine what it was for. If it was not a "vendor's lien," in the strict sense of that term, it was security by lien upon real estate, and, while it continued to exist, constituted a bar to the issuance of an attachment, under the provisions of section 4303, Rev. St. Idaho, "unless it had, without any act of the plaintiff, or the person to whom the security was given, become valueless." *Gessner v. Palmateer*, 89 Cal. 89, 24 Pac. 608, and 26 Pac. 789. The affidavit for attachment being untrue, in that it stated that "the payment of the debt was not secured by any mortgage, lien, or pledge upon real or personal property," its verity is not re-established by the fact that plaintiff had included in his action two small claims assigned to him but a few days before the commencement of suit, which claims were unsecured. It was not to serve such purposes that the very latitudinous attachment law of this state was enacted. *Murphy v. Montandon*, 2 Idaho, 1048, 29 Pac. 851.

There is another matter, in connection with this case, to which we desire to call attention. Section 4304 of the Revised Statutes of this state provides that "before issuing the writ, [of attachment,] the clerk must require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars, and not exceeding the amount claimed by the plaintiff," etc. This invests the clerk with a discretion in fixing the amount of the undertaking to a minimum of \$200, and a maximum fixed by the amount of the claim sued for. The case under consideration is a striking illustration of the disastrous results that are liable to ensue from placing such a discretion in the hands of a clerk. In the case at bar, the amount sued for, as shown by the affidavit for attachment, was the sum of \$4,661.82. The affidavit of the defendant in support of his motion to discharge the attachment contains the following statement: "Deponent further says that the property attached consists of a stock of goods with which defendant had been engaged in business for many years, now exceeding twenty thousand dollars, and has built thereon credit; that his business has exceeded \$45,000 per year for over two years past; that the effect of this attachment is to ruin the credit, business, and business standing of this defendant; that the value of said business far exceeds the amount involved in this litigation." The undertaking was for \$300. Comment is unnecessary. So long as the statute remains as it now is, we think a safe exercise of discretion by the clerk should in all cases require an undertaking not less than the amount of the claim sued for, as shown by the affidavit, when the sum sued for is over \$200. Order and judgment of district court affirmed, with cost to respondent.

MORGAN and SULLIVAN, JJ., concur.

HOLT v. SPOKANE & P. RY. CO.

(Supreme Court of Idaho. Dec. 7, 1893.)

DEATH OF MINOR CHILD—DANGEROUS PREMISES—INSTRUCTIONS—DAMAGES—EVIDENCE—REPAIR OF PREMISES AFTER ACCIDENT—DECLARATIONS OF AGENT—REVIEW.

1. The exception that the verdict is not supported by the evidence cannot be reviewed, unless the appeal is taken within 60 days after the rendition of judgment.

2. A complaint alleging ownership and possession of a certain town lot in defendant, upon which a well is situated, and that through the carelessness and negligence of defendant said well was left open, and that deceased, without negligence, carelessness, or fault on his part, fell therein, and was instantly killed, states a cause of action.

3. As to the measure of damages, the court, on its own motion, instructed the jury that if they found for the plaintiff they should award him "such damages as they think him entitled to." *Held* error; that it gave the jury an arbitrary discretion to assess damages as caprice, whim, or passion might suggest, regardless of the amount demanded by the complaint, or shown by the evidence. It relieves the jury of every restriction, and authorizes them to grant such damages as they may "think" plaintiff entitled to, whether, under all the circumstances of the case, they be just or not.

4. Prior to giving the instruction above referred to, the court instructed the jury that, if they found for the plaintiff, "such damages may be given as, under the circumstances of the case, may be just," and among other things, in awarding damages, they might take into consideration "the relation proved as existing between plaintiff and deceased, and the injury, if any, sustained by plaintiff in the loss of said deceased child's society." *Held* error. The expression, "all the circumstances of the case," as used in section 4100, Rev. St. 1887, means relevant circumstances presented to the jury by evidence under the pleadings. No demand was made in the complaint for damages because of the loss of said infant's society, and no proof was offered showing the social relations existing between plaintiff and said infant.

5. Under section 4100, Rev. St. 1887, in this class of cases, certain elements based upon proof may be taken into consideration; yet, without proof, the jury should not consider them.

6. Where the court gives inconsistent or contradictory instructions, the judgment will be reversed.

7. The court did not err in refusing to instruct the jury that, in an action by a parent for the death of his minor child, the measure of damages "is the value of the child's services until he becomes of age, less the expenses of his support during that time."

8. The instruction as to the law of negligence, as given and found in the transcript, is the correct rule in this case.

9. The overruling of defendant's motion for a nonsuit cannot be considered, for the reason that this appeal was not taken within 60 days after the rendition of judgment.

10. Over the objection of defendant, the respondent was permitted to show that appellant filed said well some days after the death of the child. *Held* prejudicial error.

11. Admissions and declarations made by an agent after an accident has occurred cannot be admitted to show the negligence of the principal.

12. Where error is shown, it is presumed to have worked injury to the party against whom it was committed, unless it affirmatively appears from the record that no injury did or could result.

(Syllabus by the Court.)

Appeal from district court, Nez Perces county; W. G. Piper, Judge.

Action by Samuel H. Holt against the Spokane & Palouse Railway Company to recover for the death of plaintiff's infant son. Plaintiff had judgment, and defendant appeals. Reversed.

McBride & Allen, for appellant. J. W. Reid, for respondent.

SULLIVAN, J. This action was brought to recover damages for the death of the infant son of the respondent. The complaint alleges the corporate existence of the appellant; its ownership and possession of certain town lots in the city of Lewiston, Nez Perces county; that while said infant son was traveling and passing upon a certain street and sidewalk, and upon said lot or premises, without any negligence, carelessness, or fault on his part, he fell into a certain well situated upon said premises, and was instantly killed; that said well had been left open through the negligence, carelessness, imprudence, misconduct, and wrongdoing of the appellant,—and demanded damages in the sum of \$100 for funeral expenses, and for the further sum of \$10,000 damages sustained by reason of the death of said child. The answer admits the ownership of the lot on which said well was situated, and denies possession, and other material allegations of the complaint. The cause was tried by the court, with a jury, and a verdict and judgment given and entered for the respondent for the sum of \$5,000 and costs. Thereafter, a motion for a new trial was interposed by appellant, and overruled by the court. This appeal is from the judgment.

The first error assigned is, in substance, that the complaint fails to state a cause of action. After a careful consideration of the allegations of the complaint, we are of the opinion that they state a cause of action, especially when construed as commanded by section 4207 of the Revised Statutes of 1887. Said section directs the allegations of the pleadings to be liberally construed, with a view to substantial justice between the parties. The complaint, in some respects, is indefinite and ambiguous, but on the whole, we think, states a cause of action.

The second error assigned is that the court erred in refusing to instruct the jury that the evidence was not sufficient to sustain a verdict for the plaintiff. Section 4807, Rev. St. 1887, provides, among other things that "an exception to the decision or verdict, on the ground that it is not sustained by the evidence cannot be reviewed on an appeal from the judgment unless the appeal is taken within sixty days after the rendition of the judgment." The judgment was rendered on the 28th day of November, 1892, and the appeal was not taken until the 27th day of May, 1893. It will be observed that the appeal was not taken within 60 days after the rendition of the judgment, and for that rea-

son the exception that the verdict is not supported by the evidence cannot be reviewed on this appeal. Hayne, New Trials & App. § 186.

The third error assigned is that the court erred in refusing to give the following instruction: "The jury are instructed that if they should find that the defendant is liable in damages for the death of said child, Samuel C. Holt, then, under the law and evidence in this case, the plaintiff will only be entitled to recover the amount that he expended for the burial of said child, as shown by the evidence, together with nominal damages for the loss of said child." This instruction is clearly erroneous, and was properly refused.

The fourth error assigned is the court erred in refusing to give the following charge to the jury: "In this case the plaintiff, in his complaint, alleges that the well in question was situated within a very short distance of a street called 'A Street,' in the town of Lewiston; that said A street was then and there, and had been for a long time prior to the 29th day of April, 1891, a common public street or highway for all persons to go and return in and upon, travel, walk, pass, and re-pass on foot, in and upon and in and by, with coaches, wagons, and other vehicles, at their free will and pleasure, unmolested, and in no wise subjected to risk or hazard, and that by reason of the removal of all the fences and inclosures, buildings, and other improvements from the lot on which the well was situated, and the boxing, inclosure, and curbing from, around, and off said well, left the said well open and exposed, and said lot open and uninclosed, as a part of the public common, by reason whereof the said public street or highway, with the sidewalks thereon, and the said lot adjacent and fronting on said street and sidewalks, were then and there extremely dangerous and hazardous for all persons to go and return, travel, walk, pass, and re-pass in and upon, and subjected persons so traveling, walking, going, playing, returning, passing, and re-passing in and upon the said public highway, and the sidewalks thereof, to great and unnecessary dangers and risks; and that while the said infant, Samuel C. Holt, was then and there traveling, walking, going, playing, returning, passing, and re-passing in and upon the said public street or highway and the sidewalks thereof, adjacent to said premises, and upon the lot and premises of the defendant, on foot, without any negligence, carelessness, or fault on his part, fell into said well, and was instantly killed. These allegations are all specifically denied by defendant in its answer. Now, I instruct you that under these allegations, and the denials thereof, it is incumbent upon the plaintiff to establish by a preponderance of evidence that said A street was a public traveled street or thoroughfare, where people were in the habit of traveling, passing, and re-passing, and that the well in question was

so near to said public street, or the sidewalks thereon, that persons lawfully traveling thereon would be liable to fall into the well. And I further instruct you that if you find from the evidence that said A street was not at the time of the accident complained of, and had not been for a long time prior thereto, a common public street or highway for all persons to go and return in and upon, travel, walk, pass, and repass on, as alleged in the complaint, but had been washed away and abandoned, and was not fit for or used for travel, and that said street had no sidewalks, and that said well was distant from said street sixty or seventy feet, and that no person traveling upon said street could have fallen into the well, then the plaintiff cannot recover against the defendant in this action, and your verdict must be for the defendant." Which instruction the court gave to the jury, but modified the same by adding thereto, and giving as a modification thereof, the following, to wit: "But if the jury shall find that the well mentioned in the complaint was left open and exposed, and the lot and premises open, as mentioned in the complaint, and in the possession and under the control of the defendant, at the time of the death of plaintiff's infant son, then, in case the jury find for the plaintiff, they shall give him such sum as they think he is entitled to." There was no error in the refusal of said instruction before modification. The quotation from the complaint therein contains much surplusage, and is indefinite in its allegation as to whether the child fell from said A street, the sidewalk, or from said town lot, into said well; and to instruct the jury that, if they found that said A street and sidewalk were 60 or 70 feet distant from said well, plaintiff could not recover, would take from their consideration whether, if the child had fallen into said well from said town lot, the plaintiff could recover. We can readily suppose a case in which, if the child fell from said town lot into said well, the owner in possession might possibly be liable in damages; but, whether liable under all the circumstances of this case, we are not called upon to say. The question then arises whether the giving of said instruction, as modified, was error. By the modification the court instructed the jury, if they found for the plaintiff, they might give him "such sum as they think he is entitled to." This leaves the jury without limit in their estimation of damages. They are not even confined to the amount demanded by the complaint. It gives the jury an arbitrary discretion to give such damages as caprice, whim, or passion might dictate, regardless of the amount claimed by the complaint, or shown by the evidence. It relieves the jury of every restriction, and authorizes them to give such sum as they "think" plaintiff entitled to, whether, under all the circumstances of the case, it be just or not, and turns them loose, without chart or guide, to

grant such damages as they may think the pecuniary necessities of the plaintiff might seem to need, regardless of the evidence in the case. It is inconsistent with all rules governing juries in making up their verdicts that they should do so to any extent they may think, without regard to proof.

In this connection, we will dispose of the ninth error assigned, which is as follows: "You are instructed that, if your verdict shall be for the plaintiff, such damages may be given by you to the plaintiff as, under the circumstances of the case, may be just; and, in determining the amount, you have the right to take in consideration the pecuniary loss, if any, suffered by this plaintiff in the death of Samuel C. Holt by being subjected to burial and funeral expenses, and by being deprived of his support, and also the relation proved as existing between plaintiff and deceased, and the injury, if any, sustained by plaintiff in the loss of said deceased child's society." This instruction was given to the jury prior to the one last above considered, and that part of it which directs the jury that, in case they find for the plaintiff, such damages might be given, "as, under the circumstances of the case, may be just," substantially follows section 4100 of the Revised Statutes of 1887. The expression, "as, under all the circumstances of the case," as used in said section, means the "circumstances of the case" that are properly shown to the jury by the evidence under the pleadings, and the jury should have been so instructed. Said section does not turn the jury loose, without restriction, and permit them to assess damages on their own ideas and notions of what the "circumstances of the case" are, regardless of the pleadings and proof. It does not set at naught the rules of evidence applicable to the production or introduction of testimony on the trial of the case, and authorize the jury to assess damages from all the circumstances of the case that they or any of them may have read or heard outside of the jury box, as well as those shown by irrelevant testimony within the jury box. Said section permits the jury to consider only the circumstances that are produced and shown on the trial of the case by relevant testimony under the pleadings, and none other. Plaintiff was permitted to testify in this case that he was a very poor man; that he had no property; and will it be contended that his poverty was a circumstance of this case that could have been considered by the jury in their estimation of damages? We think not. We refer to this to emphasize the fact that the expression, "all the circumstances of the case," does not mean that irrelevant circumstances, and circumstances not properly presented to the jury, should be considered by them in awarding damages. It means only relevant circumstances that are properly presented to the jury by the evidence under the pleadings. Their estimate must be based upon facts and

circumstances properly in evidence, and they should be properly instructed as to the principles of law applicable to the "facts," or, in other words, "the circumstances of the case" shown by the evidence. In this class of cases, certain elements based upon proof may be taken into consideration; yet, without proof, the jury should not consider them. 2 Thomp. Neg. 1290. The instruction under consideration is substantially the same, in effect, as one considered in *Beeson v. Mining Co.*, 57 Cal. 20. That was an action brought by the widow for damages for the death of the husband; and the court held, under section 377, Code Civil Proc. Cal., which is identical with section 4100, Rev. St. Idaho, that it was not error to instruct the jury that among other things, in awarding damages, they might take into consideration "the relation proved as existing between plaintiff and deceased at the time of his death, and the injury, if any, sustained by her in the loss of his society." This clause of said instruction was based upon certain evidence in regard to the character of the social relation existing between the plaintiff and her deceased husband. The evidence showed that the social relations were always pleasant; that the kindest social relations existed. Based upon this evidence, the trial court instructed the jury as above indicated, which instruction was sustained on appeal. The court in that case say: "It is true that in one sense the value of social relations and of society cannot be measured by a pecuniary standard; and possibly the legislature, in enacting section 377, Code Civil Proc., may not have intended to give relief in that sense, especially as the words 'pecuniary or exemplary,' which were formerly in the section, were omitted in the amendment of 1873-74; but, in another sense, it might be, not only possible, but eminently fitting, that a loss from severing the social relations, or from deprivation of society, might be measured, or at least considered from a pecuniary standpoint," and that "the loss of a kind husband may be a considerable pecuniary loss to a wife. She loses his advice and assistance in matters of domestic economy." The evidence in that case established the kind social relations that existed between the plaintiff and deceased, and the court held, because of the severance of those relations, the wife might suffer considerable pecuniary loss, and for that reason it was a circumstance which the jury might properly consider in making up their verdict, while in the case at bar there was no attempt at proof of the social relationship existing between plaintiff and his 2½ year old child; and, if such proof were possible, it would certainly not be contended that a child of such tender age could give advice and assistance to its parents in any matter whatever. However, be that as it may, there is no claim for damages made by the plaintiff, in his complaint, for loss of society, nor is

there any proof of circumstances that would warrant the jury in considering that element in estimating the amount of the verdict. It will be observed that the court gave inconsistent or contradictory instructions as to the measure of damages. The first was that, if the jury found for plaintiff, such damages should be given "as, under all the circumstances of the case, may be just." The second was that, if they found for the plaintiff, "they shall give him such sum as they think him entitled to." In the first the jury were confined to all the circumstances of the case as the only elements to be considered in reaching the amount of damages, while in the second they were not confined to any circumstances or evidence, but were authorized to give such sum as they "think plaintiff entitled to," entirely regardless of the circumstances of the case. Where instructions are inconsistent or contradictory, the judgment will be reversed. *Monroe v. Cooper*, (Cal.) 6 Pac. 378; *Sappenfeld v. Railroad Co.*, 91 Cal. 48, 27 Pac. 590; *McKelvey v. Railway Co.*, (W. Va.) 14 S. E. 261; *Harrison v. Spring Valley, etc., Co.*, (Cal.) 4 Pac. 381. It is held in numerous cases that an erroneous instruction is not cured by a correct one subsequently given on the same subject, unless the latter specifically withdraws the erroneous one. *Wasson v. Palmer*, (Neb.) 14 N. W. 171; *Fitzgerald v. Meyer*, (Neb.) 41 N. W. 123; *Baxter v. Lockett*, (Wash. T.) 6 Pac. 429. In the case at bar the erroneous instruction was the last given.

The fourth error assigned is the court's refusal to give the following instructions: "The jury are instructed that, in an action by a parent for the death of his minor child, the measure of damages, if, under the evidence in said action, he is entitled to damages, is the value of the child's services until he becomes of age, less the expenses of his support during that time." There was no error in the refusal of said instruction.

The sixth error assigned is that the court erred in giving the following instruction: "You are instructed that in determining the question of negligence, in this case, you should take into consideration the situation and conduct of both parties at the time of the alleged death of plaintiff's infant child, as disclosed by the evidence; and if you believe from the evidence that the death of plaintiff's infant son was caused by the negligence of the defendant's servants or employes, as charged in plaintiff's complaint, and without any greater want of care on the part of the plaintiff than was reasonably to be expected from a person of ordinary care and prudence in looking after and caring for his own infant son, then the plaintiff is entitled to recover." We think this instruction fairly states the law, and there was no error in giving it.

The seventh error assigned goes to the following instruction: "And, although you may find from the evidence that the parents

of said child were imprudent or careless in this respect, yet if you find that the servants and employes of the defendant in charge of said railroad ground were in a situation to see and recognize the fact that leaving the well open and exposed, if so, was unsafe and dangerous, and could have prevented the injury resulting in the death of said child, then the plaintiff is entitled to recover." Under the evidence in this case, as shown by the record, this instruction should not have been given.

The eighth error assigned is that the court erred in giving the following instruction: "I instruct you that under the law in this state a father may maintain an action for the injury or death of his minor child, and in such action such damages may be given as, under all the circumstances of the case, may seem just." The instruction contains the law, and there was no error in giving it. The latter part of this instruction has been above commented upon, under the ninth error assigned. The circumstances of the case are those relevant circumstances disclosed by the evidence, and the jury should have been so instructed.

The tenth error assigned is that the court erred in overruling defendant's objection to the following testimony, to wit: "Q. State, if you know, who took possession of the lot and premises after she left it. A. My understanding is that the railroad company has taken possession." Plaintiff was attempting to prove possession. The question was certainly a proper one, but the answer is not responsive, and does not state that the railroad company took possession after "she left it;" that is, immediately after, or even prior to the death of the child. We do not think there was prejudicial error in admitting said answer, considering the evidence adduced on the trial by the defendant.

The eleventh error assigned is that the court erred in permitting Samuel H. Holt to testify to the relation held by Van Arsdel to the defendant. We do not think this error. If it was error, it was cured by the testimony of Van Arsdel afterwards given.

The twelfth error assigned is that the court erred in refusing to strike out the alleged proof of declarations and conversations between Van Arsdel and witness Holt. Said declarations and conversations are not particularly pointed out by this exception, nor in appellant's brief, and for that reason cannot be considered.

The objection that the court erred in refusing to sustain the motion for a nonsuit at the close of plaintiff's testimony, because the same did not present a proper case for the jury, we cannot consider, for the reason that this appeal was not taken within 60 days after the rendition of the judgment. The authorities cited under the first error assigned are applicable to this exception.

The fourteenth and fifteenth errors assigned go to the cross-examination of appellant's witness Van Arsdel, asking his interpretation of the contracts put in evidence. This was error, and should not have been permitted.

The sixteenth, seventeenth, and eighteenth errors assigned are treated together by counsel for appellant, and relate to the alleged errors of the court in permitting Holt to testify to the declarations of Van Arsdel, agent of appellant, made after the accident, and also to the filling of the well after the accident. On cross-examination, Mr. Worden, a witness for the defendant, testified that Mr. Fontleroy employed him to fill the well after the accident occurred, and that he filled it. Counsel for appellant objected to this evidence as incompetent. Thereupon, the court asked the following question: "Court: How long was it after the accident? A. I could not tell exactly the date, but it was some time after. Q. How long was it after the child fell into the well before Fontleroy employed you to fill it up? (Counsel for defendant objects to this as incompetent. Objection overruled, and exception allowed.) A. Well, it was some time— I could not tell exactly. It was after the child was drowned. Could not state whether it was one or two weeks." It is true that the court stated that the evidence of Worden in regard to filling the well after the death of the child was let in to show possession of lot in appellant, but failed to instruct the jury to consider it for any other purpose; and it would appear to us quite difficult to prove possession of the lot at the date of the accident by proving that the well was filled some two weeks thereafter by the orders of appellant's servant. Precautionary measures for the future, such as making machinery more safe where an accident has happened, or placing safeguards about a place where a person has been injured, cannot be considered as showing negligence in the past, and it is error to admit evidence showing such facts. *Railway Co. v. Hennessey*, 73 Tex. 155, 12 S. W. 608; *Railroad Co. v. Clem*, (Ind. Sup.) 23 N. E. 966; *Sappenfield v. Railroad Co.*, 91 Cal. 48, 27 Pac. 590; *Alcorn v. Railroad Co.*, (Mo. Sup.) 18 S. W. 188; *Railroad Co. v. Hawthorne*, 144 U. S. 207, 12 Sup. Ct. 591; *Harvey v. Mining Co.*, (Idaho,) 31 Pac. 819.

Holt, as a witness on his own behalf, as to a conversation had with Van Arsdel, who the witness had testified was the "chief of construction" for appellant, was asked the following question by his counsel. "Question. Go on, and state where it was, and when. Answer. I could not state when it was. It was during court here last spring. It was about the time this trial was to be called. After the accident I met Mr. Van Arsdel in the Raymond House. (Counsel for defendant objected to the giving of the conversation, for the reason that any conversa-

tion or declaration by the agent of a party, made after the happening of an accident, is incompetent, and cannot bind the principal.)" The objection was overruled, and duly excepted to, and the witness answered as follows: "Well, as I said, I met Mr. Van Arsdell in the Raymond House the evening I came. We shook hands, and talked awhile. He said he was awful sorry about my losing my boy. I spoke up, and says, 'That well should never have been left there uncovered.' He says, 'I would have had them wells filled up, but we were going right to work to build the foundation for the depot grounds, and we would have had to dig another well. We needed that for water.'" The witness further testified that this conversation took place after the commencement of this suit. Counsel for appellant thereupon moved to strike out all of the above testimony, and the motion was overruled, and an exception duly taken. This evidence might be construed by the jury as an admission on the part of the company of its negligence in not having filled the well before the death of the infant. Admissions of an agent after an accident has happened cannot be admitted to show the negligence of the principal. *Beasley v. Packing Co.*, 92 Cal. 338, 23 Pac. 485; *Packet Co. v. Clough*, 20 Wall. 528; *Black, Proof & Pl. § 28*.

The last instruction, as to the amount of damages the jury might award, and also the one defining the elements which the jury might consider in estimating damages, were clearly erroneous, as well as the admission and declaration of Van Arsdell made after the death of the child; also, the evidence of the well having been filled thereafter,—all of which we cannot say, from the record, did not operate to the prejudice of the appellant. If error is shown, it is presumed to have worked injury to the party against whom it was committed, unless it affirmatively appears from the record that no injury did or could result. *Rice v. Heath*, 39 Cal. 609; *Cleary v. Railroad Co.*, 76 Cal. 240, 18 Pac. 269. The judgment is reversed, and the cause remanded to the court below for new trial, with costs in favor of the appellant.

HALL v. PEOPLE.

(Supreme Court of Colorado. Dec. 22, 1893.)

CRIMINAL LAW—COMPETENCY OF IMPEACHING EVIDENCE.

In a criminal prosecution it is not competent for the defense to introduce evidence for the sole purpose of impeaching the credibility of a person not a witness for the people. (Syllabus by the Court.)

Error to district court, El Paso county.

Newton Hall was convicted of assault with intent to commit the crime of rape, and brings error. Affirmed.

J. M. Brinson, for plaintiff in error.

ELLIOTT, J. Two grounds for reversal are urged in this court.

1. After the evidence on the part of the prosecution had been given, Mr. Stephenson was called and sworn as a witness in behalf of defendant. On inquiry he testified that he was the father of the little girl whom defendant was accused of having assaulted with criminal intent, and that he (the father) made the criminal complaint in the case. An anonymous letter was then handed to the witness, and he was asked whether he had sent the same to defendant. He replied that he had not; that he had never written and had never sent any such letter. The letter was as follows: "Colorado Springs. Mr. Hall: If you think your freedom is worth five hundred dollars, you know where to come or send your friends." Counsel for defendant offered to prove that the letter was in the handwriting of the witness Stephenson. The refusal of the trial court to admit such proof is complained of. The refusal was not error. The only effect of the proof would have been to discredit the character of the father by showing that he was willing to compromise for money the alleged criminal assault upon the person of his infant daughter. The admission of such evidence would have introduced a purely collateral issue. This was a people's case,—a criminal prosecution. The father was not a party, nor had he testified as a witness against defendant. The criminal complaint made as a basis for defendant's arrest and preliminary examination was not evidence on the trial before the jury, nor did it appear that the father had controlled or influenced any evidence given in the case. Not being a party, the father's declarations were not substantive evidence; and, not being a witness for the people, it was not competent for the defense to introduce evidence for the sole purpose of impeaching his credibility.

2. Upon careful examination we are not able to say that the verdict is unsupported by the evidence. The jury, upon competent evidence given by several witnesses in open court, found defendant guilty, and the trial court confirmed the finding. Under such circumstances, no substantial error appearing in the record, it is not the province of the appellate court to disturb the verdict. The judgment is accordingly affirmed.

KIMBALL et al. v. LYON.

(Supreme Court of Colorado. Dec. 22, 1893.)

FINDINGS BY REFEREE—EFFECT OF—PLEADINGS—WAIVING OBJECTIONS TO—ATTACHMENT—DEBT NOT DUE.

1. Where a cause is tried before a referee having authority to hear and decide the whole issue, his findings of fact upon oral and documentary evidence are entitled to the same consideration as the verdict of a jury or the findings of the court, based upon like evidence produced in open court.

2. The practice of stating causes of action in general terms, like the common counts, is not favored by the Code, but objections to such mode of pleading should be taken, if at all, by special demurrer or motion; they will not be entertained when raised for the first time on appeal or error.

3. Under certain circumstances, a writ of attachment may issue upon a debt or liability not due, as well as upon claims that are due; but, where neither the complaint nor the affidavit of attachment states that the action includes a claim not due, the recovery may properly be restricted to such claims as are due.

(Syllabus by the Court.)

Appeal from district court, Arapahoe county.

Action by E. S. Lyon against George L. Kimball and others to recover the price of stone and rock sold and delivered, and for labor performed. Findings and judgment for plaintiff, and defendants appeal. Plaintiff also assigns cross errors. Affirmed.

Carpenter & McBird, for appellants. Willis Stidger and N. M. Laws, for appellee.

ELLIOTT, J. 1. The trial of the issues in this action required the examination of long accounts. The cause was accordingly referred to William H. Bryant, Esq., an attorney of the court, "to take testimony herein and report the same, together with his findings of fact and conclusions of law thereon." This was equivalent to a reference with directions to the referee to hear and decide the whole issue. Code, c. 10, §§ 204, 209, 212. The cause was tried upon the testimony of witnesses examined orally before the referee, as well as upon books of account and other documentary evidence. The referee having heard and observed the witnesses, and having authority to decide the whole issue, his findings of fact are entitled to the same consideration as the verdict of a jury or the findings of the court, based upon oral and written evidence produced in open court. In certain cases where the trial court has rendered its decree upon the report of a master or referee, this court has held that it must, upon appeal, examine and weigh all the evidence for the purpose of determining the issues of fact, as well as the law and equity of the case, according to its own judgment. But an examination of the record discloses that those cases stand upon a different footing from the present case, and that they are not in conflict with the views expressed in this opinion. For example: The case of Jackson v. Allen, 4 Colo. 263, was commenced and tried under the old equity practice, the testimony being taken and reported by a master, without any findings or conclusions whatever. In Miller v. Taylor, 6 Colo. 41, and also in Sieber v. Frink, 7 Colo. 148, 2 Pac. 901, the referee was directed to take and report the testimony, but no findings or conclusions, either of law or fact, were required of him. The present Code, in respect to references of the kind under consideration, provides as follows:

"The findings of the referee upon the whole issue shall stand as the finding of the court, and upon filing the same with the clerk, judgment shall be entered thereon in the same manner as if the action had been tried by the court, unless objected to by either party by filing a motion for a new trial as hereinafter provided. When the referee is to report the facts, the finding shall have the effect of a special verdict." See section 212. From the foregoing it is clear that we are not required, on this appeal, to sift and weigh the evidence, as in cases where the testimony is taken and reported without findings of fact, but that the review is to be confined to specific objections and exceptions, as in cases of ordinary trials before the court or jury upon oral and written evidence.

2. In their printed brief, counsel for appellants contend that the complaint does not state facts sufficient to constitute a cause of action. But there is no assignment of error to that effect, nor does it appear that any such objection was interposed in the trial court. The complaint states the different causes of action in general terms, much like the common counts for goods sold and delivered, and for work done and performed. Such mode of pleading is not favored by the Code, but objections thereto should be taken, if at all, by special demurrer, or by motion for a copy of the account sued on, or for a bill of particulars; they will not be entertained when raised for the first time on appeal or error. Code, §§ 50, 63. See Campbell v. Shiland, 14 Colo. 491, 23 Pac. 324; also, Mulock v. Wilson, 35 Pac. —, (recently decided by this court.) The referee deducted \$500 from appellee's claim on account of unmerchantable stone. Counsel for appellants claim that this allowance was not enough. Counsel for appellee claim that no allowance whatever should have been made. The testimony upon this point is conflicting; but, considering the referee's superior opportunity for weighing the evidence, we cannot undertake to revise his conclusions as to the amount of unmerchantable stone. Appellants' claim for overcharges of stone delivered stands upon similar testimony. They claim that they were overcharged \$1,134.76. This was reduced by items amounting to nearly \$300. The referee allowed something over \$400 in favor of appellants. We cannot say this allowance was not warranted by the evidence. Under the contract, appellants were to pay, on the 10th of each month, for all stone delivered and sold, and 50 per cent. of the contract price for stone delivered and remaining unsold. As the evidence does not show the amount of stone delivered and sold, nor the amount remaining unsold, it is contended that there is not sufficient data upon which to determine the amount due to appellee when this suit was commenced. But it appears that the referee was able to determine with reasonable certainty the amount of stone delivered; and so the amount

sold, as well as the amount remaining unsold, could easily have been shown by appellants if they had correctly kept the accounts. Even if the burden of proving the amount sold and the amount unsold devolved upon appellee,—a point we do not decide,—the testimony of Mr. Kimball, one of appellants, was that, at the end of the month of March, "we took an invoice to show how much of the Lyon stone was on hand unsold. * * * At the end of no other month was any effort made to arrive at the amount of Lyon stone on hand. * * * We abandoned the contract, and failed to keep accurate accounts at end of each month, because it was a very difficult thing to do. We were receiving all kinds of stone, and selling a good deal, and our force was limited. From the first month the stone was so mixed that it was impossible to say with accuracy how much of the Lyon stone remained at the end of any month." Considering the evidence, and the status in which the parties had placed themselves, the referee was justified in holding that appellee was entitled to recover for all the stone delivered up to the 1st of August.

3. Appellee, under his assignment of cross errors, complains that he was not allowed to recover for stone delivered on and after August 1, 1889. His claim for August business was disallowed on the ground that it was not due when this action was commenced. Appellants were not required to settle and pay for August deliveries until the 10th of September following. This suit was brought August 17th. It is urged, however, that under Code, § 94, appellee might recover for August, for the reason that he had commenced his suit by attachment, and had alleged causes of attachment entitling him to recover upon debts or liabilities not yet due. The referee held that, inasmuch as neither the complaint nor the affidavit of attachment stated that the suit was brought for a debt or liability not yet due, appellee's recovery should be restricted to such claims as were due. This was not an unreasonable construction of the pleadings. Perhaps, by amendment, appellee might have been permitted to include the August transactions in his recovery, but the pleadings were not amended in this respect. It is unnecessary to notice further, in detail, the matters complained of by the parties respectively. Upon careful consideration, we are of the opinion that the trial court did not err in approving, as a whole, the findings of the referee. His report shows that he sat for 21 days in the trial of this cause. He took and reported a large volume of testimony, and his summing up shows that he gave patient and careful attention to the evidence, and the law applicable thereto, under the issues. Notwithstanding the assignments and cross assignments of error, we are not able to say that any error affecting the substantial rights of the parties was committed by the

referee. On the contrary, his findings appear to do substantial justice between the parties as to all matters in controversy prior to August 1, 1889. Their transactions since that time are not affected by this adjudication. The judgment of the district court is affirmed.

GUTSHALL v. CRAWFORD et al.

(Supreme Court of Colorado. Dec. 22, 1893.)

APPEAL—REVIEW.

If a defendant seeking to recoup or recover damages alleged to have been occasioned by the breach of a special contract fail to prove the existence of the contract, the rulings of the trial court relating to the measure of his damages in case of such breach are not material to be considered on appeal.

(Syllabus by the Court.)

Appeal from district court, Lake county.

Action by Crawford & Wheeler against S. P. Gutshall for the price of logs sold and delivered. From a judgment entered on findings for plaintiffs, defendant appeals. Affirmed.

A. W. Stone, for appellant. Bryant & Lee, for appellees.

ELLIOTT, J. The claims of the parties as set forth in their pleadings, respectively, are in substance as follows: Plaintiffs claim that they delivered to defendant at his mill in Summit county, Colo., 53,804 feet of logs, at the contract price of \$5.75 per thousand; that they paid an order for defendant for the further sum of \$50; and that they have received as payment from defendant on account thereof the sum of \$156.59. Plaintiffs also claim the further sum of \$9 for wood sold and delivered to defendant at his request. Total amount of plaintiffs' claim, \$211.78. Defendant denies the contract as claimed by plaintiffs; denies the delivery to him of the wood; and alleges as a counterclaim that a special contract was entered into between himself and plaintiffs, whereby they agreed to deliver to him at his mill 500,000 feet of logs at \$5.75 per thousand, and to deliver 10,000 feet per day until the whole amount should be delivered; payment of 75 per cent. of the amount due under the contract to be made on the 10th day of each month, and the remaining 25 per cent. upon the completion of the contract. That defendant kept and performed the contract on his part; but that plaintiffs failed to deliver any more logs than the amount stated in their complaint; and that defendant was damaged by reason of plaintiffs' breach of said special contract in the sum of \$1,000. Plaintiffs, in reply, deny that they entered into the special contract with defendant as pleaded in his answer. By consent of parties the cause was tried by the court without a jury, and a number of witnesses were examined orally. There was much conflict in the testimony in respect to the existence or

nonexistence of the alleged special contract pleaded by defendant. The evidence in behalf of defendant tended to show that the special contract, substantially as pleaded by him, had been reduced to writing; that plaintiffs had agreed to its terms, and had agreed to sign it. No special contract was signed by either of the plaintiffs. The evidence in their behalf was to the effect that they never had agreed to sign it, and never had agreed to its terms. The testimony in behalf of the opposing parties was also conflicting as to the sale and delivery of the wood sued for. The finding of the court was as follows: "The court, having heard all the evidence adduced, and the arguments of counsel thereon, duly considered the same, and, being well advised in the premises, now finds for said plaintiffs, and that said defendant is justly indebted to plaintiffs in the sum of two hundred and two and 78-100 (\$202.78) dollars."

From the finding it is obvious that the trial court considered that plaintiffs had failed to establish their claim for the wood, and that defendant had also failed to establish the existence of the special contract affirmatively pleaded in his answer. This appears from the fact that the finding was for the exact amount of plaintiffs' claim, less the amount claimed for the wood. In arriving at these conclusions it does not appear that any substantial error was committed; and the finding is sufficiently supported by the evidence to forbid any interference therewith by an appellate court.

Upon the trial important questions were raised respecting the measure of defendant's damages in case of a breach of the special contract as pleaded by him. The rulings of the court upon such questions are assigned for error, and the same have been ably argued by appellant's counsel. But, it having been determined as a fact that the parties did not enter into such special contract, the rulings of the trial court relating to such measure of damages are not material to be considered on this appeal. Without the special contract, there could be no breach thereof, and hence no damages. *Oppenheimer v. Railway Co.*, 9 Colo. 320, 12 Pac. 217. The judgment of the district court must be affirmed.

GODDARD, J., having tried this cause at nisi prius, did not participate in the decision in this court.

UNION PAC. RY. CO. v. KERR.

(Supreme Court of Colorado. Dec. 22, 1893.)
CONSTITUTIONAL LAW — STOCK KILLING BY RAILROAD COMPANY.

The decision of the court follows the doctrine announced in *Wadsworth v. Railway Co.*, 33 Pac. 515, 18 Colo. 600.

(Syllabus by the Court.)

Appeal from district court, Larimer county.

Action by John Kerr against the Union Pacific Railway Company for killing certain animals. Plaintiff had judgment, and defendant appeals. Reversed.

Teller & Orashood and C. M. Kendall, for appellant. Robinson & Love, for appellee.

PER CURIAM. This was an action by plaintiff below to recover damages for the killing of his live stock by the operation of the defendant company's railway. It is conceded that plaintiff's recovery was had under the statute, the same as in the case of *Wadsworth v. Railway Co.*, 18 Colo. 600, 33 Pac. 515. The judgment must accordingly be reversed upon the doctrine announced in that case.

ANSON v. EVANS.

(Supreme Court of Colorado. Dec. 22, 1893.)

MASTER AND SERVANT—DEFECTIVE APPLIANCES.

1. Plaintiff, employed to clean the front of a building, was told that the work was dangerous, because the acid used would, if spattered on the ropes of the swinging platform, rot them. Plaintiff, who contended that the rope was rotten to begin with, testified that he had used the full length of it 20 times during the day, before it broke. There was evidence for defendant that the ropes were sound when plaintiff began work, and that plaintiff had carelessly spattered acid on them. Held error to refuse to charge that, if plaintiff had been told that the acid would rot the ropes, and the ropes were sound when he began work, and broke because of the acid he got on them, he could not recover.

2. After admitting declarations of a witness, only competent to impeach him, which relate to repairs made by defendant after the accident, the subject of suit, the court should have charged that such repairs were not to be considered on the question of defendant's liability.

Appeal from district court, Arapahoe county.

Action by George W. Evans against James T. Anson for damages for personal injuries. Judgment for plaintiff. Defendant appeals. Reversed.

The other facts fully appear in the following statement by GODDARD, J.:

This action is brought to recover damages for personal injuries. The substantial averments of the complaint are that on the 27th day of August, 1889, and long prior thereto, defendant was engaged in the business of cleaning the outside walls of brick buildings in Denver. That defendant employed plaintiff as a common laborer in defendant's said business, and to work for him in cleaning the outside walls of a certain building. That such work was performed by means of a platform suspended by ropes outside of the building, the ropes being attached to the top of the building, and the platform raised or lowered by means of such ropes run upon pulleys. That plaintiff, while engaged in cleaning said building was on the platform, which was about 40 feet above the street.

when one of the ropes that sustained the platform suddenly broke, by means whereof plaintiff was precipitated upon and against the stone sidewalk below. That by such fall plaintiff was permanently and seriously injured. Alleges that the rope which sustained the platform upon which he was then working, while apparently sound and secure, was in fact unsound and rotten, and insufficient to stand the weight required of it in the performance of said work. That by reason of said rotten and unsound condition the same broke, and caused the injuries complained of. That defendant carelessly, negligently, and knowingly provided said rope while knowing, or by the exercise of reasonable diligence should have known, the same to be rotten and unsound. Defendant, answering, admits that he employed plaintiff for the purposes aforesaid. Alleges that the platform and ropes were, at the time of the accident, fully under the control of plaintiff and his coemployee; that the plaintiff had been fully informed as to the danger incident to carrying on said business, and of the use of certain acids used in the cleaning of said walls, and had been fully informed of the care and caution necessary in the handling of said ropes and materials, and the danger incident to working in said business. Denies that the rope which sustained the platform upon which plaintiff worked was unsound or rotten. Alleges that the rope which was furnished to plaintiff was sound and in good condition, sufficient and suitable for such work; and if the same was unsound in any place at the time of said injury such condition had been caused entirely by the carelessness and negligent acts of the plaintiff in the improper use and handling of the acid used in cleaning the walls. In a second defense, alleges that the injury set forth was entirely and wholly occasioned by the contributory negligence of plaintiff. The cause was tried to a jury, and verdict rendered for \$3,150. Motion for a new trial overruled, and judgment entered on the verdict. The defendant brings the case here on appeal.

Coe & Freeman and C. E. & F. Herrington, for appellant. W. W. Dale and H. M. Chittenden, for appellee.

GODDARD, J., (after stating the facts.) We are of the opinion that the court below committed no error in refusing to take the case from the jury; that the evidence presented a fairly debatable question as to the immediate cause of the accident, and, it being within the province of the jury to decide that question of fact, we are not at liberty to disturb its finding, and upon this review must accept its conclusion that such cause was the breaking of the rope that suspended the end of the platform upon which the plaintiff was standing at the time of the accident. Whether the rope broke by reason of a defect that existed at the time plain-

tiff commenced work, or whether it was subsequently weakened and rendered insufficient by his own act in negligently spattering acid thereon while at work, was the fact decisive of plaintiff's right to recover, and upon that question the appellant prayed the following instruction: "(7) If you find from the evidence that the plaintiff had been instructed that the acid used for cleaning would eat the ropes, and the ropes were of sufficient strength when the plaintiff began work, and that the rope broke because of acid which the plaintiff got upon the same, then he cannot recover." This instruction was pertinent to the vital issue of fact in the case, and was specially applicable to the evidence introduced upon that issue. It was undisputed that plaintiff, at the time of his employment, was expressly told that the business was dangerous, owing to the fact that the muriatic acid used in cleaning the walls would, if brought in contact with the ropes, eat and rot them. It was further testified by defendant and the witness Hall that the ropes were sound and sufficient at the time plaintiff began work; and there was evidence tending to show that plaintiff had once or twice on the day of the accident carelessly spattered acid upon the rope. In view of this evidence, and of the testimony of plaintiff himself that the rope had been used by him during the day to its full length at least 20 times, we think it was eminently proper that the attention of the jury should have been specially directed to the consideration of the cause that rendered the rope unsafe. Counsel for appellee seek to excuse the refusal to give the instruction upon the ground that the evidence was unsatisfactory and insufficient to establish the fact that acid in sufficient quantity to injure it got upon the rope. The sufficiency of the evidence was for the jury to determine. Nor can we agree with counsel that the issue to which this request was directed was properly submitted to the jury by the court in its general charge. We are unable to find in the general charge an announcement of the principle expressed in the instruction prayed for, or any intimation that can be construed as its equivalent.

A further, and what we regard as a fatal, error occurring on the trial of the case, was the refusal of the court to give the following instruction prayed by appellant: "(11) The fact that after the accident defendant used a new rope in continuing the work cannot be used by the jury in determining whether defendant is liable to plaintiff." Plaintiff was permitted, against objection, to introduce in evidence declarations of the witness Hall, made subsequent to the accident, to the effect that after the accident the ropes in use at the time it occurred were abandoned, and new ropes substituted. Hall was the principal witness introduced on the part of defendant, and in his examination in chief testified that he knew the condition of the

ropes when plaintiff began work, and that they were sound ropes. On cross-examination he was asked the following questions: "Q. Did you not state to Mrs. Dietz, at her house on Curtis street, about November 1st, in the presence of Kate Evans, Mr. Jennings, and the plaintiff, that it was an old rope? A. No, sir; I did not, to them or anybody else." To this question and answer counsel for defendant interposed an objection, which was overruled. "Q. Did you not on that occasion state that they had abandoned the use of that rope, and no longer used it, immediately after the accident?" In overruling the objection to this question the court said: "It is for the jury to determine what this evidence tends to prove." "A. I never said nothing to them. Q. Did you not at the same time and place say, in substance, that Anson had locked the stable door after the horse was gone? A. No, sir." In rebuttal the plaintiff introduced testimony as follows: W. S. Jennings, witness for plaintiff: "I heard the question to last witness as to the conversation at Mrs. Dietz's house. Q. Did not Hall state in that conversation that it was an old rope? (Objected to as incompetent, immaterial, etc. Objection overruled.) A. Yes, sir; Mr. Hall made the remark that the rope was old. Q. What, if anything, did Hall say in that same conversation with reference to locking the stable door after the horse was gone?" Over objection witness answered: "A. He made the statement, 'After horse was stolen, it was customary to lock the barn,' or to that effect." Kate Evans, sworn for plaintiff: "I am plaintiff's sister. I remember Hall coming to George's bedroom at Mrs. Dietz's. Q. State whether or not at that time Hall said this rope was old." Over objection, witness answered: "A. He said it was old, and 'We have put a new rope on;' that after the horse was stolen the barn door was locked." George Evans, the plaintiff, testified to the same effect. The only purpose for which this evidence could be admitted (if at all) would be to impeach the witness Hall, and for this purpose it may be that his statement outside of court that the ropes were old, and that new ones were substituted after the accident, may have been admissible as being contradictory of his statement in chief. But from the remark of the court in overruling the objection to its admission, that "It is for the jury to determine what this evidence tends to prove," the jury might well infer that they were to consider it as substantive evidence in the case, and as proof of the fact that new ropes were substituted by the defendant after the accident. In this view the evidence was objectionable for two reasons: First. Because the declaration, made out of court by a witness not a party to the action, is inadmissible as evidence to establish a substantive fact. *Coal Co. v. Edman*, 18 Colo. 438, 27 Pac. 1060. Second. It was not permissible on the trial of this action to show that

defendant supplied new ropes after the accident. The question of defendant's liability depended upon whether he had exercised the proper care in providing reasonably safe appliances for the service in which plaintiff was engaged, and that inquiry must be determined by his acts and conduct prior to the accident. What he did afterwards could throw no light upon that question, and it was error to admit evidence of what he did to guard against future accidents. This principle is grounded in reason, and sustained by the great weight of authority. *Electric Co. v. Lubbers*, 11 Colo. 505, 19 Pac. 479; *Morse v. Railway Co.*, 30 Minn. 465, 16 N. W. 358; *Nalley v. Carpet Co.*, 51 Conn. 524; *Shinners v. Proprietors of Locks & Canals*, 154 Mass. 169, 28 N. E. 10; *Corcoran v. Peekskill*, 108 N. Y. 151, 15 N. E. 309; *Petty v. Town of Hamlin*, 127 N. Y. 636, 27 N. E. 399; *Alcorn v. Railroad Co.*, 108 Mo. 81, 18 S. W. 188; *Railroad Co. v. Clem*, 123 Ind. 15, 23 N. E. 965; *Lowe v. Elliott*, 109 N. C. 581, 14 S. E. 51; *Cramer v. City of Burlington*, 45 Iowa, 627. It having been brought to the knowledge of the jury that defendant substituted new ropes after the accident, the appellant was entitled to have that fact withdrawn from their consideration, and the court erred in refusing to give this instruction.

We think there is much force in appellant's criticism of the instruction given as to the measure of damages, in so far as it permitted the jury to consider the time lost by plaintiff during his sickness, and to consider the effect of the injury upon his ability to labor, under the evidence introduced. The plaintiff would not have the right to recover for the portion of time that elapsed after the accident and until he attained his majority, and there was no evidence of his ability to labor upon which the jury could estimate the loss that he may suffer by reason of the impairment of his ability to labor in the future. It is not necessary for us to determine whether the instruction in this respect would constitute reversible error, as the case must be reversed upon the other grounds noticed; but we deem it of sufficient importance to call attention to this assignment of error in case another trial should be had. For the reasons given, the judgment is reversed, and the cause remanded for a new trial.

QUINN v. KELLOGG.

(Court of Appeals of Colorado. Dec. 11, 1893.)
ACTION TO CANCEL MORTGAGE—WHEN ACCRUES.

1. Gen. St. 1883, § 2175, provides that bills of relief, in case of the existence of a trust not cognizable at common law, shall be filed within five years after the cause of action accrues. *Held*, in an action to have a deed absolute on its face declared a mortgage, and to compel a reconveyance, where it appeared that plaintiff gave the deed to secure a note which he subsequently paid in full, and some time afterwards demanded a reconveyance,

which was refused, the cause of action, if governed by section 2175, accrued, not when the note was paid, but when defendant refused to reconvey.

2. Since the mortgage was fully satisfied, it is defunct, and, until released upon the record, remains simply a cloud upon plaintiff's title; and, as no limits are fixed within which a party in possession must proceed to remove a cloud from his title, the action is not barred.

Appeal from district court, Lake county.

Action by C. C. Kellogg against Patrick Quinn to have a deed absolute upon its face declared a mortgage, and to compel reconveyance. Decree for plaintiff, and defendant appeals. Affirmed.

M. B. Carpenter and N. M. Laws, for appellant. John M. Maxwell, for appellee.

THOMSON, J. This is a proceeding to have a deed absolute upon its face adjudged to be a mortgage, and to compel a reconveyance. The deed was executed by C. C. Kellogg to Patrick Quinn on the 18th day of October, 1883, and conveyed one-fourth of the Humbolt mining claim, and one-fourth of the north end of the Belgian mining claim, in California mining district, Lake county. The action was commenced on the 18th day of November, 1891. At the trial, Kellogg, the plaintiff, testified that on October 18, 1883, he borrowed of the defendant, Quinn, \$300, and gave him the deed to hold until the money was repaid; that it was understood that the deed should not be recorded; that, as evidence of the indebtedness, he made and delivered to Quinn, together with the deed, his note for the \$300 borrowed, with interest, due three months from date; that he made payments from time to time, which were indorsed upon the note, and finally paid the note in full, and took it up and canceled it; that, owing to other matters which were troubling him, he forgot about the deed; that he was reminded of its existence by finding it upon an abstract from the record which he had occasion to procure; that, upon the discovery, he went to Quinn, and told him of it, and how he had forgotten it, when Quinn said that he had forgotten it too; that there were several meetings between them, in which a reconveyance was the subject of conversation; that Quinn finally refused to convey unless Kellogg would give him \$6,000; that Kellogg then had a deed prepared, and, together with a notary public, presented it to Quinn, demanding his signature, which Quinn refused; and that thereupon he commenced this suit. The plaintiff also testified that, at the time of the loan, the interest conveyed was worth \$6,000; that he had been in possession of the interest all of the time, and in charge of the entire property, except, perhaps, in 1883 and 1884; that the defendant never claimed or exercised any rights of ownership in the property; that the property was worked continuously since the loan; that improvements were placed upon it, cost-

ing \$10,500, of which, and also of all taxes assessed against it, he had paid his share; and that the deed was executed subject to an incumbrance of \$1,000 on the interest conveyed, which he paid. Quinn, in his own behalf, testified that he received the deed in payment for work which he had done upon the property, and that it was intended as an absolute conveyance to him. He denied the statements of Kellogg as to the consideration of the deed. He admitted a loan of \$300 to Kellogg, but stated that it was made a long time afterwards, and had no connection with the deed. There was other evidence on both sides, more or less corroborative of the conflicting statements. The court, after hearing all of the testimony, found the facts to be with the plaintiff, and we are concluded by its finding.

It is objected to the complaint that it does not state facts sufficient to constitute a cause of action, but it is simply a narration of the facts as given by the plaintiff in his testimony, and, if these facts entitle him to relief, the complaint is sufficient. The plaintiff, as the court found, executed the deed, and it was held by the defendant, as security for the repayment of the sum of money borrowed from him by the plaintiff. It was therefore, although absolute on its face, in fact a mortgage; and in equity it is competent to show the real character of such an instrument by parol evidence. Such evidence does not have the effect to contradict or vary the writing. It is admitted merely to show the purpose for which the deed was given. *Freeman v. Wilson*, 51 Miss. 329; *Peugh v. Davis*, 96 U. S. 332; *Anthony v. Anthony*, 23 Ark. 479; *Pierce v. Robinson*, 13 Cal. 116; *Beatty v. Brummett*, 94 Ind. 76; *Moore v. Wade*, 8 Kan. 380.

The principal controversy in the case arises out of a plea of the statute of limitations. The answer avers that the cause of action, if any ever accrued to the plaintiff, accrued more than five years before the commencement of the suit, and was therefore barred by the statute. It appears that the debt which the deed was given to secure was paid, principal and interest, prior to July 1, 1884. Defendant's contention is that, by the transaction, a resulting trust was created; that the legal title to the premises was vested in the defendant for the benefit of the plaintiff; that plaintiff's right of action to compel a reconveyance of the property accrued at the time the debt secured was paid; that the statute then commenced to run; and that, more than five years having elapsed between that time and the commencement of this proceeding, the action was barred by the terms of section 13 of the statute of limitations. That section is in the following words: "Bills of relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not heretofore provided for, shall

be filed within five years after the cause thereof shall accrue, and not after." Gen. St. 1883, § 2175. We are of the opinion that the present case is not one contemplated by the statute; but conceding, for the moment, that it is, the question to be decided is: "When did the cause of action accrue to the plaintiff?" The answer to this question will determine whether the suit was commenced in time. Counsel very earnestly contend that it is unnecessary that the defendant should have denied or repudiated the trust, but that, on the contrary, the right to sue vested instantly upon the payment of the debt, and refer us to a number of authorities which it is claimed sustain that position. An examination of these authorities, or some of them, will therefore be proper for the purpose of seeing whether counsel's reliance is well grounded.

In *Hecht v. Slaney*, 72 Cal. 363, 14 Pac. 88, Slaney had filed a petition in insolvency. Afterwards, he filed a petition to have certain real estate set apart to him as a homestead. No notice was given of the filing of the latter petition, or of the time for its hearing, and, by an order of the court, the property was set aside as prayed. Some years afterwards, Hecht, a judgment creditor, filed his bill, alleging that the representations in the petition were false and fraudulent, and made for the purpose of defrauding creditors, and praying that Slaney be adjudged to hold the property in trust for his creditors, and that it be applied to the payment of his debts. The court held that, as the trust originated in a wrong, the statute commenced to run at the time of the commission of the wrong, and that Hecht, having suffered the statutory limit to expire, was barred. To the same effect is *Howell v. Howell*, 15 Wis. 55. A partner had bought land with partnership funds, without the consent of his copartner, and had the conveyance made to a third person, who took it with knowledge of the facts. The court, holding that a cause of action accrued to the other partner immediately, says: "The trust in such cases originates in a fraud, which is in itself as complete and absolute a denial of the rights of the injured party as it is possible to have; and every day which passes, without reparation of the injury, is a continuation or repetition of it. William Howell might have commenced his action the moment the land was purchased." Further notice of the cases cited is unnecessary. There is none which, in its facts, approaches more nearly the present case than the foregoing. The two cases reviewed deal with a class of trusts within which this, whatever else it may be, does not fall. If we class this as a trust, it results from the agreement or understanding of the parties, and is therefore what is known as a "resulting trust," and counsel are correct in so distinguishing it. But the trusts considered in the foregoing cases did not arise

out of any contract, either express or implied, between the parties. They arose from fraud committed by one party upon the other, and were what is termed "constructive trusts." Where a person clothed with some fiduciary character wrongfully or fraudulently conducts a transaction so as to gain an advantage to himself over another person interested, the law converts him into a trustee, contrary to his intention, and against his will, and a constructive trust arises. Counsel's position, in support of which these cases are cited, is that the statute commenced to run, not when the defendant refused to make the conveyance, but when, by reason of payment of the note, the plaintiff had the right to demand it. But when, by an analysis of the cases, we reach the principle which they establish, and apply it to the facts before us, we are forced to a directly contrary conclusion. Those cases, upon their own facts, hold that in order to set the statute in motion it was not necessary that the trustee should have denied or repudiated the trust; and the reason for so holding was that the trustee had already, by the very acts upon which the law founds such a trust, as effectually denied and repudiated it as it was possible for him to do. Any further denial would have been superfluous, and could have added nothing to that already existing. The cases fix the time when the statute commenced to run as being the time when the wrong was committed; and as the wrong was, in itself, a repudiation of the trust, the statute therefore began at that repudiation. Let us apply this principle to the facts as found here, and see where it will lead us. There was no fraud in the original transaction. The trust grew out of the contract between the parties. By accepting the deed as security for the money loaned, the defendant acknowledged the trust. He acknowledged it again when he received the money and surrendered the note. During the whole period between the inception of the transaction and the final refusal of the defendant to execute the deed, although the plaintiff was in possession of the property, and he was out of possession, he never, by word or act, indicated that he claimed anything by virtue of the deed, inconsistent with its character as a mortgage. He did not execute a release, and deliver it to the plaintiff, it is true; and, until demand was made upon him for that purpose, he was under no obligation, legal or moral, to do so. His acts and his silence equally affirmed the trust. A reconveyance was finally demanded of him, and then, for the first time, he attempted a denial and repudiation. His refusal to make the deed was the first appearance of a claim inconsistent with the trust. This was the only wrong in the history of the case which could set the statute in motion, and, in accordance with the doctrine of the very cases relied upon by the defendant, it was then, and not before, that

the statute commenced to run. Not only are we sustained in this conclusion by the reasoning in the cases referred to, but the court in *Howell v. Howell*, supra, comes directly to our support. In the course of the opinion; Dixon, C. J., says: "It follows that the cause of action set forth was barred in the lifetime of William Howell, unless, as counsel supposed, it was necessary that there should have been a denial of the trust before the statute would begin to run. But that doctrine is applicable only to express or acknowledged trusts, where the trustee had afterwards repudiated the rights of the cestui que trust, and set up a claim to the trust property in his own right, and not to those implied or equitable trusts which spring from the originally wrongful and fraudulent acts of the party to be charged, and which were never recognized or admitted by him." Therefore, accepting counsel's theory that this was a trust to which the statute would apply, as the action was commenced immediately after the refusal by the defendant to make the deed, it was not barred.

But we are disposed to rest our decision of the case upon other grounds. This is not an action to redeem. The defendant was never in possession of the mortgaged property, applying its rents and profits in payment of the debt, so as to make an accounting necessary. There was no uncertainty or dispute as to the amount which had been paid, so as to require an ascertainment of that for the purposes of redemption. The debt had been fully paid, and the note which evidenced it canceled. The bill makes no allegations which require an investigation to ascertain what, if anything, is still due, in order that the plaintiff, by payment of the balance, may redeem his property. It is simply a bill to cancel a mortgage which had already been satisfied. While the debt which a mortgage was given to secure remains unpaid, it is valid and efficacious for the purpose of the enforcement of the mortgagee's remedy against the mortgaged property; but, when the debt is fully paid, the mortgage is defunct,—it becomes null and void; it is useless in the hands of the mortgagee for any purpose,—and, as long as it is unreleased upon the record, it remains a mere cloud upon the title of the mortgagor, to be removed, if necessary, in a proper proceeding for that purpose. The statute of limitations contemplates a loss by one party, on account of his delay, of some right or possession which inures to the benefit of the opposite party, so that what one loses the other gains. Here the defendant would gain nothing if the plaintiff's action were barred, and he would lose nothing if it were not. It is immaterial whether the effect of the mortgage is to vest the legal title in the mortgagee or leave it in the mortgagor. In either case, when the debt is paid, the mortgage is, in equity, extinguished, and a reconveyance is necessary only for the purpose

of making the record title of the mortgagor complete. We have no statute which limits the time within which a party in possession shall proceed to remove a cloud from his title, and, as no lapse of time can restore vitality to a mortgage which has been paid and extinguished, so no lapse of time will bar a mortgagor from proceeding to cause the fact of its extinguishment to appear upon the record. The decree will be affirmed.

MADERA v. HOLDREGE.

(Court of Appeals of Colorado. Nov. 27, 1893.)

SHERIFFS AND CONSTABLES—UNLAWFUL SEIZURE—TREBLE DAMAGES—ACCRUAL OF ACTION—SUFFICIENCY OF COMPLAINT.

1. Gen. St. 1883, § 1868, provides that if any officer, under any execution or other process, shall seize any exempt property, such officer shall be liable to the party injured for three times the value of the property so seized. *Held*, that the right of action for treble damages does not accrue immediately on the seizure of exempt property, but that the officer had the right to return the property after demand by the debtor.

2. A complaint states facts sufficient to constitute a cause of action, without an allegation that the action is brought to recover the statutory penalty, where it alleges plaintiff's title, his right under the statute, the levy of process, his demand and the refusal to return, and his right to the possession of the property, and prays treble damages therefor.

Appeal from district court, Boulder county.

Action by Ell A. Holdrege against Shep Madera for treble damages for the seizure of exempt property. Judgment for plaintiff. Defendant appeals. Reversed.

The other facts fully appear in the following statement by BISSELL, P. J.:

This suit was brought against an officer to recover treble damages for the seizure, under a writ of attachment, of property which the alleged debtor claimed was exempt from execution. The General Statutes of 1883 (section 1868) provide: "If any officer or other person, by virtue of any execution or other process, or by any right of distress shall take or seize any of the articles of property hereinbefore exempted from levy and sale such officer or person shall be liable to the party injured for three times the value of the property illegally taken or seized, to be recovered by action of trespass with costs of suit." In February, 1892, I. T. McAllister commenced an action against Ell A. Holdrege before a justice in Boulder county, to recover \$53.05, and sued out a writ of attachment in aid of the suit. The process was put in the hands of Frank Metcalf, a constable, in the ordinary way. The officer levied the writ on a stallion belonging to Holdrege, and took him away. At the time of the levy, neither the officer nor the defendant said anything concerning the claim or right of exemption, and the ordinary course pursued by officers in the service of process was taken by Metcalf. After the

property was taken, the defendant served a notice on the officer, claiming the animal as a work horse, and exempt under the law. Within a short time an attempt was made to release the levy and return the property. Metcalf seems to have had occasion to leave town, and delegated Madera, the defendant in the ultimate suit and the appellant here, to act for him in respect of this matter. Madera and McAllister, in response to the demand, took the horse down to Holdrege's place, and attempted to redeliver him. They took it into the yard, and tendered it to Holdrege, who refused to take it. Thereupon the horse was tied to a wagon in the yard, and Madera told Holdrege that he brought him back at Metcalf's request, in response to the demand. Madera was also a constable. After this attempted delivery, Madera demanded of Holdrege that he turn over to him other property, which it was claimed he owned, to be taken in satisfaction of the writ, and to answer for the debt; stating that, in case the debtor failed to do this, he would again levy a writ on the animal. Some doubt is left in the record as to precisely what Holdrege said concerning other property, but, at all events, he turned over none. Madera thereupon produced a second writ of attachment, which had been issued in the same suit of McAllister against Holdrege, served a copy on the defendant, and took the horse. Afterwards, Holdrege served a demand on Madera for the return of the animal, making the same claim asserted in the notice to Metcalf. The notice was served on the 3d of March. Madera did nothing in response to this notice for several days, and on the 8th of March the present suit was instituted. Judgment was entered in the original action of McAllister v. Holdrege on the 5th of March, and, on the 7th, an execution was issued for its enforcement. Nothing was done under this execution, so far as the proof shows, and, at all events, no sale of the property had occurred, or other disposition been made of it, when the present action was brought, and at the time of the subsequent occurrences, which will be stated. Some time after the service of the notice on Madera, but at what precise date the abstract does not show, in response to the demand which had been served on him, Madera undertook to return the animal. He took him down to Holdrege's place, and tried to enter the yard, and found the entrance barred. He saw Holdrege, however, at that time, and told him what he had come for, and offered him the horse. Concerning this matter there is no dispute, since Holdrege himself testifies that he absolutely refused to take it, and that Madera offered it to him, and would have turned it over had he not declined to receive it. At the time of this last transaction, another Richmond appeared in the field, armed with an authority which the exemption statute did not affect. It seems that on the 5th of December, 1891,

Holdrege had made a chattel mortgage to the First National Bank of Boulder which covered this and other property. The mortgage contained the usual conditions, and matured, if there were no other breach, by the lapse of time, in May. Like all other instruments of this description, a levy of a writ of attachment on the property gave the holder the right to declare the whole sum due. The history of this mortgage and its transfers is not clearly stated in the abstract, nor did the jury find anything about it. It appears that, prior to the seizure to be afterwards noted, McAllister bought the mortgage of the bank, but at some time intermediate its enforcement parted with the title, and possibly with all interest in it, to some other person, and that title became vested in J. H. Crary, who was one of McAllister's employees, and who testified that he was the owner. When Madera took the horse down to Holdrege's place, and sought to deliver it under the demand, he was followed by another officer, who held this mortgage, and, when Holdrege refused to receive the animal, this representative of the mortgagee took the property out of Madera's possession under the authority which the instrument contained, and the horse was subsequently sold thereunder. Holdrege attempted to pursue his rights, and notified the parties concerned that the mortgage was not due, and that they were without the right to sell; contending that it was being used as an instrument by McAllister to enforce the payment of the debt by a claim of a breach of a condition created by his own act, to wit, the issue of the writ of attachment. The cause was submitted to the jury under sundry instructions, which stated generally what property was exempt, the terms of the statute, and the rule concerning the right of the mortgagor of chattels to claim an exemption. The court also instructed the jury: "If you believe that at the time that the writ of attachment was levied in this case, that the defendant in this suit, who is the plaintiff here, had other working animals besides the one in question, you are instructed that it was his duty, within a reasonable time, to turn over such animals for the satisfaction of the debt, and he is not entitled to claim any exemption until he does so. If you find for the plaintiff, find for three times the value of the horse, as shown by the evidence." As usual, the evidence of value was conflicting, but the jury found a verdict against the officer for \$375, for which judgment was entered, with costs, and the case was appealed to this court.

R. H. Whiteley, for appellant. J. R. Zuver and H. O. Henderson, for appellee.

BISSELL, P. J., (after stating the facts.) This judgment was evidently entered on a misconception of the privilege and the duty of the exemption claimant, of the authority

and responsibilities of the officer under the writ, and of the proper construction of the exemption statute. There is considerable conflict in the cases concerning the duty of the claimant with respect to the assertion of his rights of exemption, and the powers of the officer with reference to the seizure of property. So far as those questions arise in this case, the particular principle involved has been settled by the supreme court, and we need not look further for authority on which to declare the law. As a general proposition, it is established that the officer may enforce his writ against whatever property he finds in the defendant's possession, whether he be serving a writ of attachment or a writ of execution, unless the only property which the defendant has subject to levy is within the protection of the exemption statute. The earlier case undoubtedly declared the law to be that the duty rested upon the defendant to claim the exemption if he desired to insist on it. The subsequent decision draws a distinction between the case where the only property owned by the defendant is clearly within the statutory limit, and a case where the defendant has other property subject to levy; the later decision holding that, in the first instance, the levy is illegal, and, in the latter, that the defendant must assert his rights. *Behymer v. Cook*, 5 Colo. 395; *Harrington v. Smith*, 14 Colo. 376, 23 Pac. 331. These authorities do not state when the right of selection shall be exercised, nor when the claim shall be made; but since, under some circumstances, the claimant must make his selection, the rule adopted in those cases which impose the duty on the claimant is the only one which can be followed. In general, those authorities state that the selection may be made, and the notice concerning it may be given, at any time prior to sale under the process by which it was taken. Of course, the rule would be the same in attachment as after judgment, although in the former the right to exercise the privilege would probably continue until the final entry, and an attempt to sell under the execution. *Thomp. Homest.* § 839; *Freem. Ex'ns*, § 211 et seq. In this case it is fairly deducible from the record that the defendant had other property than the horse which was seized. Since this is true, it follows that the officer had a right to take the property into his custody; and it thereupon devolved on the claimant to assert his rights, and notify the officer that this particular horse was selected by him as a work-horse, and claimed as exempt under the statute. This the appellee did, and his notice was entirely regular, and it became the duty of the officer, on receipt of it, within a reasonable time thereafter to return the property to the custody of the attachment defendant. The importance of this statement will be recognized when it is remembered that the officer holding the first writ (Metcalf) undertook to

discharge this duty, sent the horse back, and tendered it to Holdrege, who refused to receive it. No right of action could have accrued to Holdrege, as against Metcalf, under this state of facts, for if the law cast upon him the duty to exercise the right of selection, and likewise gave to the officer holding the writ the right to seize the property, it necessarily follows that the right of return must accrue to the officer upon the service of the notice of the demand, and that this return, if made or tendered, would relieve him from liability to treble damages under the statute. Thus far the case is plain, and seems to have been accepted, since no action was brought against Metcalf for an illegal seizure.

The case is nearly as plain under the facts which surround Madera's connection with the transaction. When the horse was returned and tendered to Holdrege, and tied to the wagon for the purposes of surrender, Metcalf's rights as an officer, under his writ, were gone, and it was incumbent upon Holdrege to resume possession, and no right of action had then accrued to him for trespass for the taking. At this point, Madera, who held the second writ, was doubtless in error in the assertion of his powers thereunder, and the court was in error in its instruction on this subject. When Madera left the property with the defendant, under Metcalf's instructions, he undertook to compel Holdrege to turn out other property for the satisfaction of the process which he held, and, when this was not done, he asserted a right to retake the exempt animal into his possession. In this he was clearly wrong. There is no known principle of law under which an officer can force a person against whom he holds a process to aid him in discovering property, nor can he use his process as a club for the purposes of extracting the information. If it happens that, at the time he attempts to make his levy, the property which he is about to seize is exempt under the statute, the defendant may insist on his rights, and his neglect, or his refusal even, to point out other property, will not clothe the officer with the power to take that around which the statute has thrown its protecting arm. It may be that this principle is not absolutely universal, and that, if the defendant had two horses, and fraudulently concealed one to prevent the service of the writ on it, claiming the other as exempt, by which proceeding he would obtain the benefit of two horses in place of one, the law would uphold the officer in taking that which was in sight, though claimed to be exempt. This seems to be the ruling in the case of *Yates v. Gransbury*, 9 Colo. 323, 12 Pac. 206. But the present case furnishes no facts to which this rule can be applied. The court consequently erred when it stated the law to be that it was the duty of the defendant to turn over the other animals in satisfaction of the claim, and that he was without the right

to insist upon the exemption until he had performed this duty.

Although this is true, no injury seems to have come to Holdrege by reason of the officer's conduct, nor did any cause of action come to him by reason of it. He refused to take the horse when Metcalf returned it, and although it was probably, in the contemplation of the law, in his possession when it entered the yard, and the officer transcended his rights when he retook it into his possession, the legal status of the parties was settled by their subsequent proceedings. After Madera took the horse away, Holdrege served a written demand on him for its return, claiming his statutory privilege. The case shows that after this demand, though at what precise date cannot be determined, Madera took the horse back to Holdrege's place, and attempted to redeliver it. He went to the yard, found the gate closed, and asked Holdrege to open it, that he might return the animal. Holdrege declined, and absolutely refused to receive it, and confesses on the stand, in the course of his testimony, that Madera would have delivered the horse to him if he would have received it. Under these circumstances it cannot be held that he had a cause of action against the officer for a trespass as for an illegal taking, unless the construction of the statute which the court evidently adopted, and on which counsel insist, is justified by its terms. We do not so conclude. The phraseology of the act undoubtedly is that "if any officer," etc., "shall take or seize," etc., "any of the articles," etc. On the argument it was seriously insisted by counsel that the right of action for treble damages under the act accrues immediately upon the taking or seizure of property, and if it is not returned, under the exemptioner's demand, before suit brought, the status of the parties is thereby settled and concluded. It was contended that they occupied precisely the same situation they would in the case of a seizure of the property of one by another, and a refusal to surrender on demand, which is always proof of conversion in the action of trover. But we think there must be, in a case of this description, something which is equivalent to a conversion of property by the officer to entitle the defendant to the enforcement of this penalty. To "take and seize" must be held to include, in its legal significance, the elements of conversion. No other construction would prevent the most manifest injustice. If the right of action for treble damages accrues immediately upon the seizure of exempt property under process, the defendant could recover from the officer at once three times its value, replevy what had been taken, pay his debt, have money and the goods left, and be likened unto the disciples on the banks of the Sea of Galilee, when they gathered up more than 12 basketfuls of fragments beyond the amount of the original feast. If it be the law that the duty of se-

lection must, under some circumstances, be discharged by the claimant, and may be exercised at any time prior to the sale, this construction is impossible. This right to claim the exempt property draws after it a coequal right to be enjoyed by the officer to return it on demand. If the officer may lawfully seize under his writ, and the defendant may afterwards lawfully assert the exemption, it follows that the right of return must come to the officer after demand made.

The appellants attack the complaint because of the failure of the pleader to insert an allegation that the action was brought to recover the penalty specified in the statute. A good deal of stress was laid on the discussion of this proposition, and counsel seem to consider the pleading so fatally defective as to be subject to the criticism that it did not state facts sufficient to constitute a cause of action. It is not vulnerable to this objection. The pleader aptly and sufficiently stated all the facts constituting his cause of action,—his title, his right under the statute, the levy of process, his demand, the refusal to surrender, and all other facts essential to show his right to the possession of the property, and the recovery of three times its value; and for this he prayed. These allegations were certainly a sufficient statement of a cause of action. Had they been adequately supported by the testimony, this would have enabled the plaintiff to succeed. His failure to prove a refusal to return the horse after demand, should the same result be reached on a subsequent trial, would doubtless defeat his recovery, and the absence of both averment and proof of conversion would then become of first importance, if the court should be called on to pass on the matter of costs.

In the statement of facts preceding the opinion, we have recited a meager history of the mortgage under which a third party took the property from the custody of Madera after Holdrege's refusal to receive it, and under which it was subsequently sold, and applied to the satisfaction of the mortgage debt. Under some circumstances, this proceeding might possibly operate as a defense to the officer when he was sued under the statute for the illegal taking. The matter is not sufficiently developed in the present record to enable us to speak definitely concerning it. It was not pleaded by way of defense, nor was the proof about it sufficiently specific to entitle us to express a definite conclusion concerning the legal results flowing from its enforcement. Counsel have insisted that, if the property were taken under the mortgage, then the officer could not be held liable, since the law would assume, under the circumstances, that the property was in Holdrege's possession when the mortgagee attempted to enforce it. It is insisted otherwise,—that the mortgage really belonged to McAllister, the creditor, who was

using his attachment suit as a means of declaring the mortgage due, that he might enforce it to the prejudice of the debtor. In the silence of the record, and in the absence of a sufficient issue to raise them, we are unable to pass on these questions. Probably the only possible importance of any proof on this matter would be seen in some application which might be made to the court concerning the imposition of the costs in this suit. If, on the subsequent trial, the jury should find that the officer, in good faith, offered to return the property, and Holdrege refused to receive it, then the law would attach to this proof the legal effect of a waiver of exemption rights, and the creditor would have the right to sell the property under subsequent judicial proceedings, or to take it and sell it under his mortgage security. The question would then remain whether this suit was so prematurely brought as to disentitle the plaintiff to recover his costs. The court will doubtless be able, on the subsequent investigation, to so determine these matters as to make a proper and equitable adjustment of the expenses incurred in this litigation. It has been referred to because insisted upon in argument, and, since the case must go back for a further trial, the court has deemed it wise to throw out these suggestions for the guidance of the court on the subsequent hearing. The judgment is erroneous, and because of the errors committed by the trial court it must be reversed, and the case remanded for a new trial, in conformity with this opinion.

WATERS et al. v. PEOPLE.

(Court of Appeals of Colorado. Nov. 27, 1893.)

CRIMINAL LAW—RECOGNIZANCE—SUFFICIENCY.

Gen. St. 1883, § 978, provides that a justice may commit or admit to bail a person brought before him on a criminal charge, and that the recognizance must require such person to appear in court, and at a time therein specified. *Held*, that the recognizance must state the charge on which the accused is held.

Appeal from district court, San Miguel county.

Action by the people of the state of Colorado against J. H. Ernest Waters and George L. Fisher to recover on a recognizance entered into by defendants as sureties for Thomas Moffitt. There was judgment for plaintiff, and defendants appeal. Reversed.

W. H. Gabbert, for appellants. Hogg & Fitzgerald, for the People.

THOMSON, J. This is an action on a criminal recognizance for the appearance of Thomas Moffitt before the district court of San Miguel county on the first day of its October term, 1886. The recognizance, which is set forth in full in the complaint, is in the following words: "State of Colorado, San Miguel county—ss. This day per-

sonally appeared before the undersigned, Albert Holmes, a justice of the peace in and for said county, Thomas Moffitt, J. H. E. Waters, and George Fisher, and jointly and severally acknowledged themselves to owe and be indebted unto the people of the state of Colorado in the sum of fifteen hundred dollars, to be levied of their goods and chattels, lands and tenements, if default be made in the premises and conditions following, to wit: Whereas, the above-bounden Thomas Moffitt, on the 24th day of September, 1886, was examined by and before Albert Holmes, a justice of the peace in and for the county aforesaid, on a charge preferred against him for breaking and removing from the Sheridan mine certain ores, the property of Nicholas, Sewell & Co., and upon defendant waiving examination it was adjudged and required by the said justice to give bonds, as required by the statute in such case made and provided, for his appearance to answer said charges. Now, the condition of this recognizance is such that if the above-bounden Thomas Moffitt shall personally be and appear before the district court of the said county of San Miguel on the first day of the next term to be holden in the courthouse in Telluride, on October 11, A. D. 1886, and from day to day thereafter until discharged by order of said court, then and there to answer to the said people of the state of Colorado on said charge of breaking and removing ore as aforesaid, and abide the order and judgment of said court, and not depart the same without leave, then, and in that case, this recognizance to become void; otherwise to be and remain in full force and virtue. As witness our hands and seals this 24th day of September, A. D. 1886. Thomas Moffitt. [Seal.] J. H. Ernest Waters. [Seal.] George L. Fisher. [Seal.]"

The only question to be determined arises upon demurrer to the complaint. The objection made to the recognizance is that it does not specify any offense upon which a criminal prosecution can be based, and is therefore void. The determination of this question disposes of all the errors assigned. Is it essential to the validity of a criminal recognizance that it should state the charge upon which the party accused is held? The following are our statutory provisions upon that subject: "It shall be lawful for any of the aforementioned judges or justices of the peace, upon oath or affirmation being made before him, that any person or persons have committed any criminal offense in this state, or that a criminal offense has been committed, and that the witness or witnesses have just and reasonable grounds to suspect that such person or persons have committed the same, to issue his warrant under his hand, commanding the officer or person charged with the execution thereof, to arrest the person or persons so charged, and bring him, her or them before the officer issuing such warrant,

or in case of his absence, before any other judge or justice of the peace; the said judge or justice of the peace, before whom any person shall be brought in pursuance of such warrant, or shall be brought without warrant, and charged with any criminal offense, before he shall commit such prisoner to jail, admit to bail or discharge him or her from custody, shall inquire into the truth or probability of the charge exhibited against such prisoner or prisoners, by the oath of all the witnesses attending; and shall, upon consideration of the facts and circumstances then proved, either commit such person or persons so charged, to jail, admit him or them to bail or discharge him or them from custody. * * * All recognizances taken in pursuance of this section shall require the accused to appear at and on the first day of the next district court, or if the court be then sitting, on some day of the term to be therein designated." Gen. St. 1883, § 978. As will be seen, no form of recognizance is prescribed. The only condition required is that the accused appear in court at a time specified; so that we are remitted in the discussion of the question to general principles. In *State v. Randolph*, 22 Mo. 474, the bond was very similar to the one before us; the only difference being that in that case the charge was contained in the condition, instead of the body, of the obligation. By the terms of that recognizance, Robert D. Randolph and Robert Randolph acknowledged themselves to owe to the state of Missouri \$250 each if they should fail in the condition underwritten. The condition was that if Robert D. Randolph should personally appear at the circuit court of Callaway county on the first day of its next term, to answer an indictment to be preferred against him for assault, etc., whereof he was charged, and not depart the same without leave, the recognizance to be void; otherwise to be in force. It was objected there, as here, that the recognizance was invalid, because it did not charge the principal obligor with any offense known to the law. The court, in discussing the question raised, quotes from Serjeant Hawkins, (*Pleas of the Crown*.) as follows: "If persons be bound by a recognizance that J. S. shall appear in the K. B., in such a term, to answer such an information against him, and not depart till he shall be discharged by the court, and afterwards the attorney general enter a nolle prosequi as to that information, and exhibit another, upon which the defendant is convicted, and he refuses to appear in court after personal notice, the recognizance is forfeited; for, being express that the party shall not depart till he be discharged by the court, it cannot be satisfied unless he be forthcoming and ready to answer any other information exhibited against him while he continued undischarged." Reasoning from this, the court reaches the conclusion that a recognizance is good without specifying any

charge, and that, if it attempts to describe a charge, and the one stated does not constitute an offense, the words descriptive of the charge may be disregarded; thus making the instrument a recognizance to answer generally to any indictment against the party, on account of the insertion in it of the words "not to depart," etc. We do not think the citation quoted warranted the court in this conclusion. The language of Hawkins plainly contemplates the insertion in the bond of a particular charge, to which the party must appear and answer; although it is further stated that if a nolle prosequi be entered as to that, the conditions of the obligation are still unsatisfied, unless the party be forthcoming to answer any other information exhibited against him while he remains undischarged. This, in our estimation, impairs the value of the case as an authority. Opposed to the doctrine of *State v. Randolph* is an array of decisions holding that the authority to take a recognizance should plainly appear upon its face by a specification of the charge which is made against the party, and that, without such specification, the recognizance is void. *Com. v. Downey*, 9 Mass. 520; *Com. v. Daggett*, 18 Mass. 447; *Goodwin v. Governor*, 1 Stew. & P. 465; *People v. Sloper*, 1 Idaho, 158; *State v. Forno*, 14 La. Ann. 450; *Nicholson v. State*, 2 Ga. 363. See, also, *Archb. Crim. Pr. & Pl.* (8th Ed.) 180, 180. The sole authority possessed by a justice to hold a party to bail for his appearance in a court of criminal jurisdiction is contained in section 978 of the General Statutes, which we have quoted. That section prescribes certain conditions upon which a recognizance may be required. Among these is a preceding charge of a criminal offense against the person held. Without such charge the justice has no jurisdiction to exact or take a recognizance, and a recognizance so taken is void. A recognizance is an instrument which must be complete within itself; and it must therefore appear upon its face that the justice has authority to require it. As that authority grows out of a criminal charge, it follows that the charge must be recited in the recognizance. It need not be set out with the same technical particularity required in an indictment, but the words used must import a violation of a criminal law. The instrument before us recites a charge of "breaking and removing from the Sheridan mine certain ores, the property of Nicholas, Sewell & Co." Manifestly, this is not a charge of a criminal offense, or one, even, from which a criminal offense can be implied. The ore may have been rightfully broken and removed by Moffitt as employe of the owners, or under claim of ownership in the mine, and while in its possession. Certainly there is no presumption of criminal intent in the acts charged, nor are they indictable. The justice had no authority of law to hold him to bail for his appearance to answer a charge

Like this, and, as the want of authority appears upon the face of the instrument, it is void. The demurrer was overruled, and judgment entered against the obligors, whereas it should have been sustained. The judgment will therefore be reversed.

MOUAT et al. v. WOOD.

(Court of Appeals of Colorado. Nov. 27, 1893.)

TROVER AND CONVERSION—EVIDENCE—MEASURE OF DAMAGES.

1. In an action for the value of goods consigned for sale to defendant commission company, and received and converted by it, an inventory of plaintiff's goods in defendant's hands remaining unsold, furnished plaintiff by defendant's manager shortly before the conversion, is competent to prove the amount of plaintiff's goods defendant had on hand at the date of the inventory.

2. Where plaintiff consigned goods to defendant for sale on commission, and thereafter defendant converted all the goods in its possession, plaintiff is entitled to recover the total value of the goods received from him by defendant, in the absence of proof by the latter that it had disposed of part of the goods under its agency, and accounted to plaintiff for the proceeds.

3. The admission of incompetent evidence is harmless error where there is other evidence sufficient to sustain the verdict.

Appeal from district court, Arapahoe county.

Action by Thomas Wood against John Mouat and another for the value of goods converted by defendants. From a judgment for plaintiff, defendants appeal. Affirmed.

R. H. Gilmore and Doud & Fowler, for appellants. Stuart Bros. & Andrews, C. P. Evans, and E. E. Edmonds, for appellee.

BISSELL, P. This record presents but one question. It is based solely on the alleged error of the court in admitting certain testimony tending to support the plaintiff's recovery. During the year 1890, Thomas Wood was a wholesale dealer in teas, coffees, and spices, doing business under the name of Thomas Wood & Co. in the city of Boston. In the early part of the year W. S. Spencer had been his representative in Colorado, under an arrangement which authorized him to solicit and receive orders for the goods dealt in by Wood & Co., which were filled by that concern when the transaction proved satisfactory. During the time Spencer was acting as Wood's agent he had stored the goods with the J. M. Clark Commission Company. In July, Spencer entered the grocery department of this company, and notified Wood of the change in his business, and recommended that house as his successor for the sale and distribution of the goods handled by Mr. Wood. In the letters from Spencer there was some change suggested in the terms of the agency, but these simply concerned the question of storage, which need not be otherwise referred to. Later in

the negotiations, before the arrangement with the commission company was completed, Spencer wrote several letters to Thomas Wood & Co. on behalf of the commission house. After this transfer of agency the transactions between the two concerns were somewhat numerous; goods were shipped and sold, remittances made, commissions allowed, and the business between the houses was carried on in the usual way. On the 1st of December the commission house wrote a letter to Wood & Co., of Boston, and inclosed an inventory or statement of the goods on hand and unsold at that date. The letter was written on behalf of the company by Mr. Spencer, and was signed at the end by J. M. Clark as manager, apparently to authenticate it. This letter is one of the principal subjects of objection, and it will be referred to again. The company became embarrassed later, and on the 23d or the 24th day of January sold in a lump all the goods which they had in their place to John Martin for the sum of \$8,000. The price was not paid in cash, but Martin gave his notes for the consideration. These notes were turned over to the North Denver Bank, and when they were collected the proceeds were applied pro tanto to the satisfaction of an indebtedness of about \$25,000, which the commission company owed the bank. No reference will be made to the connection of the appellants, Mouat and Goss, with the transaction, further than to say that they were directors of the company, and made the sale to Martin; and it is conceded by counsel that their connection with the transaction was such that they were liable to Wood & Co. for the value of so much of the goods as could be traced to this sale, and be shown to have been transferred to Martin. On the 27th of January the concern made an assignment to Mr. Martin, and he went into possession of the remnant, which only consisted of counters and cases and the other paraphernalia of a commission house. It was in evidence that some direction had been received by the commission company from Wood to reship his goods, so far as they were unsold, via Galveston to Boston. After the receipt of this order the company boxed and crated all or a portion of them, and marked them with the address of Thomas Wood & Co., Boston, via the Morgan Line steamers, Galveston. This is stated simply for the purpose of showing that it came to the knowledge of the defendants, as well as to the knowledge of the purchaser, that the goods were not the property of the commission company, but that title was in the original vendor, Wood & Co., of Boston. The transactions between Wood & Co. and the Clark Commission Company from the 1st of December to the time of their assignment were shown by Wood himself, who was on the stand, and the debits and credits of the account reduced the claim so that if the recovery were based on the amount and value

expressed in the inventory the judgment would be about \$2,900; and this was the verdict of the jury. In support of his contention that the inventory was correct, Wood produced on the trial, and offered in evidence, transcripts of his books. These transcripts were enormously large exhibits, and covered a multitude of transactions. The items of the sales were very small, the packages numerous, and the entries consequently very extensive. The appellants objected to this proof, and now insist that the books themselves were the only legitimate testimony which could be offered in support of the inventory.

This somewhat lengthy statement serves to emphasize the only question on which counsel insist. It is conceded that, to the extent of some sixteen hundred and odd dollars, the verdict is just, and the plaintiffs entitled to recover. It is their contention, however, that as to the balance of the judgment it ought to be reversed, because there is not sufficient competent testimony to support it. The appellants further insist that, even though there was competent testimony offered, which might possibly support the finding, the error which the court committed in permitting the introduction of Exhibits L and M ought to reverse the case, since it cannot be determined on what basis the jury rendered their verdict. We cannot agree with counsel in any of their positions. We are clearly of the opinion that the inventory of December 1, 1890, was sufficiently authenticated to make it competent testimony against the defendants, and that their objection to its introduction was neither aptly expressed nor properly taken to support their position. It is very clear that the evidence demonstrated that J. M. Clark was the manager of the commission company. It was likewise well established that Wood & Co.'s antecedent agent, Spencer, had entered the employ of the commission house, and on its behalf transacted business with the wholesale dealer in Boston. The letters and communications between Wood & Co. and the J. M. Clark Commission Company were sufficiently proven and identified to entitle them to be offered, and the general objection that these letters were immaterial and irrelevant was not enough to exclude them from the consideration of the jury. When the letter was offered which contained the inventory of December 1st, purporting to be signed by the J. M. Clark Commission Company, through its agent, Spencer, and verified by the signature of J. M. Clark, the manager of the company, it was sufficiently identified, under the testimony, to entitle it to be offered in evidence when the only objection to its introduction was based upon its immateriality and irrelevancy. It is difficult to conceive of any better proof of the quantity of goods in the possession of a house than the inventory furnished by its manager to the vendor of the property. It is

insisted on this appeal that there was no proof that J. M. Clark was the manager of the company, or that the signature is Clark's. We deem it well established by the evidence that Clark was the direct head and business manager of the commission company, and possessed of full authority to manage its concerns to such an extent that any transaction entered into between him and a third party would bind that corporation. Since this is established, it follows that the inventory was competent evidence, unless it was essential to prove Clark's signature to the paper produced. If the genuineness of the autograph were questioned, the contention might be well based. No such objection was offered, and it was simply contended that the inventory was immaterial, and incompetent for the purpose for which it was offered, to wit, to show what goods the commission company had received from Wood, and had on hand at the date specified. We conceive it to be entirely competent and exceedingly satisfactory proof, and that the objection now insisted upon is entirely unavailable. As we have already stated, the plaintiffs attempted to support this proof by the production of the Exhibits L and M, which were transcripts of Wood's books, showing the shipment of the goods. It is insisted by the appellants that these exhibits were not admissible, and that the books themselves were the only evidence which the plaintiff had a right to offer in support of his complaint. It may be conceded that this is a debatable question, and one perhaps not satisfactorily settled by the authorities. This arises principally from the fact that the record does not disclose whether this case was brought within the rule laid down in 1 Greenleaf on Evidence, (section 93,) which permits the compilations to be offered where they are the result of voluminous facts, or the inspection of many books and papers, which could not be conveniently examined in court. In a case like the present, where a foreign vendor brings his action to recover from a commission company the value of goods which they have received and admit to have converted, the rule concerning the production of books ought to be so far relaxed as to permit fairly verified compilations wherever the accounts and the books are numerous, and the expense and inconvenience attending their production so great as to furnish very cogent reasons for the application of the rule. We do not decide that precise question here, since we find in the record sufficient testimony to support the verdict regardless of this proof. It is impossible to see that the introduction of these exhibits, if they could not be legitimately received under the rule, operated to the prejudice of the appellants to the extent which authorizes them to insist on a reversal of the judgment. Without them, there is enough in the record to warrant the verdict, and it cannot be disturbed on this account. It

transpired during the trial that these goods which the commission company held for disposition were included in the sale to Martin, and that the commission company and the vendee, Martin, as well as these appellants, well knew that the goods were held by the company for sale on commission, and that the company had no title to them otherwise. It was likewise shown that the purchase price was devoted to the liquidation of the debts of the company, and it is consequently very properly conceded by counsel that Wood & Co. were entitled to recover from the appellants the value of the goods which they thus transferred. The proofs furnished by the inventory, and the history of the subsequent transactions as testified to by Mr. Wood, established the liability to be substantially as found by the jury. The defendants, however, offered evidence which tended to show that some of the cans and packages which were turned over by the company to Martin had been broken, and some of the contents disposed of, prior to their transfer. The appellants now insist that it is incumbent on the plaintiff to show just how much went into the hands of Martin by reason of this sale, and that without such proof his right to recover cannot be measured by the inventory as modified by the proof of the subsequent transactions between the parties. We do not so think. When it is conceded, as it must be, that the goods mentioned in the inventory were shipped to the commission house, and that those goods, in so far as the evidence was obtainable by the vendor, were sold by the company to Martin, the measure of the recovery must undoubtedly be the value of these goods, subject, of course, to any reduction which the defendants may establish. The burden of showing the diminution in value was with the defendants. The case seems to come very fairly within the principle laid down in the well-considered opinion of Mr. Commissioner Macdon in the case of *Little Pittsburg Con. Min. Co. v. Little Chief Con. Min. Co.*, 11 Colo. 223, 17 Pac. 760. This case clearly holds that where the proof is within the knowledge and control of the wrongdoer, the burden is on him to reduce the recovery by showing the extent of his own wrong. One of the appellants (Goss) testified that he was president of the company, and knew that a large portion of these goods which were sold by the company to Martin were held by the J. M. Clark Commission Company, to be sold on commission; and that that concern had no title to that property. He testifies that he was advised that the goods of Wood & Co., of Boston, were included in the sale, and he knew that those goods which had been packed for transshipment to Boston were delivered to Martin, and that the company, of which he was the president, got the proceeds of the sale. Under these circumstances, it is no breach of any well-settled rule of evidence or of law which permits the

vendor to recover the full value of all the goods which he could trace into the hands of the commission house, and to recover upon the basis that the packages were unbroken and full, unless that house by satisfactory and competent proof showed that they had disposed of a portion of the goods under their agency, and had either remitted the proceeds thereof, or had sent to the vendor the accounts against the people who purchased from them. It was the duty of the commission house to keep strict account of all the goods, and it should have been entirely within their power to make complete and satisfactory proof as to every package and every pound which passed out of their possession. Falling in this, that company is properly chargeable with the full value of what they got. The appellants who participated in the sale to Martin, being the president and directors of the company, have no greater rights in the premises than what inured to the house itself. We discover no errors in the record which require that the case should be reversed, and it will accordingly be affirmed.

TAYLOR v. DERRY.

(Court of Appeals of Colorado. Nov. 27, 1893.)
BILL OF EXCEPTIONS—TIME OF FILING—EXTENSION WITHOUT NOTICE.

Under Civil Code, § 372, requiring written notice of all motions except those made during trial, if a motion to extend defendant's time for filing bill of exceptions be granted ex parte without notice, the bill filed within such extended time will not be considered in the appellate court, though no motion to vacate the order has been made below.

Appeal from Arapahoe county court.

Action by William Derry against Charles E. Taylor and wife. From a judgment for plaintiff, Charles E. Taylor appeals. Affirmed.

Coe & Carpenter, for appellant. William R. Barbour and William M. Maguire, for appellee.

THOMSON, J. On the 18th day of May, 1892, William Derry, plaintiff below, recovered judgment against the defendant, Charles E. Taylor, for \$105. On the same day defendant prayed an appeal to this court, which was allowed, and 60 days given him within which to prepare and tender his bill of exceptions. On the 8th day of July, 1892, upon defendant's motion, the court made an order extending this time 30 additional days. It appears from the record that no notice of the motion was given to the plaintiff or his attorney, and that the order was made ex parte. Section 372 of the Civil Code provides that written notice of motions shall be required in all cases except those made during the progress of a trial. The sections following fix the time of notice before the hearing, and prescribe the manner

of its service. These Code requirements are jurisdictional. Except upon proper notice, the court was without power to make the order; and, having been made *ex parte*, it is void. *Mallan v. Higenbotham*, 10 Colo. 264, 15 Pac. 352; *Nevitt v. Crow*, 1 Colo. App. 453, 29 Pac. 749. The bill of exceptions was not tendered until the 8th day of August, 1892, long after the expiration of the time originally allowed for that purpose. The order, being void, did not operate to extend the time; and the bill of exceptions is therefore improperly in the record. A motion in the court below to vacate the order was unnecessary. A jurisdictional question may be raised for the first time in the appellate court. The case was commenced before a justice of the peace. There are no written pleadings to apprise us of the nature of the plaintiff's demand. The bill of exceptions cannot be considered; and as, therefore, none of the evidence in the case is before us, we are bound by the presumption that the judgment is correct, and it is accordingly affirmed.

DOUGAN v. ABBOTT et al.

(Supreme Court of Washington. Dec. 13, 1893.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

In an action on a note, defendant's evidence that plaintiff had agreed to take land in payment is not so conclusively corroborated by the fact that defendant undertook to carry out the alleged agreement by executing and tendering deeds as to warrant the supreme court to set aside a verdict finding in favor of plaintiff, on his testimony that the transaction had been talked about, but that he refused his assent after inspecting the land.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by James M. Dougan against T. O. Abbott and Frances C. Abbott on two promissory notes. From a judgment in plaintiff's favor, defendants appeal. Affirmed.

Stevens, Seymour & Sharpstein, for appellants. Town & Dillon, for respondent.

SCOTT, J. This action was brought by respondent to recover judgment on two promissory notes, and to subject certain stock, pledged as collateral, to the payment of the judgment. Appellants admitted execution and delivery of the notes, and pledging the stock to secure their payment, but set up, by way of new matter, an agreement whereby they were to procure the conveyance of certain real estate to respondent, upon the execution of which conveyance respondent was to surrender the notes and collateral. The cause was tried by the court, and judgment was rendered in favor of respondent. The only question which arises upon the appeal is one of fact. There is a direct conflict between appellant T. O. Ab-

bott and respondent in their testimony as to whether such agreement was made. The testimony of said Abbott is to the effect that the respondent and himself had been discussing the question of the payment of the notes, and that respondent broached the proposition of taking lots owned by appellants in satisfaction thereof. That the lots referred to by respondent were lots 1, 2, 3, 4, and 5, in block 35, in what is known as "Monticello Park." That he (Abbott) stated that these lots were incumbered by a mortgage, but that he could procure five other lots immediately adjoining, which were then owned by one Clement; and inasmuch as said lots did not, at the price agreed upon, quite cover the amount due on the notes, he agreed to deed a lot in another addition, (Bay View,) to make up for the deficiency,—to all of which he claims the respondent assented. And that appellants then obtained a deed from Clement, and tendered it, and one of the lot in Bay View, to respondent, who refused to accept the same, asserting that he had not agreed to take them; that the only lots he ever talked about taking were lots 1, 2, 3, 4, and 5, aforesaid, and that he did not agree to take those lots even until after he had had an opportunity of seeing them; that, having seen them, they were not where appellants had represented them to be, and for that reason he refused to make the agreement. It is contended that the court should have found for appellants, because the testimony of said Abbott was supported by that of another witness, and because of the fact that appellants undertook to carry out said alleged agreement, which they would not have done unless the agreement was actually made. The testimony of the other witness referred to was not very material, and we do not deem it important to give more than a brief synopsis of the evidence introduced. The appellants, no doubt, believed that the agreement set up had been entered into, but the testimony of the respondent was to the effect that, while some such transaction had been contemplated and talked of, it had never been agreed upon. Regardless of how we might have found had it been our duty to pass upon the testimony in the first instance, appellants' showing is not of that strength which we feel would warrant us in overturning the finding of the court below, and consequently the judgment is affirmed.

HOYT and STILES, JJ., concur.

HARPER v. SINCLAIR.

(Supreme Court of Washington. Dec. 13, 1893.)

AGENCY—UNDISCLOSED PRINCIPAL—EVIDENCE OF RELATION.

In an action to charge defendant, as an undisclosed principal, with the price of mill machinery sold to H. individually, a nonsuit should have been granted when it appeared

that defendant leased the mill property, for which the machinery was bought, to H., and contracted to convey to him an undivided interest on payment of a proportionate share of the cost; that H. took possession, conducted a milling business, and purchased this machinery, and that the sellers sought to charge the property with liens therefor which showed a sale to H.; that defendant denied liability for the machinery, and refused to O. K. bills, or to agree in writing to pay the same, but that he told plaintiff that "when they should get rid of H., and get straightened out, that they would pay all the bills, and should not want the mill incumbered by them;" and H. testified that defendant refused to be liable for the machinery, but said he would buy in the claims at a reduced price.

Appeal from superior court, King county; Richard Osborn, Judge.

Action by William P. Harper against Joseph F. Sinclair. From a judgment for plaintiff, defendant appeals. Reversed.

Turner & McCutcheon, for appellant. O. E. Bowman and Stratton, Lewis & Gilman, for respondent.

SCOTT, J. This action was brought by respondent to recover the purchase price of certain mill machinery. The appellant obtained possession of a sawmill, logging boom, etc., formerly belonging to the Salmon Bay Lumber Company, by redeeming the same from a judicial sale, and on the 13th of April, 1892, he leased the same to one Hight, at the stated annual rent of \$2,000, by virtue whereof Hight was to take good care of the property, and was not to suffer the same to be attached or levied on to satisfy any judgment which might be recovered against him by any person other than the lessor, his heirs or assigns. A further agreement was entered into between said parties upon said day, wherein it was stated that appellant had obtained said property, by virtue of such redemption, at a cost to him of \$2,500, and had expended about \$500 additional thereon, and recited the fact that he had that day leased said property to said Hight for a term of one year, at a yearly rental of \$2,000; and, further, that it was understood that said Hight had contributed nothing to said redemption, but that he had become personally indebted for some part of the expenses incurred in the erection of a dry house; and that said redemption was made, and said dry house erected, under an agreement between said parties that, in the event Sinclair should become the owner thereof, (in case the property should not be redeemed from him,) he would sell and convey an undivided one-half of said property to Hight, upon payment to him by Hight of one-half of all expenditures made, or to be made, by him, to acquire title thereto, with interest thereon at 10 per cent.; and that the amount of rent stipulated in said lease was not \$2,000 per annum, but was \$1,000 per annum; and that all payments made by Hight on account of rent, in excess of the sum of \$1,000, should be received by

Sinclair as Hight's contribution towards the payment of the sums advanced, or which might be advanced, by Sinclair in and about the acquisition of the title to said property; and that Hight should become entitled to a conveyance, as above specified, when he should have fully paid his one-half of all such sums so advanced and paid, or to be advanced and paid, by Sinclair. After the execution of these agreements, Hight took possession of the property, and conducted a milling business. The merchandise aforesaid was sold and delivered by Robert G. Westerman, and Westerman & Yeaton, and J. Hutton & Son to said Hight. It was not known then, by any of these parties, that appellant was the owner of the property, or had any interest therein, and it appears that the goods were sold by them to Hight individually; and they subsequently assigned their claims to the respondent, who had previously held them for collection, and who, upon learning of Sinclair's connection with the property, sought to charge him as an undisclosed principal, claiming that Hight had made said purchases as his agent. A jury trial was had, and verdict and judgment rendered in favor of the plaintiff, whereupon defendant appealed.

A number of points are raised, only one of which it will be necessary to notice. At the conclusion of the plaintiff's case, the defendant moved for a nonsuit on the ground that the evidence was insufficient to support a recovery, which motion was denied. After an examination of the evidence, we are of the opinion that the motion should have been granted. There is nothing to show that appellant was in any wise interested in the management of the mill, or in the milling business which Hight was conducting while in possession under the lease. The parties selling the merchandise aforesaid had sought to charge the property with liens therefor, which liens showed that the sales had been made to Hight. It is contended that appellant subsequently assumed the liability for Hight's indebtedness, and agreed to pay the claims in question; but the evidence fails to support this contention. This claim is based upon certain conversations had with appellant, wherein he was requested to pay the bills. In none of these did he admit an individual liability, although it appears that he said, upon a number of occasions, that the bills would be paid. The plaintiff testified that Sinclair told him that "when they should get rid of Hight, and get straightened out, that they would pay all the bills, and that they should not want the mill incumbered by them, and did not want me to be dunning them for them." There is no testimony in the record stronger than this upon which the contention aforesaid could be based. It appears that the machinery which was purchased was necessary for the operation of the mill, but this, of itself, would not tend to estab-

Has any liability as against Sinclair. It is not claimed that this so-called "promise" of appellant was made upon any consideration, so as to be binding of itself, but it is claimed that it is evidence of an original liability; and under some circumstances, or if unexplained, a promise to pay might be evidence of a previous or existing liability, but, under the uncontradicted evidence introduced previous to the making of the motion for a nonsuit, it appears that Sinclair, with others, had contemplated making some sort of an agreement with Hight, whereby they would take certain property of him; and Hight claimed that a part of the consideration therefor was that they were to protect him against these claims,—not that they agreed to pay them. In fact, he says that Sinclair expressly refused to become liable for them, so the creditors could enforce payment against him, but told him that they would buy them in, claiming that Hight had been charged too much for such machinery, and that the claims could be bought at greatly reduced prices.

It also appears from the plaintiff's testimony that Sinclair denied being liable on said claims in any way, and that he expressly refused to O. K. the bills, or to enter into any agreement in writing to pay the same, although the plaintiff contends that Sinclair in fact orally admitted his liability therefor, and agreed to pay the same; but, in stating what was said, he related what is above set forth. In this it will be noticed that appellant did not make any individual promise to pay, but simply said that when they got rid of Hight, and got matters straightened up, they would pay all the bills; and, in the light of what was subsequently shown as to how this statement came to be made, it amounted to nothing more than a mere scintilla of evidence of an original or existing liability, and one which would be insufficient to support a verdict. It appeared that appellant had said to Hight that, if he was unable to purchase the necessary machinery, he might help him to procure the same by indorsing or otherwise; but there is an entire absence of testimony in the record to show any liability of appellant upon the claims in question, and, for that reason, the motion for a nonsuit should have been granted. Reversed and remanded, with direction to enter judgment of nonsuit.

HOYT and STILES, JJ., concur.

PARK v. MIGHELL et al.

(Supreme Court of Washington. Nov. 22, 1893.)

REFERENCE—RE-REFERENCE TO FIND FACTS— WAIVER OF JURY.

1. Where judgment on a referee's report has been reversed for failure of such report

to state the items allowed and disallowed, it is proper to re-refer the case to the same referee, to find the facts on the evidence formerly taken before him, none other being offered on either side.

2. Trial by jury having been once waived, and a reference agreed on, a party cannot demand a jury trial when the judgment on the report has been reversed for failure of the report to state the account, and the case re-referred for that purpose.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by R. J. Park against W. E. Mighell and D. Richards for commissions. Judgment for plaintiff on report of referee. Defendants appeal. Affirmed.

For former report, see 29 Pac. 556.

H. W. Lueders, for appellants. J. P. Cass, for sureties. Carroll & Carroll and Hagerman & Votaw, for respondent.

SCOTT, J. This case was here once before, (3 Wash. 737, 29 Pac. 556,) when it appeared that the facts had not been found by the referee. A judgment had been rendered for the sum of \$300 in favor of the plaintiff, but there was no finding upon many of the issues made by the pleadings, and apparently, so far as the record disclosed, there never had been a complete trial. Upon that ground the case was reversed, and sent back for a retrial, with directions to make findings upon these matters. The order contemplated that it should go back to the same referee, and be heard upon the testimony already taken. When the case came up again before the referee, the defendants objected to his proceeding therewith, on the ground that he was disqualified by reason of the former trial, and because they desired a trial by jury. These objections were overruled. The defendants had originally waived a trial by jury, and this waiver held good; and, under the peculiar circumstances of the case, the referee was not disqualified by reason of his prior proceedings in the premises. No other testimony was offered by either side, and the referee proceeded to make his findings of fact upon the testimony previously taken, whereby he found that the defendants were indebted to the plaintiff in the sum of \$271, and judgment was rendered for this amount.

It is contended that there was error in several orders made by the court relating to security for costs, and to the granting of continuances of the trial. As to these, it is sufficient to say that no good ground appears for a reversal of the judgment in consequence thereof. Many of the other errors alleged challenge the correctness of the findings of fact. These findings, however, appear to be complete upon the issues, and there is testimony to support them. The findings support the judgment, and no sufficient ground is shown for disturbing the same. There are many other matters discussed which have no foundation in the record that we are

able to discover, and for that reason we deem it unnecessary to set them forth. Judgment affirmed.

DUNBAR, C. J., and HOYT, STILES, and ANDERS, JJ., concur.

SOUTH BEND LAND CO. v. DENIO.

(Supreme Court of Washington. Nov. 22, 1893.)

GUARDIANS—CONDUCT OF SUITS FOR WARDS.

In an action against an administrator to compel conveyance of certain lands standing in deceased's name to plaintiff as the equitable owner, the guardian of deceased children, being refused leave to intervene, appealed, and later, without consulting his attorney, stipulated to dismiss the appeal. *Held*, that the court must respect his stipulation, and dismiss the appeal, though such course be opposed to the interests of the minor heirs.

Appeal from superior court, Pacific county; W. W. Langhorne, Judge.

Action by the South Bend Land Company against A. L. Denio, as administrator c. t. a. of the estate of Philander W. Swett, deceased. Harry H. Hunter, guardian of the minor heirs of said Swett, being refused leave to intervene, appeals. Respondents move to dismiss the appeal on appellant's stipulation. Appellant's counsel contests the motion on the ground that appellant signed the stipulation without consulting him, to the detriment of the interests of the minor heirs. Dismissed.

Edward F. Hunter, for appellant. Richard K. Boney, for respondent.

STILES, J. A suit was brought in the court below against the administrator with the will annexed of Philander W. Swett, the complaint showing that certain lands, the record title to which was in the name of the deceased, had been purchased with money of the South Bend Land Company, and should, therefore, be conveyed by the administrator to it. The appellant, guardian of the minor children of the deceased, sought to intervene in the action by showing the interest of his wards in the result, and that the administrator was a stockholder of the plaintiff company, and upon some other grounds. The petition for leave to intervene was denied, and the guardian appealed. The respondents, after the appellant's brief was on file in this court, procured from the appellant himself a stipulation to dismiss the appeal, which has also been filed, and upon which it is now asked that the appeal be dismissed. The attorney of the appellant alone objects to this disposition of the case, but furnishes no sufficient ground, in our judgment, for refusing the action demanded. The guardian of the minor who wages an action in a court has the same right to control the action that any other suitor has. If the course

which he takes is inimical to the interests of his wards, or tainted with fraud, the way is always open for his removal, and the substitution of some more suitable person. Upon the stipulation filed we can do nothing but allow the appeal to be dismissed, and it is so ordered.

DUNBAR, C. J., and HOYT, SCOTT, and ANDERS, JJ., concur.

McCAIN v. GIBBONS.

(Supreme Court of Washington. Nov. 24, 1893.)

LIMITATION OF ACTIONS—RUNNING OF THE STATUTE—RESIDENCE OF MARRIED WOMAN.

Code Proc. § 133, provides that "when the cause of action has arisen in another state, between nonresidents of this state, and by the laws of the state where the action arose an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained in this state." *Held*, that after the lapse of three years, a married woman, who had remained in Dakota after her husband had left to take up his residence in Washington, cannot maintain an action in Washington for the wrongful taking of her personal property in Dakota after the departure of her husband, as her residence in Dakota at the time of the taking, in matters relative to her separate property rights, was not affected by the change in the husband's residence, and as the Dakota statute limits the time of bringing such actions to three years.

Appeal from superior court, Pierce county; F. Campbell, Judge.

Action by Alice S. McCain against Florence E. Gibbons for the wrongful taking of certain personal property. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

Stevens, Seymour & Sharpstein, for appellant. W. W. Likens, for respondent.

STILES, J. This was an action for the wrongful taking and detention of personal property, which is by the law of this state barred in three years, (Code Proc. § 115, subd. 2;) and the acts complained of occurred December 10, 1888. The action was commenced March 21, 1892, and a demurrer to the complaint was sustained. Of this ruling the appellant complains, because the transaction took place in the territory of Dakota, when respondent was a resident of that territory, and appellant was a resident of Washington. It is said that the Dakota statute of limitations on this subject is the same as our own, and both parties assume this, and no point is made that the plea of the statute of limitations of a foreign state should be taken by answer and not by demurrer. The question is therefore before us whether Code Proc. § 133, ought to apply to this case. That section reads as follows: "When the cause of action has arisen in another state, territory or country, between

non-residents of this state, and by the laws of the state, territory or country where the action arose, an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained in this state." New the facts, as shown by the complaint, are that appellant was a married woman, whose husband had become a resident of Washington; but she had remained in Dakota, only temporarily sojourning there for the purpose of closing up certain of her business affairs. The property taken was the separate property of appellant, and was in no wise liable for the debts of the husband, and could not lawfully be taken in execution against him; but it was so taken by respondent. It consisted in part of the furniture of a house formerly occupied and then temporarily occupied by appellant, as aforesaid. We think it may be fairly inferred that appellant and her husband had been residents of Dakota, and that the husband had removed to this state, leaving his wife to settle up her affairs, and then follow him here. Respondent was a resident of Dakota, and had never been in this state, but jurisdiction was sought to be obtained by the attachment of property of hers which was found here. But for the statute above quoted, the action could be maintained here; and it seems to us the vital question is whether a married woman's residence follows that of her husband, so that, as to her separate property, she is not bound by the statutes of limitations of the place where both she and the property are at the time it is taken from her possession. Formerly it is altogether likely that the question of residence or domicile might have cut a considerable figure in such a case as this, because a married woman had no legal existence apart from her husband, except in some very limited particulars. But since the rise of the modern statutes on the subject of married women and their property there is very little left of the marriage relation, which was the thing formerly so jealously guarded by courts, but certain personal duties of the spouses to each other. In Dakota, and in this state, so far as their separate property rights are concerned, husband and wife are the same as if they were unmarried, and there seems to be no good reason, or, indeed, any reason at all, why the wife, who remains in Dakota, and has her actual residence there after her husband has gone to another state, should not continue to be liable to all the laws of Dakota, just as though she were single, in all matters affecting her separate property rights. Section 2600 of the Compiled Laws of Dakota (1887) puts the independence of married women into even stronger language than our own statutes. We therefore hold that the demurrer was properly sustained, and affirm the judgment.

DUNBAR, C. J., and HOYT, ANDERS, and SCOTT, JJ., concur.

v.35p.no.1—5

ALLEN et al. v. WALL.¹

(Supreme Court of Washington. Nov. 24, 1893.)

RES JUDICATA—BREACH OF CONTRACT—RESCISSION—DAMAGES—PAYMENT IN WORK.

1. The adjudication that a contract was rescinded, cannot be inferred from a judgment which recites that the jury found a verdict for plaintiff, and assessed his damages at \$240, and which directs that plaintiff recover of defendant \$240, and taxed costs.

2. Where a complaint alleges breach of contract, and claims damages, an allegation that "defendant did fraudulently establish a newspaper contrary to" the terms of the agreement is a mere allegation that he did so in willful violation of the contract.

3. A complaint alleged breach of contract, claimed damages, and prayed that defendant be restrained from disposing of notes given by plaintiff under the contract, and that the notes be delivered up and canceled, to prevent defendant, whose insolvency was alleged, from disposing of them before plaintiff recovered judgment. *Held*, that such prayer did not show a desire of plaintiff to have the notes brought in for a rescission of the contract, but for their application on the judgment for damages which he hoped to recover, and that such judgment, when obtained, was no bar to an action on the notes.

4. Plaintiff did not ask any rescission of the contract in suit, abandoned his prayer that defendant be restrained from disposing of notes given under the contract, did not make or plead a tender, and remained in possession of the benefits of the contract. *Held*, that he elected to recover damages for breach of contract, rather than to rescind the contract, and that his judgment for damages could not be pleaded as *res judicata* in an action against him on the notes.

5. Where the purchaser of a printing establishment contracts to pay a certain amount in printing, the seller cannot enforce the collection of such amount in cash, as a profit presumably attaches to the printing.

Appeal from superior court, Chehalis county; Mason Irwin, Judge.

Action by D. Allen and M. J. Cochran against Francis R. Wall to foreclose a chattel mortgage. From an order granting plaintiff's motion to strike out part of the answer, defendant appeals. Affirmed.

J. C. Cross and F. R. Wall, for appellant. M. J. Cochran and S. J. White, for respondents.

DUNBAR, C. J. The controlling question in this case is: Did the court err in sustaining the respondents' motion to strike a portion of appellant's answer; or, in other words, does the matter stricken out present facts sufficient to constitute an estoppel, if proven?

We will not stop to discuss the question whether the objection should have been made by motion or demurrer. The court probably treated it as a demurrer to the answer. We do not doubt the soundness of the principles of law contended for by appellant, that "the judgment of a court of competent jurisdiction upon a question directly involved

¹ Rehearing pending.

in the suit is conclusive in a second suit between the same parties or their privies." This rule is beyond controversy, and is the universally accepted law governing *res adjudicata*. And so with the other rule, that "however numerous the questions involved in a suit, if they were tried and decided, the renewal of litigation for any one of the same causes violates the doctrine of *res adjudicata* as much as if the first suit presented but one issue." And so with substantially all the legal propositions contended for by appellant. But, conceding the soundness of appellant's propositions, and accepting the authorities cited, we are unable to see their application to this case.

First, let us see what was actually adjudicated in the case of *Wall v. Finch*, which judgment is pleaded as *res adjudicata* in this case. Omitting the formal parts of the judgment, it recites as follows: "And afterwards, to wit, on the 17th day of February, 1893, the jury returned into court its verdict, finding for the plaintiff, and assessing his damages at \$240." And the judgment, continuing, says: "Now, therefore, by virtue of the premises aforesaid and the verdict of the jury, it is ordered and adjudged that the plaintiff, F. R. Wall, do have judgment against the said defendant, Edward C. Finch, and that he do have and recover of and from the said Finch the sum of \$240, and costs of suit, taxed at \$128.35, and that he may have execution therefor." Certainly, then, all that was really adjudicated was a plain matter of damages, and it cannot be inferred from the judgment that there was any question of a rescission of contract in the case.

But conceding, for the sake of argument, the correctness of the further proposition urged by appellant, that "the estoppel extends to all matters which could rightfully have been decided under the pleadings," we are still of the opinion that the complaint in the case of *Wall v. Finch* shows that the action was simply an action for damages for the violation of a contract, and in no sense an action for a rescission of the contract. Paragraph 4 of the complaint, which contains the main allegation of grievance, is as follows: "That on account of said defendant so establishing and founding, and being instrumental and assisting in establishing and founding, the said *The Aberdeen Weekly Bulletin* and the said job-printing office, the said plaintiff has been greatly injured and damaged, and deprived of proceeds of the said *Aberdeen Herald* and the said job-printing office, which would otherwise have come to him. That, on account of such conduct on the part of the said defendant failing to keep his said contract as aforesaid, the actual and cash value of the said plaintiff's newspaper and job-printing office and business has decreased, and is not now what it would have been in cash value had not defendant broken his said contract

as aforesaid; and, on account of such breach of defendant as aforesaid, the plaintiff has been damaged and injured in the management and sale of his said newspaper, and deprived of the sale of very many of his said newspapers, and of the profits which would have arisen therefrom, and which would otherwise have come to him; and, on account of such breach on the part of the said defendant, the said plaintiff has been deprived of a great amount of advertisements and notices, and the profits arising therefrom, which would have come to him and his said newspaper had not the said defendant broken his said contract as aforesaid; and the plaintiff has been greatly injured and damaged on account of said breach of contract, as aforesaid, by the said defendant, by being deprived of a great amount of work, printing, and job work, and the profits that would have arisen therefrom, which would have otherwise come to the plaintiff's said job-printing office. And the plaintiff alleges that, on account of the said breach as hereinbefore set out, he, said plaintiff, has been deprived of a large amount of money which would otherwise have come to him, arising from the sources hereinbefore mentioned; and defendant, by his said breach, has damaged plaintiff in the manner aforesaid, in the sum of three thousand dollars."

It is true that the complaint alleges that the defendant, Finch, did fraudulently, etc., establish a newspaper, contrary to the terms of the agreement; yet we think that this statement, when taken in connection with the whole complaint, was really nothing more than an allegation that he did so in willful violation of his contract.

It is true, also, that the plaintiff prays that the defendant, Finch, be restrained from disposing of the notes, and that the said notes be delivered up and canceled; but paragraphs 7 and 8, which are as follows: (7) "That the plaintiff has good reason to believe that the defendant will endeavor to transfer said notes and mortgage before said plaintiff can obtain judgment against the said defendant; and that, should said notes and mortgage be assigned, this plaintiff would be wholly without remedy, either at law or in equity, for the damage he has suffered; and that he is at present without adequate remedy at law." (8) "That the plaintiff is not sufficiently acquainted with the financial standing of the defendant to know whether a judgment against said defendant could be collected or not; but his belief is that such a judgment could not be collected, and he therefore alleges that said defendant is insolvent, and that, if said notes are permitted to be assigned, a judgment cannot be collected against the said defendant,"—explain the reason for this demand, and show that the pleader did not desire or ask to have the notes brought in for the purpose of rescinding the contract, but for the sole pur-

pose of being applied on the judgment for damages which he hoped to obtain.

The injunctive relief was abandoned at the trial, presumably because it had no place in such an action. The plaintiff had not asked for any rescission of the contract. No tender had been made or pleaded. He was still confessedly in the possession of the fruits of the contract. A contract cannot be rescinded on one side, and left in force on the other. The most venerable maxim of the law is that "he who asks equity must do equity." If the contract had been fraudulently violated, the plaintiff had two remedies, either of which he could have invoked. He could have sued in a court of equity for a rescission of the contract, and asked to be placed in the same position in which he was before the contract was executed; or he could still have carried on business under the contract, and asked for damages in a court of law for its violation. He elected the latter remedy, and he must be bound by it. If he was not satisfied with the judgment in that case, he should have appealed. This he did not do, and the rights of the parties have been determined in that case. This determination was acknowledged and respected by the court in this case by offsetting the judgment in this case to the extent of the judgment in that. If the present action had never been brought, all that Wall could have obtained from Finch was the amount of his judgment, to wit, \$240. Under what theory he expects to get that judgment increased by reason of the institution of this suit we are unable to understand.

We do not agree with the contention of the respondents in regard to the amount which, under the contract, was to be paid for in printing. The appellant might not have been willing to have contracted to have paid that amount in money, and it may have been one of the considerations for the purchase that the amount could be paid for in work, to which a profit presumably attaches. To enforce the collection of this amount in cash would be equivalent, or at least might be equivalent, to compelling the appellant to pay more than he contracted to pay for the plant. The parties must be bound by the contracts which they make. We think the judgment in all respects is right. It is therefore affirmed.

SCOTT, HOYT, ANDERS, and STILES,
JJ., concur.

MAIN et al. v. JOHNSON et al.
(Supreme Court of Washington. Nov. 24,
1893.)

NEGOTIABLE INSTRUMENTS—ACTION AGAINST MAKER AND INDORSER—DISCONTINUANCE—TRIAL BY COURT—HARMLESS ERROR.

1. In an action on a note against the makers and an indorser, where the indorser answered and went to trial, plaintiff, by tak-

ing judgment against the makers on their default, did not cause a discontinuance of the case, he not being compelled to postpone such judgment until the determination of the issue between him and the indorser.

2. That judgment was prematurely rendered immediately on the making and filing of the findings of fact is not ground of complaint on appeal when there was no objection below, and no motion to set aside on that ground, and it appears that appellant lost none of his rights thereby.

3. A note executed in the state of Washington on Sunday is valid.

4. When the note in suit, the amount of which was a little over \$1,000, provided for a reasonable attorney's fee, the court did not err in allowing a fee of \$100, under Laws 1887-88, p. 9, which provides that an attorney's fee may be allowed, when specially contracted to be paid by the terms of the note, in any amount so specially contracted.

5. On a trial without a jury the action of the court in allowing a witness to testify from a memorandum is not ground for reversal when the court stated at the time that the evidence was immaterial.

Appeal from superior court, Pierce county; Emmett N. Parker, Judge.

Action by E. Main and another against O. W. Johnson and others on a promissory note. From a judgment in favor of plaintiffs, defendant Hoska appeals. Affirmed.

H. W. Lueders, for appellant. Frank D. Nash, for respondents.

SCOTT, J. The respondents had demands in the shape of several past-due promissory notes against the defendants, upon which they were all liable. Subsequently a new note was executed to the appellant, Hoska, by the other defendants, and indorsed by Hoska to the respondents, whereupon the former notes were surrendered. The makers of said note, and appellant as indorser, were sued by the respondents in one action. Default and judgment was taken against all of the defendants excepting appellant. As to him, issue was joined, and a trial had, which also resulted in a judgment for the respondents.

It is contended that the appellant, being only an indorser of said note, could not be joined in an action against the makers; but the statute (section 148, Code Proc.) expressly authorizes this.

It is further contended that, after judgment had been rendered against the makers of the note, it, in effect, worked a discontinuance of the case; and that it was incompetent thereafter for the respondents to proceed upon the issue joined with Hoska. There is no merit in this contention. It was proper to take judgment against the other defendants on their default. The plaintiffs were not compelled to postpone such judgment until the issue had been determined between them and Hoska.

It is contended that the judgment was prematurely rendered, in that the court rendered judgment immediately upon the making and filing of its findings of fact. How-

ever this may be, it does not appear to have been objected to, nor was there any motion made to set the same aside upon that ground. Furthermore, it appears that appellant lost none of his rights thereby in any event, for he made a motion for a new trial, which was entertained and passed upon by the court.

It is contended that the note sued on was void, because it was executed upon a Sunday. Conceding that the proof shows that the note was executed upon a Sunday, the point is not well taken, for a note executed in this state upon Sunday is valid. Our laws relating to the observance of Sunday do not purport to prohibit the transaction of all business, or to render ordinary business transactions void. Pen. Code, § 211; Bloom v. Richards, 2 Ohio St. 387.

It is contended that there was error in rendering judgment for costs, but it does not appear that there was any motion made to retax the same in the superior court.

It is further contended that the court erred in rendering judgment for \$100 attorney's fees. The note provided for a reasonable attorney's fee, and, the amount of the note being only slightly in excess of \$1,000, it is contended that not more than 5 per cent. could be taxed under the Laws of 1885-86, p. 176. But this act was superseded by the act (Sess. Laws 1887-88, p. 9) which provides that "an attorney's fee may be allowed when specially contracted to be paid by the terms of the note or mortgage, in any amount so specially contracted." The fee in this case was fixed by the court, and we do not think there was any error in the premises.

It is contended that the court erred in allowing one of the witnesses for the plaintiff to testify from a memorandum which he held in his hand. This testimony, however, went to an immaterial matter. The cause was tried by the court without a jury, and the court at the time said he regarded the testimony as immaterial; consequently, whether error or not, no harm resulted to the appellant.

There are some other propositions urged by appellant in his brief, but, in our opinion, they are without sufficient merit to warrant a discussion. The proceedings in the superior court appear to have been regular, and we find no error therein. Judgment affirmed.

DUNBAR, O. J., and STILES, HOYT, and ANDERS, JJ., concur.

McQUILLAN v. CITY OF SEATTLE.

(Supreme Court of Washington. Nov. 29, 1893.)

DISMISSAL OF APPEAL.

Where, in an appeal, the statement of facts is not filed within 30 days after judgment, the statement will be stricken; and when no question is involved which is not controlled by the statement the appeal will be dismissed.

Appeal from superior court, King county; R. Osborn, Judge.

Action by John McQuillan against the city of Seattle to recover damages for personal injuries alleged to have been sustained in consequence of a defective sidewalk. At the close of plaintiff's case defendant's motion for nonsuit was granted, and from the judgment entered thereon in favor of defendant plaintiff appeals. Appeal dismissed.

Byers, McElwain & Byers, for appellant. Geo. Donworth and James B. Howe, for respondent.

PER CURIAM. Respondent moves to strike the statement of fact in this case, for the reason that the same was not filed within 30 days from the rendition of the judgment. It appears from the record, and is conceded by appellant, that the statement of facts was not filed within 30 days from the rendition of the judgment. The statement was prepared and handed to the bailiff of the court by appellant's attorney to carry to the clerk, but was not given into the possession of the clerk until five days after the time for filing had expired, or 35 days after the rendition of the judgment. The statute provides that the statement should be filed within 30 days from the rendition of the judgment. This not having been done, the statement must be stricken; and, as it is conceded that no question is involved in the appeal which is not controlled by the statement of facts, the appeal will be dismissed.

BISSELL et al. v. TAYLOR et al., (BELL et al., Interveners.)

(Supreme Court of Washington. Nov. 24, 1893.)

CORPORATIONS — RIGHTS OF STOCKHOLDER — PROTECTING CORPORATE INTERESTS — DIRECTORS' REFUSAL TO SUE.

In an action to set aside a deed, where both plaintiffs and defendants claimed title from a certain corporation, a complaint in intervention alleged that interveners were original stockholders in such corporation; that the land had never rightfully passed therefrom; that they had sought to have the corporation intervene, but the board of directors had refused to call a meeting of the stockholders to consider the matter, on the ground that the corporation had already conveyed away all its title to the property, and that the board declined to take any action until the court passed on said title. *Held*, that the complaint did not show such neglect on the part of the directors to protect the corporation as would authorize a stockholder to go into court for that purpose.

Appeal from superior court, Pierce county; Emmett N. Parker, Judge.

Action by B. A. Bissell and others against E. W. Taylor and others to set aside a deed. Mark A. Bell and others intervened, and from a judgment dismissing their complaint in intervention they appeal. Affirmed.

Bartlett Tripp and C. H. Dillon, for appellants. Ben Sheeks, Wm. W. Archer, Parsons, Corell & Parsons, J. H. & E. B. Watson, Dell Stuart, Fenley Bryan, and R. F. Hensill, for respondents.

HOYT, J. The only question presented by this appeal is as to the sufficiency of the complaint in intervention filed in the court below by the appellants. The suit in which such complaint was filed was one between the grantees in two several deeds from substantially the same grantor or grantors. The plaintiffs sought to have the deed of the defendants set aside as fraudulent, and as a part of their complaint alleged that they were, and had been for a long period, in the actual and open possession of the land covered by the deeds. The land originally belonged to a certain corporation, and the title of both the plaintiff and the defendant in the action went back in some way to such corporation. The interveners alleged in their complaint, among other things, that they were original stockholders in such corporation, and that the title of the land had never rightfully passed therefrom; that they had sought to have the corporation intervene in said action, or bring an independent one, to protect its rights as to the title to said land; that it had refused so to do, and for that reason they, as stockholders, in behalf of themselves and others similarly situated, came into the action to protect such rights. The allegation as to the refusal of such corporation to institute a new suit or intervene in this one was substantially as follows: That the board of directors of such corporation had duly held a meeting, and considered the application of the interveners to have it bring a new suit or enter into this one for the defense and protection of the rights and interests of such corporation, and that the said board of directors had declined to call a meeting of the stockholders to consider said application, upon the ground that said corporation had already conveyed to E. W. Taylor and others all its right, title, and interest in and to said real property, and that until the court had passed upon said title they declined to bring any action on behalf of said corporation, or to enter its appearance in any action then pending in court in reference to the subject-matter of their application. It will be seen from this allegation that the board of directors did not unqualifiedly refuse to take the steps which they deemed necessary to protect the rights of the corporation and of its stockholders. The most that can be claimed of such allegation, when construed, as we think it should be, most strictly against those making it, is that the board refused to take any action until the determination of a certain question which they thought it best should be determined before any action was had; and, thus construing it, and having due regard to the surrounding circumstances as

shown by all the other allegations of the complaint, we think it did not show such a neglect on the part of the board of directors to protect the interests of the corporation as would authorize a stockholder to take the burden upon himself, and go into court for that purpose. That a stockholder may do this under certain circumstances is too clear for argument, but, as we understand the rule, he can only do so when there has been such a neglect or refusal on the part of the corporation, or its officers, to protect its interests, that the court can clearly see that such action on the part of the stockholder is necessary to their protection. Such being our construction of this allegation, it must follow that, in our opinion, the complaint did not state a cause of action. If the complaint did not show that the interveners were authorized to act for the corporation, they could have no standing in court, for it was the rights of the corporation that were sought to be protected by such intervention. Besides, in our opinion, the complaint did not satisfactorily show why the corporation and its stockholders were not estopped from asserting their rights by the statute of limitations or by laches; for, while it is true that there is an allegation in the complaint in intervention that the corporation had been, and was then, in possession of the land, yet it is doubtful whether or not that allegation is sufficient in a complaint in intervention, where, as in this case, the principal complaint alleged that the plaintiffs were in actual possession. The demurrer of some of the defendants must necessarily have been sustained upon more technical grounds. The corporation, as such, was a necessary party, and at the time the court below passed upon the sufficiency of the complaint it seems that there was nothing in the record to show that it had been made such party. On the whole, we are satisfied with the ruling of the lower court in sustaining the several demurrers to the complaint, and the judgment thereon must be affirmed.

DUNBAR, C. J., and SCOTT and ANDERS, JJ., concur. STILES, J., not sitting.

GILLIAM v. DAVIS.

(Supreme Court of Washington. Dec. 1, 1893.)
ACTION ON NOTE — CONSTRUCTION OF ANSWER —
PAYMENT OF COLLATERAL NOTE—WHAT CONSTITUTES—EFFECT.

1. In an action on a note made by defendant to a bank, and indorsed to plaintiff, defendant answered that two sons of plaintiff gave him their note, which he indorsed and delivered to the bank as collateral security for the note in suit; that, after the note so indorsed as security became due, the bank sued the makers thereon; that, while the action was pending plaintiff paid the bank the amount due on the note made by him, and induced it to dismiss the action against his sons, and de-

liver to him the note in suit, and also the collateral note of his sons. The answer also alleged that, in the acts above set forth, plaintiff acted for his sons, paid the said sum with money furnished by them, and holds the note in suit as their agent, and for their benefit. Held that, under the allegations of the answer, the payment of the collateral note was a payment by the makers, plaintiff's sons, and that under the circumstances this constituted a payment of the original note.

2. The power of a creditor generally to dispose of mercantile paper as was done by the bank in this case cannot be raised, since, under the allegations of the answer, the purchaser was the maker of the collateral note, and purchased with full knowledge of all the relations existing, so that there was no question of innocent purchasers.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by W. S. Gilliam against A. L. Davis on a promissory note. From a judgment sustaining a demurrer to the answer, defendant appeals. Reversed.

Turner, Graves & McKinstry, for appellant. Kinnaird & Happy, for respondents.

DUNBAR, C. J. This is an action on a promissory note. The complaint alleges, in substance, that the defendant duly made, executed, and delivered to the First National Bank of Walla Walla a certain promissory note for the sum of \$3,324.34; that thereafter said bank, for a valuable consideration, duly sold, transferred, indorsed, and delivered said promissory note to the plaintiff, who is now the owner and holder thereof, and asks for judgment for the amount of said note, with interest, costs, and an attorney's fee of \$200. The answer alleges, in substance, that one Lane C. Gilliam and one J. B. Gilliam made their promissory note, and thereby promised to pay to the order of the defendant the sum of \$4,000, with interest, etc., payable semiannually; that, after the making and delivery of said note, defendant indorsed and delivered the same to the First National Bank of Walla Walla as collateral security for the promissory note described in the complaint, and thereafter, and after said note had become due, the said First National Bank of Walla Walla commenced an action in the superior court of Spokane county against the said Lane C. Gilliam and J. B. Gilliam to enforce the collection of said note; that while the said action was pending the plaintiff herein, W. S. Gilliam, who is the father of the said Lane C. and J. B. Gilliam, paid to the First National Bank of Walla Walla the amount due upon the note made by the defendant to the said First National Bank, and induced the bank, in breach of its duty, and contrary to the rights of defendant, to dismiss the action against the said Lane C. and J. B. Gilliam, and to deliver to him, said W. S. Gilliam, the note of the defendant described in the complaint, also the collateral note of the said Lane C. and J. B. Gilliam. The answer also contains the following di-

rect allegation, viz.: "That, in the acts and transactions above set forth, plaintiff acted for said Lane C. and J. B. Gilliam, paid the said sum with money furnished by the said Lane C. and J. B. Gilliam, and now owns and holds the note in the complaint described as the agent of, and for the benefit of, the said Lane C. and J. B. Gilliam,"—and prays that he may go hence without day. A demurrer was interposed to the answer, alleging that it did not state facts sufficient to constitute a defense to plaintiff's cause of action. The demurrer was sustained, and the action of the court in sustaining the demurrer is alleged here as error by appellant. The legal questions involved are: (1) Was the payment of the collateral note, under the allegations of the answer, a payment by the makers? and (2) under such circumstances, does the payment of the collateral note amount to a payment on, or an extinguishment of, the original note?

On the first proposition the respondent insists that the transactions set up in the answer have every characteristic of a sale, and stress is placed on the averment that the Gilliams now own and hold the note. This expression, construed as an independent proposition, would no doubt justify respondent's contention; but to give it such a construction would render it inharmonious with the other averments of the answer, and in fact would render the other averments meaningless; and, construing all the allegations together, we think sufficient is stated in the answer to plainly show that the act of W. S. Gilliam in the transaction was the act of Lane C. and J. B. Gilliam. In fact, that allegation is set out in language plain and unmistakable.

That point being settled, then, was the payment of the collateral note a payment of the original note sued on in the action? We think the authorities sustain this proposition. Randolph on Commercial Paper (section 795) lays down this general proposition: "When the collateral note is collected, and the proceeds received by the pledgee, it operates as a payment pro tanto of the debt secured." In *Hunt v. Nevers*, 15 Pick. 500, the following rule was announced: "Where collateral security is received for a debt, with power to convert the security into money, and the proceeds of the security equal or exceed the amount of the debt, the debt is de facto paid; for, the same person being the party to receive and pay, no act applying the money to the debt is necessary, but the law makes the application." In *Ware v. Russell*, 57 Ala. 43, the doctrine of payment is made to depend upon the priority of the transfer. Thus, it is held that, if the collateral be first transferred, it operates pro tanto as a payment or extinguishment of the original debt. If, on the other hand, the original note is first transferred, the collateral will follow it into whosoever hands it passes. But in the case at bar it is evident that if

such a distinction is to be made the collateral note was the first that was transferred, as that was the note that was sued upon by the pledgee. In *Cocke v. Chaney*, 14 Ala. 65, it was held that, when a creditor who has received a note as collateral security transfers it to another, he must be understood to have elected that mode of payment, and to have made the security a substitute for the debt. The same doctrine was announced in *Westphal v. Ludlow*, 2 McCrary, 505, 6 Fed. 348; and we think the authorities are uniform in holding that where the transferee is the maker of the collateral note the payment of the collateral note extinguishes the original note.

It was argued by the respondent that if the bank had power to sell the note the defense in this action could not be maintained. The general consensus of authority seems to be that, unless a power to sell is superadded to the agreement whereby such chose in action is pledged as a collateral security, the creditor has no right to sell such chose in action. This was squarely decided in *Whitaker v. Gas Co.*, 16 W. Va. 717, and in *Roberts v. Thompson*, 14 Ohio St. 1. But it seems to us that the power of the creditor generally to dispose of mercantile paper under such circumstances cannot be raised in this case, for under the allegations of the answer the purchaser, in this instance, was the maker of the collateral note, and purchased with full knowledge of all the relations existing, and there is no question of innocent purchasers in the case. Respondent cites several authorities to the effect that the payment by one not a party to the note of the amount of the note, to the holder thereof, does not constitute a payment of the note, independent of other facts showing an intention to discharge the note. It is not necessary to refute this proposition, under the construction we give to the answer. The answer in this case follows the statute, and states the facts constituting its defense; and we think the facts stated are sufficient, and that the demurrer should have been overruled. Judgment will therefore be reversed, and the cause remanded, with instructions to proceed in accordance with this opinion.

STILES, ANDERS, and SCOTT, JJ., concur.

IN RE BOJAR.

(Supreme Court of Washington. Dec. 5, 1893.)

CRIMINAL LAW—SENTENCE—APPEAL.

Act March 8, 1893, p. 133, § 30, provides that an appeal shall stay the execution of the judgment of conviction, and in case the defendant has been convicted of a felony, and has been unable to furnish the bail bond required pending the appeal, the time during which he remains in jail shall be deducted from the term of his sentence, if judgment against him be affirmed. *Held*, that a defendant is entitled to the benefit of this act when the appeal is dismissed for want of prosecution.

Appeal from superior court, King county; T. J. Humes, Judge.

Antonio Bojar was convicted of an assault with a deadly weapon, and his appeal was dismissed for want of prosecution. From an order discharging him under a writ of habeas corpus, the state appeals. Affirmed.

John F. Miller, Proa. Atty., for the State.

SCOTT, J. Antonio Bojar was convicted in the superior court of King county of an assault with a deadly weapon, and on July 2, 1892, was sentenced to confinement in the penitentiary for the term of nine months. He took an appeal therefrom to this court, which was dismissed for want of prosecution. While said action was being prosecuted in the superior court, and while said appeal was being taken and was pending, said Bojar remained in the county jail of King county, which period exceeded the time for which he was sentenced to imprisonment in the penitentiary. Subsequently, said Bojar sued out a writ of habeas corpus in said court to obtain his discharge under section 30 of the act approved March 8, 1893, (Sess. Laws, p. 133,) which provides as follows: "An appeal by a defendant in a criminal action shall stay the execution of the judgment of conviction. In case the defendant has been convicted of a felony, and has been unable to furnish the bail bond required by section thirty-one of this act, pending the appeal, the time during which he remains in the jail of the county from which the appeal is taken shall be deducted from the term for which he was theretofore sentenced to the penitentiary, if judgment against him be affirmed." And said court ordered his discharge thereunder. From this order the state appeals.

It is contended that said defendant was not entitled to the benefit of this section, upon the ground that the dismissal for want of prosecution was not an affirmation of the judgment. This may be technically correct, yet the practical result of a dismissal is the same as a judgment of affirmation. It is contended that, if a dismissal for want of prosecution is to be held equivalent to an affirmation in this respect, it will afford offenders sentenced to short terms in the penitentiary an opportunity to evade the sentence by simply taking an appeal and delaying its prosecution. There is some force in this contention, but the legislature made no distinction as to short-term sentences, and the statute only applies where the offender has remained in the county jail meanwhile. In case of an appeal, and a failure to duly prosecute it, the state can move to dismiss for that reason. We are of the opinion that the judgment of the superior court discharging the defendant was right, and it is affirmed.

DUNBAR, C. J., and HOYT and STILES, JJ., concur.

PACIFIC SUPPLY CO. v. BRAND et al.
(Supreme Court of Washington. Dec. 5, 1893.)
APPEALABLE JUDGMENT—DISMISSAL FOR FAILURE TO PROSECUTE.

No appeal lies from a judgment dismissing the action for plaintiff's failure to amend its complaint within the time fixed in an order sustaining a demurrer thereto, where plaintiff did not resist the motion for dismissal, or move to set aside the judgment in the court below.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by the Pacific Supply Company against Bertha E. Brand and Henry D. Brand to foreclose a mechanic's lien. From a judgment dismissing the action for plaintiff's failure to amend its complaint after a demurrer thereto had been sustained, plaintiff appeals. Dismissed.

Shank, Murray & Dresbach, for appellant. Eric Edw. Rosling, for respondents.

SCOTT, J. The appellant filed its complaint in the superior court of Pierce county, to which the respondents interposed a demurrer, which was sustained by the court, and appellant was granted 10 days to amend. After the lapse of said time, no further proceedings having been had, the respondents moved said court for an order adjudging appellant to be in default, and for a dismissal of the action, whereupon the court entered an order accordingly, and dismissed the action. This motion was not resisted, nor was any motion made to set said judgment aside. With the record in this condition, appellant took its appeal. The respondents moved to dismiss said appeal for the reason that none would lie from the judgment entered, and we are of the opinion that this motion must prevail. Appellant contends that it did not desire to amend the pleading; that the sustaining of the demurrer, and subsequent dismissal of said cause, was in effect an adjudication of its rights upon the merits; and that it was its intention to appeal therefrom, to test the validity thereof in this court. However this may be, the status of the case here must depend upon the record, as made in the lower court, and there is nothing on the face of the record to indicate appellant's contention in any wise, excepting the bare fact that an appeal was taken as stated. An appeal will not lie directly from a judgment of dismissal for want of prosecution, and it must be dismissed.

DUNBAR, C. J., and HOYT, J., concur.

DECORVET et al. v. DOLAN et al.¹
(Supreme Court of Washington. Dec. 9, 1893.)
SUMMONS—SERVICE BY PUBLICATION—NATURE OF ACTION.

1. Laws 1877, p. 15, § 65, authorizing service by publication where defendant "resides

out of the territory, or has departed from the territory, or cannot after due diligence be found within the territory," etc., does not require that all of the different grounds enumerated should exist before publication can be made, but it is sufficient if any one of such grounds exists.

2. A statement in an affidavit for publication that defendant is a nonresident is the statement of a fact, and is sufficient, under Laws 1877, p. 15, § 65, authorizing service by publication where defendant "resides out of the territory," without alleging that defendant cannot, after due diligence, be found within the territory.

3. A statement in a summons that the action is brought for the recovery of money alleged to be due on a particularly described note, and to foreclose a mortgage given to secure the same, is a sufficient statement of the general nature of the action required to be given in the summons.

Appeal from superior court, Thurston county; M. J. Gordon, Judge.

Action by Anna Decorvet and Carl Rosin against Patrick Dolan and Mary J. Dolan to quiet title to lands. From a judgment for defendants, plaintiffs appeal. Affirmed.

John C. Kleber, for appellants. Hobart G. Hagin and O. V. Linn, for respondents.

SCOTT, J. This action was brought by appellants to quiet title to certain lands situated in Thurston county. Respondents' title rests upon a sale under a decree foreclosing a mortgage on said lands, in which action one George Cook was plaintiff, and Carl Rosin and Anna Rosin were defendants. Respondents' title depends upon the validity of said foreclosure proceedings, which are attacked upon two grounds:

The first point relates to the service of process, which was by publication. It is claimed that the affidavit upon which the same is based, under section 65, Laws 1877, p. 15, is defective, and insufficient to authorize a service of summons by publication. It is further contended that the summons was defective, and insufficient to confer jurisdiction upon the court, in that it did not sufficiently state the cause and general nature of the action, as required by section 61, p. 13, of the act aforesaid. Section 65 provides as follows: "If at the time the complaint is filed or any time afterward, the plaintiff or intervenor, or an attorney in the action for the plaintiff or intervenor, file in the action his affidavit stating that the person on whom service is to be made, resides out of the territory, or has departed from the territory, or cannot after due diligence be found within the territory, or conceals himself to avoid the service of summons, or the defendant or the party to be served is a foreign corporation, or the cause of action against such corporation arose within the territory, service may be made by the publication of the summons." And section 61 provides that if service is to be made by publication the summons shall contain, in addition to the other requirements of said section, the cause and general nature of the

¹ For dissenting opinion, see 35 Pac. 1072.

action. The affidavit upon which the service by publication is based, omitting the formal parts, is as follows: "George Cook, being duly sworn, says that he is the plaintiff in the above-described action; that the defendants reside out of this territory. He therefore asks that summons be served on the defendants by publication." It is contended that this affidavit is insufficient, in that it states a mere conclusion of law; and, further, that it should show that the defendants could not, after due diligence, be found within the territory. A number of cases have been cited from different states relating to the construction of somewhat similar sections, but none that are directly in point. A statement in the identical language of the statute is sometimes insufficient. This is especially the case where the ground alleged is inability to find the defendants after due diligence, and it is upon this ground that many of the cases cited are based. But the statement that the defendants reside out of the territory is the statement of a fact, and is all that need be said upon the subject. The statute does not make it necessary to show where the defendants resided. This is immaterial, so that they were nonresidents. Appellants contend that the different grounds set forth in the statute should be read in the conjunctive, and that the affidavit, to authorize a service by publication, should cover all of said grounds; but we do not think this contention can be sustained. The very language of the statute itself refutes it, for there could not well be a case where all of said grounds would exist, nor would there be any reason for requiring such a showing. There is force in appellants' contention that there should have been a showing that the defendants not only resided out of the territory, but were without the territory at said time, and consequently could not be served personally; but the force of this contention is directed against the policy of such a statute, rather than to its construction. The statute clearly makes the fact that the defendant resides out of the territory ground for obtaining service by publication, and, upon an affidavit made to that effect, the summons is issued by the clerk as a matter of course; it not being necessary to obtain any order from the court or judge for that purpose, as is the case in most of the states before service by publication is authorized. Statutes authorizing service upon nonresidents by publication are constitutional, and the jurisdiction is dependent upon a compliance with the statute providing for the publication. *Brown, Jur. § 51.* We are of the opinion that in this instance the affidavit was sufficient to warrant the service had.

As to the other point, the cause and general nature of the action is stated in said summons as follows: "The said action is brought to recover from you the sum of

three hundred thirty-five and 75/100 dollars, with interest thereon at the rate of one and one-fourth per cent. per month from the 10th day of June, A. D. 1881, which sum is said to be due plaintiff upon a certain promissory note given by you to plaintiff, and dated November 2, 1878. Also, to foreclose a certain mortgage given to secure the payment of said note, together with the recovery of ten per cent. upon the amount found due the plaintiff, as counsel fees and costs of suit; and you are hereby notified that, if you fail to appear and answer said complaint as above required, the plaintiff will take judgment as therein demanded." And we think, under the weight of authorities, this was a sufficient compliance with the provision. The note upon which the action is brought is specified with particularity, and defendants are informed that the action is brought to foreclose a mortgage given to secure the payment of it, and this informs the defendants of the cause and general nature of the action. It is not necessary that the cause of action should be set forth in a summons with the same particularity as is required in a complaint. The information is only required to be general, and particular information is furnished by the complaint. *Bewick v. Muir*, 83 Cal. 300, 23 Pac. 889; *Hinzle v. Kempner*, (Tex. Sup.) 18 S. W. 659. Judgment affirmed.

DUNBAR, C. J., and HOYT, J., concur.

PATCHETT et al. v. PACIFIC COAST RY. CO. (No. 19,240.)

(Supreme Court of California. Dec. 26, 1893.)

LIMITATION OF ACTIONS—TRUSTS—INFANCY.

An action barred by limitation against a trustee is also barred against the beneficiaries, though they were under the disability of infancy, under Code Civil Proc. § 869.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by John A. Patchett and others against the Pacific Coast Railway Company to quiet title. Plaintiffs had judgment, and defendant appeals. Reversed.

Wilcoxon & Bouldin, for appellant. W. H. Spencer and Venable & Goodchild, for respondent.

BELCHER, C. This action was instituted in November, 1892, by John A. Patchett and his four children, to have their title quieted to a tract of land in San Luis Obispo county. The defendant corporation, by its answer, alleged title in itself to a strip 60 feet wide across the said tract, and pleaded in bar of the action the statute of limitations. The court below gave judgment against the defendant, from which it has appealed on the judgment roll.

The facts found are, in substance, as follows: The plaintiff John A. Patchett and one Amanda Patchett were husband and wife, and on December 9, 1880, were divorced. The land described in the complaint was community property owned by them, the title standing in the name of the husband, but no division or disposition of it was made by the decree. After the divorce, and on the same day, John A. executed to Amanda a deed of the said property, which was duly acknowledged and recorded on the day of its date. It recited "that whereas, the parties hereto have heretofore been husband and wife; and whereas, a decree of divorce has been this day made and entered in the superior court of the county of San Luis Obispo, state of California, dissolving the marriage between the parties, and awarding the care, custody, and control of the minor children of the parties hereto to said party of the second part; and whereas, certain property of the party of the first part was and is the community property of the parties hereto: Now, as a full and complete settlement of all property rights as between the parties hereto, and to make provision for the support and education of the said minor children of the parties hereto, and said party of the first part, in consideration of the premises and of one dollar lawful money of the United States to him in hand paid by the said party of the second part, has granted, bargained, sold, conveyed, and confirmed, and does hereby grant, bargain, sell, convey, and confirm, unto the said party of the second part, and her heirs and assigns, forever, all those certain tracts, pieces, or parcels of land, [describing the property,] to have and to hold, all and singular, the said premises, with the appurtenances, unto the said party of the second part, her heirs and assigns, forever, in trust for the use and benefit of herself and Mary Alice Patchett, now aged ten years, Benjamin E. Patchett, now aged nine years, Bertha Mabel Patchett, now aged five years, and Minerva Emma Patchett, now aged two years, the minor children of the parties hereto; to collect the rents, and to receive the rents, issues, and profits, of the said premises, and apply the same to the maintenance and support of herself and said minor children, until the youngest of said children has attained her majority; and, when the youngest of said children is of legal age, the said trustee to convey to each of said children the one-fifth (1-5) part or interest in and to the said premises, and every part thereof, and to have and take the one-fifth (1-5) part thereof to herself in fee, free from the trust aforesaid; the intention hereof being that the said property shall be kept together, managed, and controlled by the said party of the second part until the youngest of said children is eighteen years of age, and then divided equally between the said party of the second part and said children, share and share alike."

On September 8, 1881, Mrs. Patchett, by a deed duly executed and recorded, and expressing a consideration of one dollar, conveyed to a railway company a right of way for a railroad across the said tract of land, the strip described being 60 feet wide, etc., and the same strip now claimed by the defendant. Shortly after the execution of the last-named deed the defendant succeeded to all the interest acquired by the grantee thereunder, and ever since 1882 it has had the said strip of land "fenced on each side, and during all said time has used the same for the purposes mentioned in said conveyance of September 8, 1881, placing valuable improvements thereon, and the entire length thereof, consisting of railroad ties and iron rails, over which, daily, the freight and passenger cars of said defendant are propelled by its steam engines, and has thus used, exclusively, continuously, openly, peaceably, and notoriously, the same, under a claim of right to said easement, and with the knowledge of all the parties to this action and said Amanda and one Wm. Sandercock, hereinafter named, since 1882, and has paid all taxes assessed against said easement and the railroad constructed thereon." Afterwards, Mrs. Patchett mortgaged her interest in the land, and the mortgage was foreclosed. At the sale under the decree of foreclosure, John A. Patchett became the purchaser, and thereby acquired all the interest of the mortgagor in the property, except in so far as it was affected by her conveyance of September 8, 1881. Mrs. Patchett continued to act under the deed to her of December 9, 1880, until May, 1890, when, by a decree of the superior court, she was removed from her trusteeship, and one William Sandercock was appointed in her place. The latter accepted the position, and acted as trustee, until June, 1891, when he resigned, and the plaintiff John A. Patchett was duly appointed trustee in his place and stead. At the time of the trial the children were of the ages, respectively, of 22, 21, 17 and 14 years.

Upon these facts the court found, as conclusions of law, that the deed made by Mrs. Patchett to the railroad company on September 8, 1881, was void and conveyed nothing, for the reason that the grantor was the trustee of the estate, and the conveyance was in violation of the terms of the trust, and also that the plaintiffs' cause of action was not barred, and an easement in favor of the defendant railway company had not been created by adverse possession and user, "because four of the cestui que trust, owners of the equitable estate in the land, were within the age of majority at the time of the entry of the defendant company, and during all the time of the occupation and user of the claimed way." The principal question for decision is, was the conclusion of the court that the action was not barred, and the defendant had acquired no easement by

adverse possession and user, justified by the facts found?

That a private right of way over land is an easement and an interest in the land which may be acquired by limitation—in such case ordinarily called “prescription”—is a question which does not admit of debate, and in support of which no authorities need be cited. Here the findings show that everything was done by the defendant necessary to create a prescriptive right, if such right could be acquired against the minor children, for whom the title to four-fifths of the property was held in trust. Our Code provides that an executor or administrator, or trustee of an express trust, may sue without joining with him the persons for whose benefit the action is prosecuted. Code Civil Proc. § 369. There has been some conflict in the decisions as to the rights of minors in cases like this, but the weight of authority seems to be contrary to the conclusion of the court below. In a note to Moore v. Armstrong, 36 Amer. Dec. 68, it is said: “There is also diversity of opinion on the question as to how far the rights of an infant are affected when his property is in the hands of a trustee, executor, or guardian; and the tendency of the decisions is to support the position that when the right of action vests in an executor, guardian, or trustee, who is under no legal disability, the statute will commence to run despite the disability of the minor, and, if the claim is lost by the neglect of the representative to sue, the minor is barred;” citing numerous cases. So in Perry, Trusts, (4th Ed.) § 858, it is said: “It was said in one case that ‘forbearance of the trustees in not doing what it was their office to have done should in no sort prejudice the cestui que trust;’ that is, that if the trustee does not bring an action to recover the estate within the statutory period the cestui que trust is not barred. But this is not the rule of law. Lord Hardwicke said: ‘The rule that the statute of limitations does not bar a trust estate holds only between cestui que trust and trustee, not as between cestui que trust and trustee on one side, and strangers on the other; for that would make the statute of no force at all, because there is hardly any estate of consequence without such trust, and so the act would never take place. Therefore, where the cestui que trust and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both.’ * * * Where the trustee is barred, so is the cestui.” And see, also, 13 Amer. & Eng. Enc. Law, p. 740, and cases cited. Following the rule thus declared, it was said by this court in McLeran v. Benton, 73 Cal. 342, 14 Pac. 879: “If the entry of the defendants was wrongful, the devisees of Harmon could not maintain an action, for that right existed exclusively in the executors, who, in all suits for the benefit of the estate, represented both the creditors and the heirs. Cunningham v. Ash-

ley, 45 Cal. 493; Halleck v. Mixer, 16 Cal. 579. It would seem to follow, therefore, that when the executor is barred of his action the heir is barred, although the heir or devisee be laboring under a disability. Wilmerding v. Russ, 33 Conn. 68. The general rule is that when a trustee is barred by the statute of limitations the cestui que trust is likewise barred, even though an infant. Hill, Trustees, 287, 408, 504.” If the law is correctly stated in the authorities above cited and referred to,—and we think it is,—then it is apparent that the court below was mistaken in its conclusions, and its judgment was erroneous. We advise, therefore, that the judgment be reversed and the cause remanded, with directions to enter judgment upon the findings in favor of the defendant corporation.

We concur: VANOLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment be reversed and the cause remanded, with directions to enter judgment upon the findings in favor of the defendant corporation.

KENYON v. WESTERN UNION TEL. CO. (No. 19,320.)

(Supreme Court of California. Dec. 21, 1893.)

TELEGRAPH COMPANIES — FAILURE TO DELIVER MESSAGE — DAMAGES — NOMINAL DAMAGES — DE MINIMIS NON CURAT LEX.

1. In an action against a telegraph company for failure to deliver a message, by reason of which plaintiff failed to receive an appointment as deputy assessor, damages for loss of the salary he would have received are too speculative, since a deputy only holds office at the pleasure of the officer appointing him.

2. Where a complaint shows that plaintiff is only entitled to nominal damages, and such a judgment will not carry costs, and no permanent right will be determined, a demurrer is properly sustained under the maxim “de minimis non curat lex.”

3. A judgment for defendant will not be reversed merely because plaintiff was entitled to recover nominal damages, where such a judgment would not entitle him to costs, and no permanent right is involved.

Commissioners’ decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by A. S. Kenyon against the Western Union Telegraph Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Callen & Neale, for appellant. Cassius Carter, for respondent.

HAYNES, C. Appeal from a judgment in favor of defendant upon its demurrer to plaintiff’s complaint. The complaint, in substance, alleges that on January 2, 1893, the plaintiff delivered to the defendant at San Diego, for transmission and delivery, the following message: “Col. A. G. Gassen, 501 Geary Street, San Francisco: Rennie will

appoint. You wire him, please. Urgent. A. S. Kenyon." That through the gross negligence of the defendant the address as received at San Francisco read, "Collag Massen," and that it was not delivered for 10 days thereafter, though defendant informed plaintiff on January 3, 1893, that it had been delivered. That said Rennie was then, and since, the city assessor of the city of San Diego. That Gassen was an alderman of San Diego. That he was fully advised and understood the contents and importance of the message. That plaintiff was an applicant for an appointment as deputy of said city assessor at a salary of \$75 per month; and that, if said message had been promptly delivered, plaintiff would have received the said appointment; and that he had sustained damage in the sum of \$375, for which sum he prayed judgment. The demurrer is that the complaint does not state a cause of action.

The negligence of defendant, and that plaintiff would have been appointed as such deputy but for such negligence, are sufficiently averred. Respondent claims, however, that the damages alleged are too remote, and that is said by respondent to be the ground upon which the demurrer was sustained. In his brief, counsel for respondent also insists that the character and importance of the message were not disclosed, and that hence it could not be inferred therefrom that the loss of the sender's appointment to an office, or other employment, might result from a failure to deliver it. Upon both these points the authorities are, or appear to be, conflicting; but upon both questions the facts involved in the cases are so various and diverse that a careful consideration of each is required before it can be certainly said that they are in point upon the one side or the other. That there was a breach of its contract on the part of the defendant is not disputed, nor can it be contended that the plaintiff is not entitled to recover all damages he sustained from the defendant's breach of contract, provided such damages are not too remote, and are capable of being ascertained with sufficient certainty. The case principally relied upon by appellant is *Telegraph Co. v. Fenton*, 52 Ind. 1. There the owner of a steamboat plying upon the Ohio and Mississippi rivers telegraphed from Cincinnati to Fenton, at Aurora, as follows: "Will you go on Argosy with me for one hundred and fifty dollars. Answer immediately." Fenton was a pilot, and the telegram was sent in consequence of a previous conversation, and meant that he would pay \$150 per month. The delivery of the telegram was delayed, whereby Fenton lost the employment. The court held that the damages were neither remote nor speculative. In the case at bar it is not necessary to consider whether the damages claimed were too remote, since it is clear they were speculative and uncertain. The allegation

is that plaintiff would have been appointed deputy, and that the salary paid a deputy in that office is \$75 per month. But it is not alleged that the city assessor would have contracted to employ him for any definite length of time. A deputy is appointed to hold during the pleasure of the officer appointing him. Pol. Code, § 878. The power of appointing deputies is in the officer, and not in the man. *Hubert v. Mendheim*, 64 Cal. 220, 30 Pac. 633; Pol. Code, § 876. An appointment as deputy does not imply a contract for his employment for any length of time, nor otherwise than at the pleasure of the officer making the appointment. The allegation, therefore, that he would have received the appointment, is not an allegation that he would have been retained for any definite length of time; nor could such allegation be made. He might have received the appointment and been discharged the same day, either for cause or without cause; and, as damages or compensation must be measured by the loss sustained, where that loss cannot be ascertained damages cannot be recovered. In *Telegraph Co. v. Fenton*, supra, an answer which Fenton would have sent, accepting the offered employment, if the message had been delivered to him when it should have been, would have constituted a contract for at least one month's service at the specified sum of \$150, and this much, at least, it was clear he had lost. It is therefore not necessary to discuss or decide whether the damages, if they were ascertainable, and were in fact sustained, were too remote, nor whether the defendant would otherwise have been relieved because not informed of the nature of the transaction to which the telegram related; since, if both these points were decided against the respondent, the plaintiff could still recover nothing more than nominal damages.

Appellant contends, however, that he was, at the least, entitled to nominal damages, and that, as the judgment was for defendant, he is entitled to a reversal. The failure to perform a duty required by contract is a legal wrong, independently of actual damage sustained by the party to whom performance is due; and in general, where a contract right is violated, the maxim "*de minimis non curat lex*" has no application, and nominal damages will be given. But where a judgment is erroneous only because it fails to give nominal damages, it will not be reversed unless nominal damages in the given case would carry costs. *Suth. Dam. § 11*, and cases there cited. If, however, as said by the author just cited, the object of the action is to determine some question of permanent right, the fact that he can only recover nominal damages will not prevent a reversal. In this case nominal damages would not entitle the plaintiff to costs, and would, therefore, not justify a reversal, even if it be conceded that the judgment is erroneous. But I think the judgment is right. The ques-

tion arose upon demurrer. If the demurrer had been overruled, it must have resulted in an issue of fact and a trial, and in the end a judgment for plaintiff for nominal damages which would not even impose costs upon defendant. No question of "permanent right" existed between the parties to be settled by a trial and judgment, and, in view of these facts, I think the maxim above quoted was properly observed, and that the judgment should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

PACIFIC MUT. LIFE INS. CO. v. FISHER
et al. (No. 19,361.)

(Supreme Court of California. Oct. 26, 1893.)

APPEAL—STAY OF PROCEEDINGS—NECESSITY OF
BOND.

On appeal by a mortgagee from a judgment declaring the lien of the mortgage subordinate to certain mechanics' liens, and directing the sale of the mortgaged property to satisfy the liens, no undertaking save the ordinary one is necessary to stay the execution of the judgment; Code Civil Proc. § 945, requiring undertakings for the payment of any deficiency arising upon the sale of property, referring only to liens created by mortgage.

In bank.

Action by the Pacific Mutual Life Insurance Company against John C. Fisher and others to foreclose a mortgage. A number of actions to foreclose mechanics' liens on the mortgaged property were consolidated with it. There was judgment foreclosing the mortgage, but making the lien of the mortgage subordinate to certain of the mechanics' liens. Plaintiff appealed. Pending the appeal the lienholders threatened to sell the property, because plaintiff had given only the bond of \$300 to cover costs on appeal, and no stay bond. Plaintiff petitioned the supreme court for a stay, on the ground that no stay bond was required. Petition granted.

PER CURIAM. The facts stated in the petition herein bring this proceeding within the rule declared in *Painter v. Painter*, (Cal.) 33 Pac. 483,¹ and upon the authority

¹ Code Civil Proc. § 945, provides that if the judgment appealed from direct the sale of real property, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant he will not commit any waste and that, if the judgment be affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency.

of that case the application of plaintiff and appellant for a stay of proceedings under the judgment appealed from must be granted. So ordered.

In re KOWALSKY. (No. 15,329.)

(Supreme Court of California. Dec. 22, 1893.)

ATTORNEYS AT LAW—MISCONDUCT—DISBARMENT.

The judge of department 9 of the superior court of San Francisco, who had directed a guardian not to pay out any of the trust fund except on order of the court, refused to grant an attorney an order allowing payment for services, because not properly itemized. This judge had, in fact, never had jurisdiction of the matter, and the attorney was so told by the judge of department 10, where the same was pending, and who promised to sign the order. The attorney thereupon, in good faith, obtained the money from the guardian, after telling him the facts. *Held* no ground for disbarment.

Proceedings to disbar Henry I. Kowalsky. Dismissed.

Robert Y. Hayne, for petitioner. Frank M. Stone, for respondent.

PER CURIAM. This proceeding was instituted here by a written accusation charging Henry I. Kowalsky, an attorney of this court, with certain professional misconduct, and praying that he "be removed from the office of attorney and counselor at law." Kowalsky filed a written answer to the accusation, and the proceeding was referred to Hon. Niles Searles, now one of the commissioners of this court, to take evidence in the matter, "and to report the facts adduced therefrom to this court." The commissioner took, in writing, the evidence introduced by the parties to the proceeding, and returned the same to the court. He also reported, made, and filed his findings of facts, which are as follows:

"Filed June 3, 1893.

"In the Supreme Court of the State of California.

"Proceedings to remove Henry I. Kowalsky from the office of attorney and counselor at law. (No. 15,329.)

"The undersigned, heretofore appointed a committee to take depositions in the above-entitled proceeding, and to report the facts deduced therefrom to the supreme court, begs leave to report that the parties appeared before him by their respective attorneys,—John A. Wright, Esq., appearing for and on behalf of the prosecution, and Frank M. Stone, Esq., on behalf of Henry I. Kowalsky, the accused; whereupon the testimony offered by the respective parties was received, reduced to writing, and is herewith reported to the court. From the testimony so taken, and from the admissions in the pleadings, and after argument of counsel for the respective parties, I find the following facts:

"(1) Henry I. Kowalsky is, and all the times mentioned in the proceedings herein was, an attorney and counselor at law, regularly admitted to practice as such attorney and counselor, in all the courts of the state of California.

"(2) On the 27th day of March, 1890, one P. J. Corbett, by an order of the superior court in and for the city and county of San Francisco, state of California, made in department No. 10 thereof, by Hon. Walter H. Levy, one of the judges of said court, and judge of said department No. 10, was duly appointed guardian of the person and estate of a certain minor named Henry MacDonald, and duly qualified as such guardian, giving a bond in the sum of one hundred dollars, being the amount fixed by the court, whereupon letters of guardianship issued to him, and he entered upon the discharge of his duties as such guardian, and continued so to act during the time hereinafter mentioned.

"(3) The minor, Henry MacDonald, at the time of the appointment of the said guardian, asserted himself, or was asserted by his mother, to be the son of one C. E. S. MacDonald, deceased, who was a man of large wealth, and whose estate was then in the course of administration in the said superior court, but the said claim of relationship was denied by the relatives of the said decedent; and the said minor, Henry MacDonald, was possessed of no property, and had no expectation of receiving any during his minority, unless he established, by process of law, his said disputed claim of relationship, and obtained a part of said estate.

"(4) Jeremiah D. Sullivan, Esq., an attorney at law, entered into an agreement with the mother and family of the said minor, Henry MacDonald, by the terms of which, in consideration of one-half of any sum or sums of money which might be recovered for said minor from the estate of C. E. S. MacDonald, deceased, he undertook to conduct, as an attorney, such proceedings as might be necessary to establish the right of said minor to said estate, or to an interest therein. Said Sullivan appeared as the attorney for P. J. Corbett in the matter of procuring for him letters of guardianship of said minor, and the said Corbett, as guardian, assented to the agreement between Sullivan and the family of said minor in reference to the services and compensation of said Sullivan. Some months later, said Jeremiah D. Sullivan, finding that the course of litigation necessary to establish the rights of said minor in and to the estate was likely to be protracted and laborious, employed the respondent, Henry I. Kowalsky, as associate counsel, to assist him therein, and the latter labored for a period of from four to seven months, assiduously, in the accomplishment of the object of his employment.

"(5) The proceedings to establish the claim of Henry MacDonald to be the son of C. E. S. MacDonald, deceased, and to be entitled

to a share in his estate, were initiated and prosecuted in the superior court in and for the city and county of San Francisco, and in department No. 9 thereof, of which Hon. J. V. Coffey was and still is the judge.

"(6) The compensation of respondent, Kowalsky, for his services in the matter of prosecuting the claims of said minor, as agreed upon between said Sullivan and respondent, was to be one-half of that which he (Sullivan) might receive under his (the said Sullivan's) agreement.

"(7) Such proceedings were had in the superior court (department No. 9) that prior to October 3, 1892, the status of Henry MacDonald, as the son and heir of C. E. S. MacDonald, was established in his favor; but an appeal to the supreme court had been taken, or was about to be taken, and there being other litigation pending, involving a large share of the estate, it was deemed judicious to compromise the matters in issue, and it was accordingly agreed upon; and on the 3d day of October, 1892, the respondent, Henry I. Kowalsky, appeared before Hon. J. V. Coffey, judge of department No. 9 of the superior court, in company with P. J. Corbett, guardian, and, as attorney for said Corbett, presented a plan of compromise, and an order authorizing said Corbett, as guardian of Henry MacDonald, to settle and compromise the matters of difference touching the estate of C. E. S. MacDonald, deceased. The order was granted by the court, and a compromise made. The estimated value of the estate at the date of the settlement was, say, \$120,000, of which Henry MacDonald, by the terms of the compromise, become entitled to, say, \$40,000.

"(8) Prior to the 6th day of October, 1892, Hon. J. V. Coffey, judge of department No. 9 of the superior court, advised and instructed P. J. Corbett, guardian of Henry MacDonald, in the presence of Henry I. Kowalsky, to keep the funds of his ward, Henry MacDonald, intact, to deposit the same in bank, and not to make any payments therefrom except upon order of the court. The advice so given to Corbett was in unison with a practice which prevailed in the court of Judge Coffey, but which had not been, up to that date, published as a rule of his department of the superior court.

"(9) At the date of the directions so given by Judge Coffey to Corbett, the matter of the guardianship of Henry MacDonald was not, and never had been, pending in the department of Hon. J. V. Coffey, judge in department No. 9 of the superior court, but had been, was, and for some weeks thereafter continued to be, pending in department No. 10 of the superior court, presided over by Hon. W. H. Levy, Judge. Judge Coffey at that time supposed, and all the parties supposed, the matter of guardianship aforesaid was pending in his (Judge Coffey's) department.

"(10) On the 6th day of October, 1892, P. J.

Corbett had in his hands funds of the estate of his ward, Henry MacDonald, paid him by James C. Pennie, Esq., administrator of C. E. S. MacDonald, deceased, amounting to \$7,000, less \$500 paid to Henry I. Kowalsky by said Pennie, and receipted for as cash by said Corbett, guardian, which funds were on deposit in the German Savings and Loan Society's Bank, except the \$500 paid to Kowalsky, as aforesaid. Jeremiah D. Sullivan had, at said last-mentioned date, paid out from his own funds, in the conduct of the case on behalf of Henry MacDonald, and in the support of said minor and his mother and family, the sum of \$2,200.

"(11) On said 6th day of October, 1892, Henry I. Kowalsky was about to leave by an evening train for Los Angeles, and both he and said Sullivan were desirous of receiving, as fees and compensation on account of services and expenditures in the MacDonald case, the sum of \$3,500, making, with the sum already received, the sum of \$4,000. The parties, Corbett, Kowalsky, and Sullivan, met on that day at the office of the latter, when the subject of such payment was broached to Corbett, who was willing to make the payment, but desired an order of the court authorizing the same. An order was drawn, and at about 1 o'clock P. M. Kowalsky repaired with it to the city hall to procure an order of allowance, etc., for \$4,000. Before leaving, it was suggested that, as the hour was becoming late, Kowalsky should, upon procuring the order, telephone to Sullivan, that Corbett might procure the funds from the bank before it closed. The order was presented by respondent to Judge Coffey in open court, and by him refused, because not itemized and verified, as required by the rules of his department. Kowalsky then left the court room of Judge Coffey en route for the clerk's office, to procure the data upon which to frame an itemized petition and order. On his way he called in at the court room of Judge Levy, to take leave of the latter before departing for Los Angeles, and, to the question of the latter of what brought him to the city hall, responded, 'To get an order from Judge Coffey in the MacDonald guardianship case,' and received for reply that the guardianship matter was in his (Judge Levy's) department, and not in that of Judge Coffey. Kowalsky repaired to the clerk's office, verified the statement of Judge Levy, and then returned to Judge Levy, told the latter he was correct, and asked for the order, which Judge Levy, knowing of the services rendered, was willing to grant, but was then informed by Kowalsky that he had made a like application to Judge Coffey, and that it had been refused, giving the reason therefor. Judge Levy responded that he had no such rule in his department, but that, under the circumstances, he (Kowalsky) had better comply with the rule, and bring it up regularly in court when the order would be granted. Kow-

alsky then telephoned to Sullivan that the case was not in Judge Coffey's court, but in that of Judge Levy, and that it would be all right. P. J. Corbett, who had remained at Sullivan's office, thereupon repaired to the German Savings Bank, drew \$3,500, and brought it to Sullivan's office. On the return of Kowalsky, he explained truthfully what had occurred at the city hall. Banking hours having closed, Corbett asked Sullivan what he was to do with the money. Sullivan replied that he and Kowalsky were good for it, and he could pay it to them, and they would get the order from Judge Levy. The money (\$3,500) and Kowalsky's receipt for \$500 were then handed over; Corbett receiving the joint receipt of Sullivan and Kowalsky for \$4,000. A petition and order were then dictated by Kowalsky for the allowance by the court of the \$4,000, and written out by a typewriter. The money was divided,—respondent, Kowalsky, receiving \$1,500 and his receipt for \$500 previously paid him, and Sullivan \$2,000. Kowalsky then departed to make preparation for his intended trip of that evening for Los Angeles, wrote a note to Judge Coffey, explaining the mistake in supposing the matter to be in his department, and apologizing for the trouble, etc. He also saw Judge Levy in the evening before starting, and told him the money had been paid over. Kowalsky was absent thereafter for some ten days to two weeks.

"(12) Neither Sullivan nor Kowalsky sought or intended to cheat, defraud, deceive, or mislead P. J. Corbett, the guardian, in any way in the premises, but acted in good faith, believing, and having good cause to believe, that, upon presenting the petition and order in proper form in the court of Judge Levy, the said order would be granted, and the guardian authorized to make the payment to them of \$4,000, and, had the same been presented in open court, it would have been allowed.

"(13) P. J. Corbett, the guardian, believed the order would be granted by the court upon presentation, and would not have made the payment but for such belief.

"(14) Immediately after Kowalsky left the office, Sullivan and Corbett repaired to the city hall with the petition and order allowing the payment of the \$4,000. The court of Judge Levy was not in session, but Sullivan found Hon. W. H. Levy, the judge thereof, in his chambers, and presented to him the papers for an order of allowance, as aforesaid. Judge Levy declined to sign the order until it should be regularly brought to a hearing in open court.

"(15) The value of the services rendered by Sullivan and Kowalsky as attorneys in the case of Henry MacDonald, hereinbefore mentioned, were at least equal to the amount of \$4,000, and probably greatly in excess of that sum; but no order of any court or judge authorizing the guardian to pay any sum of money to them, or either of them, had been

obtained or made, prior to October 6, 1892, or prior to the payment of the money on said last-mentioned day.

"(16) The respondent Kowalsky has not, as charged, evaded or disobeyed any lawful or other direction of any judicial officer, except as hereinbefore stated in reference to the instructions of Hon. J. V. Coffey, as to deposit of trust fund in bank by the guardian, and as to the payment of the same out only on the order of the court. Such instructions having been given in a case in which Judge Coffey had then no jurisdiction, and to a guardian over whom he had no authority, it becomes a question as to the binding force and effect thereof.

"(17) The matter of the guardianship by P. J. Corbett of Henry MacDonald was prior to December 12, 1892, transferred to department No. 9 of the superior court, and on or about the last-mentioned date, the account of the said Corbett coming before the court for settlement, the item of \$4,000 contained therein, on account of moneys paid to the respondent and Sullivan, was disallowed by the court, and charged to P. J. Corbett as guardian.

"Respectfully submitted,
"Niles Searles, Committee."

We think that the foregoing findings of the commissioner are fully justified by the evidence, and present a correct and fair statement of the facts in the case; and, after a careful consideration of the matter, we are satisfied that these facts would not warrant us in rendering any judgment against the accused. The prayer of the accusation is denied, and the proceeding dismissed.

PEOPLE v. GALLAGHER. (No. 20,972.)
(Supreme Court of California. Dec. 22, 1893.)
EMBEZZLEMENT—CRIMINAL LAW—CROSS-EXAMIN-
ING ACCUSED.

1. A company's secretary, authorized to draw and sign checks, (to be signed also by the vice president,) who, receiving from the vice president two blank checks, signed by him, to pay two certain bills, fills out said checks for much larger sums, draws the money from the bank, and absconds, obtains control of it "by virtue of his employment," within Pen. Code, § 508, defining "embezzlement by servants."

2. Since the checks were drawn against an existing balance, the bank had no option but to pay them, and the money embezzled was the company's not the bank's.

3. Defendant, accused of abetting B. in embezzling money drawn by B. from the bank on his employer's account, with which money they two had gone by train to S., testified that he had been with B. most of the day before the crime, and had agreed to meet B. near noon next day at a bar opposite the bank, with no special purpose; that they had agreed to go by a certain train to S.; that they did not agree to take the money with them; that defendant had never advised B. to take his employer's money, agreed with him to go off with it, nor consented to his doing so. *Held*, that the state could ask him, as "matters about which he was examined in chief," (Penal Code, § 1323.)

whether, the day the money was drawn, he went with B. and the money to a neighboring city, helped B. to change part of it, returned with B. and the same money, and left B., and went to the depot with part of it.

In bank. Appeal from superior court, Alameda county; W. E. Green Judge.

B. F. Gallagher, convicted of embezzlement, appeals. Affirmed.

W. F. Aram, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. The appellant was convicted of the crime of embezzlement, and has appealed from the judgment, and from an order denying his motion for a new trial. The indictment charges that, at the county of Alameda, one Richard C. Beggs, a clerk, agent, and servant of the Oakland Consolidated Street Railway Company, a corporation, embezzled \$8,500, the personal property of said company, and that the defendant, B. F. Gallagher, did aid and abet said Beggs in such embezzlement.

The first point made by appellant is that Beggs did not commit the crime of embezzlement, as charged in the information. "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted." Pen. Code, § 503. Section 508 of the Penal Code is in the following language: "Every clerk, agent or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent or servant, is guilty of embezzlement." The crime of embezzlement is a statutory offense, and was unknown to the common law. It is said that in the common-law definition of "larceny" there were two gaps through which, in the expansion of business, many criminals escaped. The first of these gaps was caused by the rule that, to sustain a charge of larceny, it was necessary that the stolen goods should have been at some time in the prosecutor's possession. The second was in the assumption that when possession of goods was acquired by a bailee, no subsequent fraudulent conversion constituted larceny while the bailment lasted, save in a few excepted cases. It was to meet these defects in the common law that statutes have been passed in most if not all of the states of our Union, in some of which an offense is created known as "embezzlement larceny," and in others, as in our own statute, designating the offense as "embezzlement." The case at bar relates to the remedy for the first defect mentioned in the common law, viz. a case in which the personal property alleged to have been fraudulently converted had not been in the prosecutor's possession.

These preliminary remarks, with a view to the better understanding of the initial

points in the case, and we proceed to a review of the contention of appellant, the underlying theory of which is that the money alleged to have been embezzled did not come into the control or care of Beggs by virtue of his employment as a clerk, agent, or servant. The uncontradicted evidence was to the effect that the Oakland Consolidated Street Railway Company, a corporation, was doing business at Oakland, in the county of Alameda; was indebted to two companies in several sums of money aggregating, say, \$2,500; that Richard C. Beggs was secretary of the corporation, and as such secretary his duties were, among other things, to keep the books of the company, to receive all the coin due the company, and deposit it (except small sums kept to pay off discharged workmen) in the First National Bank of the city of Oakland; to draw and sign checks as secretary, which checks were also to be signed by the president or vice president; that the corporation had in the bank aforesaid some \$8,000 to \$10,000, and credit for an overdraft of \$10,000; that on or about June 3, 1892, J. E. McElrath, vice president of the corporation, for the purpose of paying off the indebtedness of the corporation to the two companies aforesaid, and not knowing the precise amount thereof, signed and delivered to Beggs two checks payable to his (Beggs') order on said bank, leaving the amount to be paid thereon, and on each of them, in blank. The evidence is contradictory as to whether Beggs was to indorse the checks and deliver them to the creditors, or to draw the money thereon from the bank and pay them. As there was evidence to that effect, we must, in favor of the verdict, assume the latter theory to have met the approbation of the jury. On the 6th day of July, 1892, Beggs filled up the checks,—one for \$4,000, and the other for \$4,519.20,—signed them as secretary, drew the full amount thereof, aggregating \$8,519.20, from the First National Bank, converted \$1,300 thereof into currency, left \$2,500 with his wife, and fled with the residue to the northern part of the state, where he was arrested two or three days later, and thereupon confessed his guilt. The connection of defendant with the transaction is not here mentioned, for the reason that the contention under this head relates only to the receipt of the money by Beggs in the course of his employment. The argument that the money received by Beggs was that of the bank, and not that of his corporate employers, cannot be maintained. The corporation had funds in the bank. The checks were duly signed by the authorized officer of the corporation, and countersigned by Beggs, its secretary. Under such circumstances, it was not only the privilege but the duty of the bank to pay the checks to Beggs, who was the payee and holder thereof, upon presentation, and, when paid the amount of payment, was a proper charge against the corporation. This being so, the

money, when received by Beggs, was as much the property of the corporation as though collected by the former for it upon a lawful account against any other debtor of the corporation. It is further urged that Beggs had no authority to draw the money from the bank, and hence it did not "come into his control or care by virtue of his employment," within the purview of the statute. The earlier English authorities are not uniform on this proposition. In *Rex v. Snowley*, 4 Car. & P. 390, the prisoner was hired to perform certain services, and was authorized to receive not less than 20 shillings in each case; in a single instance, he charged only 6 shillings, which he received, and did not account for. Held, that there was no embezzlement of the 6 shillings, inasmuch as it was his duty to take no sum less than 20 shillings, and therefore the 6 shillings were not received by the prisoner in the course of his employment. There are other English cases of like import, while perhaps an equal number of cases in the same courts hold a contrary doctrine. Bishop, in his work on Criminal Law, in commenting upon *Rex v. Snowley*, uses the following language: "That in reason, whenever a man claims to be a servant while getting into his possession, by force of this claim, the property to be embezzled, he should be held to be such on his trial for the embezzlement. Why should not the rule of estoppel, known throughout the entire civil department of our jurisdiction, apply in the criminal? If it is applied here, then it settles the question; for by it, when a man has received a thing from another under a claim of agency, he cannot turn round, and tell the principal, asking for the thing, 'Sir, I was not your agent in taking it, but a deceiver and a scoundrel.'" *Bish. Crim. Law*, (3d Ed.) § 367. In the seventh edition of the same work, like language, with some additions, is used, at section 364 of volume 2. In *Ex parte Hedley*, 31 Cal. 109,—a case involving the same question, and in many respects similar to the one at bar,—this court quoted with marked approval the foregoing extract from Bishop, and, in an opinion regarded as conclusive of the question here, held that if an agent obtains the money of his principal in the capacity of agent, but in a manner not authorized, and converts the same to his own use, with intent, etc., it is money received "in the course of his employment" as agent. The evidence shows that it was within the course of the employment of Beggs to draw, upon like checks with those in question, the money of the corporation from bank, and to pay its debts. In the present instance he held the two checks with authority to fill them up in amounts aggregating about \$2,500, and, according to his evidence, to draw the money, and pay the creditors of the corporation, or, according to the evidence of the vice president, to indorse and deliver them to the creditors. It

was as the secretary, and in the course of his employment as such, that he received the checks and filled them up, but in a manner different from his instructions, in that he filled them for larger amounts than he was authorized. Under such circumstances, he comes within the rule laid down by Bishop, supra, as interpreted in *Ex parte Hedley*, supra.

Appellant further insists that there is no evidence whatever that defendant aided and abetted in the appropriation and conversion of the money. In the light of the testimony, this claim seems somewhat extraordinary. There was testimony tending to show that, by previous appointment, defendant repaired to a saloon in the vicinity of the bank, while Beggs procured the money. That they immediately met, and came to San Francisco with the funds; procured a private room at the Lick House, where defendant registered under a fictitious name. That he procured currency for \$1,300 of the coin; took all of the funds, except \$2,500, in a valise to the Oakland station; procured tickets for himself and Beggs to Sacramento, paying therefor from the appropriated fund; had access to and carried the money at least a portion of the time, and when arrested had fifty or sixty dollars of the money on his person,—coupled with the fact that they did not pursue the usual course of travelers, in procuring through tickets to their destination, but only for short distances, and in various ways acted unlike men with money in hand honestly acquired, intent upon a journey, taken in connection with the statements of defendant when arrested, and subsequently, lead irresistibly to the conclusion that the two men were particeps criminis. Waiving, therefore, the evidence that it was the defendant, who, previous to the commission of the crime, had "advised and encouraged" it, we think the evidence against defendant was ample to warrant a conviction. The very fact that the embezzlement was determined upon before the money was drawn from the bank detracts nothing from the guilt of defendant as an aider and abettor, under such circumstances. Mere intention to commit a crime does not constitute an offense. Had Beggs, after procuring the money from the bank, honestly appropriated it to the legitimate uses of his employer, then, although the amount was in excess of the sum he was authorized to draw, his offense would have been incomplete. It was the subsequent wrongful appropriation of the funds that constituted the crime, and in this the defendant participated, under circumstances clearly indicating guilty knowledge and criminal intent. He was not simply an accessory after the fact, but a co-worker in the performance of the acts constituting the *corpus delicti*.

The defendant offered himself as a witness in his own behalf, and testified that he was not sure whether he saw Beggs on the

Saturday next before the 6th of June or not, but that on the following Sunday he did see him; that he met him about 1 or 2 o'clock on that day, and was with him until 11 o'clock in the evening; that when they separated that night they made an appointment to meet on the following day, Monday, June 6, 1892, between 11 and 12 o'clock in the morning, at a certain saloon in Oakland, across the street from the First National Bank; that there was nothing said about Beggs drawing money from the bank; and that there was no particular purpose for which they were to meet. He also testified: "I did not on this Saturday just referred to, or at any other time, or ever, advise him to take the funds of the bank or corporation of which he was secretary, and appropriate them to his own use, nor did I, then or ever, suggest to him that he might do that, or that he and I might do that, or that we might go to Canada, or to some place, or that we would divide the funds equally after we got away. I did not ever, at any time, advise him to draw this money from the bank, and go off with it, nor did he ever suggest doing so, and I consent to it, nor did I ever agree with him to go off with the money of the bank, or of the corporation on deposit in the bank." Upon his cross-examination he was asked: "Q. Did not you and Beggs, at or previous to the time you met in the saloon, on the 6th day of June, 1892, agree to take this \$8,500 which Beggs had drawn out of the bank, and go to San Francisco? A. No, sir. Q. Did you not further agree that you should take this money to San Francisco, and change it into currency? A. No, sir. Q. And did you not agree that after the money was changed into currency you should take the train which goes at seven o'clock towards Portland, Or., and take the money with you, and go to Sacramento? A. He spoke about going to Sacramento on the seven o'clock train. Q. I am asking you if you did not agree with him to do that before one o'clock of June 6th? A. We agreed to go to Sacramento, yes, but did not agree to take the money." The counsel for the prosecution then asked the following questions: "Q. I will now ask if you did not go to San Francisco with Mr. Beggs on Monday afternoon, Monday, the 6th day of June, 1892, and take with you \$8,500 which Mr. Beggs had drawn from the First National Bank of the city of Oakland, belonging to the First Oakland Consolidated Street Railway Company?" to which the witness answered, "Yes." "Q. Did you not, when you arrived in San Francisco, assist Mr. Beggs in changing about \$1,300 of that money into currency? A. I changed \$1,300 of that money into currency. I did not do so in order to make it easier for Mr. Beggs and myself to flee with this money. Q. Did you not return to Oakland, bring back this same money with Mr. Beggs, and leave Mr. Beggs

somewhere near Oakland Point, and you go to the Sixteenth street station, taking with you \$8,000 of this money? A. We returned to Oakland, and I went to Sixteenth street station with the money, at Begg's dictation." These last three questions were objected to by the defendant's counsel upon the ground that they were not proper cross-examination, not having reference to any matter testified to by the witness in his examination in chief. The court overruled the objection, and, upon the witness declining to answer the questions on the further ground that the answers would tend to criminate him, the court peremptorily ordered him to answer, and thereupon the above answers were given. These rulings of the court were properly excepted to, and are now assigned as error.

We are of the opinion that the court did not err in overruling the objections. Section 1323 of the Penal Code provides: "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief." The effect of the latter clause of the above is to take from the court any discretion which it might ordinarily exercise in allowing the range of a cross-examination to extend beyond the matter brought out upon the direct examination, (see *People v. Rozelle*, 78 Cal. 84, 20 Pac. 36,) and to prevent the prosecution from questioning the defendant upon the case generally, and in effect making him its own witness, (*People v. O'Brien*, 66 Cal. 602, 6 Pac. 695.) The statute does not, however, place any limitation or restriction upon the extent or character of his cross-examination "as to all matters about which he was examined in chief," and upon those matters he may be cross-examined as fully as any other witness. Any question which would have the tendency to elicit from him the whole truth about any matter upon which he had been examined in chief, or which would explain or qualify or destroy the force of his direct testimony, whether it be to give the whole of a conversation or transaction of which he had given only a part, to show by his own admissions that he had made contrary statements, or that his conduct had been inconsistent with the statements given in his direct testimony, and thus throw discredit upon them, would be legitimate cross-examination. The "matter" about which the defendant had been examined in chief was whether he had co-operated or acted in concert with Beggs in appropriating to his own use and converting the money in question; and, although he had stated in categorical terms that he had not done so, his answers were not conclusive in his favor, nor did they prevent the prosecution from showing through the medium of a cross-examination that they were false; and for this purpose

the prosecution was not limited to a repetition of the questions propounded upon the direct examination, or to asking him whether his answers to those questions were correct or not. Neither was the right of cross-examination limited to the mere questions that his counsel had asked him upon the direct examination, or to the replies which he had made to those questions, but it extended to the entire matter "about" which he had been examined in his own behalf, viz. whether he had given to Beggs any advice or suggestion or aid in appropriating the money. By offering himself as a witness he waived all objection to his constitutional right to claim exemption from giving testimony against himself upon all the matters about which he should volunteer to testify, and as to those matters he opened the door for the most searching investigation by cross-examination as to the accuracy of his testimony, as fully as any other witness who might have given the same testimony. The right of cross-examination affords the most effective mode of testing the accuracy or credibility of a witness, and should not be restricted beyond the requirements of the statute. It was not the intention of the legislature to give to a defendant the opportunity of making any statement upon his direct examination which he might choose, in reference to the issue before the court, and to preclude the prosecution from showing out of his own mouth that such statement is false. In *People v. Rozelle*, 78 Cal. 84, 20 Pac. 36, it was held that the defendant might be cross-examined upon a letter which he had written, and about which no questions had been asked him upon the direct examination, upon the theory that the letter tended to contradict the denials which he had made on his direct examination. The statute of Missouri authorizing the defendant to be a witness in his own behalf contains a restriction upon his cross-examination in the same language as our own. In *State v. McKinsie*, 102 Mo. 620, 15 S. W. 149, there had been evidence on the part of the prosecution tending to show that the defendant had provoked a controversy by striking the deceased with a cane, and the defendant offered himself as a witness, and testified in his own behalf that he had no cane with him at the time of the killing, nor did he strike the deceased with a cane. Upon his cross-examination he was asked whether he did not have a cane with him in a certain saloon which he and the deceased had left a short time before the killing. This question was objected to upon the ground that the defendant had only been questioned about what occurred after he left the saloon, and that he could not be questioned as to what had occurred prior thereto; but the court held that the question was proper cross-examination, upon the ground that he had been asked about having a cane with him and using it in the homicide, and that his

possession and use of the cane were the matters referred to in the examination in chief, and that he might be cross-examined fully with reference to such possession and use. The testimony of the defendant that he had been with Beggs during the greater portion of the preceding day, and until a late hour in the night, and that they had parted with an agreement to meet in a saloon across the street from the bank between 11 and 12 o'clock on the next day without any particular purpose for so meeting, taken in connection with his testimony that they had agreed to go to Sacramento by the 7 o'clock train, made the questions proper cross-examination for the purpose of throwing discredit upon the accuracy of his statements that they did not also agree to take the money with them, and that he had never advised Beggs to take the funds of the corporation of which he was the secretary, and had never agreed with him to go off with the money, or consented to his doing so. If the defendant and Beggs did in fact, on the 6th of June, after they had met at the saloon according to their previous appointment, go to San Francisco together, with this money, and after their arrival there the defendant changed a portion of it into currency, and thereafter returned to Oakland, and went to the Sixteenth street station with this same money, where he met Beggs, and they thereafter took tickets and went to Sacramento, taking this money with them, these facts would tend to show concerted action and a prior agreement between them to do the acts. For this purpose it was proper to permit the prosecution to show these facts by the cross-examination of the defendant. We find no error in the record, and the judgment and order are affirmed.

PEOPLE v. CROWLEY. (No. 21,028.)

(Supreme Court of California. Dec. 23, 1893.)

BURGLARY—INDICTMENT AND PROOF—DEFENDANT AS WITNESS—CROSS-EXAMINATION—IMPEACHMENT—SUFFICIENCY OF EVIDENCE.

1. One may be convicted of attempted burglary under an indictment alleging an attempt to enter a house with intent to commit larceny, though the proof shows an attempt to enter with intent to commit robbery.

2. Though Pen. Code, § 1323, authorizes the cross-examination of defendant in a criminal case only as to matters about which he was examined in chief, still, under Code Civil Proc. § 2051, providing that, for the purpose of impeaching "a witness," it may be shown by the examination of the witness that he has been convicted of a felony, a defendant in a criminal case may, on cross-examination, be asked if he has been convicted of a felony.

3. In a criminal case the sufficiency of the evidence cannot be reviewed, where it does not appear by the bill of exceptions that the point was raised below.

Department 2. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Phil Crowley was convicted of attempted burglary, and appeals. Affirmed.

J. Q. White, J. E. Pemberton, Dist. Atty., Carroll Cook, and Geo. A. Sturtevant, for appellant. W. H. H. Hart, Atty. Gen., for the People.

McFARLAND, J. The appellant was informed against, and convicted of the crime of an attempt to commit burglary; and he appeals from the judgment, and from an order denying a new trial. There are only two points made by appellant which need special notice,—which points, by the way, are not discussed in the brief of respondent.

1. The charge is that appellant feloniously attempted to enter the house of one Patrick Kenny with intent to commit larceny; and it is contended that the court erroneously refused to give an instruction to the jury to the effect that if he attempted to enter the house forcibly, with the intention "of forcibly taking personal property from the immediate presence or possession of said Patrick Kenny, and against his will, and by means of force or fear," then he could not be convicted of the crime charged in the information. We do not think that the court erred in this ruling. A charge that the attempted entry was with intent to commit a certain offense would not be sustained by proof of an intent to commit an entirely different sort of offense; as, for instance, the charge of intent to commit larceny would not be sustained by proof of an intent to commit rape. But larceny and robbery are generically the same,—the one being merely an aggravated form of the other. Each is the felonious taking of the personal property of another, although in robbery the felonious taking is accomplished by force or threats. The text-books speak of robbery as "an aggravated species of larceny." 2 Russ. Crimes, p. 101. In *East's Pleas of the Crown*, the author, after speaking of certain larcenies from the person, says, "The next species of aggravated larceny from the person is robbery;" and, indeed, the distinction between certain larcenies from the person and robbery is often hard to draw. It has been held here that robbery necessarily includes larceny, and that under an indictment for the former there may be a conviction of the latter. *People v. Jones*, 53 Cal. 58; *People v. Gilbert*, 60 Cal. 111. In *People v. Jones*, supra, the court say that "an indictment for robbery must aver every fact necessary to constitute larceny, and more." This being so, if the appellant had the intent to commit robbery, that intent included all the elements of an intent to commit larceny. The information in the case at bar, therefore, sufficiently complies with the reason of the rule that a defendant must be informed of the charge against him. We have been referred to no case to the contrary.

2. The information charges that appellant had been previously convicted of a felony, and by his plea appellant confessed.

the prior conviction. While on the stand as a witness for himself, the appellant testified to some things which occurred on the night of the alleged burglary, and on cross-examination he was asked by counsel for the prosecution if he had not been previously convicted of a felony. Appellant objected to the question, and his objection was overruled, and he contends that this ruling was erroneous. The first legislation about the testimony of a defendant in a criminal case, except the general provision that he could not be compelled to testify against himself, was that on a preliminary examination he might make a statement, if he so desired; but he could not be asked any question, except by the magistrate, who could ask him only a few questions expressly enumerated in the statute. Hitt. Gen. Laws, para. 1742-1746. It was afterwards enacted that on the trial of a person charged with crime "the person so charged shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury." When the Codes were adopted, section 1323 of the Penal Code simply provided that "a defendant in a criminal action or proceeding to which he is a party is not, without his consent, a competent witness for or against himself." Thus far there was no provision about the cross-examination of the defendant when he offered himself as a witness, although it was always provided that he could not be compelled to testify against himself. In some of the states he is allowed to make a statement before the jury, but cannot be cross-examined at all. But in 1874 the present statutory law upon the subject was enacted by an amendment to said section 1323 of the Penal Code, which made it read as follows: "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself. But if he offer himself as a witness he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief."

The proper construction of section 1323, as it now stands, has not been definitely settled. In *People v. Rozelle*, 78 Cal. 84, 20 Pac. 36, there is some general language in the opinion of the majority of the court to the effect that the same rule applies to a defendant as to other witnesses, but that language is immediately qualified in the next sentence. The only thing decided there was that after a defendant, as a witness, "had denied, in general terms, that he aided, abetted, counseled, or encouraged the commission of the offense charged," he might be asked on cross-examination if he had written a certain letter showing that he had so aided, etc. Of the cases cited in the opinion, *People v. McGungill*, 41 Cal. 481; *People v. Dennis*, 39 Cal. 634; *People v. Reinhart*, Id. 449; and *People v. Russell*, 46 Cal. 121,—were all decided before section 1323 was enacted, and

therefore afford no aid in its construction. In *People v. Beck*, 58 Cal. 212, there was no question as to the cross-examination of a defendant, the only thing there decided being that he could be impeached as a witness by showing his bad character for truth. *People v. Johnson*, 57 Cal. 571, which will be noticed hereafter, is in point as to one phase of the question. We have been referred to no case decided since the present condition of the statutory law on the subject, which holds that the cross-examination of a defendant may be as wide as that of any other witness. On the other hand, in *People v. O'Brien*, 66 Cal. 602, 6 Pac. 695, Morrison, C. J., delivering the opinion of the court, after quoting section 1323 as it now stands, says of a defendant in a criminal action, that "when he is called on his own behalf, and examined respecting a particular fact or matter in the case, the right of cross-examination is confined to the fact or matter testified to on the examination in chief," and that "such is the express language of the statute." It is not correct to say that section 1323 merely states the common-law rule as to the cross-examination of witnesses generally; for witnesses under the general rule can, for various purposes, be asked concerning matters about which they had not been examined in chief. 2 Phil. Ev. p. 895 et seq. And in *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45, the court say that, "so far as the defendant is concerned, the court is not allowed that discretion as to the extent of the scope of the cross-examination which it is permitted to exercise in the examination of the other witnesses." But, with respect to the precise point made in the case at bar, this court, in *People v. Johnson*, 57 Cal. 571, ruled against the contention of appellant. In that case the defendant was asked on cross-examination if he had not been convicted of a prior felony, and it was held that the trial court had not erred in allowing the question. The decision was based upon the ground that section 2051, Code Civil Proc., is the governing section as to such question; and that section provides that, for the purpose of impeaching "a witness," it "may be shown by the examination of the witness * * * that he had been convicted of a felony." Counsel for appellant contends very forcibly that, as in a case like the one at bar, the part of the information charging a prior conviction cannot be read to the jury, there should be no evidence allowed on that subject, and that such rule cannot be evaded through the form of cross-examining the defendant. But those were the very facts presented in *People v. Johnson*, and upon the authority of that case we must hold that the contention of appellant cannot be maintained.

Counsel for appellant makes the point in his brief that the verdict is not sustained by the evidence, but no such point appears

in the record. The bill of exceptions shows upon its face that it does not contain all the evidence. Only enough of the evidence to illustrate the points made is presented. It is true that in a criminal case it is not necessary for the appellant to state the particulars in which the evidence was insufficient to sustain the verdict, but it must appear somewhere in the record that the point of the insufficiency of the evidence was made. Where no such point is made, the prosecution is not called upon to see to it that all the evidence is put into the bill of exceptions. In the case at bar it does not appear from the bill of exceptions that insufficiency of the evidence to sustain the verdict was one of the grounds upon which the motion for a new trial was based. The point, therefore, is not before us.

Since writing the above our attention has been called to the fact that appellant, under a suggestion of diminution of the record, has filed here a certified copy of a motion for new trial. But a notice of motion for a new trial is no part of the judgment roll, and can be made part of the record only by a bill of exceptions. However, we have examined the evidence; and, while it is clear that neither party intended that all the evidence should be put into the bill of exceptions, still we think that there is sufficient of it to support the verdict. We do not think that either of the other points made by appellant is tenable, or requires special notice. In *People v. Gallagher*, 35 Pac. 80, (No. 20,972, this day decided,) the right to cross-examine a defendant is quite fully discussed. The judgment and order appealed from are affirmed.

We concur: FITZGERALD, J.; DE HAVEN, J.

TREAT v. DORMAN et al. (No. 15,391.)
(Supreme Court of California. Dec. 30, 1893.)

MORTGAGES—LIEN—GROWING CROPS.

A mortgage of land, with the rents, issues, and profits thereof, is a lien on the crop growing when suit is begun to foreclose, superior to a junior chattel mortgage on said crop.

Commissioners' decision. Department 2. Appeal from superior court, Contra Costa county; Jos. P. Jones, Judge.

Action by Webster Treat against Asenath Dorman and the Earl Fruit Company to foreclose a mortgage. Decree for complainant. The Earl Fruit Company appeals from part of the decree. Affirmed.

Holl & Dunn, for appellant. W. S. Tinning and Cary Howard, for respondents.

SEARLS, C. This action was brought to foreclose a mortgage for \$35,000 and interest, executed July 8, 1891, in favor of plaintiff, by Emery D. Howe and Ellen D. Thurber,

upon a ranch situate in Contra Costa county. The mortgage purported to convey the land, etc., with the "rents, issues, and profits thereof," and was acknowledged and duly recorded July 10, 1891. The Earl Fruit Company (a corporation) held a subsequent chattel mortgage, executed in due form, July 20, 1892, upon the "crops of fruits and grapes now growing and to be grown, during the seasons of 1892 and 1893," upon the same ranch, and which was recorded July 21, 1892. The Earl Fruit Company was made a defendant in the action, and filed an answer and cross complaint, in the latter of which it set up its chattel mortgage, and averred there was due thereon \$882.65, for which sum it prayed judgment against the mortgagor defendants, and that it be declared a lien upon the fruit and grape crops of 1893; and prayed, further, that, if plaintiff's mortgage be declared a lien, the premises be sold separately from the fruit and grape crops of 1893, and that the said fruit and grape crops be next sold, and the proceeds thereof, after the payment of any deficiency due the plaintiff, be paid to this cross complainant upon the said indebtedness, etc. On the application of the plaintiff, a receiver was appointed in the case January 19, 1893, to take charge, etc., pending the litigation. The court, upon a trial of the cause, found in favor of the plaintiff, and also in favor of the Earl Fruit Company, and entered a decree for the sale of the real property to satisfy the plaintiff's mortgage; found the lien of plaintiff's mortgage on the fruit crop of 1893, prior to the chattel mortgage; and decreed the proceeds thereof to be applied—First, to satisfy any deficiency due plaintiff after a sale of the real property; and, second, to the satisfaction of the sum found due said Earl Fruit Company, and secured by said chattel mortgage. The Earl Fruit Company appeals from so much of the decree as requires the receiver to pay, out of the proceeds of the crop of 1893, the deficiency, if any, due to plaintiff, and the residue to said company, etc. The appeal is presented on the judgment roll.

It is not often that a party appeals from a judgment granting him all that he asked, and yet in this case just that thing has happened. The contention of appellant is that it is entitled, under section 580 of the Code of Civil Procedure, to any relief consistent with the case made by its cross complaint, and embraced within the issue. This is true. Still, every intendment is in favor of the regularity of the judgment, and where, as in the present case, the cause comes up on the judgment roll, with no bill of exceptions or statement, and nothing to show that appellant ever even asked for any other or further relief than that which he prayed for and received, it is not perceived on what principle he can be heard to complain. Waiving all this, however, and the judgment appealed from should be affirmed. The prior mortgage of the plaintiff, in express terms, was

made to cover the "rents, issues, and profits" of the mortgaged premises. In *Montgomery v. Merrill*, 65 Cal. 432, 4 Pac. 414, as here, the mortgage was made to cover the rents, issues, and profits, and, as here, a receiver had been appointed, during the pendency of the action, who had harvested and sold a crop grown upon the land, and held the proceeds. At the foreclosure sale the mortgaged premises did not bring a sum sufficient to satisfy the debt secured by the mortgage, and the plaintiff applied for an order that the money received from the sale of the crop be applied to the payment of the deficiency; and this court held that, under the mortgage thus worded, "not only the land described in the complaint, but the rents, issues, and profits thereof, were mortgaged, so that the crop which the receiver took possession of was a part of the mortgaged property." The contest there was between the mortgagee and mortgagor, but, upon principle, the lien which is valid as against the mortgagor is equally valid as against a subsequent mortgagee with notice. In the present case the plaintiff had an abstract right to have the entire property sold, and its value would have been enhanced by so much as the value of the growing crops of grapes and fruit; but as between plaintiff and defendant, the latter of whom had a lien on the crops only, it was proper, at the request of the latter, to segregate the crops in order that the surplus, if any, after satisfying the sum secured by the mortgage to plaintiff, might be applied to the extinguishment of the subsequent mortgage to defendant. The judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

LOVEREN v. LOVEREN. (No. 15,343.)
(Supreme Court of California. Dec. 28, 1898.)

DIVORCE—ALIMONY PENDENTE LITE.

Money raised on the wife's own credit, and paid for expenses already incurred, is not reimbursable pendente lite, at the court's discretion, as money necessary to enable her to prosecute the action. Civil Code, § 187.

In bank. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

In the suit of Mary J. Loveren against S. S. Loveren for a divorce, defendant appeals from an order for alimony pendente lite. Reversed.

J. N. Gillett, J. F. Coonan, and E. W. Wilson, for appellant. Chamberlin & Wheeler and Frank McGowan, for respondent.

FITZGERALD, J. This is an appeal from an order made by the court below during the pendency of an action for divorce requiring

the defendant to "pay the plaintiff the sum of \$799.68 for the purpose of defraying the costs and expenses of this action incurred by her up to this date." The only question to be determined here involves the power of the court to make such order. The power of the court to grant alimony pendente lite in an action for divorce is derived solely from that part of section 137, Civil Code, which reads as follows: "While an action for divorce is pending the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife * * * to prosecute or defend the action." The plain object of this statute was to empower the court during the pendency of an action for divorce, upon a proper showing made by the wife for that purpose, to compel the husband to provide her with the means necessary to enable her to prosecute or defend the action. If the expenses of the action have been incurred or paid by her with means derived from her separate estate, or upon her credit, then there can be no necessity for an allowance by the court to enable her to do that which she has already done, and without such necessity the court has no authority under the statute to make such an order. And no better evidence can be adduced of her ability in this respect than the fact that she has been able, as the record shows, to incur these expenses and to pay them with money borrowed by her entirely upon the strength of her own credit. Expenses so incurred and paid may be, where it is proper to do so, taxable as costs in the case, but they cannot be made the basis of an order, within the meaning of this statute granting an allowance therefor, and compelling the husband to pay them. Such an allowance can only be granted as to expenses necessary to be incurred in the future prosecution or defense of the action, and cannot be made for the payment of past expenses, except where such payment is necessary to be made in order to enable the wife to further prosecute or defend her case. Section 1769 of the New York Code, which is substantially the same as section 137 of our Code, above quoted, was so construed by the court of appeals of that state in *Beadleston v. Beadleston*, 103 N. Y. 402, 8 N. E. 735. The appeal in that case was also from an order granting an allowance pending an action for divorce to pay expenses previously incurred. This case was subsequently approved in *McCarthy v. McCarthy*, (N. Y. App.) 38 N. E. 550. In *Bohnert v. Bohnert*, 91 Cal. 430, 27 Pac. 732, which was an action for divorce, the appeal was taken by the husband from two orders made after judgment. The first order was for an allowance of "\$87.50, to be paid out forthwith as expenses for transcribing the testimony on the part of the defendant already incurred." It appears that the allowance for past unpaid expenses for transcribing the testimony referred to was necessary to be made, in order to enable

the wife to further prosecute or defend her case in perfecting her appeal to this court. This allowance was clearly authorized by the statute. The second order appealed from required the husband to "pay to the clerk of said court the amount of \$269.90 to be by said clerk retained, and to await further action herein." This order was affirmed by the court, on the ground that the husband was not injured by it. That case is neither in conflict with the views herein expressed nor with the New York cases cited; but is, so far as it goes, in line with them. The order appealed from herein shows upon its face that the allowance was made to pay expenses theretofore incurred; and, as it does not appear, and is not claimed, that it was made upon the ground that it was necessary to enable the wife to further prosecute or defend the action, it follows that the order should be reversed. So ordered.

We concur: BEATTY, C. J.; DE HAVEN, J.; McFARLAND, J.; GAROUTTE, J.; PATTERSON, J.; HARRISON, J.

PEOPLE v. KRUGER. (No. 21,023.)

(Supreme Court of California. Dec. 26, 1893.)

BURGLARY—INSTRUCTIONS AS TO DEGREE—IMPEACHING WITNESS.

1. One jointly indicted with defendant for burglary, and who had pleaded guilty, as a witness for the state testified that defendant had nothing to do with the robbery. Held that, for the purpose of laying a foundation for showing that he had made contradictory statements, the state was properly allowed to ask him if, when he pleaded guilty, he did not, in the presence of the court, its officers, and others, state that defendant was one of the parties to the robbery, there being no purpose to impeach him by his written testimony, so that it should have been first read to him.

2. It being clear that a burglary, if committed at all, was in the nighttime, there can be no injury in an instruction that, if defendant is found guilty, it should be of burglary in the first degree.

Department 2. Appeal from superior court, city and county of San Francisco; James M. Trout, Judge.

Adolph Kruger was convicted of burglary, and appeals. Affirmed.

Robert Ferral, for appellant. Atty. Gen. Hart, for the People.

McFARLAND, J. The information charges appellant, jointly with one Oman, with the crime of burglary. He was convicted, and appeals from the judgment, and from an order denying a new trial.

Oman, who had pleaded guilty, was called as a witness for the prosecution, and testified that appellant had nothing to do with the commission of the alleged crime. The prosecuting attorney was allowed, on the ground of surprise, to ask the witness if, at the time he pleaded guilty, he had not stated, in the presence of the court, the clerk,

the shorthand reporter, the prosecuting attorney, and others, that appellant was one of the parties who committed the crime, and had climbed over the roof through the skylight, etc. To this, counsel for appellant objected, not upon the ground that it was not a genuine case of surprise, but upon the ground that, if he made such a statement, he should first have the testimony read to him. We do not think that the court erred in overruling the objection. The purpose was not to impeach the witness by a written instrument, but simply to lay a foundation for showing that he had made contradictory statements. It does not even appear that the statement referred to was in the shape of testimony.

Objection is made to the last paragraph of the court's charge to the jury, to the effect that if the jury were convinced from the evidence, beyond a reasonable doubt, that appellant was guilty of the crime charged, then their verdict should be, "Guilty of burglary in the first degree." It is true that a court should not often hazard such an instruction; but it is so clear in the case at bar that the burglary charged was committed, if at all, in the nighttime, that no possible injury could have been done by the instruction. The instructions, as a whole, stated the law applicable to the case correctly, and were not at all unfavorable to appellant.

The most direct evidence against appellant came from accomplices, but we think that their testimony was sufficiently corroborated. There are no other points made by appellant. Judgment and order affirmed.

We concur: DE HAVEN, J., FITZGERALD, J.

MURRAY v. GLEESON. (No. 15,395.)

(Supreme Court of California. Dec. 26, 1893.)

DISMISSAL—FAILURE TO SERVE SUMMONS.

Under Code Civil Proc. § 581, subd. 7, which provides that an action shall be dismissed "unless summons shall have been issued within one year, and served, and return thereon made within three years," it is error to dismiss an action, because the summons was not served within one year after suit brought.

Commissioners' decision. Department 2. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by William F. Murray against John Gleeson to foreclose a mortgage. From a judgment dismissing the action, plaintiff appeals. Reversed.

J. W. Harding, for appellant. A. H. Griffith and G. W. Bowie, for respondent.

BELOCHER, C. This is an action to foreclose a mortgage on real property. The complaint was filed and the summons issued on December 26, 1891. The summons was

served upon the defendant on April 3, 1893, and on the 12th of that month defendant served notice upon the plaintiff that he would, on May 1, 1893, move the court to dismiss the action on the ground that the summons was not served within the time required by law. At the time named the motion was heard by the court, and taken under advisement until the 15th of the same month, when the motion was granted, and judgment entered dismissing the action solely "on the ground that the summons was not served within one year after the commencement of the action." From this judgment the plaintiff appeals.

The action of the court was based upon subdivision 7 of section 581, Code Civil Proc., which was added to the Code by an amendment made in 1889, and reads as follows: "And no action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced on its own motion, or on the motion of any party interested therein, whether named in the complaint or not, unless summons shall have been issued within one year, and served, and return thereon made within three years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said three years." The respondent contends that this language, when properly construed, means that the summons must be both issued and served within one year after the complaint is filed; and whether this be so or not is the only question presented for decision. Prior to the amendment in question, the statute provided that the summons must be issued within one year after filing the complaint, but there was no express limitation as to the time within which service and return must be made. It was, however, held that the service must be made within a reasonable time, and, if not so made, that it was ground for a dismissal of the action. *Grigsby v. Napa Co.*, 36 Cal. 585; *Carpentier v. Minturn*, 39 Cal. 450; *Eldridge v. Kay*, 45 Cal. 49; *Lander v. Fleming*, 47 Cal. 614; *Diggins v. Thornton*, 96 Cal. 417, 31 Pac. 289. In the case first cited the summons was served about two years and eight months after it was issued. A motion to dismiss the action for want of prosecution was made and granted on the ground that the delay was unreasonable. On appeal the order was affirmed. In the case last cited the complaint was filed about nine years before the summons was served. A motion to dismiss was made and denied. On appeal it was held that the delay was grossly unreasonable, and was ground for dismissing the action, in the absence of a showing of the proper exercise of diligence in the service of the summons. The order was reversed. If respondent's construction is correct, then, while the sum-

mons must be issued and served within a year, the return may be delayed for two years or more thereafter. But this, in our opinion, is not the meaning of the statute, and was never intended by the legislators who passed it. Section 406, Code Civil Proc., provides that the summons may be issued at any time within one year after the complaint is filed. It may therefore be issued on the last day of the year, and at that time the defendant may be at a distance, or may conceal himself to avoid service. When the defendant is found and actually served, the court acquires jurisdiction of his person, and thereafter no great length of time can be required for making the return. To construe the statute, therefore, as requiring the service to be made within a year, and the return within three years, would be unreasonable and absurd. In our opinion, one of the obvious purposes in adopting the amendment was to fix three years as the limit of time beyond which no service or return could be made, thus meeting and removing an uncertainty which had before existed. The question, however, as to whether there has been reasonable diligence in making the service within the time limited is left an open one, to be considered and decided by the court upon the facts of each particular case. See *Kreiss v. Hotaling*, (Cal.) 33 Pac. 1125. It follows that the court erred in granting the defendant's motion, and that the judgment should be reversed, and the cause remanded.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded.

SOUTH END MIN. CO. v. TINNEY et al. (No. 1,373.)

(Supreme Court of Nevada. Jan. 2, 1894.)

EJECTMENT—PLEADING—DEFENSES—MINES AND MINING—LOCATION OF CLAIM—PATENT—LIMITATION OF ACTIONS.

1. An equitable defense may be set up to an action for the possession of lands, and as to such defense the case is to be tried in the same manner and on such principles as would apply to an original bill in equity.

2. Where a person abandons his application for a patent to a mining claim, and ceases work on it, without having obtained a certificate of purchase, the claim may be relocated, under Rev. St. U. S. § 2324.

3. Several years after plaintiff had abandoned its application for a patent to a mining claim, and after it had ceased to work it, defendants' grantor relocated a portion of the claim according to the mining law, and held possession thereof continuously thereafter. A year after such relocation, plaintiff, without giving notice of its intention so to do, and without defendants' consent or knowledge, fraudulently obtained a patent to such claim. Held, that plaintiff was a trustee of the title to such claim for defendants. *Murphy, C. J.*, and *Belknap, J.*, dissenting.

4. Defendants, being in possession of such

claim under a location made in accordance with the law, are in such privity with the United States that they can contest plaintiff's patent, and assert their rights to the claim.

5. "Patented mines" are within the provisions of Gen. St. § 3632, providing that no action to recover "mining claims" shall be maintained unless plaintiff was "seised" or "possessed" or was the "owner" of such claim according to the laws and customs of the district embracing the same within two years before the commencement of such action, and that occupation and adverse possession of a "mining claim" shall consist in holding and working the same in the usual mode of holding and working similar claims in the vicinity. Murphy, C. J., dissenting.

Appeal from district court, Lyon county; Richard Rising, Judge.

Ejectment by the South End Mining Company against Charles Tinney and others. There was judgment for plaintiff, and defendants appeal. Reversed.

The other facts fully appear in the following statement by BIGELOW, J.:

Action of ejectment to recover possession of a piece of mining ground, 1,100 feet in length by 400 feet in width, including the Comet ledge, to which the plaintiff alleges title in fee since March, 1888, and ouster by defendants in March, 1891, and to obtain an injunction perpetually enjoining the defendants from trespassing upon or removing ore from said mining ground. The answer denies the plaintiff's ownership, but admits that the plaintiff obtained a patent for the ground from the United States on March 29, 1888, and thereby acquired the legal title to the same, but sets up the following facts as avoiding the effects of this admission: That in 1876 the plaintiff's grantors applied for a patent for the Comet mining claim, covering the ground in dispute, alleging it to have been located in 1872. That in 1878 the plaintiff abandoned its application for a patent, abandoned the claim, ceased to possess or occupy the same, and from that time up to 1888 failed to do the annual work or any work or labor thereon, by reason of which abandonment and failure the ground became subject to relocation. That on January 5, 1887, while the mine was in this condition, the defendants' grantors entered thereon, and located in accordance with the laws of the United States the Phoenix mining claim, covering a portion of the Comet claim, and defendants and their grantors have ever since remained in possession thereof, in strict compliance with the mining laws, and have expended in its development some \$6,000. That on the 13th of April, 1888, they made a strike of ore therein, and thereupon the plaintiff "reorganized, and resumed the prosecution of its said application for patent, and without the knowledge of the defendants or their grantors, and without posting or publishing any other or further notice of application for patent, procured the register and receiver to sell said Comet mining claim to plaintiff, and to issue a certificate of the purchase thereof; and, in order to induce said

register and receiver to accept payment and issue said certificate of purchase, and for the purpose of inducing the government of the United States to sell and patent said mining claim to plaintiff, procured and caused to be presented to and filed in the office of said register and receiver of the United States land office false and fraudulent affidavits and testimony, showing and tending to show that the annual labor and improvements had been made by plaintiff upon the said Comet mining claim and location between the date of location, to wit, 1872, and the date of such proof and certificate of purchase; said plaintiff well knowing that said affidavits and proofs were false and fraudulent." The answer also set up the statute of limitation founded upon an adverse possession of more than two years. Upon motion the court below granted judgment for the plaintiff upon the pleadings, holding that the answer failed to state facts constituting any defense to the action.

R. M. Clark and E. D. Knight, for appellants. W. E. F. Deal, for respondent.

BIGELOW, J., (after stating the facts.) The complaint in this action has a double aspect. It states—First, a cause of action is ejectment; and, secondly, an equitable cause of action to obtain an injunction to restrain certain trespasses threatened by the defendants. To these the answer attempts to plead, among other things, an equitable defense. Of the right of the defendants to set up an equitable defense to an action for the possession of lands there can be no question, and as to this defense the case is to be tried in the same manner and upon the same principles that would apply to an original bill in equity, brought for the same purpose. *Pomeroy v. Rem. & Rem. Rights*, § 87 et seq.; *Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. 782; *Quinby v. Conlan*, 104 U. S. 420; *Estrada v. Murphy*, 19 Cal. 248, 273; *Hollinshead v. Simms*, 51 Cal. 158; *Treadway v. Wilder*, 8 Nev. 93; *Dutertree v. Shallenberger*, 21 Nev. 507, 34 Pac. 449; *Suessenbach v. Bank*, 5 Dak. 477, 41 N. W. 662.

2. As judgment was rendered against the defendants upon the pleadings, the question is whether the answer states any defense, and I pass to a consideration of whether, in the light of equitable principles, it presents facts which entitle the defendants to defeat the action, founded, as it is, upon the legal title. It will be noticed that when the plaintiff ceased the prosecution of its application for a patent, and abandoned the mine, it had not paid for the ground, nor obtained a final certificate of purchase from the receiver of the land office. This failure prevents it from having obtained such vested rights as relieved it from the necessity of doing the annual assessment work, and distinguishes the case from *Benson Mining etc., Co. v. Alta Mining, etc., Co.*, 145 U. S.

428, 12 Sup. Ct. 877, and *Deno v. Griffin*, 20 Nev. 249, 20 Pac. 308, where it was held that by reason of completed patent applications and payment the requirement of doing the work no longer existed. Section 2324, Rev. St. U. S., provides that, until a patent issues, not less than \$100 worth of labor shall be performed or improvements made upon a claim during each year, and upon failure to do so the claim shall be open to relocation in the same manner as though no location had ever been made. The courts have held a patent certificate issued upon final payment to be equivalent to a patent, but until then abandonment, or a failure to do the annual work, subjects the claim to relocation. *Sickels*, Min. Dec. 371, 384; *Copp*, Min. Lands, 255, 296; *Ferguson v. Mining Co.*, 18 Copp, Landowner, 242; *Minning Co. v. Gage*, 17 Copp, Landowner, 89. Then, by reason of this abandonment and forfeiture, the *Comet* became subject to relocation, and while in this condition the defendants and their grantors relocated a portion of it under the name of the "Phoenix." The answer shows that this relocation was made strictly in accordance with the mining laws, and there is no contention that it was not in all respects sufficient, nor that the defendants have not since fully complied with the laws in keeping up their title. Under these circumstances, up to the time the patent was issued to the plaintiff, they were vested with both the legal and equitable title to the ground as fully as it is possible to obtain such title by a location of a mine upon the mineral lands of the United States, upon which no patent has been obtained. As will be shown hereafter in another connection, this vested in them, even as against the United States, the full beneficial ownership of the claim, which could only be lost by a failure upon their part to comply with the mining laws. Suppose that prior to the issuance of this patent to the plaintiff it had brought this action, can there be any question that it would have been decided in favor of the defendants? There can be but one answer to this, and this shows that it is only by reason of the bare legal title, obtained by this patent, that it now has any standing, even in a court of law. Then the naked fact is that, while the defendants were the full beneficial owners of this property in accordance with the laws of the United States, without notice to them, and without their knowledge, the plaintiff has, by fraud and trickery practiced in the land office, obtained a patent therefor; and the question is whether this fraud has been so well perpetrated, and is so well entrenched in the law, that even a court of equity can afford the defendants no remedy. I am happy to say that in my judgment such is not the case, and, further, that any system of laws that would not afford a remedy under such circumstances would be unworthy

a civilized people. The publication and posting of the notices which the mining law requires to be made upon applications for patent had been made long prior to the time that the defendants located the *Phoenix* claim. An adverse claim must be filed during the 60 days that these notices are given, and it was consequently impossible for them to file an adverse claim to the application. Their rights date from 10 years subsequent to this. Had their ownership dated from any time prior to the publication of the notices, they would, of course, have been required to adverse the application in the land office, or they would have lost all right in the ground. But the law does not require impossibilities, and the fact that they did not and could not do so cuts no figure in the case. Subsequent to this, the plaintiff lost all ownership in the ground, and the defendants obtained their title; and it is upon this situation that the case must be decided.

8. Having established, at least to my own satisfaction, that previous to the patent the mine was the property of the defendants, I proceed to consider whether by reason of that patent they have lost all right therein which can be protected by a court of equity. It is doubtful, although in my view quite immaterial, whether the plaintiff was guilty of any fraud upon the United States in the proceedings in the land office such as would justify the annulling and setting aside of the patent, in that the fact that they had done the annual labor is not one of the conditions of obtaining a patent; but this does not matter, and I shall not pause to consider it. Obtaining a patent to the defendants' mine was, under the circumstances, a positive and unequivocal fraud upon them; and, even if it were not, the answer shows such a state of facts as make the plaintiff the holder of the patent title in trust for the owners of the mine. These are that without the publication or posting of any notice of its intention so to do, and without the defendants' consent or knowledge, the plaintiff has secretly and surreptitiously obtained a patent to their property. This is entirely sufficient to require a court of equity to hold it a trustee of that title for the defendants. This has often been decided by the courts, and the principle upon which it is done is quite clearly stated by Judge Sawyer in the case of *Lakin v. Mining Co.*, 11 Sawy. 281, 238, 25 Fed. 337, as follows: "Where one party wrongfully obtains the legal title to land, which in equity and good conscience belongs to another, whether he acts in good faith or otherwise, he will be charged in equity as a constructive trustee of the equitable owner. That, I think, is a doctrine established by the following cases: *Wilson v. Castro*, 31 Cal. 420; *Salmon v. Symonds*, 30 Cal. 301; *Bludworth v. Lake*, 33 Cal. 256; *Hardy v. Harbin*, 4 Sawy. 549,—the latter being a decision of Mr. Justice Field on the circuit." This case, while no

more in point upon principle than many other decisions, is in its facts very similar to the case in hand. The defendant there had secretly and clandestinely, but without positive fraud, and without any fiduciary relation existing between the parties, by means of an old and dormant application obtained a patent to the plaintiff's mine. Upon the ground stated in the quotation it was decreed that the defendant held this title in trust for the plaintiff, and it was compelled to convey it to him. Two cases more alike in their essential facts than that and this could scarcely be found. Of the two, this is the stronger, as here actual fraud in the land office intervened. That case was approved, and the same principle affirmed, in *Hunt v. Patchin*, 13 Sawy. 304, 35 Fed. 816, where the patentee of a mine was again decreed to hold the patent title in trust for the equitable owner of the property. In *Wilson v. Castro*, 31 Cal. 420, it was held that where one who had a grant of land from the Mexican government died intestate, and then a person, mistakenly believing himself the heir, sold a part of the land to others, who afterwards, under the belief that they had acquired a good title, and without any fraud, obtained a confirmation of the grant, and a patent from the United States, the patent did not deprive the true heirs at law of their interest in the property, but the patentees held the title in trust for them; that it did not matter whether the patentees acted in good faith, and did not know that they occupied to the heirs at law the relation of trustees in equity, for the trust arose as a matter of law, and was a constructive trust. It was held further that the fact that the true heirs had notice of the proceedings taken by the patentees to obtain a confirmation of the grant and patent for the same, but did not intervene to protect their rights, did not destroy the trust. In *Hardy v. Harbin*, 4 Sawy. 536, Justice Field said, (page 540:) "The bill is filed for the purpose of having a trust declared and enforced, the complainants relying upon the established doctrine that wherever property is acquired by fraud, or under such circumstances as to render it inequitable for the holder of the legal title to retain it, a court of equity will convert him into a trustee of the party actually entitled to its beneficial enjoyment." The title involved was a United States patent, and it was again decreed to be held in trust for the true owner. In *Sanford v. Sanford*, 13 Pac. 602, decided by the supreme court of Oregon, and subsequently affirmed by the supreme court of the United States, (139 U. S. 642, 11 Sup. Ct. 666,) one had, by a false affidavit made in the land office, obtained a patent to a piece of land upon which another had settled, and which equitably belonged to the latter. It was again decided that the patentee held the legal title in trust for the equitable owner. In *Rector v. Gibbon*, 111 U. S. 276, 291, 4

Sup. Ct. 605, the supreme court of the United States, speaking of the case of *Johnson v. Townsley*, 13 Wall. 72, said: "The decision aptly expresses the settled doctrine of this court with reference to the action of officers of the land department,—that when the legal title has passed from the United States to one party, when in equity and in good conscience and by the laws of congress it ought to go to another, a court of equity will convert the holder into a trustee of the true owner, and compel him to convey the legal title." Nothing to the contrary was decided, or even suggested, in *Hamilton v. Mining Co.*, 13 Sawy. 113, 3 Fed. 562, and the same is true of *Smelting Co. v. Kemp*, 104 U. S. 636, and *Steel v. Refining Co.*, 108 U. S. 447, 1 Sup. Ct. 388. The two latter were both actions at law in the United States courts, where, as every lawyer knows, no equitable defense can be interposed, but must be set up by a separate action in equity. The attempt in those cases was to assail a patent collaterally, which upon well-settled principles, it was held could not be done. The distinction between those cases and such a proceeding in equity as we are now dealing with is over again pointed out in the opinions therein rendered by Mr. Justice Field. In *Silver v. Ladd*, 7 Wall. 219, 228, speaking of the equitable action, Mr. Justice Miller said: "The relief given in this class of cases does not proceed upon the ground of annulling or setting aside the patent wrongfully issued. That would leave the title in the United States, and the plaintiff might be as far from obtaining justice as before. And it may be well doubted whether the patent can be set aside without the United States being a party to the suit. The relief granted is founded upon the theory that the title which has passed from the United States to the defendant inured in equity to the benefit of plaintiff; and a court of chancery gives effect to this equity, according to its forms, in several ways." Language used in *Hardy v. Harbin*, 4 Sawy. 536, 541, is also very much in point here. The court said: "And it is upon the confirmation and patent that the defendants rely to resist the claim of the complainants. Their position is that the confirmation inured to the benefit of the confirmer, and that the patent is conclusive evidence of the validity of their title; that it is the record of the government upon which cannot be questioned, except in direct proceedings instituted in the name of the government, or by its authority. It is undoubtedly true that the confirmation inured to the benefit of the confirmer, so far as the legal title to the premises was concerned. It established the legal title in them, but it determined nothing as to the equitable relations between them and third parties." This distinction is again carefully pointed out in *Sanford v. Sanford*, 139 U. S. 642, 646, 11 Sup. Ct. 666, and in *Lee v. Johnson*

116 U. S. 48, 6 Sup. Ct. 249. In very many of the cases no fiduciary relations existed between the parties, and hence the suggestion that this is the only ground upon which a patentee can be held to be a trustee is shown to be without foundation. The true ground in such cases as this is fraud, or that "in equity and good conscience" the land belongs to another.

4. It is also argued that the defendants are not in such privity with the government title that they can contest the patent and assert their rights. I find, however, the contrary to be the law. As I have shown, the defendants were, at the time the patent issued, the owners of a mining location upon the premises in dispute, made and held in all respects in accordance with the laws. As to the effect of this location, the court, in *Noyes v. Mantle*, 127 U. S. 348, 353, 8 Sup. Ct. 1132, used this language: "As said in *Belk v. Meagher*, 104 U. S. 279, 283: 'A mining claim perfected under the law is property in the highest sense of the term, which may be bought, sold, and conveyed, and will pass by descent.' It is not, therefore, subject to the disposal of the government." And again, in *Gwillim v. Donnellan*, 115 U. S. 45, 49, 5 Sup. Ct. 1110: "A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located."

* * * To entitle the plaintiff to recover in this suit, therefore, it was incumbent on him to show that he was the owner of a valid and subsisting location of the land in dispute, superior in right to that of the defendants. His location must be one which entitles him to possession against the United States, as well as against another claimant. If it is not valid as against the one, it is not as against the other. The location is the plaintiff's title." In *Seymour v. Fisher*, 16 Colo. 188, 27 Pac. 240, the court said: "The locator thereof is entitled to the present possession and use as against all the world, including even the United States, which, prior to patent, retains the legal ownership." Such a title as this is amply sufficient to entitle the owner to demand that the patentee shall hold the title in trust for him. *Sparks v. Pierce*, 115 U. S. 408, 6 Sup. Ct. 102; *Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. 782. "Until the patent issued, the government held the title in trust for the locators or their vendees. * * * The entry at the United States land office, and the patent issued in pursuance thereof, was burdened with this trust, and the same may be enforced against any person claiming under the patent who can be charged with it." *Suessenbach v. Bank*, 5 Dak. 477, 499, 41 N. W. 662. The rule in such cases is well stated in *Ohlson v. Price*, 54 Ark. 251, 258, 15 S. W. 883, 1081, as follows: "A stranger or occupant without right cannot assail a patent for fraud practiced against the state;

but an occupant with a right to purchase may attack a patent issued in fraud of his rights, and upon equitable terms may demand a conveyance from the patentee." *Hermocilla v. Hubbell*, 89 Cal. 5, 10, 26 Pac. 611, is directly in point. It was there held: "The defendants were in possession of their claims under locations which were made in accordance with the law and the local rules and customs. They were, therefore, in privity with the United States, and had a clear right to contest the patent and assert their rights."

5. It is said that the defendants' remedy is to apply to the attorney general of the United States to bring a bill in equity to set aside the patent. I shall not consider this matter. Aside from the fact that it would be puerile to hold that the defendants' vested rights can be made dependent upon the discretionary action of an executive officer, there are several answers to it, some of which are suggested in *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273, 8 Sup. Ct. 850. But as I have shown that in this proceeding they are entitled to the protection of the law, it is unnecessary to determine whether any other course is open to them. The case of *Railroad Co. v. Cannon*, 4 C. C. A. 303, 54 Fed. 253, is not in point. As there stated by *Hawley, J.*, (page 255, 54 Fed., and page 306, 4 C. C. A.) that was "not a case where equitable relief is sought against a party holding the legal title." This is. Again, the court there held that the railroad company's rights did not attach to the premises, if ever, until 1882; while the patent had been issued to the defendants in 1879. A court would not be likely to hold that a patent was taken in trust for a party that obtained no right in the land until two years after it was granted. But here the defendants' rights date from 1887, and the patent was not issued to the plaintiff for more than a year thereafter.

6. The question as to the statute of limitation turns upon whether the legislature intended to include patented mines within the provisions of Gen St. § 3632. As originally adopted, the section read as follows, (St. 1861, p. 27:) "No action for the recovery of mining claims, or for the recovery of the possession thereof, shall be maintained unless it appear that the plaintiff, or his assigns, was seized or possessed of such mining claim in question within two years before the commencement of such action." In 1867 it was amended to its present form, and now reads thus: "No action for the recovery of mining claims, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff or those through or from whom he claims, were seized or possessed of such mining claim, or were the owners thereof according to the laws and customs of the district embracing the same, within two years before the commencement of such action. Occupation and adverse possession of a mining claim shall con-

sist in holding and working the same, in the usual and customary mode of holding and working similar claims in the vicinity thereof. All the provisions of this act, which apply to other real estate, so far as applicable, shall be deemed to include and apply to mining claims; provided, that in such application 'two years' shall be held to be the period intended whenever the term 'five years' is used; and provided further, that when the terms 'legal title' or 'title' are used, they shall be held to include title acquired by location or occupation, according to the usages, laws and customs of the district embracing the claim." The argument that the section was not intended to include patented claims is based upon the use of the term "mining claims," which, it is said, means simply a mine held under the laws and customs of miners; and upon the fact that when the section was first enacted no greater title than that could be obtained. It will be noticed, however, that when the amendment was adopted the laws of the United States did provide for obtaining a patent to a mine, and it must be supposed that the amendment was adopted with that state of facts in view. As to the meaning of the term "mining claim," the question is, of course, not what the words mean in other connections, but what they were intended to mean as used here. Had the legislature used the word "mines" in connection with, or instead of, "mining claims," there would seem to be no point to the argument; and whatever there is now is considerably weakened by the fact that those terms were then, as they still are, often used to mean the same thing. *State v. Real Del Monte Gold & Silver Min. Co.*, 1 Nev. 523. As the section now stands it seems to provide for three kinds of ownership of a mining claim: (1) Where the claimant was seised; (2) where he was possessed; (3) where it had been held in accordance with mining laws and customs. We are not to suppose that any of these terms were needlessly used, or used without meaning; and, if not, the word "seised" means something different from simple possession of a claim, or of a holding of it in accordance with the laws and customs of miners. If so, it must mean, as it would naturally import, an ownership in fee, for this is the only other kind of ownership known to the law. The phrase, "according to the laws and customs of the district," is not found in the original section, and must have been added because of doubts as to whether a claim so held was within the words "seised or possessed." Apparently the main purpose of the amendment was to make certain the application of the section to such claims, and that could only have been demanded by a belief that, as originally adopted, it did not apply to them, and applied only to mines held in fee, or by simple possession. Again, the definition of what shall constitute adverse possession of mining

property mentions nothing but mining claims; and, if those words were not intended to cover patented claims as well, then there is no provision as to what shall constitute an adverse holding of a patented mine,—a hardly probable oversight. The same words, "seised or possessed," are used in the next section with reference to other real property, but no suggestion has ever been made that they do not apply to lands held in fee, as well as otherwise, although when adopted there was, perhaps, not a piece of patented land in the whole territory. The main reason, too, for fixing a shorter period of limitation for mines than for other property, applies as well to patented claims as to those held by other titles. Other classes of real property are comparatively stable in value, and can be used and made productive at a comparatively small expense; but not so with mines. They are often only made to "pay" by the expenditure of vast sums of money, and by this are sometimes changed from worthlessness to a value of many thousands of dollars. It is only justice that the holders of claims against this class of property should be required to assert them at an early day, to the end that they may not, in recovering their own, also reap too large a benefit from the enterprise of others. *Oil Co. v. Marbury*, 91 U. S. 587, 592. Altogether, it seems reasonably clear that by the use of the words mentioned the legislature intended to include every kind of title by which mining property can be held. Judgment reversed.

BRILKNAP, J., (concurring.) Plaintiff made application to the government of the United States in the year 1876 for a mineral patent to the Comet mining claim. The matter was suffered to remain without any further proceedings until the month of March, 1888. In the mean time, and during the month of January, 1887, defendants relocated a portion of the ground under the name of the "Phoenix Claim." Thereafter, and without any further notice save such as may have been contained in the original notice of its application, a patent was issued to the plaintiff in the month of March, 1888. Defendants, in their answer, allege that the patent was procured by false swearing and perjury on the part of plaintiff's witnesses in making the final proof of labor done and improvements made before the register and receiver. This fact, coupled with a strict compliance with the mining laws on their part, and an abandonment by plaintiff, entitles the defendants, it is claimed, to a decree in their favor as equitable owners of so much of the mining claim as conflicts with their claim. Congress has provided the manner in which the government title to the mineral lands may be acquired. Section 2318, Rev. St., declares that "in all cases, lands valuable for minerals shall be reserved from sale, except as otherwise expressly direct-

ed by law." Section 2325: "Any person who has complied with all the requirements of the law may file in the proper land office an application for patent under oath showing such compliance, together with other matters required by the statute but unnecessary to be mentioned here. Upon the filing of the application and such other papers as the statute directs, the register of the land office is required to publish a notice that the application has been made, for the period of sixty days in some newspaper to be by him designated as published nearest to the claim, and he must also post a similar notice for the same time in his own office. If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third persons to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." Section 2326: "It shall be the duty of the adverse claimant within the thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession and prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim or such portion thereof as the applicant shall appear, from the decision of the court to rightfully possess. If it appears, from the decision of the court, that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment roll to the commissioner of the general land office as in the preceding case, and patents shall issue to the several parties according to their respective rights."

No title from the government to the mineral lands can be acquired in any other way than as prescribed by this statute. The par-

ties claim by separate rights. No fiduciary relation exists between them, and no protest was made against the issuance of the plaintiff's patent. If the plaintiff has acquired the title contrary to the terms of the statute, the facts can be shown, and the patent annulled in a proper proceeding. Relief in such cases is expressly provided in section 2325 of the foregoing act. But until the patent has been got out of the way, and proceedings instituted to determine the validity of the title of the defendants, no relief upon this part of the case can be afforded them.

It does not follow that the defendants are entitled to the patent, conceding all of the allegations in their answer to be true. According to it, the plaintiff has failed to comply with the terms of the statute in the matter of expenditures required, (Rev. St. § 2324,) and the patent for this cause may be annulled. But the defendants are not in a position to acquire the government title. They are neither applicants for patent nor protestants under the statute. They have not complied with the requirements of the foregoing statute in that regard, and submitted their claim to adjudication, and in a court of competent jurisdiction, and had their rights ascertained and determined. The statute is not restrictive in its operation, as the defendants appear to have assumed, but all claimants to the ground in question are embraced in its provisions, and are required to present their claims for adjudication in the local courts; and a failure to do so will be a waiver of the adverse claim. It follows, upon the facts presented, that the patent cannot be attacked in this proceeding.

Upon the question of the statutes of limitations, I am of opinion that two years is the time fixed for such actions.

MURPHY, C. J., (dissenting.) This is an action of ejectment brought by the South End Mining Company, in the district court in and for Lyon county, for a mining claim situated in the Devil's Gate and Chinatown mining district, Lyon county, Nev., being 400 feet in width and 1,100 feet in length. The complaint is in the ordinary form in ejectment, coupled with a prayer for an injunction and \$500 damages, and alleges that on the — day of March, 1888, the plaintiff was and is now the owner in fee simple of the ground in controversy. To this complaint the defendants answered, setting up general denials, and pleading affirmative matter. They deny that on the 29th day of March, 1888, the plaintiff was or now is the owner, in fee simple or otherwise, or was in the possession, or entitled to the possession, of the mining claim or ledge described in the complaint. They admit that the plaintiff purchased the mining ground described in the complaint from the United States of America on the 29th day of March, 1888, and acquired the legal title on that day, but allege that

such title was illegal, fraudulent, and void. They assign the following acts of plaintiff, constituting such illegality and fraud: "The defendants, further answering, aver that on the — day of — 1876 the plaintiff's grantors applied to the register and receiver of the United States land office at Carson City, Nev., for a patent for the Comet mining claim and lode, alleged to have been located on the 27th day of August, 1872; * * * said notice claiming 1,500 feet of the quartz lode, being a relocation of the Dorrence, with all its dips, spurs, and variations, together with all dumping grounds and dumping privileges, and the lawful 200 feet on each side of the ledge. That afterwards, and on or about the — day of —, 1878, and until on or about the — day of April, 1888, the said plaintiff abandoned the said application for patent and ceased to prosecute the same, and abandoned said mining claim and location, and ceased to occupy or possess the same, or to prosecute the business of mining thereon, or to keep up the monuments marking the boundaries thereof, or to do or perform any work or labor thereon, and failed and neglected to do or perform the annual labor or make the annual improvements required by the mining laws of the United States, and wholly failed and neglected to comply with the conditions of the mining laws of the United States necessary to preserve the said location, and forfeited the same; and by reason of the premises the said Comet location and mining ground applied for as hereinbefore stated was subject to relocation, and during said period of time said Comet ledge was relocated, and was claimed, held, and occupied, under said relocation, adversely to the plaintiff, for the period of more than five years. And defendants aver that during said period, and on, to wit, January 5, 1887, said grantors of the defendants entered and located said Phoenix mining claim, lode, and location; the same being then unoccupied public mineral lands of the United States, and subject to location. Defendants, further answering, aver, that on or about the 13th day of April, 1888, the said persons relocating the said Comet lode discovered ore thereon, and commenced extracting the same, and that after such discovery said plaintiff reorganized, and resumed the prosecution of its application for patent, and without the knowledge of defendants or their grantors, and without posting or publishing any other or further notice of application for patent, procured the said register and receiver to sell said Comet mining claim to plaintiff, and to issue a certificate of purchase thereof; and in order to induce the said register and receiver to accept payment and issue said certificate of purchase, and for the purpose of inducing the government of the United States to sell and patent said mining claim to plaintiff, procured, and caused to be presented to and filed in the office of said register and receiver of the United States land

office, false and fraudulent affidavits and testimony showing and tending to show that the annual labor and improvements had been made by plaintiff upon the said Comet mining claim and location between the date of location, to wit, 1872, and the date of such proof and certificate of purchase; said plaintiff well knowing that said affidavits and proofs were false and fraudulent, and well knowing that said plaintiff had abandoned said location, and had failed and neglected to do the annual labor or make the annual improvements upon the said location for or during the years from 1879 to 1887, inclusive, and each of them." The defendants aver that the Comet location is a relocation of the Dorrence mine, and is shown by cuts and excavations on the ground; that the Phoenix ledge located by the grantors of the defendants is within the surface ground described in the patent to the plaintiff,—but deny that it is the ledge located by the plaintiff's grantors, and is not the ledge applied for by the plaintiff, and its top or apex is more than 300 feet from the center of the Comet ledge. And they aver that the Comet ledge, on its horizontal course and on its strike, crosses the east side line of the plaintiff's location and claim, as described in its patent, at a point 650 feet from the northerly end of the Phoenix ledge of the defendants.

The defendants plead the statute of limitation and title by prescription, and aver that, they having expended \$6,000 in labor and improvements on the ground, to the knowledge of the plaintiff, the plaintiff is now estopped to assert his title. The plaintiff demurred to this answer on the ground that the facts therein stated did not constitute a defense to the action, and asked for judgment on the pleadings, on the ground that the answer admitted the ownership of the plaintiff to the ground in controversy by its patent, and that the defendants were not in a position to attack said patent, they not having connected themselves with the government title. The district court sustained the motion, and judgment was entered in favor of the plaintiff, without damages, and this appeal is from the judgment.

There is no dispute as to the sufficiency of the location of the Comet ledge in 1872. There is no controversy as to the proceedings taken to procure the patent, from the time of making the application up to and including the publication of the notice of such application. But the appellants contend that by reason of the fact that the respondent allowed such a length of time to elapse between the expiration of the publication of application for patent and the final proof and payment for the land, coupled with the fact that the plaintiff failed and neglected to do the assessment work or make improvements in each year as required by act of congress, forfeited whatever rights it had to the ground in dispute; and the defendants' grantors having entered upon the ground in 1887.

and relocated the same, they are in a position to attack said patent, and have the same set aside, as being absolutely void. It is admitted by the answer that all of the defendants' works, and the top or apex of the Phoenix ledge at the point of discovery, are within the surface boundaries of the Comet patented ground. In the year 1866, and as amended in 1872, congress, by statute, conferred upon citizens of the United States, and those who had declared their intentions to become such, the right to locate and hold mining claims, so long as they complied with the acts of congress and the local rules and regulations of the miners in the mining district. These statutes gave to the locators the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of the surface lines, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular, in their course downward, as to extend outside the vertical side lines of such surface location. Rev. St. U. S. § 2322. This possessory right often is of great value, and may be sold, transferred, or mortgaged. The locator has the right to explore and extract the minerals therefrom without being required to purchase the government title thereto. He is not compelled to do so. Under his possessory right, he can hold as against everybody except the government of the United States. *Forbes v. Gracey*, 94 U. S. 766. The public mineral land is at the disposal of the federal government; and although individuals may locate and acquire a possessory right to enter upon the unoccupied mineral lands, and extract the valuable ores and minerals therefrom, yet all such rights so acquired are subject to the paramount title of the government. Congress has provided that the locator or his grantors may purchase the mineral land, and has prescribed the terms and conditions upon which the government title may be acquired. Congress has also created a branch of the executive department of the government, before which all matters pertaining to the issuance of patents to mining claims are heard and determined. The land department of the government is a special tribunal created for the purpose of hearing and determining the rights of parties to purchase land, and, within the scope of its jurisdiction, its adjudications are final and conclusive. *Smelting Co. v. Kemp*, 104 U. S. 639; *Wight v. Dubois*, 21 Fed. 693; *Ferry v. Street*, (Utah,) 11 Pac. 576; *Jeffords v. Hine*, (Ariz.) Id. 352; *Johnson v. Towley*, 13 Wall. 80; *Talbott v. King*, (Mont.) 9 Pac. 434. In the case of *Steel v. Refining Co.*, 106 U. S. 450, 1 Sup. Ct. 389, Mr. Justice Field, speaking for the court, said: "We have so often had occasion to speak of the land department, the object of its creation, and the powers it possessed in

the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to a portion of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation." *Quinby v. Conlan*, 104 U. S. 426; *Moore v. Robbins*, 96 U. S. 532; *Shepley v. Cowan*, 91 U. S. 340; *Marquez v. Frisbie*, 101 U. S. 476; *Beard v. Federy*, 3 Wall. 491; *French v. Fyan*, 93 U. S. 170.

It is insisted on the part of appellants that they having alleged in their answer that the plaintiff committed a fraud on the defendants, by reason of false affidavits having been submitted to the register and receiver of the United States land office to establish the fact that the assessment work had been done on the claim in each year as required by the mining laws, when in fact it had not, it is a direct attack, as to the validity of the patent, and constitutes a good defense in equity to the plaintiff's action; and their counsel contends that under the pleadings in this case the court can go behind the patent, and inquire into the regularity of the proceedings, the sufficiency and character of the evidence submitted on said application for a patent, and that the defendants should be permitted to introduce testimony before the court to contradict the statements set forth in the affidavits, the sufficiency of which has already been passed upon by the register and receiver before issuing the final certificate or receipt for money received in payment for the land. Under our system of practice, equitable defenses of this nature, as well as defenses at law, may be interposed in an action of ejectment. The answer, when presenting them, is in its nature a bill in equity, and must contain all its essential allegations. It must disclose a case which, if established, will justify a decree adjudging that the title be transferred to the defendants, or enjoining the further prosecution of the action. There are cases, and quite a number of them, where courts of law, as well as in equity, have permitted litigants to go behind the patent, and inquire into the proceedings had before the land department. In such cases the party attempting to impeach the patent must show that he has a title to the premises, or such an interest therein, in subordination to the title, wherever it may lie, as

will authorize him to call the true title to his aid, or where the United States or a state had issued their patents to lands over or to which they had no control or title at the date of the issuance of the patents, by reason of the fact that the law did not authorize the selling of the lands, or that they had been reserved from sale, or had been previously transferred to others, as where swamp and overflowed lands were donated to the state by the act of congress, a patent issued thereafter by the United States is void. Why? Because the government has been divested of the title thereto. *Railroad Co. v. McCusker*, 67 Cal. 67, 7 Pac. 122; *Kille v. Tubbs*, 59 Cal. 191; *Hermocilla v. Hubbell*, 89 Cal. 5, 28 Pac. 611. A United States patent for land included within the limits of a Mexican grant is void, the government having no title. *Carr v. Quigly*, 57 Cal. 394; *Newhall v. Sanger*, 92 U. S. 761. Where the state of California issued its patent for land once the bed of a navigable stream, but which had never been acquired as swamp and overflowed land from the United States, the patent was held to be void. *Edwards v. Rolley*, (Cal.) 31 Pac. 267. In establishing the facts as set forth in the above or similar cases, the proceedings of the land department upon matters properly before it are not called in question, but its authority to act at all is denied, by reason of the fact that the government or the state had no title to convey. *Smelting Co. v. Kemp*, *supra*. There is no such question involved in this case. It is admitted by the answer that the land was open to sale; that the paramount title was in the United States, and that such title was transferred by the government to the plaintiff in the month of March, 1888; and that the plaintiff is now the owner of the legal title to the premises in controversy. It does not appear from the answer that the defendants have attempted, or ever will attempt, to connect themselves with the government title; nor are there any averments in their pleadings that would justify a court in holding that the plaintiff is trustee for them, and that the legal title must be transferred to them by the plaintiff; nor can we, under the pleadings, enjoin the prosecution of the action. The mere occupation of the defendants is worthless, when opposed to the government title.

In the case of *Courchaine v. Mining Co.*, 4 Nev. 374; *Lewis, J.*, speaking for the court, said: "The public land is absolutely at the disposal of the federal government. Although individuals may settle upon and occupy portions of it, no title is acquired thereby which will be available against the paramount right of the government. As between each other, settlers may acquire rights which the courts will maintain and enforce. Thus, the first possessor is always deemed to have the best right, and by establishing priority of possession he is allowed to recover in ejectment, and in fact he is treated

as the absolute owner of the land occupied by him. But all rights so acquired are subject to the paramount title of the government. Occupation and priority of possession are utterly worthless, when opposed to a title or right of possession expressly conferred by the proper federal authorities. As between persons none of whom claim title from the government, nor can show a right of possession recognized by it, priority of possession must prevail. When, however, the government has declared, or by its proper tribunals decided, that a particular person is entitled to the possession, such declaration or decision, in the absence of fraud, is high evidence of his right to such possession; certainly, superior to that which is acquired simply by priority of possession unaccompanied with any recognition from the government." *Frisbie v. Whitney*, 9 Wall. 194; *The Yosemite Valley Case*, 15 Wall. 86; *Shepley v. Cowan*, 91 U. S. 331; *Oaksmith v. Johnston*, 92 U. S. 346.

Courts have universally held that, after land is once offered for sale by the government, the party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises, for the reason that when the patent issues it relates back to the date of the initiatory act, and cuts off all intervening claims. *Eureka Con. Min. Co. v. Richmond Min. Co.*, 4 Sawy. 317; *Shepley v. Cowan*, 91 U. S. 337; *Talbott v. King*, (Mont.) 9 Pac. 439; *Deffebach v. Hawke*, 115 U. S. 405, 6 Sup. Ct. 95. The rule which prohibits courts from going behind the patents, and inquiring into the proceedings had before the land department, when the controversy is between the holder of the legal title and a party claiming by occupation only, is derived from the provisions of the statutes of the United States, which prescribes the filing of adverse claims. Where a statute prescribes one way in which a thing shall be done, it precludes every other. The plaintiff having made application for a patent to the Comet mining claim, the defendants, claiming to have relocated a portion of the ground, had but one method open to them to protect their interest, if they had any, and have their rights determined. The statute, after limiting the time within which an adverse claim may be filed, provides: "Thereafter no objections from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." Section 2325, Rev. St. U. S. From the date of filing of the application for a patent by the plaintiff to the land in dispute, it ceased to belong to the public domain. No other claim to the same land could be asserted, except in the manner pointed out by the statute. We do not understand defendants to deny but what the plaintiff and its grantors complied with the mining laws, local rules, regulations, and customs of the

miners within the district from the date of location of the Comet ledge and claim until and including the date of the expiration of the publication of the notice of application for its patent; but what they do claim is that after such publication had been completed the plaintiff abandoned the claim, and failed to do the assessment work, until 1888, when it resumed work, and, without giving any further or additional notice of its intentions, applied at the United States land office, made proof of having done the assessment work, by means of false affidavits, paid five dollars an acre for the land, received the receiver's receipt, and upon such proof and receipt the patent was issued. And the defendants claim that after said abandonment, and before said proof and payment, their grantors entered upon and relocated a portion of said surface location of the Comet claim. The proceedings on application for a patent to land, before the land department, from the initiatory step until the issuance of the patent, are *ex parte*, unless an adverse claim be filed; and if an adverse claim is filed, in mineral applications, it is referred to the courts, and in all other cases they are heard and determined in the land department. But we know of no law, rule, or regulation of the land department that requires of a party applying for a patent to mineral land to give or publish any additional notice after the expiration of the 60-days publication. After such publication the applicant can make what is termed his "final proof," which consists of the affidavit of the publisher or manager of the paper that the notice had been published therein for 60 days; of the applicant himself, or his agent, that the plat and notice remained posted upon the claim during the period of publication; of two disinterested persons, that the \$100 worth of labor or improvements were performed or made on the claim during the year in which the final proof was made. If no adverse claim was filed prior to this proof submitted to the register and receiver, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officers of five dollars per acre, and that no adverse claim exists. By Act Cong. March 3, 1849, (Rev. St. § 441,) the secretary of the interior was charged with the supervision of public business relating to the following subjects: "Second. The public lands including mines." By section 453, the office of commissioner of the land department was created, and that officer was to perform his duties under the direction of the secretary of the interior, and, as hereinbefore stated, that department being vested with the supervision and sale of the mineral land, the decisions and rulings of the officers of the land department, made within the scope of their authority, on questions of fact, are conclusive everywhere; and when a party relies upon a relocation made subsequent to publication, and prior to final proof and pay-

ment, the only course for him to pursue is by presenting his grievance in the shape of a protest, setting forth the fact that the applicant for the patent had not complied with the law, by reason of its failure to do the assessment work or make the improvements, which protest should be filed in the land office, and a hearing demanded, which would be granted, as was said by Acting Commissioner Holcomb in the appeal case of Wheeler v. Sanger, (under date of October 21, 1880,) Sickels, Min. Dec., at page 275: "I am also of the opinion that all adverse claims, from whatever source derived, should be presented in the manner prescribed by law, and during the period of publication of notice of application for patent, with a single exception, to wit: Should the abandonment occur subsequent to such publication, and prior to entry and payment, a case would be presented by which the executive department would be compelled to take jurisdiction, because the law, under that state of facts, allows the abandoned ground to be again located by any qualified person in the same manner as if no location of the same had ever been, and makes no provision for the determination elsewhere of any question or controversy arising out of this class of conflicting claims." This instruction was given to the local land office in 1880, and the same has been followed and approved in the following cases, and by the following officers: Bodie Tunnel & Min. Co. v. Bechtel Consol. Min. Co., 1 Dec. Dep. Int. 599,—letter of Secretary Kirkwood to Commissioner McFarland, (December 12, 1881,) in which he says: "I desire to say that, while I am of the opinion that controversies between adverse mining claimants cannot be heard and determined before this department, I am nevertheless of the opinion that where, under the last clause of section 2325, third parties present evidence by affidavits, etc., to show that an applicant has failed to comply with the mining statutes, if the evidence is of such character as to entitle it to credit, and if the allegations are such as, if proven in regular proceedings, would show that the law has not been complied with, that patent under the law ought not to be issued, or that you have no jurisdiction to issue the patent, then it is your duty to order an investigation as between the government and the applicant, as in similar cases of agricultural entries." Secretary Vilas to Commissioner Stockslager, (January 25, 1889,) in the case of Bright v. Mining Co., 8 Dec. Dep. Int. 122. Secretary Noble to the commissioner of the general land office, (November 4, 1889,) Tangerman v. Mining Co., 9 Dec. Dep. Int. 538. And by the same secretary to the same officer in the case of Sweeney v. Wilson, under date of February 13, 1890, in which the land department canceled an application for a patent on the ground that the applicant had not complied with the law. 10 Dec. Dep. Int. 157. First

Assistant Secretary Chandler to the commissioner of the general land office, under date of May 2, 1890, in the case of *Mining Co. v. Gage*, in which the secretary orders a hearing to determine as to whether the ground in controversy was subject to relocation pending adverse proceedings and application for patent. 10 Dec. Dep. Int. 534. *Nichols v. Becker*, 11 Dec. Dep. Int. 8. *Copp, Min. Lands*, 315. *Bellwither Lode*, Id. 133. In the case of *St. Lawrence Min. Co. v. Albion Min. Co.*, 10 Copp, Landowner, 51, Commissioner McFarland, writing to the register and receiver of the land office at Eureka, said: "The protest of the Richmond Mining Company is deemed sufficient to authorize a hearing to ascertain whether or not the survey of the Albion, No. 1, corresponds with the location of the claim, and the only question to be considered is whether such a hearing should be ordered while action on the application for patent is suspended on account of the suit pending in court on the adverse claim. The subject-matter of the protest appears not to be in any way involved in the suit, and it relates solely to questions of noncompliance with the law by the applicant in his proceedings for patent. If the protest is true, a portion of the land was not subject to the application for patent, and that is a question for this office, and it can be investigated and determined without regard to the pending suit. The proceedings which are required by law to be suspended are those relating to the patenting of the claim, and this office is not barred by the filing of an adverse claim from investigating the collateral fact as to whether the application embraces land not subject to the same. Such action has no tendency to advance the application for patent, nor to interfere in any way with the matters properly referred to the court. You will accordingly order a hearing to determine the truth or falsity of the allegations in the Richmond Mining Company's protest."

Section 2450, Rev. St. U. S., creates the board of equitable adjudication, consisting of the secretary of the interior, the attorney general, and the commissioner of the general land office, who are authorized to decide, upon principles of equity and justice as recognized in courts of equity, and in accordance with regulations to be settled by the secretary of the interior, all cases of suspended entries of public lands, and to adjudge in what cases patents shall issue upon the same. Section 2456 provides: "Where patents have been already issued on entries which are confirmed by the officers who are constituted the board of adjudication, the commissioner of the general land office, upon the canceling of the outstanding patent, is authorized to issue a new patent, on such confirmation, to the person who made the entry, his heirs or assigns." In the case of *Omaha Quartz Mine*, (on appeal.) *Copp, Min. Lands*, 198, and the letter of Commissioner McFarland to the

register and receiver at Central City, Colo., Id. 317, protests were filed against the issuance of patents on the ground that the notices were not published in the newspapers nearest the mines, and the law had not been complied with. In each case it was held that the questions were such as called for the interposition of the board of equitable adjudication. For any causes existing prior to the date of an application for a patent the party claiming any rights adverse to the applicant must file his adverse claim before the 60-days publication expires, and within 30 days thereafter he shall commence his proceedings in a court of competent jurisdiction for the recovery of the claim. But for failure to comply with the law, such as failure to post or publish the notice or do the assessment work as required by law, it then becomes a controversy between the United States and the applicant only, the question being as to compliance on their part with the prerequisite conditions of the law. *Pettit v. Mining Co.*, 9 Dec. Dep. Int. 565. And he who has acquired any rights after the application for patent has been made must apply to the land department for a protection of the same. From the averments in the answer, the defendants were in a position to file a protest in the United States land office at Carson City after they had located the Phoenix claim, and before the plaintiff had offered its final proof and payment. They allege that their grantors entered upon and located the claim in the month of January, 1887; that the plaintiff did not do the assessment work, nor make any improvements on the claim, from 1878 until the month of April, 1888; they had one year in which to file a protest against the plaintiff's right to further prosecute its application for patent. If the allegations contained within the answer are true, the defendants had a right to say to the officers of the land department that the applicant had not complied with the terms of the statute, and demand an investigation, and show, if they could, that the plaintiff had not complied with the law. It is not a valid excuse for them to say that the plaintiff gave no additional notice as to when it would make final proof and payment. It was not required to do so, and an examination of the files in the United States land office in Carson City would satisfy the defendants that the application of the plaintiff for patent was filed and pending therein. They not having filed their protest, they are not in a position to attack the patent now. In *Knight v. Association*, 142 U. S. 176, 12 Sup. Ct. 258, the supervisory power of the secretary of the interior over all matters relating to the sale and disposition of the public lands, and the issuing of patents thereon, was fully considered, and numerous authorities cited. It is therein declared by Mr. Justice Lamar, speaking for the court, that the secretary was clothed with plenary authority as the supervising agent of the

government to do justice to all claimants, and to preserve the rights of the people of the United States, and that he could exercise such supervision by direct orders or by review on appeal, and, in the absence of statutory directions, prescribe the mode in which it could be exercised by such rules and regulations as he might adopt. In the case of *Doe v. Mining Co.*, 54 Fed. 946, an attempt was made to go behind the patent, and show that the end lines of the Silver King location were not parallel. Judge Ross, in passing upon this question said: "If the rights conferred by the patent can be defeated by showing a want of parallelism of the end lines in the original location, it is difficult to understand why the patent may not likewise be defeated by showing that the original location was void because its boundaries were not properly marked upon the ground, or because no vein, lode, or ledge was discovered within them, or because the statutory requirement in respect to the posting of the notice of location was not complied with, or because of an omission on the part of the locator to comply with any other provision of the statute regarding the location of such lode claims. All such matters I understand to be absolutely concluded by the patent, so long as it stands unrevoked. If questions relating to the boundaries of the location; the marking of them; the discovery of a vein, lode, or ledge within them; the posting of the required notice, etc.,—are open to contestation after the issuance of a patent for the claim, as before, the issuance of such an instrument would be a vain act, and would wholly fail to secure to the patentee the rights and privileges designed by the law authorizing its issue. The very purpose of the patent is to do away with the necessity of going back to the facts upon which it is based. Authorities to this effect, in both federal and state courts, are so numerous as to render it, I think, unnecessary to cite them." In *Smelting Co. v. Kemp*, 104 U. S. 639, on the trial of the case the plaintiff introduced the patent and its record title, and rested its case. The court permitted the defendant to introduce in evidence a certified copy of the record of proceedings in the general land office at Washington, upon which Starr obtained his patent. "The plaintiff objected to the introduction of the paper on the ground that it could only show, or tend to show, the regularity or irregularity of the proceedings before the executive department in obtaining the patent, or the validity or invalidity of the possessory title or pre-emption right upon which the patent was founded, and that no evidence could be introduced to impeach the patent, or attack it collaterally, or in any way affect it in the action." In passing upon this ruling, Justice Field, speaking for a majority of the court, after holding that the actions or decisions of the officers of the land department could not be assailed,

at page 641, said: "It is this passable character which gives to it [the patent] its chief, indeed its only, value, as a means of quieting its possessor in the enjoyment of the land it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the land department, and correctness of its rulings upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land, if the jury was satisfied that the evidence produced justified the action of the department, and lose another portion, the title whereunto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh the evidence." *Moore v. Wilkinson*, 13 Cal. 478; *Beard v. Federy*, 3 Wall. 492. And at page 647 of the same report the judge says: "According to the doctrine thus expressed, and the cases cited in its support, (and there are none in conflict with it,) there can be no doubt that the court below erred in admitting the record of the proceedings upon which the patent was issued, in order to impeach its validity. The judgment of the department upon their sufficiency was not, as already stated, open to contestation. If, in issuing a patent, its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even then his complaint cannot be heard unless he connects himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the plaintiff's hands. *Boggs v. Mining Co.*, 14 Cal. 279; *Chapman v. Quinn*, 56 Cal. 274. It does not lie in the mouth of a stranger to the title to complain of the acts of the government with respect to it. If the government is dissatisfied, it can, on its own account, authorize proceedings to vacate the patent or limit its operations."

Wight v. Dubois, 21 Fed. 693, was a bill in equity to set aside a patent to a mining claim. *Brewer, J.*, on petition for rehearing, said: "The government, as the original owner, offers the title to these mineral lands, upon certain conditions, to whomsoever discovers mineral. The amount of land it will convey to each locator is limited, and certain forms of procedure are prescribed, but the primal fact is that the lands are offered to those who discover the mineral. In this mat-

ter the government resembles a private landowner, who makes an offer to sell his lands upon specified conditions. When the patent issues, the title passes from the government, and no one can question that title who has not, prior thereto, by compliance with the conditions prescribed by the government, himself acquired an interest in the land. It matters not what wrong the patentee may have perpetrated upon the government; it, and it alone, can complain. In other words, when grantor and grantee are satisfied, a stranger has nothing to say." *Field v. Seabury*, 19 How. 330. In the case of *Steel v. Refining Co.*, 106 U. S. 453, 1 Sup. Ct. 389, the answer charged that bribery and subornation of perjury were committed by Starr in inducing parties to make false affidavits respecting the claim patented by the land department. The perjury consisted in Starr's affidavit as to his citizenship, and the possession and working, by himself or grantors, of the claim for which the patent was issued. That false and perjured testimony was used to influence the officers of the land department. There was no allegation of improper conduct on the part of the officers. At page 457, 106 U. S., and page 389, 1 Sup. Ct., the court, in passing upon the question of fraud, said: "Though the various matters of fraud, perjury, and subornation of perjury, alleged as a defense, are to be taken as true for the purposes of this decision, they are not to be taken as true for any other purpose. What we decide is that, if true, they are not available in this form of action, and that any relief against the patent founded upon them must be sought in another way, and by a direct proceeding." See, also, the opinion of Justice Hawley in the case of *Railroad Co. v. Cannon*, 4 C. C. A. 303, 54 Fed. 253, and authorities therein cited; *Turner v. Donnelly*, 70 Cal. 604, 12 Pac. 469.

It seems to us that the above decisions are directly in point on the question under consideration in the case at bar. The allegation charging fraud in this answer is "that, in order to induce the register and receiver to sell said mining claim, and issue their receipt for the payment of the land, and to induce the government of the United States to sell and patent said mining claim to plaintiff, the said plaintiff procured, and caused to be procured, and filed in the office of the register and receiver, false and fraudulent affidavits and testimony showing, and tending to show, that the assessment work had been done from the year 1879, to and including the year 1887, when in fact the plaintiff well knew it had not been done." It does not charge any officer of the land department with being guilty of fraud, nor that they colluded or connived with the plaintiff in any manner in the procurement of said patent, and, if a fraud was perpetrated, it was against the government. Such being the case, the United States is the only one that can ask to have the patent set aside. The patent is not void, admitting that

everything stated in the answer be true,—It is merely voidable; and, it having been issued to the plaintiff, there can be no higher evidence of title, and, in favor of the validity and integrity of such an instrument, we must presume that all antecedent steps necessary to its issuance were duly taken. It being admitted by the answer that the paramount title was in the United States, and that that title was transferred to the plaintiff by the department of government authorized by law to transfer its title by patent, the presumption is that the plaintiff is entitled to the possession, as well as to the whole beneficial interest; and, as the grantee of the government—the plaintiff—takes and holds whatever interest therein the government could grant, subject to no conditions other than those expressed in the patent, and no person, company, or association claiming in his, their, or its own right any interest in the lands can legally prevent the patentee from entering, under and by virtue of its patent. The mere entry and claim of relocation of a part of the Comet claim by the defendants or their grantors did not give them a vested or an absolute estate as against the United States, nor one which the government might not impose additional duties upon, or take away from them entirely. The *Yosemite Valley Case*, 15 Wall. 86. It was not sufficient for the defendants to have alleged in their answer that the plaintiff was not entitled to the patent. The government was satisfied with the proofs submitted by the plaintiff, and received its five dollars an acre, and issued its patent for the land, and into the bona fides of this transaction no one but the government can inquire. In *Wight v. Dubois*, supra, it is said: "The government, as a landowner, offers its lands for sale upon certain prescribed conditions, compliance with which is a matter of settlement between the owner and purchaser alone, and with which no stranger to the title can interfere. Publication of notice is process bringing all adverse claimants into court, and, if no adverse claims are presented, it is conclusively presumed that none exist, and that no third parties have any rights or equities in the land. Thereafter, the only right or privilege remaining to any third parties is that of protest or objections filed with the land department, and cognizable only there. If sustained by the department, the proceedings had by the applicant are set aside; if overruled, the protestant or objector is without further right or remedy." *Land Co. v. Griffey*, 143 U. S. 41, 12 Sup. Ct. 362; *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249; *Sparks v. Pierce*, 115 U. S. 411, 6 Sup. Ct. 102; *Gwillim v. Donnellan*, 115 U. S. 50, 5 Sup. Ct. 1110; *Deffebach v. Hawke*, 115 U. S. 405, 6 Sup. Ct. 95; *Bohall v. Dilla*, 114 U. S. 50, 5 Sup. Ct. 782; *Smelting Co. v. Kemp*, supra; *Lee v. Stahl*, 9 Colo. 210, 11 Pac. 77; *Hamilton v. Mining Co.*, 33 Fed. 565; *Chapman v. Quinn*, 56 Cal. 274.

In their answer the defendants allege that

their grantors relocated a portion of the Comet claim in the month of January, 1887. If the Comet claim was abandoned at that time, the relocation thereof by the defendants' grantors entitled them to the exclusive possession and use thereof, as against everybody except the United States, which, prior to patent, is the owner of the legal title. The different statutes providing for the location and patenting of mining claims are to be considered together, and the laws giving the miner certain rights to mining claims which he has located in compliance therewith must be construed in connection with the adverse provisions treated of in several enactments. The locator's claim by right of possession is the lowest grade of title known to the mining laws. Under such a right, the locator cannot assert or claim any title as against the government. The government merely recognizes his right to remain in possession so long as he complies with the rules and regulations which congress may prescribe. The equitable title accrues to the applicant upon entry and purchase at the United States land office. Still, the legal title is in the government, and the applicant may be deprived of his equitable title if it can be shown that he has not complied with the law; and that showing must be made before the officers of the land department before the patent issues. Title in fee simple is acquired on delivery of patent, evidencing the legal title, and, when the patent is issued, it relates back to the inception of the rights of the patentee, in so far as it may be necessary to cut off intervening rights and claimants. It sometimes happens, under the pre-emption laws, that the legal title may be in one person, and a superior equity in another. But such cannot occur under the operation of the United States mining laws. The statute providing for adverse proceedings in the land office and adverse suits in the courts, all legal and equitable adverse titles and claims must be presented to and passed upon by the courts prior to the issuance of the patent, or be considered stale and abandoned. In the case of *Miller v. Girard*, (Colo. App.) 33 Pac. 69, it appears from the facts, as stated by the court, that the Long John lode was located in 1883. Sometime thereafter a claim known as the "North Star" was located in such a manner as to include within its exterior boundaries a portion of the Long John claim, including the discovery shaft. Thereafter, the owners of the North Star obtained a patent to their claim, including the ground on which the Long John discovery shaft had been sunk. The owners of the Long John did not file a protest, nor object to the issuance of the patent to the North Star claim. In 1888 the Aurora and Elgin claims were located, and we would infer that these locations included a portion of the Long John location. After such location, the owners of the Aurora and Elgin claims made application for a patent, and, while the adver-

tisement was pending, the owners of the Long John commenced adverse proceedings. The priority of the Long John location was conceded, and also that the assessment work had been done each and every year since its location; but it was contended, on the part of the owners of the Aurora and Elgin locations, that the fact of the North Star claim having been located subsequent to the Long John, and the North Star Company having secured a patent to its location, which included the Long John discovery shaft, the residue of the Long John location reverted to the public domain, and was open to exploration and location by the parties making the Aurora and Elgin locations. In passing on this question, Bissell, P. J., speaking for the court, said: "Ever since the decision of the case of *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. 1110, it has been the conceded and established law that if a locator permits an adjoining claimant to obtain a patent from the government for that portion of his territory which includes his discovery shaft, and he is without another which gives him a superior right as against the contesting claimant, he must be adjudged to have lost title to whatever territory is embraced within the lines of his claim. That case unquestionably decides that, if the locator permits the adjoining occupant to patent that part of his territory, it is the equivalent of an adjudication that he is without title, and the remaining part of his location reverts to the condition of public lands, and is open to location and purchase by other citizens and claimants, unless the locators, in some legal fashion, have initiated a new title." Applying the above rule, which we think is a correct one, to the case under consideration, if the defendants' grantors did locate the Phoenix claim in 1887, which location crossed the Comet claim diagonally, but did not include any of the workings on the Comet location, but all of the workings of the Phoenix claim are within the territorial limits of the Comet claim; and it is also admitted by the answer that the plaintiff re-entered in the month of April, 1888, and resumed work on the Comet claim, made final proof and payment for the land, and obtained a patent therefor, including the workings of the Phoenix Company,—such being the case, and the defendants failing to file a protest or interpose any objections to the resuming of work, or the making of the final proof or payment, by the plaintiff, upon which its patent issued, they are to be treated as having voluntarily waived whatever rights they may have acquired under their location, for, upon the issuance of the patent to the plaintiff, it related back to, and took effect as of, the date of the original location. The *Eureka Case*, 4 Sawy. 317; *Lee v. Stahl*, 9 Colo. 210, 11 Pac. 77; *Kannaugh v. Mining Co.*, 16 Colo. 346, 27 Pac. 245; *Seymour v. Fisher*, 16 Colo. 191, 27 Pac. 240. The questions as to the location, marking off boundaries, work-

ing, or improvements made upon mining claims are all questions of fact, or mixed questions of law and fact, and the decisions of the officers of the land department thereon are final. If the defendants did not file a protest with the register and receiver after their location, and before the plaintiff made its final proof and payment, it was their own fault. The evidence which they now propose to introduce, as to the abandonment of the claim, was known to them before the final proof and payment was made, and should have been taken advantage of at that time. The charge of fraud is vague and indefinite, and, if any fraud was committed, the United States is the proper party to take the necessary proceedings to have the patent declared void. The defendants, not having connected themselves with the government title, cannot attack the patent. It is enough for them to show that the plaintiff was not entitled to have received the patent. They must also show that they occupy such a status towards the property as entitles them to control the legal title. *Plummer v. Brown*, 70 Cal. 545, 12 Pac. 464; *Johnson v. Towsley*, supra; *Smelting Co. v. Kemp*, supra; *Buckley v. Howe*, (Cal.) 25 Pac. 133.

The plaintiff cannot be held as a trustee for the defendants. This is not one of that class of cases, of which many instances may be found in the decisions of courts, wherein a party receiving a patent from the United States has been declared to hold the legal title merely in trust for another claiming to have a superior equity. There is no privity between the plaintiff and the defendants; they are strangers to each other's titles. No circumstances are alleged or claimed to exist between them, such as to create the relationship of trustee and cestui que trust, and the defendants ask for no such relief in their answer, but, upon the contrary, the defendants' claim is that, by reason of adverse possession of the premises in controversy, they have acquired a title to the claim as against the entire world. *Collins v. Bartlett*, 44 Cal. 380. It is admitted in the answer that the top or apex of the Phoenix mining claim, and the lode therein, and all the workings thereon, are within the surface boundaries of the Comet location, and on the plaintiff's patented ground, but that the Phoenix ledge is not the ledge located by the plaintiff or its grantors, and is not the ledge patented; and is more than 300 feet from the center of the Comet ledge. As we understand the argument of the appellants' counsel, it is this: That, the plaintiff's grantors having discovered a ledge, and having reason to believe that on its strike and horizontal course it ran in a northerly and southerly direction, and made their location accordingly, claiming 1,100 feet along the presumed course of said vein and lode, and 200 feet on each side of the middle thereof, as allowed by the local laws, rules, and customs of the miners of that district, and the patent was issued for the ground

so located, the defendants claim that upon further exploration it will be found that the ledge which the plaintiff's grantors located will pass without the east side line of the plaintiff's patented ground, within four or five hundred feet from the south end thereof, and that, by so passing without the side line, the said side line does not only become the end line, to determine its claim to the ledge, but also determines the end of its surface boundaries; and the appellants contend that the plaintiff cannot claim but 200 feet of surface ground north of the point where its ledge is supposed to have crossed its side line, notwithstanding plaintiff holds the government title to six or seven hundred feet north of said point; and the counsel claims that it was not in the power or jurisdiction of the officers of the land department to issue the patent for that portion of the surface ground north of such point, and that the patent is absolutely void as to that portion of the surface ground, and that the defendants had a right to enter upon the north end of the Comet location, and locate any ledge, the top or apex of which was within the surface boundaries of the patented ground. True it is that if the grantors of the plaintiff were so unfortunate as to locate the Comet ledge in such a manner as that, instead of the vein or ledge continuing lengthwise through the center of the location, it should so far depart from such course and direction that it will pass without the east side line, under such circumstances, the side line becomes the end line, to determine the extent to which the plaintiff can work on or follow the ledge, but does not in any manner affect its ownership to the land embraced within the surface boundaries of its patented ground. *Mining Co. v. Tabet*, 98 U. S. 463. Section 2319 of the Revised Statutes reads: "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase and the lands in which they are found to occupation and purchase." Prior to July 20, 1866, the government title to mineral lands could not be acquired. Nevertheless, the government recognized the possessory rights of miners, and their rules and regulations in relation to the holding and working the same; yet they were reserved from survey, from pre-emption, and from all grants. *U. S. v. Gratiot*, 14 Pet. 537; *Mining Co. v. Consolidated Min. Co.*, 102 U. S. 175; *Morton v. Nebraska*, 21 Wall. 667. By the act of 1872, not only the veins, lodes, and ledges are open to exploration and purchase, but the land in which they are found is also declared open to occupation and purchase to the extent allowed by the United States mining laws, and the rules and regulations of the miners within the district in which the claim is situated, and the land so defined constitutes a mining claim. The intention of congress in enacting this law was to dispose of

the government title to the mineral lands, and this meant that the absolute title could be acquired therein. It did not mean simply an easement, with the right of the owner to pass over the ground in going to and returning from his work, or dumping privileges. The right to occupy and to purchase means the right to acquire the title in fee simple, and the right to acquire such a title is followed by the right to the exclusive enjoyment of the entire surface ground embraced within the lines of the location; and the land described in the patent to the plaintiff is withdrawn from the public domain as though it was a homestead or pre-emption entry. *Belk v. Meagher*, 104 U. S. 233; *Forbes v. Gracey*, 94 U. S. 762; *Butte City Smoke-House Lode Cases*, (Mont.) 12 Pac. 860; *Deffeback v. Hawke*, *Talbott v. King*, and *Beard v. Federy*, *supra*. By virtue of its patent, the plaintiff is the owner of all veins, lodes, and ledges, the top or apex of which lies inside the surface lines of its location. Most, if not all, patents for mining claims contain the following: "The premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge, or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same, in its downward course, be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge, or deposit." This reservation in the patent specifies the conditions and stipulations under which it is issued. It does not authorize a party to enter upon the surface and make a location, nor does it permit the owner of an adjoining location to enter upon the surface. He may follow his ledge beneath the surface, but he cannot enter upon the surface, and sink a shaft for the purpose of hoisting the ore to the surface at less expense than he could through his own ground, without first obtaining consent of the owner of the adjoining claim. Section 2322, Rev. St. U. S., "Mineral Laws;" *Mining Co. v. Cheesman*, 116 U. S. 533, 6 Sup. Ct. 481; *Iron Silver Min. Co. v. Elgin*, etc., *Smelting Co.*, 118 U. S. 198, 6 Sup. Ct. 1177; *Mining Co. v. Campbell*, 135 U. S. 293, 10 Sup. Ct. 765; *Mining Co. v. Sweeney*, 4 C. C. A. 329, 54 Fed. 290. In the case of *Mining Co. v. Leach*, 33 Pac. 421, the supreme court of Arizona said: "It was argued, during the presentation of this case by the appellants, that a mining claim, to be valid, must be located along the course of the lode; that the statute contemplates that it shall be so done. The statute, as we understand it, only intends to prescribe the limit of extent along the course of the lode that the locator may claim, not that he shall locate, so that the greatest dimension of his claim shall coincide with the course of the lode. It is provided that the extreme extent along the lode shall not exceed

1,500 feet. It may be less. And if the miner, in making his location, should mistake the direction of the lode upon which he locates, and accordingly make the extreme dimensions of his claim in a direction other than that of the lode, that fact does not invalidate his claim, but only operates to diminish the extent of the lode that he might have included within the boundaries of his claim. Of course, congress expected that the miner would avail himself of the privilege accorded him, and locate along the course of the lode, but it does not require him to do so. The only result of not so locating is that the locator gets less, in extent, of the lode, than he otherwise would have located, and that if the side lines, instead of the end lines, cross the course of the lode, in order to define the locator's rights to pursue the lode on its dip, the side lines will be treated as the end lines." The title to the land in controversy being in the government, the plaintiff having connected itself with that title, and the extent of its claim not being in excess of the number of feet allowed by the United States mining laws, or the local rules and regulations of the miners within the district, the plaintiff is the owner of all the surface ground described in its patent, and of all ledges, the top or apex of which lies inside of such surface boundary lines.

The appellants contend that the respondent is estopped to maintain this action by reason of its acts in suffering and encouraging them to locate the property, and expend money and labor in discovering and developing the ledge. This contention is untenable. There was no relation of confidence or trust between the plaintiff and the defendants, and none is alleged in the answer or claimed to exist. They were not dealing at all with each other. It does not appear that the plaintiff made any representations concerning material facts, or any statement at all, to the defendants. But it does appear that the defendants were conversant with the facts in relation to the plaintiff's title, for they so state in their answer. Therefore, they were not misled. *Boggs v. Mining Co.*, 14 Cal. 306; *Kerr, Fraud & M.* 93; *Bigelow, Fraud*, 438; *People v. Brown*, 67 Ill. 437. The case presented by the defendants is not covered by the law of estoppel. They and their grantors knew that the lands were mineral lands, and were claimed as such by the plaintiff, and that the title to them could be acquired only under the laws of the United States, and from the United States; and there is no pretense that the defendants ever sought, or contemplated seeking, the title to them from the government, or claimed them in any way or manner except adversely to the plaintiff, and now they allege that they claim them as against the United States and the world. *Martin v. Zellerbach*, 38 Cal. 314.

The defendants' counsel argues that, they

having been in the possession of the premises for more than two years, holding adversely to the plaintiff, they have gained a title by prescription; and they rely upon sections 3632 and 3664 of the General Statutes of Nevada in support of this contention. Section 3632 reads as follows: "No action for the recovery of mining claims, or for the recovery of the possession thereof, shall be maintained, unless it appears that the plaintiff, or those through or from whom he claims, were seised or possessed of such mining claim, or were the owners thereof, according to the laws and customs of the district embracing the same, within two years before the commencement of such action. Occupation and adverse possession of a mining claim shall consist in holding and working the same, in the usual and customary mode of holding and working similar claims in the vicinity thereof. All the provisions of this act, which apply to other real estate, so far as applicable, shall be deemed to include and apply to mining claims; provided, that in such application 'two years' shall be held to be the period intended whenever the term 'five years' is used; and provided further, that when the terms 'legal title' or 'title' are used, they shall be held to include title acquired by location or occupation, according to the usages, laws, and customs of the district embracing the claim." Section 3664 reads: "No action for the recovery of real property, or for the recovery of the possession thereof other than mining claims, shall be maintained, unless it appears that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question, within five years before the commencement thereof." The act defining the time of commencing civil actions was approved November 21, 1861. St. 1861, p. 26. It was amended in 1867, so as to read as set forth in section 3632, while section 3664 was passed, as a supplementary act, in 1869. As between parties having no higher title than such as is derived from mere occupancy or possession, an action would undoubtedly be barred at the expiration of two years' adverse possession, under the above statutes. Do the above acts apply and run as against a party who has connected himself with the government title? The plaintiff, holding a patent to the land issued by authority of the United States, was invested with the highest title known to the law, and five years had not elapsed after the issuance of the patent, and before the commencement of this action. Congress has the absolute power to dispose of the government land, and this power is subject to no limitation. No state legislation can interfere with this right, for it is well settled that the statute of limitations of a state cannot run against the United States, by the third subdivision of the ordinance adopted with our constitution: "That the people inhabiting said territory do agree, and declare, that they forever disclaim all right

and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States." Therefore, the statute did not begin to run against the plaintiff's cause of action until after the issuance of the patent, which is alleged to be on the 29th day of March, 1888. *King v. Thomas*, (Mont.) 12 Pac. 867; *Redfield v. Parks*, 132 U. S. 241, 10 Sup. Ct. 83. Was the plaintiff's cause of action barred in two years after the issuance of the patent, or does it require five years' adverse possession, as provided by section 3635, which reads: "In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law; and the occupation of such premises by any other person shall be deemed to have been under, and in subordination to, the legal title, unless it appears that such premises have been held and possessed adversely to such legal title for five years before the commencement of such action." I think the section last quoted should govern this case, for the reason that the issuance of the patent to the plaintiff gave new rights. The patentee then had a right superior to any theretofore owned or held by it, viz. the absolute owner in fee simple,—the highest and best title known to a court of law.

In passing upon the statute of limitation, the court is in duty bound to take into consideration the nature and character of the property, and the title by which the same is held, upon which the statute is intended to act. Such being the case, it is a well-known fact that, prior to 1866, no title to mineral lands could be acquired. The rights the miners had were those of occupancy and possession so long as they conformed to the rules, regulations, and customs of the miners within the district where the claims were situated. This right of occupancy was recognized and permitted by the United States, and the rules and regulations of the miners were recognized and enforced by the courts of the mining states and territories. *Gore v. McBrayer*, 18 Cal. 588; *Coleman v. Clements*, 23 Cal. 248. Under this condition of affairs, section 4 of the statute of limitations was enacted in the month of November, 1861. The object of this statute was to prevent the occupation of large tracts of mineral land without any title but that of the right of possession, and without working the same for an unreasonable length of time. The intention of the legislature is the leading, and in fact the only, object to be inquired into by a court in construing legislative enactments; and it must be conceded that the first and most direct means in arriving at that intention is in the application and meaning of the language used. Therefore, when the legislature used the words, "seized or possessed of such mining claim, or were

the owners thereof, according to the laws and customs of the district embracing the same. * * * Occupation and adverse possession of a mining claim shall consist in holding and working the same, in the usual and customary mode of holding and working similar claims in the vicinity thereof,"—they wished to be understood as meaning that the act was to apply to claims held by location and possession only, and he who could not show a higher title than that of a possessory right could not maintain his action against one who had entered therein and held adversely for two years. If the purchasing of the land from the government gives no greater rights or privileges to the holder of the patent than he would have under his possessory right, then it is a useless waste of time and money in applying for a patent. That this is not the case, and that he who has made his application for a patent, and paid the purchase price for the land, is entitled to greater privileges, is shown by the rulings of the commissioner of the general land office, and the decisions of the United States and state courts, in this: A party holding by possession is required to perform the annual labor or make improvements each year, but, the moment he receives the receipt showing that he has paid for the land, he is not required to do the work, nor make the improvements, pending the decision on his application and the issuance of the patent. *Aurora Hill Con. Min. Co. v. Eighty-Five Min. Co.*, 12 Sawy. 359, 34 Fed. 515; *Deno v. Griffin*, 20 Nev. 250, 20 Pac. 308; *Benson Mining, etc., Co. v. Alta Mining, etc., Co.*, 145 U. S. 430, 12 Sup. Ct. 877. Nor is the patentee required to perform labor or make improvements on his claim after he receives his patent. The legislature of Montana enacted a law barring the right of recovery of a mining claim where the owner had not been in possession within one year before the commencement of the action. Congress extended the time for the doing of the assessment work. The locator had not been in the possession of his claim for over 18 months, and others relocated the claim. In passing upon the validity of this statute, Chief Justice Waite said: "Under the act of congress, as has just been seen, the original locators, or their grantees, had what was equivalent to a grant by the United States of the right to the exclusive possession and enjoyment of the property until January 1st. The Montana statute, if in any respect it is repugnant to this, was repealed to the extent of such repugnancy by the act of congress. As between possessors having no other title than such as is derived from mere occupancy, an action would undoubtedly be barred by the Montana statute." *Belk v. Meagher*, 104 U. S. 286. As hereinbefore stated, prior to 1866 the government title to mineral lands could not be obtained. By the statute of July 26, 1866, any person or association of persons

claiming a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local rules and customs of the miners in the district where the same was situated, and having expended, in labor and improvements, an amount of not less than \$1,000, and in regard to whose possession there is no controversy or opposing claim, was permitted to file his application for a patent, and the diagram filed with the application for patent should be so extended, laterally or otherwise, as to conform to the local laws, customs, and rules of miners. But, under that act, no plat or survey or description should in any case cover more than one vein or lode, and no patent should issue for more than one vein or lode, which should be expressed in the patent. No location thereafter made should exceed 200 feet along the vein or lode for each location, with an additional claim for discovery, together with a reasonable quantity of surface ground for the convenient working of the same. Under the law of 1866, the vein, lode, or ledge was the only thing that could be located; the surface ground was not subject to location. Parties discovering a vein or lode were entitled to locate 200 feet for discovery. They could follow that ledge in any direction it might turn, but the only claim they had to the surface adjoining was the privilege of using it for convenient working of their ledge. Another party discovering a vein, lode, or ledge running parallel with the original location, and within 10 feet of it, being a separate ledge, could locate and hold the same, and procure a patent for it, notwithstanding its close proximity to the original location. By the act of congress of 1872 the entire system of locating and holding mining claims was changed. One or more persons can locate 1,600 feet in length, and not to exceed 600 feet in width; and not only are the veins, lodes, and ledges offered for sale, but also the land in which they are found. And, under the act, a patent will not be issued for the vein, lode, or ledge alone. The application must embrace the quantity of surface ground, as allowed by the act, or the local rules of the district; and, when the patent issues, it vests in the patentee the title in fee simple, not only to all the surface ground embraced within the calls of the patent, but also all veins, lodes, and ledges, the top or apex of which lies inside of the surface boundaries of such location. I think that, under the act of 1872, new and greater privileges were granted to the locator, and, when he has connected himself with the government title, his rights assume the character, and his property is to be governed by the rule as provided for in sections 3634 and 3635. Congress has made the possession of public land, which is valuable for mineral, separate and distinct from the fee; and, in recogniz-

ing the possessory rights of miners while the paramount title remained in the government, by section 9 of the act of February 27, 1865, (Rev. St. § 910,) it was enacted "that no possessory action between individuals in the courts of the United States for the recovery of mining titles should be affected by the fact that the paramount title to the land was in the United States, but that each case should be adjudged by the law of possession." And it seems to me that the legislature took the same view by the acts of 1867 and 1869; and when the language, "or were the owners thereof, according to the laws and customs of the district embracing the same," in the first paragraph, "and provided further, that when the terms 'legal title' or 'title' are used, they shall be held to include title acquired by location or occupation, according to the usages, laws and customs of the district embracing the claim," in the closing paragraph, of section 3632, was used, it wished to be understood that the act should apply to ownership or title acquired by location and possession only, and not to the title in fee acquired from the government. The land department of the United States, in speaking of the ownership of land, uses the term, "owner by right of possession, or title by possession;" but, after the title has passed from the government, it is then spoken of as the fee being in the patentee. The government has said to the miner: "You may occupy and possess the mineral lands of the United States. You may extract the ores and minerals therefrom. Yes, you may sell, and give a good and valid title thereto. But you cannot assert this right as against the government, who is the owner of the paramount title, and has reserved unto itself the right to extend, limit, or abolish this right of possession at any time." And, when the government issued its patent to the plaintiff, it gave the plaintiff a title in fee, which, having been fixed by the rules of property, which are a part of the general law of the state, cannot be divested by a section of such law which was enacted merely to regulate neighborhood customs or regulations, which were and are intended to apply to the possessory rights of individuals only, and not to the title derived from the government. When, as in this case, the language used in sections 3632 and 3664 are supposed to conflict with the language and leading design as expressed in several other sections of the same act, can there be a better or safer rule than to place that construction upon them which will reconcile and harmonize, with the nature of the title to the property, the evident intention of the lawmakers, and, to my mind, what is equitable and just? It frequently becomes the duty of the court, in giving effect to statutes, to restrain, enlarge, or qualify the ordinary and literal meaning of the words used. Sedg. St. & Const. Law, 199, 209.

For the reasons above given, I dissent from the views expressed by my associates in relation to the construction that should be placed upon the statute of limitations, and I think the judgment sustaining the demurrer should be in all things affirmed.

STATE ex rel. BENTON v. BAUM.
(Supreme Court of Montana. Jan. 2, 1894.)

ATTORNEY—DISBARMENT.

Respondent was retained to bring an action in a justice court, receiving \$25 therefor and got judgment for \$60. The case having been appealed by the defendant, he received \$25 more, and on the appeal the judgment was reduced to \$30. Respondent then offered to prosecute an appeal to the supreme court, and received \$25 more therefor. He allowed the time for appeal to expire, collected the amount of the judgment, and converted it. *Held* sufficient ground for disbarment, within Comp. St. div. 5 p. 621, § 107, providing that where an attorney refuses to pay over to his client money collected on demand, he may be disbarred.

Application by the state, on the relation of Charles H. Benton, for the disbarment of Peter M. Baum, an attorney. Application granted.

DE WITT, J.: This is an application for the disbarment of Peter M. Baum, an attorney of this court. The relator, Charles H. Benton, judge of the eighth judicial district court, filed, in this court, written charges against said Baum. An order was issued that respondent show cause why his license should not be revoked, and his name stricken from the roll of attorneys. Upon service of that order, Mr. Baum filed an answer. The matter was thereupon referred to E. R. Russel, Esq., of Great Falls, who was appointed by this court as referee, with the usual powers of such officer, to take the testimony of witnesses and report the same to us. That report is now before us. We will examine it, and ascertain whether the charges were proved, and whether they are sufficient upon which to pronounce a judgment disbarring respondent from the practice of law. We will give our attention to only two of the charges. The first may be stated as follows: Joseph Horn employed Baum to prosecute an action for him, in a justice court, against one James Baatz, on a claim amounting to \$71.50. The price agreed upon for the service was \$25, which amount Horn paid to Baum. The service was performed and judgment was rendered in the justice court for \$60 in favor of Horn. Baatz appealed to the district court. Thereupon Baum and Horn made a second agreement that Baum should try the case in the district court for another \$25. This amount was also paid by Horn to Baum. In the district court, Horn obtained a judgment against Baatz for \$30. Thereupon a third contract was made between Horn and Baum, by which Baum agreed to appeal the case.

and argue it in the supreme court, for another \$25. This money was paid by Horn, and accepted by Baum. Baum did not appeal the case to the supreme court, but allowed the time for so doing to expire. Judgment for costs was entered against Horn in the district court by reason of the fact that the judgment of the justice of the peace was reduced on the trial *de novo* in the district court. The sheriff collected this judgment for costs from Horn. The defendant, Baatz, against whom was the judgment for \$30 in the district court, paid that amount of money into court in satisfaction. Baum, as Horn's attorney, received this \$30 from the clerk of the district court, less \$7 costs, which belonged to the justice of the peace. This \$23, so received by Baum, he retained and converted to his own use. The second charge is as follows: One Robert Temple was arrested, charged with perjury. He employed Baum to defend him. While he was in jail he paid Baum \$20, and, after being released on bail, he paid him a further sum of \$30 as a retainer. Temple wrote to a relative in Washington, D. C., asking for money, and directing the relative to send the letter in care of the law firm of which Baum was a member. This letter was sent, containing a check for \$100, payable to Temple. This letter was by Baum opened. Baum took the check for \$100, and indorsed it, "R. Temple, per Peter M. Baum," and "Peter M. Baum." He cashed this check at a Great Falls bank, and retained the money. Temple gave Baum no authority to open his letter, or to take his check or indorse it, or to receive money on it. Temple, discovering what Baum had done, discharged him from his service, and demanded the \$100, which was refused. We do not deem it necessary to notice the other charges made in the complaint.

At the hearing before the referee, Mr. Baum appeared in person, and was present at every session, the referee never proceeding with testimony until Baum appeared. Baum was not only afforded a full cross-examination of the witnesses for the state, but he was permitted to revile the witnesses and counsel, to insult the referee, to ridicule the proceedings, to challenge persons to fight, and to indulge generally in such disgraceful conduct that we much regret that the referee did not stop the hearing, and at once certify to us the acts which were taking place before him. For the referee was a part of this court, and Baum's offenses against the referee were offenses against the court. In *re Haldorn*, 10 Mont. 222, 25 Pac. 101. Perhaps it may not be amiss to note a few examples of Baum's conduct. Early in the proceedings, Mr. Baum remarks "that he does not care anything for the people who appear in this proceeding; that he defies them, and defies the supreme court to do him any harm in this case; and that nothing can be proved. I say that Ed. L. Bishop never made a cent in this

country until I took him into business. I took him into my office a pauper. That he don't know enough to chew gum, and has cheated me every time he has had a chance." Again, Baum remarks: "Mr. Baum asks now that you bring in the court clown." Again, Baum says to one of the counsel: "You stole the balance of my money. If I was the biggest coward on earth, I would knock out the man that said that to me." At another point we have the following: "Here Mr. Baum noticed W. M. Cockrill, clerk of the district court of Cascade county, standing in the door of the referee's office, and said to him, 'Come in, William, and see the circus.'" Mr. Baum, in objecting to a question, does it as follows: "Mr. Baum: Mr. Baum says that that question is leading, and outrageous, and ridiculous, and nobody but a fool would ask such a question. I say that to the supreme court, and also say that Mr. Baum says it is directory." Again, commenting upon a question, he says: "Who ever heard of a lawyer asking a question that way. Just say now, also, that if Mr. Bishop was a gentleman, and born south of Mason and Dixon's line, he would have licked Mr. Baum before this time." Speaking of himself, Baum again says: "We will see. Counsel may be drunk, but I would rather have his head drunk than yours sober. We will have a circus before we get through." Mr. Baum remarks to one of the counsel as follows: "Relating to this check: Bishop, if you had my head, drunk, it would be worth millions of dollars to you." At another time Mr. Baum says: "Old man — [naming one of the members of this court] will be amused when he sees this." Addressing Mr. Cockrill, a bystander, Mr. Baum says: "Sit down before I lick you, Cockrill." Mr. Horn, a German, being upon the stand as a witness, Mr. Baum remarks: "Oh, a Dutchman will do anything, you know. I wish you would say to the supreme court that I would like to have such a thing as that Bishop out in a green field. I believe the crows would be scared." Again, Mr. Baum remarks to one of the counsel: "I would like to have you put down that, now. Baum now says he would like to take Bishop out, and slap his face; that I think he is the laziest darn dog that was ever born. I now say that Pop Baum took him into his office when he hadn't any reputation or business, and let him make money, and that all the money he ever got, and all the reputation he ever had, he got through Pop Baum. Pop Baum made everything there is in him." Speaking of the same German witness above noted, Baum remarks: "I think he lies about that." The following is one of Mr. Baum's methods of objecting to a question: "Objected to upon the ground that Bishop is a fool. I want to show the supreme court what a fool you are, you dirty loafer." To the witness he says, "Pull off your shoes, and wash your feet. Now, you keep your mouth shut, and don't tell him a

damn thing." To punish Baum for this conduct before the referee is now impracticable, (further than the judgment disbaring him,) as he absconded from this state about the time the evidence for the state in this proceeding was closed.

The two charges above recited were clearly and amply proved by the witnesses for the state. We will examine the Horn matter for a moment. It is proved, beyond a cavil, that there were three express and well-understood contracts between Horn and Baum,—one contract to try the case in the justice court for \$25; another, to try it in the district court for \$25; and the third, to appeal, and try it in the supreme court, for \$25. These several amounts were all paid to Baum. He performed the first two services. He was paid to appeal the case to the supreme court. He did not forget to take the appeal. He deliberately did not do it, but, on the other hand, did something else; that is to say, during the time within which he might have appealed, he went to the clerk's office, and collected \$23 which had been paid into court for his client on the judgment from which he had agreed to appeal. This \$23 he appropriated and converted. So, he not only deliberately and knowingly omitted to do that which he had agreed to do, and had been paid for doing, but he also converted a sum of money belonging to his client. There is no pretense, by the mouth of any witness, that Baum had, or ever made or pretended to have, any claim upon this \$23 for fees owing from Horn. In Baum's cross-examination of Horn he tries to make it seem unreasonable and ridiculous that an attorney would agree to take a case to the supreme court for \$25, and that therefore it must be untrue that he agreed to do it. It may be unreasonable, to believe that an attorney would attempt such a service, paying costs, transcribing, printing, and expenses, for \$25. But Baum did not attempt the service. The evidence does not show that he ever intended to take the appeal, but it does show that he intended to promise to do it, and that he intended to get the \$25 for the promise, and intended to give no further consideration for that money than the promise. So much for the Horn matter.

We will look at the Temple charge. Here the evidence is just as clear. It is established that Peter M. Baum opened Robert Temple's letter; that he took therefrom Temple's check for \$100; that he indorsed Temple's name, and collected Temple's money, and put it into his pocket,—and all this without permission or authority, expressed or implied. There is no pretense here that, even if Baum had obtained possession of this money lawfully, he had any right or claim or lien upon it, for fees or otherwise.

Upon the last day that evidence was taken, Mr. Baum was present, as he was at every hearing. An adjournment was taken to March 4, 1893, at 10 A. M. Adjournments

were taken as follows: To the same day at 2 P. M.; to March 13th, 10 A. M.; to March 27th, 10 A. M.; to April 19th, 10 A. M. At none of these hearings did Baum appear. The referee then closed the hearing. Mr. Baum did not offer a syllable of proof, by himself or any other witness, in contradiction of the charges and testimony of the state. As above noticed, he has left this jurisdiction. We have held the report of the referee from the date of its filing, May 23d, until this time, January 2, 1894, so that respondent should have ample opportunity to make a defense. After the filing of the complaint in this matter, and pending the proceeding, Baum's conduct towards Judge Benton was such as was utterly unbecoming an attorney. About the time the hearings before the referee were being continued from day to day, awaiting Baum's presence, some further affidavits were filed in this court setting forth Baum's conduct. Although evidence was not taken upon these charges, the affidavits were made by respectable persons of Great Falls, and Baum has never appeared to controvert the charges therein contained. It may therefore be proper to refer to them in connection with the other matter above reviewed. It is set forth that Baum, in the presence of several persons, stated that Judge Benton was a hypocritical ———, and ought to be impeached; that he (Baum) owned the court, (referring to Judge Benton,) and that "Charley Benton is afraid of me, [Baum,] and will do what I want him to." Another affiant alleges that Baum, on the streets of Great Falls, in the presence of a number of persons, stated that he had been running the judge of the district court for a year or so, and that the judge did whatever he (Baum) desired him, regarding litigation in which he was interested, and that the judge was all right while he was under Baum's control. The other charges in these affidavits are as to personal abuse by Baum of Benton, and some of it in Benton's chambers at the courthouse. The conduct described must have sorely taxed the judicial calm of Judge Benton, and made him wish, for the time, that he were a citizen only, and not a judge of the court. The charges in these affidavits can add nothing to the severity of the judgment of this court. They only further show the abyss of degradation into which the respondent has fallen. We have shown what the charges against Peter M. Baum are. We have shown that they were proved. We have shown what Baum's conduct was in the presence of the referee, and his conduct pending those proceedings. We have the following statute: "In all cases where an attorney of any court of this state, or solicitor in chancery, shall have received, or may hereafter receive, in his said office of attorney or solicitor, in the course of collection or settlement, any money or other property belonging to any client, and

shall, upon demand made, and a tender of his reasonable fees and expenses, refuse or neglect to pay over or deliver the same to the said client, or to any person duly authorized to receive the same, it shall be lawful for any person interested to apply to the supreme court of this state for a rule upon the said attorney or solicitor to show cause, at a time to be fixed by the said court, why the name of said attorney or solicitor should not be stricken from the roll, a copy of which rule shall be duly served on said attorney or solicitor at least ten days previous to the day upon which said rule shall be made returnable; and if, upon said rule, it shall be made to appear to the said court that such attorney or solicitor has improperly neglected or refused to pay over or deliver said money or property so demanded as aforesaid, it shall be the duty of said court to direct that the name of said attorney or solicitor be stricken from the roll of attorneys in said court." Comp. St., div. 5, p. 621, § 107. We also have a provision, in section 106, that the justices of the supreme court, in open court, shall have power in their discretion to erase the name of an attorney or counselor at law from the roll for misconduct in his profession. Section 107 is sufficient to sustain a judgment disbaring Baum. We are of opinion that section 106 is also ample authority. Baum's acts were "malconduct in his profession." It would be undignified for a court to stop to discuss whether Baum's acts, as above described, were professional misconduct. He shocks professional ethics and all common morals. The standard of morals in the profession of law ought to be at a high mark. Mr. Baum was once very near expulsion from that profession, (July term of this court, 1890.) At that time he was saved by the view that we took of the courtesy which seemed to be due from us to the supreme court of the state of New York. In *re* Baum, 10 Mont. 223, 25 Pac. 99. The offenses charged against him at that time were committed in the state of New York, and it seemed that the New York supreme court had jurisdiction, and had taken proceedings against Baum, which were then pending and undetermined. On that ground we then omitted to take action. Furthermore, perhaps it is not amiss to state that this court was then addressed in behalf of Mr. Baum by gentlemen of the bench and bar in high standing in sister states. Mr. Baum was by us given the opportunity to secure an honorable place in his profession in a rapidly developing community, and among a generous people. It is characteristic of the people of the west to forgive the past, and to give the helping hand of fellowship to every struggler for a larger day and better life. Mr. Baum has flagrantly abused this sentiment of the court and the people of this state. It is the judgment of

this court that the license, as an attorney, of Peter M. Baum, is revoked, and that his name be stricken from the roll of attorneys of this court, and that he is debarred from practicing in any of the courts of this state, or from exercising any of the privileges of an attorney or counselor of law.

PEMBERTON, C. J., and HARWOOD, J., concur.

MATTINGLY et al. v. LEWISOHN.

(Supreme Court of Montana. Dec. 23, 1893.)

RES ADJUDICATA—MINING—LOCATION AND ACQUISITION OF CLAIM—INSTRUCTIONS—APPEAL.

1. Where defendant appeals from a judgment overruling his demurrer to the complaint, and determining, on the merits, that neither plaintiff nor defendant had established title to a mining claim, the judgment of the appellate court, that the complaint does not state a cause of action, reverses the judgment of the trial court entirely, so that no portion thereof can be pleaded as *res adjudicata*.

2. An appellate court will not reverse a ruling of the trial court, refusing to disturb a finding of the jury, where there was ample evidence to support the finding.

3. The declaratory statement which the locator of a mining claim is required, within 20 days, to file and have recorded in the office of the county recorder of the county in which the claim is located, must be under oath.

4. In an action to determine the right of possession to a mining claim, plaintiff need not prove compliance with the law requiring the performance of annual work on the claim, where no issue as to the performance of such work is raised by the pleadings.

5. On an issue as to whether defendant had done \$100 worth of work on a mining claim, an instruction is not prejudicial to him which states that there is no dispute as to \$75 worth of work, but as to the remaining \$25 the fact is disputed, and the evidence conflicting, where plaintiff had admitted an item of \$3.50 besides the \$75.

6. An instruction which correctly states the requirements of a mining law is not erroneous, in that it exacts too rigid a compliance with the letter of the law.

7. On an issue as to the doing of \$100 worth of work on a mining claim, an instruction that "it depends entirely on whether or not the work or improvement was reasonably worth \$100" is proper, and does not require the jury to find that the value of the claim was enhanced to the extent of \$100 by the work done.

Appeal from district court, Silver Bow county; John J. McHatton, Judge.

Action by James P. Mattingly and others against Leonard Lewisoohn to determine the right of possession to a quartz lode mining claim. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

Statement of the case by HARWOOD, J.:

Among other assignments, appellant's counsel criticise as erroneous certain instructions, numbered 1, 3, 4, 5, and 6, given by the court to the jury, as follows: "(1) A location of a quartz lode claim is made by complying with the requirements of the laws of

the United States and of the territory or state of Montana, and such requirements are as follows, to wit: There must be discovered within the limits of the claim located a vein or crevice of quartz or other rock in place, bearing gold, silver, or other precious metals, and the vein or crevice must have at least one well-defined wall rock. The location must be so well and distinctly marked on the ground that its boundaries can be readily traced. And within twenty days after making the location the locator or locators must file and have recorded, in the office of the county recorder of the county in which the claim is situated, a declaratory statement, on oath, containing the names of the locators, the date of the location, and such a description of the claim located, with reference to such natural objects or permanent monuments, as will identify the claim. The claim located may equal, but cannot exceed, 1,500 feet in length along the vein, and 300 feet in width on each side of the center of the vein. The locator or locators must be citizens of the United States, or must have declared their intention to become such."

"(3) It is not alleged or pleaded, on the part of the defendant, that the plaintiffs have forfeited the ground in controversy in this action by reason of a failure to perform the labor or make the improvements required by law, and there is no necessity for plaintiffs to prove such representation; but if you find the ground in controversy herein was on the 1st day of January, 1885, vacant and unappropriated ground, and that the plaintiffs, or those under whom the plaintiffs claim, located the same according to the law as given you in the instruction herein, then you will inquire no further, but will find a verdict for the plaintiffs. (4) The plaintiffs in this action deny the location of the Miners' Union lode claim, and also allege that the said claim, if it ever was located, has been forfeited by a failure on the part of the defendants and their predecessors in interest to perform the labor or make the improvements required by law during the year 1884; and if the jury find from the evidence, either that there was no location of the Miners' Union lode claim, or that the same was forfeited for failure to perform the labor or make the improvements required by law, then, in either case, the ground would be subject to location, and if the plaintiffs complied with the requirements of the law, as hereinbefore given, in making their location, then the jury are instructed to find for the plaintiffs. (5) If you find from the evidence that, although Fisher may have made a valid location of the said Miners' Union claim, but he or his successors in interest failed to do one hundred dollars' worth of work, or to place one hundred dollars' worth of improvements, on the said claim in the year of 1884, the ground was subject to relocation on the 1st day of January, 1885. It is claimed, and

there is no dispute, that seventy-five dollars' worth of work was done on the said claim by Jacobs, and the controversy between the respective parties is as to whether or not Carroll, or either of them, did the other twenty-five dollars' worth of work, upon which point there is a conflict of testimony, and you will be the exclusive judges of the weight to be given to the testimony of the respective witnesses, and their credibility, as well as their means of knowledge; and that if you find that there was not twenty-five dollars' worth of work done by the said Carroll, or, in other words, if you find that there was not one hundred dollars' worth of work done by all the claimants of the said Miners' Union lode claim, you will find that the said claimants forfeited all right and title to the same, and the said ground was on the 1st day of January, 1885, subject to relocation, and if there was any amount less than one hundred dollars' worth done, in the eye of the law, it occupies the same position, and their claim was forfeited, as much so as if they had done none at all, for the law says that there shall be one hundred dollars' worth of work done, or improvements made, on a claim, for each year. (6) In determining the amount of work done upon a claim, or improvements put thereon for the purpose of representation, the test is as to the reasonable value of the said work or improvements, not what was paid for it, or what the contract price was, but it depends entirely upon whether or not the said work or improvements were reasonably worth the said sum of one hundred dollars." The other facts are stated in the opinion.

M. Kirkpatrick, for appellant. F. T. McBride and Robinson & Stapleton, for respondents.

HARWOOD, J. This action was instituted pursuant to the provisions of section 2326, Rev. St. U. S., to determine the right of possession to a certain quartz lode mining claim, situate in Silver Bow county, Mont., as between appellant, who was applicant for a patent thereto under the name of "Miners' Union Lode Mining Claim," and the respondents, who were the adverse claimants, with others, of said ground, under a location known as the "Great Eastern Quartz Lode Mining Claim." The case has been pending since 1886, and the present appeal is from the judgment rendered as the result of a second trial, wherein it was determined, for the second time, that appellant, Lewisohn, failed to establish title and right of possession to said ground, and also an appeal from an order overruling his motion for new trial.

The first and most important question presented on this appeal is as to the effect of the first trial, the judgment, and reversal of that judgment by the supreme court on

a former appeal. The report of the consideration and determination of the case on the former appeal is found in 8 Mont. 259, 19 Pac. 310, and, as there shown, the first trial resulted in findings to the effect that neither party had established a title to the ground in dispute, and judgment was pronounced accordingly. Defendant prosecuted an appeal from the whole of said judgment, assigning certain errors alleged to have been committed by the court below in the trial, by way of ruling out certain evidence offered by defendant, and also assigning and urging the proposition that the complaint, as originally filed, failed to state facts sufficient to constitute a cause of action, which last objection was also raised in the court below by demurrer to the complaint. The supreme court considered, as appears from the opinion cited supra, but one question on that appeal, namely, whether or not the complaint was sufficient, and held that it was not. And thereupon reversed the judgment and remanded the case, with direction to the trial court to sustain the demurrer to the complaint. Thereafter, on return of remittitur, plaintiffs filed an amended complaint, by leave of court, which complaint was afterwards further amended by leave of court, setting up, substantially, the facts pleaded in the original complaint, and also undertaking to make the complaint sufficient in the respects wherein it was found wanting on the former adjudication. Now, defendant, who had appealed, and caused the former judgment to be reversed, as aforesaid, moved the trial court to strike the amended complaint from the files of said court, on the ground that the facts set up by plaintiffs, whereby they claimed title and right of possession to said ground in dispute, had been adjudicated and determined against them, and that such determination had not been vacated on appeal. This position was taken by defendant on the theory that the former judgment against plaintiffs, declaring them without title to said mining ground, still stood in full force and effect, notwithstanding the appeal, and reversal of said judgment. The trial court, however, overruled said motion to strike out plaintiffs' amended complaint, to which ruling exception was reserved by defendant; and that question is here presented on this appeal, as the main question for determination. Appellant contends that the reversal of the case on the former appeal was only a vacation of the judgment, as to its effect in determining that defendant was without title or right of possession to the ground in dispute. The conclusion reached by this court upon consideration of that question is that appellant cannot be sustained in his contention that the former judgment, after reversal, still stood in full force and effect against the plaintiffs. If the former appeal had been taken distinctly from part of the judgment, (*Bank v. Fuqua*, 11 Mont. 285, 28 Pac. 291.)

and the same had been reversed as to the part, only, relating to defendant's rights and claim upon said ground, for error committed in respect to that determination, there would, undoubtedly, be great force in the position contended for by appellant; but the judgment was reversed because the complaint was found wanting in the attempt to state a sufficient cause of action, and a reversal of the judgment, unconditionally, on such a ground, would seem to have entirely vacated it, together with all proceedings subsequent to the demurrer. The supreme court held, on the appeal, that the case had never been properly in court, and that the demurrer interposed to the original complaint ought to have been sustained; and for that cause the supreme court held that the judgment must be reversed, treating all proceedings subsequent to the demurrer as null and void. We think, in such a determination as that, it cannot be maintained that the judgment still stands in force as an adjudication and determination of the rights of plaintiffs in that action. To hold with appellant on this point would be to declare such a judgment as existing, valid, and binding, in certain respects, while at the same time holding that part of the judgment roll which is necessary to sustain the judgment was wanting, and also holding that for that reason the judgment should be reversed and set aside, root and branch. Such a position, we think, is untenable. If, on the former appeal, appellant had so shaped his course as to have attacked rulings which related to the action and judgment on the branch of the case concerning the determination of his alleged rights in and to said land, and had appealed from that part of the judgment only, and the appellate court, in considering such appeal, had confined its inquiries and determination to the portion of the judgment relating to defendant's claim to said ground alone, and reversed the judgment only in its effect against defendant, then, of course, it might have been left in force as an adjudication and determination of the claims of plaintiffs to said ground; this being an action where either party must, independently, make out a complete case on his own behalf, in order to obtain a judgment. But, as we have seen, that was not the character of appeal, nor was the determination so limited on the former appeal of this case, for by that determination the parties were relegated back to the position they occupied when demurrer to the original complaint was under consideration in the trial court. The ruling of the trial court, therefore, in refusing to strike out the amended complaint filed after the former reversal, we think, ought to be sustained. *Mattock v. Goughner*, 13 Mont. —. 34 Pac. 30.

Appellant further contends that the special finding of the jury on the present trial, to the effect that defendant failed to improve said mining claim to the extent of not less

than \$100 worth of work or improvements thereon in the year 1884, was not sustained by the evidence. We have carefully considered the evidence contained in the record, relating to this question, and from that examination are drawn to the conclusion that the special finding of the jury in that respect is undoubtedly supported by the evidence. Indeed, we think a finding to the contrary might be gravely questioned, as to whether, with all warrantable liberality of construction, the evidence could be held sufficient to support a conclusion that the necessary work or improvement to fulfill the requirements of the law was expended upon said mining claim in the year 1884. The jury found the contrary, and in our opinion such finding is amply supported by the evidence, and the ruling of the trial court, in refusing to disturb that finding, ought not to be reversed.

It is further urged that the trial court committed errors of law, in giving certain instructions to the jury. The instructions criticised are set forth in the above statement of the case. It is assigned that instruction No. 1 is erroneous because the court, in defining the requisites of a valid mining location, stated, among other essentials, that the locator must, within 20 days after making the location, "file and have recorded, in the office of the county recorder of the county in which the claim is located, a declaratory statement, on oath, containing," etc. The clause, "on oath," appearing in said instruction is objected to. But in view of the requirements of the statute, and the decisions wherein the same question has been considered, we think the court correctly stated the law. *Metcalf v. Prescott*, 10 Mont. 283, 25 Pac. 1037, and cases therein cited.

Instructions Nos. 3 and 4 are also objected to, on the ground that the jury was thereby informed "that it was not necessary for plaintiffs to prove compliance with the law as to performance of annual work on the Great Eastern Claim." By reference to those instructions, it will be seen the jury was thereby told that the pleadings raised no issue in respect to the representation of said Great Eastern mining claim by proper expenditure in labor or improvements thereon, as required by law. The instruction says: "It is not pleaded on the part of defendant that the plaintiffs have forfeited the ground in controversy by reason of a failure to perform the labor or make the improvements required by law, and there is no necessity for plaintiffs to prove such representation." There being no issue raised on that point by the pleadings, but, on the contrary, the fact of such representation of the Great Eastern claim being admitted, or not put in controversy, the instruction was correct. *Wulf v. Manuel*, 9 Mont. 286, 23 Pac. 723.

Instruction No. 5 is criticised as erroneous because "it states that there is no dispute that \$75 worth of work was done on the Miners' Union in 1884, but that as to the re-

maining \$25 the fact is disputed, and the evidence conflicting." In this connection, appellant's counsel say: "It is conceded that \$78.50, worth of work was done in 1884. Jacobs, the plaintiffs' witness, credits Carroll with one day's work, at \$3.50, which, added to the \$75 worth done by Jacobs and Hunsletton, amounts to \$78.50; so that the amount left in dispute, and as to which there is conflicting evidence, is not \$25, but \$21.50." Even granting all that appellant claims in this connection, with full force, we still deem the language of the instruction void of prejudice on the point of its attempted criticism. The court said to the jury, in that instruction, that the dispute was concerning \$25 worth of work or improvements on the claim in that year, in addition to the \$75 worth admitted,—in other words, that was the scope of the controversy on that point; and the court did not say that proof of the performance of some, or even all, of that \$25 worth of work had not been made. But the jury were left free to so find, if it could be found from the evidence. It is also urged against this instruction that "it is likewise erroneous in exacting too rigid a compliance with the letter of the mining laws" in respect to the amount of work or improvements required for representation. We do not find in this instruction any rigid exaction, which demands from appellant any greater measure than the law requires in return for the grant of a mining claim. The instruction simply and plainly states what the law requires. There is no error in stating the conditions which must be complied with in order to invest the locator of a mining claim on the public domain with exclusive right of possession, and enjoyment thereof. Nor do we observe anything rigid or formidable in the form of this instruction. Of course, an instruction which states the requirements of the law may seem quite rigid to one who, by dint of the utmost stretch, cannot show fulfillment. But the objection, then, is against the law, instead of the instruction which states the law; and the law appears rigid only when it lays its rule upon delinquency, and finds it wanting. We cannot sustain the objection to instruction No. 5.

Lastly, instruction No. 6 is attacked as erroneous because the jury are thereby told that: "In estimating the amount of work or improvements, the test is the reasonable value thereof, not what was paid for it, or what the contract price was, but it depends entirely upon whether or not said work or improvements were reasonably worth the sum of \$100." In this connection, appellant's counsel argue that the "intrinsic value or worth of the property may be nothing at all. If the amount of labor put into it was worth \$100, it is sufficient." We do not regard the language of the instruction fairly susceptible of a construction antagonistic to the view of appellant's counsel. Indeed, it seems to us that the court is in accord with

them, in saying to the jury. "In estimating the amount of work or improvements, the test is the reasonable value thereof." The court here said to the jury, it is the reasonable value of the work or improvements which you must consider. The court certainly did not, in that instruction, say that the value of the claim, with such work or improvements thereon, or the value of the work or improvements to the claim, was the criterion for ascertaining whether the requirements of the law had been fulfilled; and we do not think a jury would be misled in construing or applying the language used by the court, especially in view of the fact that the evidence on that point is directed to the ascertainment of the value of the work or improvements put upon the mine, irrespective of the value of the mining claim, or the propriety or expediency of making the improvement or working it in the manner shown, or inquiring how much it enhanced the value of the claim. Upon careful consideration of these instructions, in the light of the criticism brought to bear on them by the learned counsel for appellant, we think, taken in connection with the other instructions given, they plainly and sufficiently state the law applicable to the case, as developed in the pleadings and evidence. The conclusion of this court, upon all the errors assigned, is that judgment of the court below, and the order overruling appellant's motion for a new trial, should be affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

TACOMA LUMBER & MANUF'G CO. v. WOLFF et al.¹

(Supreme Court of Washington. Dec. 27, 1893.)

JUDGMENTS—IRREGULAR ENTRY—MOTION TO VACATE.

1. The fact that a judgment was rendered as a judgment at law, in a suit of equity, is not sufficient ground to vacate it, without showing that the moving party could interpose a substantial defense on a new trial.

2. A judgment will not be vacated for irregularity in entry, because of an alleged agreement between plaintiff and the moving party, by which the latter was not to be personally liable for the debt which was the foundation of the judgment, where there was a preponderance of evidence that no such agreement had been made.

Anders, J., dissenting.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by the Tacoma Lumber & Manufacturing Company against Samuel Wolff and others. There was judgment for plaintiff, and John Huntington, a defendant, moved to vacate the judgment. From an order denying his motion, he appeals. Affirmed.

J. S. Whitehouse and Baker & Campbell, for appellant. Hudson & Holt, for respondent.

HOYT, J. Appellant instituted a proceeding in the superior court, whereby he sought to have vacated a certain judgment theretofore rendered in said court against him, together with other parties. Affidavits in aid of such proceeding were filed by him, and counter affidavits by the plaintiff named in such judgment. Upon deciding the issue of fact, as it saw the burden of proof, the court below refused to vacate such judgment, and, from the order so refusing, this appeal is taken. A large number of questions have been discussed by the appellant, many of which have been addressed to points raised in the original cause in which the judgment was rendered prior to such judgment. In our opinion, very few of the questions thus discussed are involved in the decision on this appeal.

The most that is claimed as tending to show that the original judgment sought to be vacated was void was that it was rendered as a judgment at law, in a suit in equity. But, in our opinion, if all that is said by the appellant upon that point is conceded, it would in no manner show that such judgment was void. The most that it would establish would be that the entry thereof was erroneous, and while this would be enough to demand from this court a reversal of such judgment, if an appeal had been prosecuted therefrom, it becomes of comparatively little moment in a proceeding for the vacation thereof. In such a proceeding, such fact can have no controlling influence, so long as the irregularity was not such as to deprive the court of jurisdiction. All courts hold, and we have frequently done so, that it is not enough, to entitle a party to have a judgment against him vacated, that he should show that it had been irregularly entered. He must, in addition thereto, establish to the satisfaction of the court the fact that such judgment is unjust and inequitable, as against him. Proceedings of this kind are of an equitable nature, and courts will not interfere with the judgment, simply because it may have been erroneously entered, unless, in addition thereto, it is made to appear that it is unjustly burdensome to the moving party. In such a proceeding, pure technicalities can have little influence upon the decision of the court, if the judgment sought to be vacated is not of such a nature that if it were set aside the moving party would be able to interpose a substantial defense upon a new trial, or in another proceeding involving the same cause of action.

Such being the status of the judgment, and such being the office of proceedings of this kind, but a single reason was presented, by the showing of the moving party, why such judgment should, in such a proceeding, be vacated and set aside; and that was that, if so set aside, he would be able to show, in his defense, that, by an arrangement between him and the plaintiff, it was agreed that he should not be held personally liable

¹ For dissenting opinion, see 35 Pac. 755.

for the debt which was the foundation of such judgment. It in no manner attacked the bona fides of the indebtedness, nor the fact of the original liability of himself and partner for the payment thereof. If the court below had determined this single question of fact, as to such agreement having been made, in favor of the moving party, such finding would have been sufficient, under all the circumstances of this case, to have entitled him to have had the judgment set aside. But, unfortunately for him, the lower court found expressly to the contrary, and found that no such agreement had been made by or on behalf of the plaintiff. The court having so determined this fact, there remained nothing in the showing to influence it to set aside the judgment. In its opinion, there was no merit in the alleged defense, and that for that reason another trial would result in the same or a similar judgment against the moving party.

It may be suggested that the appellant was entitled to have the question of fact thus raised determined in a law court. But to so hold would be equivalent to deciding that a court of equity must not decide a fact properly before it, as it sees it, but must determine it in favor of the side having the burden of proof upon what it deems to be a preponderance of evidence upon the other side, to the end that the same question should be again passed upon in a court of law. This principle, if carried to its logical conclusion, would practically destroy all equitable jurisdiction, and we are unable to subscribe thereto. When a case has so progressed that a party who desires relief in relation thereto must appeal to a court of equity, he must so appeal to it for the purpose of having it decide all questions, both of law and fact. It is no doubt true that a court, in a proceeding of this kind, should, in cases of doubt, so decide questions of fact as to give the party a right to have it again determined by a law court. But to hold that, however clear the preponderance of evidence against the showing of the moving party may be, the court must decide in accordance with the claim of the moving party, would not only be contrary to every rule applicable to the trial of questions of fact, but would, in its results, enable a party against whom almost any judgment had been rendered to procure its vacation, and the benefit of a new trial, by the preparation of an adroit showing as a foundation for his motion to vacate the same. It follows that, in our opinion, this judgment was, at most, simply irregularly entered, and that the findings of the lower court upon the facts were such that the appellant was not entitled to any relief as against such judgment.

As to the cross appeal, by which respondent sought to have the action of the court in modifying the judgment set aside, we are of the opinion that the action of the court, in that regard, was warranted. The modifica-

tion did not go to the principal of the original judgment, but only went to the costs as taxed therein; and, under all the circumstances, we are not prepared to hold that the court did not have jurisdiction to modify the judgment as to such costs in the proceeding from which this appeal was taken. The order refusing to vacate the judgment, and modifying it as to the costs, must be affirmed.

DUNBAR, C. J., and SCOTT, J., concur.
ANDERS, J., dissents.

QUINBY v. SLIPPER et al.

(Supreme Court of Washington. Dec. 27, 1893.)

MECHANICS' LIENS — PARTIES — ENFORCEMENT AGAINST INSOLVENT'S ESTATE—INJUNCTION.

1. In an action to enforce a mechanics' lien against property of H., the mere allegation that C. claims some interest in the property is not sufficient to make the insolvent estate of H., of which C. was assignee, a party.

2. As a sale of property belonging to an insolvent's estate, on foreclosure of a mechanic's lien would constitute a cloud on the assignee's title, though the assignee, as such, was not a party to the suit, the assignee may maintain an action to restrain such sale.

3. An assignment for the benefit of creditors under the laws of Washington prevents the enforcement of a mechanic's lien on the debtor's property without leave of court.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by Frank Quinby, assignee of the estate of William Hamilton, insolvent, against Slipper & Fuller and James O'Loughlin, sheriff, to restrain execution of a decree. From a decree for plaintiff, defendants appeal. Affirmed.

Million & Houser, for appellants. Frank Quinby, for respondent.

HOYT, J. Appellants furnished material for the erection of a building for one Hamilton, and, not being paid therefor, filed their lien under the statute, and brought their action against said Hamilton to foreclose the same. In their complaint in said action it was alleged that one F. W. Carlton had some interest in the premises against which the lien was sought to be enforced. A decree of foreclosure was had, whereupon this action was prosecuted by the respondent, as assignee of the estate of said Hamilton, to enjoin the appellants from enforcing said foreclosure judgment. Said Hamilton made an assignment before the commencement of the action for foreclosure of the lien, and said F. W. Carlton was, at the time the said action was commenced, the assignee by election of the creditors; and one of the questions presented is as to whether the allegation, in the complaint in the foreclosure proceeding, that said Carlton claimed some interest in the property, was sufficient to make the estate of said Hamilton a party to the action. In our opinion, it was not. Such

allegation must be interpreted to have been directed against the said Carlton's interest in his personal capacity, and not as assignee of the said Hamilton.

The appellants claim that, this being so, the judgment was absolutely void as against the estate, and for that reason the proceedings thereunder could in no manner affect the interests thereof. We cannot agree with this contention. The decree was in terms directed against a specific piece of property, and a sale thereunder would in some degree constitute a cloud upon the title, which would interfere with the assertion of the rights of the estate in regard thereto.

The only other question presented by the record is as to the right of the plaintiff, as a lien claimant, to maintain his action for the foreclosure thereof, notwithstanding the fact that the person against whom the lien was to be enforced had, before the date of the commencement of the action, made an assignment under the statute as to insolvent debtors. In our opinion, such action could not be maintained. It is, perhaps, true that, under a common-law assignment, the estate taken by the assignee would be subject to the lien, and the person holding it could go into court, and enforce his rights thereunder, as though such assignment had not been made, by simply making the assignee a party to the proceeding, in case he desired to foreclose him, as such assignee, from raising any question in regard thereto. But this court has frequently held that an assignment under our statute is entirely different. We have held that, upon the execution of the deed of assignment, the person executing it, to all intents and purposes, surrenders all his property, whether named in the deed of assignment or not, to the jurisdiction of the court, to be applied as directed by the statute; that the assignee named in said deed of assignment, or thereafter chosen, holds the property substantially as an officer of the court. This being so, it must follow that nothing can be done by any person in reference to said property, or looking to the enforcement of any lien against the same, without its leave first obtained. By such assignment the jurisdiction of the entire matter of adjusting claims against the estate, whether secured by lien or otherwise, passes to the court, and those having claims must present them in the insolvency proceeding. This is not only necessary for the reason that the property is in the jurisdiction of the court, but it is in the interest of economy, and the proper adjustment of the affairs of the insolvent. Those having preferred claims can in no manner be injured by having thus to present them, for the reason that the court is clothed with ample power to protect the rights of such preferred creditors. The foreclosure proceeding was therefore wrongfully commenced, and, as the enforcement of the judgment rendered would tend to embarrass a proper administration

of the affairs of the insolvent, the lower court properly enjoined any enforcement thereof, and its action in so doing must be affirmed.

DUNBAR, C. J., and STILES and SCOTT, JJ., concur. ANDERS, J., did not sit at the hearing of this case.

STATE v. DUNCAN.

(Supreme Court of Washington. Dec. 4, 1893.)
CRIMINAL LAW—CONTINUANCE—PRESENCE OF ACCUSED—CROSS-EXAMINATION—INSTRUCTIONS.

1. It is not a violation of Const. art 1, § 22, that the accused shall have the right to appear and defend in person and by counsel, to grant a continuance without the personal appearance of defendant.

2. Defendant testified in his own behalf, and on his cross-examination the prosecuting attorney asked him as to his having fled soon after the crime was committed, to evade prosecution. On his direct examination defendant was questioned generally about his connection with the crime, but not as to his movements after the offense. *Held*, that the questions complained of were proper, as affecting the credibility of the witness. Stiles, J., dissenting.

3. Though the jury might not stop with considering the fact of flight as affecting his credibility, but would consider it as evidence of guilt, it could not avail defendant, since at his request the fact of flight as evidence of guilt was submitted to the jury in a charge which stated that such fact was not conclusive proof of guilt, nor in the absence of other evidence sufficient to authorize a verdict of guilty. Stiles, J., dissenting.

4. Such cross-examination did not violate Const. art. 1, § 9, providing that no person shall be compelled in any criminal case to give evidence against himself. Stiles, J., dissenting.

5. 2 Code, § 1180, provides that all persons connected with a crime, whether they counsel or aid in its commission, shall be tried as principals. *Held*, that it is not necessary to set the particular acts forth in an indictment of an accessory before the fact, and a jury may find a defendant guilty under an information charging him as principal if the evidence proved him an accessory before the fact.

6. Where defendant requested an instruction that the bare possession of stolen property alone is not sufficient to sustain a verdict of guilty, which the court gave, adding that "it is only a circumstance tending to show guilt," he cannot complain that this is a charge on the facts.

Appeal from superior court, Spokane county; Wallace Mount, Judge.

Arthur Duncan was convicted of larceny, and appeals. Affirmed.

Hyde, Glass & Reagan, for appellant. James E. Fenton, Pros. Atty., for the State.

SCOTT, J. The defendant, Arthur Duncan, was convicted of the crime of larceny, and he appealed to this court, alleging as error the granting of a continuance of the cause from the 18th to the 24th of March without his personal presence. It is claimed that this is a violation of section 22, art. 1, of the constitution, which provides that "in criminal prosecutions, the accused shall have a right to appear and defend in person

and by counsel." We are of the opinion, however, that this provision has reference to matters connected with the trial, and not to anything preliminary thereto; and the granting of a continuance is not a part of the trial, but is a preliminary matter. Counsel for the prisoner was present at the time said order was granted, and objected, but not on the ground that the defendant was absent. It does not appear that the defendant was subjected to any injustice or injury in the premises.

Upon the trial of the cause the defendant took the stand, and testified in his own behalf. Upon his cross-examination the prosecuting attorney was permitted to ask him questions relative to his having fled soon after the crime was committed, for the purpose of evading the prosecution. It is contended that this was erroneous upon two grounds: (1) Because not proper cross-examination; (2) because it was a violation of section 9, art. 1, of the constitution of the state, which provides that "no person shall be compelled in any criminal case to give evidence against himself." As to the first ground, it is contended that it was improper cross-examination, because in the direct examination of the defendant he was only questioned touching his movements on the night prior to his arrest and on the morning of his arrest, while the questions relating to his flight from the state, and absence from the trial of his brother, who was indicted with him, related to matters happening subsequent thereto. In his direct examination the defendant had been questioned generally with regard to his connection with the crime charged, and testified in relation to it. He was not asked the direct question as to whether or not he was guilty, nor did he, in specific words, deny his guilt; but the whole purpose of his testimony was to show that he was not guilty, and we are of the opinion that the questions complained of were proper as tending to affect the credibility of the witness, the fact of flight being some evidence of guilt, and, as such, tended to show that the defendant had testified untruthfully in endeavoring to show that he was not guilty. It had a direct bearing upon the truthfulness of his testimony in chief. It is contended that the jury would not stop with considering the fact of flight as affecting the credibility of the defendant only, but would consider it as evidence of his being guilty of the crime charged. It is doubtful whether a dividing line can be drawn under the facts of this case, for the only way it could affect his credibility was in showing that he was guilty of the offense charged, and that consequently the testimony he had given in his direct examination, to the effect that he was not guilty, was untrue. But, be this as it may, no error can be founded in the premises, for the instructions given by the court to the jury that the fact of flight might be taken as

evidence of guilt were given at the request of defendant. For instance, defendant requested the court to charge as follows: "The jury may consider as one of the circumstances in this case the fact that defendant did not appear when his case was called for trial a few months after his arrest; but the fact that defendant fled is not conclusive proof of his guilt, and, in the absence of other evidence, is not sufficient to authorize a verdict of guilty. In considering the circumstance of flight, the jury should consider the reasons why defendant fled, his temperament, his surroundings, the advice of his friends, the urgings of his family, and all that influenced him to flee." And the court gave this instruction, with others relating thereto, requested by the defendant; consequently, if a distinction can be drawn between considering such evidence only as affecting the credibility of the defendant, and not as evidence of his guilt of the crime charged, the defendant is not in a position to take advantage of it in this case. Nor was such cross-examination a violation of the constitutional provision aforesaid. When a defendant in a criminal case takes the witness stand he assumes the character of a witness, and as such is subject to be contradicted, disputed, or impeached, the same as any other witness. 2 Code, § 1307; *Boyle v. State*, 105 Ind. 469, 5 N. E. 203; *Thomas v. State*, 103 Ind. 419, 2 N. E. 808; *State v. Pfefferle*, 36 Kan. 90, 12 Pac. 406.

It is further contended that the court erred in charging the jury that the defendant might be convicted if, though not standing by at the time the taking was done, he advised and counseled it, with the idea and with the intention of receiving the benefits of the property taken, on the ground that this was, in effect, telling the jury that the defendant might be found guilty under the information charging him as principal if the evidence showed him to have been an accessory before the fact. Section 1189, vol. 2, of the Code, provides that "no distinction shall exist between an accessory before the fact and a principal, or between principals in the first and second degree, and all persons concerned in the commission of an offense, whether they directly counsel the act constituting the offense, or counsel, aid, and abet in its commission, though not present, shall hereafter be indicted, tried and punished as principals." Under a statute substantially like this the supreme court of California has held that the distinction between an accessory before the fact and a principal is abrogated, and that an accessory before the fact must be prosecuted, tried, and punished as principal, and that it is sufficient to charge such accessory directly as principal. *People v. Outeveras*, 48 Cal. 19; *People v. Rozelle*, 78 Cal. 84, 20 Pac. 36. It is contended that charging the defendant as principal does not sufficiently put him upon his guard, and advise him of the facts to be

proven against him, where it is sought to show that he was an accessory before the fact, but not a direct participant in the crime itself, and that, consequently, an innocent man might be surprised in a trial by the proof offered, and not have sufficient opportunity to prepare therefor, in consequence of his not having known in advance the facts to be shown against him. But we doubt if there is any more foundation for this contention than there would be where the effort was to show the defendant a principal in the commission of the crime charged. For instance, in the crime charged here,—that of larceny of a steer belonging to one Neal Smythe,—it was possible for the offense to have been committed in so many different ways, and under such a variety of circumstances, as principal even, that in the case of an innocent man the formal charge itself might not afford any accurate information of the facts and circumstances to be shown; but in such a case, where a party is prosecuted as principal, it is not contended that there need be anything more than a formal charge. It is not necessary to set up the evidence to be offered, nor the particular facts to be established; for instance, as to the particular part of the county where the property was stolen, whether taken in the night or in the day time, how taken, or how converted to the use of the defendant, the kind of property other than as one steer, etc., as to all of which the evidence might widely vary in different cases, and yet be legitimate evidence under an information couched in practically the same words, charging the defendant as principal. And until it is made necessary by law in the case of a prosecution for a crime to set up the particular acts to be proven against a principal it is not necessary to set the same forth in the case of an accessory before the fact.

The defendant requested the court to give the following instruction: "The jury are instructed that the bare possession of stolen property alone is not sufficient to sustain a verdict of guilty,"—which the court gave, but added the following: "It is only a circumstance tending to show guilt." It is contended that this is error, as being a violation of section 18, art. 4, of the constitution, which provides that "judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." It is not claimed, however, that it is not a correct statement of the proposition, and it is a sufficient answer to say that, as the defendant requested an instruction upon this point, he cannot complain upon the ground stated, because the court gave a more complete statement than he had requested. Judgment affirmed.

DUNBAR, C. J., and HOYT, J., concur.

ANDERS, J., (concurring.) I think the cross-examination of the defendant in this

case was not carried beyond legitimate bounds. Whenever a defendant becomes a witness to disprove a criminal charge, he thereby subjects himself to the same liabilities in cross-examination as does any other witness, and may be cross-examined as to any pertinent matters, even although such testimony may tend to criminate him. The statute authorizing parties charged with offenses to testify in their own behalf was never intended to enable them to testify as to facts tending to disprove guilt, and, at the same time, to suppress other facts tending to shake their credibility, or to throw additional light upon, or give color to, facts and circumstances detailed in the examination in chief. The object of all testimony is to elicit the truth, and experience has shown that it is only by cross-examination that the whole truth can be discovered. No one can be compelled to give evidence against himself, nor can any one accused of crime be compelled to testify in his own behalf; and, if he does not see fit to do so, it is the duty of the court to charge the jury that no presumption of guilt arises therefrom. But when a person charged with the commission of an offense voluntarily assumes the character of a witness, he waives his constitutional protection, to the extent, at least, of being cross-examined according to the rules of evidence; and if he states facts tending to prove his innocence it seems to me that it would be contrary to every consideration of justice to permit him to refuse to state other facts connected with the offense, which might tend to show the falsity of his testimony in chief. No one would contend that he could not be compelled to answer whether he had not made declarations out of court contrary to his testimony on the witness stand, and I am unable to understand, upon principle or reason, why he should be permitted to refuse to state whether he had not acted contrary to his declarations as a witness.

The objection that the court's modification of the instruction requested by the defendant was in contravention of section 18, art. 4, of the state constitution, is without foundation, for the reason that all that was added thereto was plainly implied in the instruction as originally presented to the court. I see no error in the record, and think the judgment ought to be affirmed.

STILES, J., (dissenting.) It is a general rule of evidence, to which the courts of this country have yielded adherence since *Railroad Co. v. Stimpson*, 14 Pet. 461, that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination; and if he wishes to examine him as to other matters he must do so by making the witness his own, and calling him as such. 1 Greenl. Ev. § 495; 1 Whart. Ev. § 529; 1 Rice, Ev. p. 586; Rap. Wit. § 246. I think this court, in the forego-

ing opinions, means to sustain this rule; but it holds that the questions asked of the defendant by the prosecution were rightfully asked, because they tended to break down his credibility as a witness. But I see nothing of that kind in it. The defendant had testified to nothing as to his whereabouts after the day of the alleged crime, but merely attempted to account for the way in which he came to be at the place where the steer was killed. It was perfectly competent, then, of course, for the state to test his credibility as an ordinary witness in any of the well-recognized modes of making such a test. But instead of that it was allowed to go into an independent examination, into a matter wholly foreign to anything that had been testified to. Flight is a circumstance which may tend to show a consciousness of guilt, and therefore guilt itself, thereby negating the legal conclusion that a defendant is not guilty. If a defendant testify on the stand to the legal conclusion that he is not guilty, then the circumstance of flight would tend to contradict his testimony, but it would not affect his credibility as a witness,—that is, the probability that he would speak the truth. The argument of the court is that, although this defendant did not say he was not guilty, the very fact that he testified was an assertion of that conclusion; but the obvious answer to that is that witnesses do not testify to the guilt or innocence of a prisoner, but to facts from which the legal conclusion one way or the other may be drawn. The law said for this defendant that he was not guilty until proven so, and in giving him the privilege of testifying it did not offer him a trap wherein, being caught, confessions of guilt might be wrung from him. As well might it be contended that a prisoner testifying to an alibi could be asked on cross-examination if he had not stated, out of court, that he actually committed the crime charged. Precisely such an attempt was made under the guise of an impeachment of the witness in *People v. Yeaton*, 75 Cal. 415, 17 Pac. 544, and the judgment was reversed by a unanimous court for the error committed in compelling the witness to answer. The constitutional provision allowing defendants in criminal cases to testify was undoubtedly intended to benefit the accused. If it had been for the benefit of the state, it would have provided that the state might call him. But if the prosecution can keep back the evidence which it has in its possession showing flight, for instance, until the defendant is on the stand, and then compel him to testify to it, it is thereby permitted to make him its own witness to prove a material fact in its own case, which the constitution expressly forbids. It seems to me that the inevitable tendency of this decision must be either to drive all criminal defendants out of the witness chair, and thus annul the constitution; or to subject every such defendant who may testify to the most insignificant fact in his

own behalf to account for himself in every conceivable way, even to admitting the very substance of the offense charged, on pain of prosecution for perjury if he fails to tell the truth. The constitutional guaranty is that no person shall be compelled in any criminal case to give evidence against himself. To give evidence is to state facts, and to be compelled to state the fact that he ran away is to compel a prisoner to give evidence against himself. "These statutes, [permitting accused persons to testify,] however, cannot be so construed as to authorize compulsory process against an accused to compel him to disclose more than he chooses. They do not so far change the old system as to establish an inquisitorial process for obtaining evidence. They confer a privilege, which the defendant may use at his option. If he does not choose to avail himself of it, unfavorable inferences are not to be drawn to his prejudice from that circumstance; and if he does testify he is at liberty to stop at any point he chooses, and it must be left to the jury to give a statement, which he declines to make a full one, such weight as, under the circumstances, they think it entitled to; otherwise the statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself, and the statutory privilege becomes a snare and a danger." *Cooley*, Const. Lim. (5th Ed.) p. 336. The correct rule is laid down in *Boyle v. State*, 105 Ind. 469, 5 N. E. 203, where it is said: "The cross-examination of a witness must be confined to the subject opened by the direct examination. This settled rule does not, however, restrict the cross-examination to the specific facts developed by the direct examination. Where a subject is opened by the direct examination, the cross-examining counsel may go fully into the details of the subject, and is not confined to the particular part of it embraced within the questions asked upon the direct examination. * * * In this instance, the accused, when on the witness stand, had given account of his movements upon a day named, and it was proper to go fully into the subject upon cross-examination, and the state was not confined to the particular period of time designated in the questions asked on direct examination."

Deeming this a very important matter in the administration of criminal law, and that the decision is contrary to all authority, I have thought it best to record my dissent at length.

STATE ex rel. HERSNER v. ARTHUR,
Judge.

(Supreme Court of Washington. Dec. 5, 1893.)

APPEAL—SETTLEMENT OF STATEMENT—JUDGE'S
CERTIFICATE—AMENDMENT.

1. Laws 1893, c. 60, § 9, providing for the settlement of a statement of facts, declares that, if no amendments are served within the

time prescribed, the proposed statement shall be deemed agreed to, and shall be certified; and section 11 provides that the judge shall certify that the proceedings embodied in the statement occurred in the cause, and are made a part of the record, and, when such is the fact, he shall certify that the same contains all the material proceedings, or, as the case may be, such proceedings as the parties have agreed are all that are material therein. *Held* that, if the party on whom the statement is served does not object within the prescribed time, the judge need not investigate it, and the parties are bound by it as certified.

2. While the statute provides that the judge may correct or supplement his certificate, according to the facts, at any time before an appeal is heard, he can correct it only in accordance with the facts as shown by the statement at the time of settlement; and he cannot correct the statement, and then make his certificate conform to the facts of the new statement.

3. The remote possibility of attorneys colluding to impose a false record on the supreme court does not render the statute unconstitutional.

4. If proper notice of the filing of the statement of facts is not given the adverse party, his remedy is to strike the statement of facts, and he cannot, after the time for amendment has expired, seek to substitute another statement or another certificate.

Petition on the relation of Joseph Hersner against Jesse Arthur, judge of the superior court of Spokane county, for a writ of mandamus directing respondent to correct his certificate to a statement of facts. Writ denied.

Jones, Belt & Quinn, for relator.

DUNBAR, C. J. This is a petition for a writ of mandamus. The petition alleges that an action for the foreclosure of a mortgage, in which petitioner was plaintiff, and B. Martin and Mary Martin, his wife, are defendants, was tried on the 23d day of May, 1893, and on said day a decree was duly rendered and signed by Jesse Arthur, judge of Spokane county, aforesaid. That, on the trial of said cause, petitioner, B. Martin and wife, and several other witnesses on the part of both plaintiff and defendants, testified and gave evidence, but that none of the testimony was reduced to writing. That Messrs. Herman & Wilson, attorneys, represented defendants at the trial of said cause. That on the 21st day of June, 1893, a paper purporting to be a copy of a statement of facts in said action was served on Messrs. Jones, Belt & Quinn, attorneys for the petitioner in said action. That on the 22d day of June, 1893, a paper purporting to be a statement of facts in said cause, and the original of the copy served on the petitioner's attorney, was filed in said cause, but that neither of said papers was addressed to the petitioner or to his said attorneys, and neither of said papers was signed or subscribed by either said B. Martin or his wife, or by his said attorneys, or by any attorney, or by any person. That afterwards, on the 6th day of July, 1893, a notice of appeal in said action to the supreme court, signed by Messrs. Prather & Danson, as attorneys of said B. Mar-

tin and wife, was served upon petitioner's attorneys, and an appeal bond was also, on the said 6th day of July, 1893, filed in said cause by the said B. Martin and wife. That no notice of substitution or change of attorneys in said cause was ever given or served. That petitioner, believing that no statement of facts had been served or filed in said cause, and that said attorneys, Prather & Danson, had no right or authority to represent said B. Martin and wife in said case without notice of substitution, as required by law, did not file any objections to said purported statement of facts; and the said Jesse Arthur, judge aforesaid, deeming that said statement of facts was agreed to, without any examination of said alleged statement of facts, did, on the 27th day of September, 1893, sign a certificate to said alleged statement of facts, as follows: "I, Jesse Arthur, the judge of said court before whom said cause was tried, do hereby certify that the matters and things embodied in the foregoing statement of facts are matters and things occurring in the cause, and that the same are hereby made a part of the record therein; and that said statement contains all the material facts, matters, and proceedings heretofore occurring in the cause, and not already a part of the record therein." That the said paper purporting to be a statement of facts purported to contain all the testimony of the witnesses given upon the trial of said cause; but petitioner alleges that a large part of the material testimony given by said witnesses on said trial was left out of said alleged statement of facts; and that only that part of the testimony of said witnesses as was favorable to said B. Martin and wife was set out in said statement; and that a large part of the testimony which was favorable to petitioner, and tended to prove the allegations of his complaint, was left out of said alleged statement; and that said alleged statement did not, and does not, contain all of the material facts and proceedings occurring in said cause. That afterwards, in the month of October, 1893, petitioner duly applied to the said Jesse Arthur, judge as aforesaid, to correct his certificate to said statement of facts according to the facts, and to state and certify in his amended certificate that none of the testimony of the witnesses on the trial of said cause was reduced to writing; and that it was impossible for the said judge to certify that the testimony of the witnesses, as set forth in said statement, is correctly embodied therein; and that said statement of facts does not contain all the material testimony of the witnesses on said trial,—which application, on due hearing, was denied. That the said Jesse Arthur, judge as aforesaid, stated, at the time he overruled said application, that none of the testimony of the witnesses testifying had been reduced to writing, and that it was impossible for him to say that the testimony of the witnesses, as set forth in said statement

of facts, was correctly given therein, or that said statement of facts contains all the material facts, or testimony of the witnesses who testified upon the trial of said cause; and that he (the said judge) signed said certificate without an examination of said statement of facts, and because the petitioner had failed to file or make any objections to said statement as filed; that he (the said judge) would deny the application to correct said certificate, for the reason that he doubted his power or right to make such correction. And petitioner prays for a mandate of this court commanding and directing the said Jesse Arthur to correct his certificate to the said statement of facts according to the facts herein alleged by the petitioner. In order to expedite a discussion of this case, the judge answered, admitting the substantial truthfulness of the matters and things set up in the petition, stating affirmatively that, even if he had made an examination of said statement, and read the same, he would have been unable to certify that it contains all the material facts testified to on the trial of said cause, as the said testimony was not reduced to writing at the time of said trial, and he did not remember, at the time he made said certificate, all the evidence or all the facts brought out in the trial of said case.

A reference to the statute providing for the settlement of a statement of facts is necessary to the determination of this question, as a statement of facts can only be settled in the manner prescribed by the statute, and a judge can only certify a statement in accordance with the direction of the statute. Section 9, c. 60, Laws 1893, which is an act providing for and regulating the taking of exceptions, and settling and certifying bills of exceptions and statements of facts, and providing the manner of preparing a statement, and the notice required, provides as follows: "If no amendment shall be served within the time aforesaid, the proposed bill or statement shall be deemed agreed to and shall be certified," etc. It seems to me that there can be but one construction given to this statute; that the intention of the legislature is plainly deduced from the language employed, viz. that a time and place have been denominated for amendments to be presented by respondent to the statement of facts, (a copy of which has been served upon him,) if he desires to make any amendments; and if he does not appear at such time and place, and offer any objections or amendments, the judge must conclude that he accepts the statement filed as the proper statement, and that no amendments are desired. For the law says plainly that under such circumstances "the proposed bill or statement shall be deemed agreed to, and shall be certified by the judge;" and under such circumstances, in my opinion, the judge has no other duty to perform; no duty of investigation is imposed upon him, excepting where amendments are offered, and there is

a contest instituted thereby. If respondents were allowed to disregard the time which is prescribed under the law for filing objections to the statement or amendments thereto, then all the provisions of the law as to time are utterly without force or meaning. The idea that the judge is only to enter into an investigation when the statement is questioned by the respondent is borne out by the provisions of section 11, which provides: "The judge shall certify that the matters and proceedings embodied in the bill or statement, as the case may be, are matters and proceedings occurring in the cause and that the same are thereby made a part of the record therein; and, when such is the fact, he shall further certify that the same contains all the material facts, matters and proceedings heretofore occurring in the cause, and not already a part of the record therein, or, as the case may be, such thereof as the parties have agreed, to be all that are material therein." Under the provisions of this section, if the parties agree that the statement contains the material facts, the judge shall so certify. This provision, taken in connection with the provision in section 9, that, where there is no amendment, the proposed statement shall be deemed agreed to, leaves very little to be said, so far as the intention of the lawmakers is concerned. In this case there was, under the law, an agreement that the statement certified contained all the material facts, and the parties are bound by it. While the statute provides that the judge may correct or supplement his certificate according to the facts at any time before an appeal is heard, and that he may be compelled to do so by mandate of this court, he can only correct it in accordance with the facts as shown by the statement at the time of the settlement; but he certainly is not given authority to correct the statement, and then make his certificate conform to the facts of the new statement, for this would be virtually a new settlement of the statement of facts, which, as we have said above, would destroy the force of the law prescribing the time, and the questions which ought to have been settled within 10 days after the filing of the statement would remain unsettled up to the time of the hearing of the appeal, and no intelligent preparation for the hearing of a case in this court could be made.

It is objected that this construction of the statute would place the settlement of a statement of facts in the hands of the litigants or their attorneys, and that the effect might be to make this court a court of original jurisdiction. A glance at section 12 of the same act leaves no doubt of the legislative intention to confer this power of settlement on the parties, for it specially provides that, in case of the death of a judge, the statement may be settled by stipulation of the parties with the same effect as if duly settled and certified by such judge while still in office;

so that the only question remaining in my mind is the question of the constitutionality of the act, and I hardly think that the remote possibility of attorneys entering into a collusion, in violation of their oaths as officers of the court, to impose a false record upon this court, is a sufficient consideration to warrant this court in holding the legislative act unconstitutional. If such a case should arise, and was brought to the attention of the court, I have no doubt of the power of the court to relieve itself of the attempted imposition.

The question of notice, presented at considerable length in the petition, it seems to me, cannot be considered here. If legal notice was not given to the respondent, his remedy is to strike the statement of facts, but he cannot rely on his want of notice until after the time for amendment has expired, and then abandon his position, and seek to substitute another statement, or another certificate, which would destroy the force and effect of the statement settled, and which could not be brought here with a certificate of any other character. The writ should not issue.

SCOTT, J., concurs.

STILES, J. I concur in the foregoing, and, in addition, would say that I desire it to appear distinctly, as my view of the matter, that it is entirely within the authority of the trial judge to correct his certificate at any time, so as to make it conform to the truth; that is, that, having certified that the statement contains all the material facts, when in fact it contains only a part of them, he cannot be estopped to make the correction. This seems to be the point about which the judge, in this instance, was most in doubt.

PRATSCH et al. v. ABERDEEN PACKING CO.

(Supreme Court of Washington. Dec. 5, 1898.)
VENDOR AND PURCHASER — SALE OF LOT — DEFICIENCY IN QUANTITY — ABATEMENT OF PRICE.

Plaintiff, having purchased of defendant corporation a lot bordering on a river, and on which a wharf had been constructed beyond the measured line, out to deep water, sought to avoid the last payment, and to recover a portion of the price already paid, on the ground of false and fraudulent representations that it could convey title to the edge of the wharf. Both the recorded plat and the one used in making the contract showed the lot as running from the street back to the river, but the length was not given. The evidence showed that only 10 to 15 feet of the front of the lot was above water at ordinary high tide, and ocean vessels could lay at the wharf at low tide; that plaintiff had lived in the vicinity for nine years, and was familiar with the lot. *Held*, that plaintiff could not recover.

Appeal from superior court, Chehalis county: Mason Irwin, Judge.

Action by Catherine A. Pratsch and an-

other against the Aberdeen Packing Company to enforce a contract to convey realty, and for other relief. There was judgment for defendant, dismissing the action, and plaintiffs appeal. Modified.

J. C. Cross, for appellants. Fulton Bros., for respondent.

STILES, J. In June, 1890, the respondent was the owner of a narrow strip of land lying to the eastward of F street, in the town of Aberdeen, between what would have been Hume and River streets had those streets been extended. The east boundary of the strip was the Wishkah river, a meandered stream in which there was a large ebb and flow of the tides. The river was navigable for all ordinary water craft, and was supposed to be subject to the provisions of the state constitution relating to harbor lines. The meandered line, as run by surveyors of the United States opposite the strip in question, was some 30 or 40 feet from the east line of F street, but the line of actual mean high water was only some 15 or 20 feet therefrom. Respondent was, and for some time had been, the owner of whatever land there was between F street and the river, and for some years there had been upon the land, and upon piles driven into the bed of the river, a fish cannery, with suitable buildings. The total breadth of the area thus covered by the cannery wharf and property was some 76 feet at the north end of the strip, and about 120 feet at the south end, and the length of it was 300 feet. The outer edge of the wharf was at about the line of extreme low tide. Being desirous of selling its property, the respondent, in said month of June, orally proposed to ten persons, of whom appellant Catherine Pratsch was one, that it would subdivide its tract into 10 lots, of 30 feet frontage on F street each, by a plat to be accepted by the Aberdeen town council and filed in the office of the county auditor, and would sell the lots for a total of \$20,000, each lot to bear its just proportion of the price as might be determined among the purchasers. This proposition was agreed to, the plat was filed, and appellant Catherine Pratsch entered into a contract with respondent for lot 7 of the plat, which was the most northerly of the lots, for the sum of \$2,125,—part cash, and part in deferred payments; the respondent agreeing to execute a warranty deed upon receiving the last payment. Under this contract, appellants went into possession of their lot, and of the building erected thereon, and made the two deferred payments due in 6 and 12 months. The third and last payment, due in 18 months, they did not make, but commenced this action, alleging a lately-discovered deficiency in the amount of land owned by respondent, and fraudulent representations on the part of the respondent in connection with the amount of land it owned and could

convey, as inducements to appellants to contract. These representations were said to consist of persuasive arguments and statements made by respondent's agent for the sale of its property, going to show that, although there was only a few feet of land between the street and the water of the river, respondent could sell, and would sell, and make good title to, all of the area covered by its wharf, and perhaps of some not actually so covered; the most positive statement being alleged to be that the outer wharf line was even within the meander line of the river as originally surveyed, and therefore the title of respondent must be good to that point. The gist of the allegations was that the agent had asserted, and induced appellants to believe, that he could make title out to the edge of the wharf; that he had promised to file a plat covering the entire wharf; and that at the time of executing the contract he had represented that such a plat had been filed. If there was a mere promise to file a plat, the case would seem to be like that of *Kelly v. Land Co.*, 4 Wash. 194, 29 Pac. 1054, where the purchaser was held bound by the plat, which was referred to and made a part of her deed. If, on the other hand, a lot had been sold according to a plat on file, and the seller had falsely represented the size of the lot, and the title to part of the lot had failed, there would have been a case like that of *Sears v. Stinson*, 3 Wash. St. 615, 29 Pac. 205. But the plat, in this instance, showed no length of the lot at all. It showed a frontage of 30 feet on F street and on the Wishkah river, and parallel side lines between the street and the river, but the side lines had no length assigned to them. It was as if there had been a description by metes and bounds, reading "east from the east side of F street to the Wishkah river," and vice versa. The interpretation of the contract would therefore be that the land from the street to the river, with a breadth of 30 feet, was to be conveyed, and a deed of that description would fully satisfy its terms. The attack made by the appellants must be upon the contract, which, they say, does not express the understanding between them and the agent under his representations. They do not ask to have the contract reformed, but rather seek to lay it aside, and to have specific performance of an executed oral contract, based on the representations of the agent, their payment of part of the purchase money and tender of the balance, and their entry into possession of the premises; and they also demand the repayment to them of \$1,625 of the purchase money, on account of the loss to them of that part of the lot to which respondent can make no title.

We think it might well be questioned whether, in a case where so large a proportion of the title falls as is here alleged, (more than four-fifths,) a court of equity

ought to decree a specific performance with compensation. *Wat. Spec. Perf.* § 206. But there is no objection to the purchaser's taking what the vendor has to convey at the full contract price. Concerning the proofs adduced to sustain the allegations of fraudulent misrepresentations in this case, for the purpose of showing a different contract to have been intended, it must be premised that, in the face of the written agreement, only clear, positive, and satisfactory evidence would suffice. *Pom. Eq. Jur.* (2d Ed.) § 862. Appellants and several other witnesses (all, however, purchasers of parts of the same premises) deposed that respondent's agent had told them, in frequent interviews, that the meander line of the river, according to the original survey, lay along the outer edge of the wharf, and that respondent's title extended to that point; to which his answer was that he did not know, and never pretended to say, where the meander line was, but that he did say that the wharf, as it was, did not interfere with navigation, and that their possession would never be disturbed for that reason, and nothing more. But, however the truth may be as to the agent's statements, we are unable to see wherein any great reliance could justly have been placed in the appellants' version of them. It did not appear that he had, or claimed to have, any superior knowledge of the location of the meander line, even if they were justified in their belief that the government survey, and not the actual line of mean high water, was the boundary of the title. The tract was sold by the United States to respondent's grantor, and conveyed to him by patent which had been of record since 1883. The patent contained no description of the meander line, and it is well known that all surveys of such lands locate meander lines, not as boundaries, but for the purpose of ascertaining the quantity of land only. *Railroad Co. v. Schurmeir*, 7 Wall. 272. This purchaser takes to the water, and his boundary is subject to the laws of accretion and reliction. *Gould, Waters*, § 155. But as against the appellants' evidence and claim of deception there were some patent and important facts. In the first place, appellants had lived in the immediate vicinity of the lot for more than nine years, and were perfectly familiar with it; secondly, the front of the lot, only, embracing but 10 or 15 feet, was above the water at ordinary high tide. It is true that the whole of the lot was covered by a building, but a photograph taken the day before the hearing shows that the most casual observer could not fail to see that the water came up nearly to the floor, the building being erected on piles, with the exception of the front end. Everybody there knew that the tide ebbed and flowed over nearly the whole lot, and that ocean-going vessels lay, at low water, alongside the end of the wharf. It is a rule in such cases that a purchaser who knows of the

facts concerning the seller's title, and of the deficiencies therein, when he contracts, is not entitled to compensation in equity, but is left to his remedy at law. Wat. Spec. Perf. § 506. Again, at the time when the contract of sale was executed, appellants and the other nine purchasers were in the agent's office, where there was a duplicate of the recorded plat exhibited on the wall. This plat had been recorded the day before, and the contract made it a part of itself. It was therefore the duty of the purchasers to examine it for themselves, to see whether the descriptions upon it accorded with their understanding of what they were buying; for, if they had paid a moment's attention to the plat, they must have seen that it purported to give no dimensions of the side lines of lots, which were merely drawn from F street, as the west boundary, to the Wishkah river on the east. It is sought to break the face of this point by a showing that a pencil sketch or plat, which the agent had used to illustrate the proposed platting when he was negotiating for sales, lay on the table, and was alone regarded by the purchasers. But, while it appears that the sketch showed lines which were actually longer in proportion than those on the recorded plat, it also appears that no dimensions were given to these lines either, and that the river terminated them. Moreover, all parties knew that some sort of a survey was to be made, and an official plat constructed therefrom, and it was their business to see that, when finished and recorded, it expressed their preliminary agreement, before they merged their negotiations into a written instrument. Failing of that degree of care, and failing, also, to show that the statements of the agent were really more than mere puffing arguments to persons having equal knowledge of the facts with himself, we think the findings of the court below should stand. These findings were made by the court after setting aside other findings of fact made by a referee appointed for that purpose. Appellants complain of this action; but it was taken upon exceptions duly filed, and was in exact accordance with the statute governing references. Code Proc. tit. 7, c. 5, and we see no objection to it. The findings of the referee were merely advisory, as it was an equity cause.

Before proceeding to a disposition of the case, it is necessary to advert to a motion of the respondent to strike the statement of facts. But objections to the statement are obviated by the fact that the testimony was taken by a referee, and reported by him in the shape of depositions, a stipulation of counsel providing that the longhand notes of the stenographer should be considered the same as though the witnesses had signed the same. *Healy v. Seward*, 5 Wash. 319, 31 Pac. 874.

The court below dismissed the action, but we cannot quite agree to that judgment

The contract provided by stringent language for the right of the respondent to declare a forfeiture in case of the failure of the appellants to pay the purchase money at the times fixed, but although, when the action was commenced, appellants were in default on their last payment of \$531, no forfeiture had been declared. A forfeiture had been threatened by letter, but, before any declaration was made, the suit was brought, and at the same time appellants, by their complaint, and the actual deposit of money, paid into court for the use of the respondent the full amount of the last payment, with interest. This was all that the respondent could have demanded at the time, and if interest from the commencement of the action until now be added, and the costs of this action be charged to appellants, it is all that it can demand now. Appellants had a right to have their rights tested in court, and, if they at all times keep respondent harmless, it cannot complain. They prayed in their complaint for a specific performance, with other proper relief, including, as they deemed they had a legal right to do, compensation for the loss of land; and we do not think equity would be done by merely dismissing their action, and subjecting them to a forfeiture of all they have paid. If, within 30 days after the filing of this opinion, appellants shall pay into the superior court of Chehalis county, for the use of respondent, interest on \$531 at 10 per cent. per annum from May 19, 1892, to the date of such payment, and file the receipt of the clerk of that court with the clerk of this court, and pay all costs of both courts, a decree will be directed that respondent convey the premises in accordance with the contract; otherwise, the judgment of the superior court will be affirmed.

ANDERS, SCOTT, and HOYT, JJ., concur.
DUNBAR, C. J., concurs in the result.

HARR v. ABERDEEN PACKING CO.
(Supreme Court of Washington. Dec. 5, 1893.)

APPEAL—SERVICE OF NOTICE BY MAIL.

1. A notice of appeal may be served by mail under Code Proc. § 1441, which authorizes the supreme court to make rules governing the manner of serving notices of appeal, and under rule 26, made in accordance therewith.

2. Under Code Proc. § 1406, authorizing the attorney to give the notice, the implication is that he may make the service himself; and he is not an interested person, within section 797, which prohibits such persons from serving notices.

Appeal from superior court, Chehalis county; Mason Irwin, Judge.

Action by M. E. Harr against the Aberdeen Packing Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

J. C. Cross, for appellant. Fulton Bros., for respondent.

STILES, J. The notice of appeal in this case was served by mail, and the proof of mailing was made by the affidavit of appellant's attorney. Respondent moves to dismiss for want of notice, under Code Proc. § 797, which provides for service of notice by an officer, or by some disinterested person, on the ground that the attorney of a party is not a disinterested person. It is also contended that the service of a notice of appeal, prescribed by Code Proc. § 1441, is a personal service. The respondent had its place of business in Pacific county, and its attorneys resided in Oregon. Section 1441 authorizes this court to make general rules governing the manner of serving notices of appeal, and of all other notices, orders, and process connected with appeals. Rule 28 covers service by mail. Code Proc. § 1405, authorizes the attorney to give the notice, and we think the implication is that he may make the service himself. Certainly, the universal practice is, and long has been, in this state, for attorneys to make such service without the intervention of a third person. The motion is denied. This case is identical with that of *Pratsch v. Packing Co.*, 35 Pac. 123, except that the appellant here tendered respondent a deed of the premises, demanded the return of his money, abandoned possession of his lot, and brought his action to rescind the contract. Having failed to sustain his action, there is nothing to be done in the case but to affirm the judgment of dismissal, and it is so ordered.

ANDERS, SCOTT, and HOYT, JJ., concur.
DUNBAR, C. J., concurs in the result.

WARD v. TUCKER.¹

(Supreme Court of Washington. Dec. 21, 1893.)

APPEAL—SETTLEMENT OF FACTS—NOTICE.

Where the appellee did not appear at the settlement of facts, and the record does not contain a copy of the notice of settlement served on him, it does not show that the judge had jurisdiction to settle the facts, though he certifies that such notice was given.

Appeal from superior court, Pierce county; Emmett N. Parker, Judge.

Action by James Ward against Charles Tucker. Plaintiff had judgment, and defendant appeals. Affirmed.

O'Brien & Robertson, for appellant. Calkins & Shackelford, for respondent.

STILES, J. The respondent did not appear at the settlement of the statement of facts, and there is no copy of the notice in the record. The judge who tried the cause certifies that the defendant had given due notice to the opposite party and his attorneys that the statement had been prepared and filed, and that it would be settled upon a certain day, —April 7, 1893. Upon this, respondent moves to strike the statement, and the motion must

be granted. The settlement of a statement of facts is the process by which this court acquires jurisdiction of the respondent for the purpose of inquiring into matters which, otherwise, would not be a part of the record. If the respondent appears, and makes no objection, he waives notice, and the jurisdiction is complete; but if he remains away he has a right to say that the finding of the judge that he was duly served is not sufficient. We held substantially this in *Mooney v. State*, 2 Wash. St. 487, 28 Pac. 363, where the respondent made no appearance in this court. In the case at bar appellant had ample notice of respondent's position by his brief, and time to supply the record if notice was in fact given. There being no assignment of error outside of the statement, the judgment is affirmed.

DUNBAR, C. J., and HOYT, SCOTT, and ANDERS, JJ., concur.

FOX et al. v. BURLINGTON MANUF'G CO. et al.

(Supreme Court of Washington. Dec. 20, 1893.)

AGENCY—CONVERSION BY ALLEGED AGENT—LIABILITY OF PRINCIPAL—EVIDENCE TO DISPROVE RELATION.

1. In an action against a corporation which owned a shingle mill for the conversion of shingle bolts by the operator of the mill, a contract which was signed by the stockholders and by such operator, and which provided that he should take possession of the mill, and operate it, and make certain payments to the stockholders until \$6,450 should be paid, when he should become owner of all the stock, was admissible to show that the corporation was not operating the mill through him as its agent.

2. The operator could not render the corporation liable for his conversion of shingle bolts by conducting the business so as to cause persons doing business with him to suppose that the mill was still operated by the corporation.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by Thomas L. Fox, Alfred G. Fox, and Cambridge Fox, as partners, under the firm name of T. L. Fox & Sons, against the Burlington Manufacturing Company, August Larson, and Freeman Luddington, for conversion of shingle bolts. From a judgment for plaintiffs, defendants appeal. Reversed.

Millon & Houser, for appellants. Sinclair & Smith, for respondents.

HOYT, J. This action was brought to recover the value of certain shingle bolts alleged to have been wrongfully taken by the defendant and converted to its use. The undisputed testimony showed that the bolts were taken by Larson and Luddington, and the vital question involved in the trial was as to whether or not, at the time of such taking, they were acting as the agents of the defendant. The defendant was the owner of a certain shingle mill, to which the bolts were

¹ Rehearing denied. See 35 Pac. 1086.

taken by said Larson and Luddington, and there cut into shingles. The plaintiffs claimed that, at the time, the mill was being operated and controlled by the defendant. The defendant, however, claimed that it was not, and that said Larson and Luddington were operating said mill as lessees of the corporation, and that it had no control whatever over the question as to what bolts should be cut therein. The controversy growing out of these opposite contentions was the one upon which the verdict of the jury probably turned, and we shall therefore confine our discussion to the questions connected therewith, as, in our opinion, the other questions suggested by the record will not arise upon a retrial.

Defendant, to prove its contention as to this controversy, introduced two or three witnesses who testified to the fact that the mill was thus being operated by said Larson and Luddington on their own account, as lessees of the defendant, and that such defendant had no connection whatever with its operation, excepting that it or its stockholders were to receive a certain sum for each thousand shingles marketed by said Larson and Luddington. The defendant, in confirmation of such testimony, offered in evidence a contract made between the several stockholders of the defendant, as the party of the first part, and Larson and Luddington, as the party of the second part, by which it was agreed, by said party of the first part, that the said party of the second part should have possession of said mill for the purpose of cutting shingles therein, and that of the proceeds of such shingles, when marketed by the party of the second part, the said party of the first part should receive 25 cents for each thousand, and that, when the money so received had amounted to \$6,450, the said Larson and Luddington should become the owners of all of the stock of the corporation; and, by said second party, that they would take possession of said mill, and operate it to its full capacity, and, subject to the regulations provided for in said contract, pay to said party of the first part said sum of 25 cents for each thousand shingles so manufactured and marketed. The court excluded this contract from the consideration of the jury, on the ground that it was not the contract of the corporation, and in so doing we think it committed error, for while it is true that, technically, such contract was not between the corporation and Larson and Luddington, yet, having been signed by all of the stockholders and by the said Larson and Luddington, it was a circumstance which tended to throw light upon the nature of the occupancy of the mill by said Larson and Luddington; that is to say, it tended clearly to confirm the testimony of the defendant's said witnesses to the effect that the corporation was not operating the mill in any sense whatever, but that the same was being operated and fully controlled by said Larson

and Luddington; and, such being the force of the contract, the defendant was entitled to have it considered by the jury.

The respondents seem to have attempted to meet the case made by the defendant upon this question by testimony tending to show that said Larson and Luddington conducted the business relating to said mill in such a way as to induce those doing business with them to suppose that the mill was still being operated by the corporation, but such fact could have no influence in determining the question under consideration. The court or jury were not called upon to decide as to what would have been the rights of one dealing with said Larson and Luddington as between him and the defendant corporation. Such a person might be able to hold the defendant corporation responsible for what was done by reason of such a method of conducting the business, and its consenting thereto. But in the case at bar the plaintiffs are not claiming by virtue of any contract relation as between them and Larson and Luddington or the defendant. Their claim is founded entirely upon the wrongful act actually done by said Larson and Luddington, and, such being the case, the defendant corporation could not be liable therefor, unless, as a matter of fact, it was connected with the tort. However much it might appear to have had such connection would be entirely immaterial if in fact it had none. The tort was either committed by it by some active participation therein in fact, or it was not committed. It could only be liable for the tort of said Larson and Luddington in the event of their acting for it, or at its instance, or in its behalf. No question of estoppel is raised by the record. For the error in excluding the contract above referred to, the judgment must be reversed, and the cause remanded for a new trial in accordance with this opinion.

SCOTT and STILES, JJ., concur. DUNBAR, C. J., not sitting.

HANNA et ux. v. SAVAGE et al.¹

(Supreme Court of Washington. Dec. 21, 1893.)

VENDOR AND PURCHASER—ACTION FOR PRICE—DEFENSES.

1. The complaint alleged that plaintiffs, being in lawful possession of land, sold it to defendants, as follows: That defendant T. told plaintiffs that he and D. would buy and pay for the land, but that, since they did not wish to be known as land speculators, the deed should be made to S.; that thereupon instruments were made all at one time, viz. plaintiffs' warranty deed to S., S.'s note and mortgage for the deferred payment, and a bond or guaranty to plaintiffs, with assignments of collateral, signed by defendants, T., D., and S., for payment of the note and mortgage; that the debt was due and unpaid,—and prayed judgment against T., D., and S. for said sum, with interest. Held not demurrable, since, while

¹ Rehearing denied.

some statements might be immaterial in law, they went to show the joint liability, and did not contradict the written contract.

2. An instrument which, after reciting a debt from S. to the obligees, sets out that its signers are bounden for the full sum of the debt, with interest, should said S. fail to pay it, is an absolute, not a conditional, guaranty.

3. Purchasers in possession under a general warranty deed from the vendors cannot defend an action for the price on the ground that plaintiffs made false representations as to their title.

4. Where a complaint for the price of land alleges that defendants have been and are in quiet possession under plaintiffs' general warranty deed, an answer not only not denying possession, but averring that defendants offered to rescind and reconvey, and plaintiffs unjustly refused and still refuse said offer, is not aided, on motion for judgment on the pleadings, by a supplemental answer that, since answer filed, plaintiffs demanded and received possession of defendants, and have been and still are in possession.

Appeal from superior court, Thurston county; M. J. Gordon, Judge.

Action by William B. and Mollie Hanna against George M. Savage, Walter J. Thompson, and Henry Drum, for the price of land. Plaintiffs alleged: That they were husband and wife, and as such were on April 18, 1890, in the quiet, peaceable and lawful possession of the 113 64/100 acres in section 35, township 19 N., range 2, W. M. That April 18, 1890, in Olympia, Thurston county, negotiations were concluded between plaintiffs and defendants whereby the plaintiffs sold all said lands, together with all their right, title, and interest in and to the streets and half streets adjacent, to defendants, for the sum of \$18,141, on the terms following: That on said day defendant Thompson stated to plaintiff W. B. Hanna that he (Thompson) and defendant Drum wished to purchase said land from Hanna, and would pay Hanna the sum of \$18,141,—\$1,000 in cash, and the balance in two years, with 10 per cent. interest,—and the sum of \$5,000 if a standard gauge railroad should be built into Olympia within two years. That Thompson at the same time stated to Hanna that he wished the deed made to George M. Savage, defendant, but that he and Drum were the men to whom Hanna should look for payment of the price; that he was worth a million dollars, and Drum a quarter of a million, but they were bankers and did not wish to appear as land speculators, and so had joined Savage with them, and were having deeds of all lands purchased by them made to him; but that they (Thompson and Drum) would pay plaintiffs \$1,000 in cash, and bind themselves by absolutely good papers, at 10 per cent. interest, to pay the balance of said price at two years from date. That on these statements, and in consideration of the sum of \$18,141, which defendants agreed to pay, certain instruments were executed and delivered, to wit: One warranty deed, dated at Olympia, Wash., April 18, 1890, from W. B. and Mollie Hanna to George M. Savage, to the land hereinbefore described; one promissory note from

George M. Savage to W. B. and Mollie Hanna, dated April 18, 1890, payable on or before April 18, 1892, at First National Bank at Olympia, for the sum of \$17,141; one mortgage on the land by George M. Savage to W. B. and Mollie Hanna, of even date, to secure said note; one bond or guaranty from Walter J. Thompson to W. B. and Mollie Hanna, dated April 18, 1890, in the sum of \$17,141, for payment of the note and mortgage, with interest as specified therein, and assigning to said W. B. and Mollie Hanna 500 shares of the stock of the North Olympia Land Company for collateral; one bond from George M. Savage and Walter J. Thompson to W. B. and Mollie Hanna, dated April 18, 1890, conditioned to pay said W. B. and Mollie Hanna \$5,000 in addition to the purchase price should a standard-gauge railroad be built into Olympia, on the east side of Budd's inlet, near said land, within two years; one bond, the same in substance, signed by George M. Savage, Walter J. Thompson, and Henry Drum; one bond or guaranty from George M. Savage, Walter J. Thompson, and Henry Drum to W. B. and Mollie Hanna, dated at Olympia, April 18, 1890, in the sum of \$17,141, for the payment of the note and mortgage, with interest as specified therein, and assigning to said W. B. and Mollie Hanna 500 shares of stock in the North Olympia Land Company for collateral; certificate No. 6, of 200 shares, from Henry Drum; certificate No. 8, of 200 shares, from Walter J. Thompson; certificate No. 12, of 100 shares, from George M. Savage. The note is as follows: "\$17,141.00. Olympia, Washington, April 18th, 1890. On or before April 18th, 1892, for value received, I promise to pay William B. Hanna and Mollie Hanna, his wife, or order, the sum of seventeen thousand one hundred and forty-one dollars, lawful money of the United States, with interest in like coin, at the rate of ten per cent. per annum from date until paid. Interest due and payable semiannually, Oct. 18th and April 18th each year. Payable at First National Bank of Olympia, Washington, and if not paid, at the option of the payee, to be added to the principal, and become a part thereof. George M. Savage." The bond or guaranty and assignment of stock from Thompson, Drum, and Savage to W. B. Hanna and wife are as follows: "Olympia, Washington, April 18, 1890. Whereas, George M. Savage has purchased of William B. Hanna and Mollie Hanna certain property, and has given to them his note and mortgage for the sum of seventeen thousand one hundred and forty-one dollars, (\$17,141); and whereas, said Wm. B. Hanna desires additional security for payment of said sum of \$17,141: Now, then, the undersigned agree to be bounden unto said William B. Hanna and Mollie Hanna for the full sum of \$17,141, with interest as specified in said note and mortgage, if said Savage shall fail to pay the same; and, as further and additional se-

curity, the undersigned hereby assign to said Wm. B. Hanna and Mollie Hanna, for the purpose of collateral security hereon, five hundred (500) shares of stock of the North Olympia Land Company, of the par value of fifty thousand dollars, (\$50,000,) the certificates whereof are hereto attached. Walter J. Thompson. Henry Drum. George M. Savage. Witness: Eugene B. Cushing. L. M. Atkins." The complaint further alleged that all the papers above set forth were made and delivered at the same time and place, and as part of the same transaction, except the certificates of stock, which were forwarded from Tacoma some days afterwards; that ever since the sale of said land, and the execution of the papers, defendants have been, and still are, in the quiet, peaceable, and undisturbed possession of said lands, and exercising dominion over the same as owners; that said defendants, on execution and delivery of the papers, paid plaintiffs \$1,000, and have since paid plaintiffs the interest on the residue of said purchase price up to October 18, 1891, leaving a balance due from defendants to plaintiffs of \$17,141, and interest at 10 per cent. from October 18, 1891; that plaintiffs have ever been, and now are, able, ready, and willing to deliver up for cancellation said note and mortgage, and all other papers held by them against the defendants, and fully discharge said defendants from obligations as to said lands, on payment by defendants to plaintiffs of the purchase price and costs; that the sum of \$17,141, and interest at 10 per cent. from October 18, 1891, became due and payable at the First National Bank of Olympia on April 21, 1892, of which each of defendants was duly notified; that no part of said sum was then paid, and notice of non payment was duly given to each defendant, and the which sum is now due and unpaid; wherefore plaintiffs pray judgment against defendants for the sum of \$17,141, with interest at 10 per cent. per annum from October 18th, \$100 attorney's fee, and costs and disbursements. Defendants alleged that plaintiffs represented to them that they had a good and perfect title to the premises, and that plaintiffs bought on faith of said representations, as plaintiffs knew; that said representations were in fact false and untrue in divers particulars, set out at length; that, on discovering the defects in the title, defendants offered to rescind and reconvey, which offer plaintiffs refused; that so the consideration of said note and mortgage had failed; and prayed for recovery of cash payment and interest paid, cancellation of the note and mortgage, surrender of the collateral and guaranty. Later, defendant Savage filed a supplemental answer that, since answer filed, plaintiffs demanded of Savage possession of the premises, and Savage duly surrendered and delivered to plaintiffs possession, and plaintiffs have ever since been, and still are, in the enjoyment and posses-

sion. Judgment on the pleadings for plaintiffs. Defendants appeal. Affirmed.

Dunning, Richards, Murray & Pratt and Doolittle & Fogg, for appellants. Allen & Moore, for respondents.

DUNBAR, C. J. Appellants' first contention is that the court erred in overruling the demurrer of Thompson and Drum to the complaint. We think the complaint states a cause of action against all of the defendants. There is possibly more stated in the complaint than was necessary to state in an action at law, but it is plain that the object in the particularity of statement and recitation of the different instruments in writing was to present a state of facts showing the relation of Savage, Thompson, and Drum to the plaintiffs,—a condition which, if true, would make each of the defendants a principal in the purchase alleged, and equally bound. Neither do we think there is any oral statement tending to dispute the written agreement. The statements are simply supplementary. The parties have a right to make the contract alleged in the complaint to have been made, and to make any arrangement of convenience which they saw fit, and there is nothing contradictory between the written obligation and the allegations of the complaint. The allegations simply explain the reasons for the form of the contract.

Much has been said in the briefs, and many cases cited, showing the respective liabilities of guarantors and insurers, but we have been unable to obtain any light from such citations; for, even conceding that Thompson and Drum are guarantors, under all the authorities they are absolute guarantors, and are absolutely bound. The bond which they all signed and executed was, after reciting the debt, as follows: "Now, then, the undersigned agree to be bounden unto said William B. Hanna and Mollie Hanna for the full sum of \$17,141, with interest as specified in said note and mortgage, if said Savage shall fail to pay the same," etc. Here is an absolute obligation for the payment if Savage fails to pay; not a guaranty that the money can be made out of Savage by due diligence, but a plain obligation that they will pay it if Savage does not. This distinction is made clear by Randolph on Commercial Paper, (section 850:) "A guaranty," says the author, "may be absolute,—that is, for the payment of the bill or note; or conditional,—that is, a guaranty that it is collectible by due diligence. One who guaranties payment becomes absolutely liable on any default of payment by his principal." And Daniel on Negotiable Instruments (section 1760) states the rule thus: "If A. guaranties, expressly or by implication, to pay the note of B. to C., provided B. does not pay it, he becomes absolutely liable for its payment immediately upon B.'s default, and is therefore deemed an absolute guarantor of the

due payment of the note by B. to C. But, if A. guarantees the collectibility or goodness of B.'s note to C., he does not absolutely guaranty its payment, but only that he will pay it in the event that C. shall test the collectibility or goodness of the note by regular prosecution of suit against B., and shall be unable, by due and reasonable diligence, to enforce its payment. And, accordingly, he is only deemed a conditional guarantor of payment." But in this case the complaint plainly shows that this instrument was entered into as a joint and concurrent contract. The several instruments were all of the same date. The whole contract took effect at one and the same time, as different parts of one entire transaction. Consequently, the principals and sureties are to be deemed joint contractors, and joint makers of the note. Story, Prom. Notes, § 467.

Appellants also complain of the lower court in granting the motion for judgment on the pleadings. We think this contention is equally untenable. The complaint alleges that appellants were in possession at the time the action was commenced. This allegation is not really denied. They not only do not deny their possession at the time of the commencement of the action, but they expressly allege that they offered to rescind in a reasonable time, and to reconvey, and that the respondents unjustly refused, and still refuse, to comply with the demands of the defendants in every particular. Construing all the allegations of the answer together, there is, in our judgment, no denial of the material allegations of the complaint, and the judgment will therefore be affirmed.

SCOTT, STILES, ANDERS, and HOYT, JJ., concur.

LOWMAN et ux. v. WEST et al.¹

(Supreme Court of Washington. Dec. 21, 1893.)

APPEAL—OBJECTION WAIVED — DISMISSAL OF ACTION.

1. Plaintiff waives objection to the sustaining of a demurrer to his complaint by moving to dismiss the action.

2. After sustaining a demurrer to the complaint, it is reversible error for the trial court to deny plaintiff's motion for a dismissal of the action, and to grant defendant's motion for judgment, since plaintiff has an absolute right to the dismissal, under Code Proc. § 409.

Appeal from superior court, King county; R. Osborn, Judge.

Action by J. D. Lowman and Mary R. Lowman, his wife, against D. W. West, M. Costopch, George Dollma, M. Totten, Chris. Johnson, Quen Hing, John Doe, Richard Roe, Frank Marino, Frank Rogers, and M. Oelkers, under the forcible entry and detainer act. From a judgment for defendants, and an order denying plaintiffs' motion to dismiss the action, plaintiffs appeal. Reversed.

¹ Rehearing denied.

Preston, Carr & Preston, for appellants. P. P. Carroll, for respondents.

HOYT, J. A demurrer to plaintiffs' complaint was sustained by the court, whereupon the plaintiffs, instead of filing an amended complaint, filed with the clerk a motion to dismiss the action. Pending the action of the court upon such motion, defendants moved the court for a judgment upon the pleadings. The court denied the motion on the part of plaintiffs, and granted the one made by the defendants. Plaintiffs have appealed from the judgment so rendered, and here argued (1) the question as to whether or not the demurrer to their complaint was properly sustained; and (2) as to whether or not the court committed error in denying their motion to dismiss, and granting the motion for judgment made by defendants.

The plaintiffs are not in a position to raise the first question. Instead of standing upon their complaint, and allowing judgment to be entered against them, and appealing therefrom, they entered a motion to dismiss the action, and, having elected so to do, must be held to have waived any error growing out of the action of the court in ruling upon said demurrer.

The action of the court in ruling upon the motions filed by the respective parties was, in our opinion, erroneous. The plaintiffs had an absolute right to have their action dismissed when they filed their motion therefor. See Code Proc. § 409. It is possible that the judgment entered at the instance of the defendants would have no greater force than would one of dismissal upon motion of plaintiffs, yet the judgment entered should be reversed, and the cause remanded, with instructions to grant the motion of the plaintiffs, for the reason that such a course may be necessary to protect rights which they were entitled to have protected by a dismissal at their instance. The court refused them a right given them by the statute, and it will be presumed that such action was prejudicial, unless the contrary affirmatively appears.

DUNBAR, C. J., and STILES, SCOTT, and ANDERS, JJ., concur.

SCHULZ v. JOHNSON.

(Supreme Court of Washington. Dec. 21, 1893.)

MASTER AND SERVANT—DEFECTIVE APPLIANCES—ASSUMPTION OF RISK.

A sawyer assumed the risk of employment, was grossly negligent, and could not maintain an action against a mill owner for personal injuries occasioned by the breaking of a rope, which, by means of a pulley and weight, automatically drew a saw out of the way, when not in use, where he had been employed in the mill for 5½ months, had operated the saw for 3½ months, and had never examined the condition of the rope, though it was in plain sight of him.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by August Schulz against C. M. Johnson for personal injuries. From a judgment entered on a verdict for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Crowley & Sullivan, for appellant. Garvey & Smith, for respondent.

DUNBAR, C. J. This is an action brought by respondent to recover for personal injuries received by him in appellant's sawmill, while employed as a sawyer in said mill. The saw was what is called a "trimmer," and was set in a swinging frame attached to the rafters of the mill. It was drawn forward by the operator, and, after it had sawed the lumber desired, was drawn back and held in its place by a rope attached to the back of the frame, which ran out through the outside of the mill, and to the end of which was attached a heavy weight. It was the breaking of this rope, to which the weight was attached, which allowed the saw to leap forward and do the damage which is complained of.

We think this case falls squarely within the rule laid down by this court in *Week v. Mill Co.*, 3 Wash. St. 629, 29 Pac. 215. In that case, it is true, the plaintiff testified that he knew that the rope was old, and that it looked worn and black, which is not the testimony in the case at bar. But, in this case, plaintiff's own testimony is that he did not look at all; that he never examined the rope to see whether it was dangerous or safe. It is true, there is some conflict in the testimony, as to whether the rope broke in front of or back of the pulley; but it clearly appears that the rope could have been examined, in every part, by the slightest effort, and any danger discovered and averted. The plaintiff was employed to operate this saw. In accepting this employment, he accepted the apparent risks incident to the employment, and the wearing out of a rope subjected to the strain to which this rope was subjected, and the extent of which was known to plaintiff, was certainly something which was apparent to the most common understanding. It was in no sense a complicated piece of machinery, with hidden defects; but it was an open attachment to the saw, working on the plainest principles of the attraction of gravitation, which the plaintiff, if he had sufficient knowledge to operate the saw at all,—and he assumed that knowledge when he accepted the employment,—could fully understand. He evidently did understand it, but was negligently heedless.

Plaintiff was injured on the 13th day of February, 1891. He had been working about the mill since the 4th day of September, 1890, and had been engaged in operating the saw in question since the 1st day of November, 1891, being 5½ months employed in the mill,

and 3¼ months operating the saw. Yet he testified that he never looked at the rope, although it was in sight of him; that he had no time to look at it. When a man is employed to operate machinery, and the machinery is under his control, it is his duty to exercise at least common prudence. It is presumed that the ordinary instincts of self-preservation will prompt a man to do this, and, if he does not, he must suffer the consequences of his own negligent acts. In this case, according to plaintiff's testimony, we think he was grossly negligent, and that such negligence was the direct cause of the injury sustained. The judgment will therefore be reversed, and the cause remanded, with instructions to dismiss the action.

ANDERS, STILES, HOYT, and SCOTT, JJ. concur.

In re HILL'S ESTATE.

Appeal of SMITH.

(Supreme Court of Washington. Dec. 21, 1893.)

APPEALABLE ORDERS—WHO MAY APPEAL.

1. An appeal lies from an order requiring a guardian to account to his wards for the money in his hands belonging to their estate, and to pay over to one of them, who has come of age, her portion.

2. An order removing a guardian required him to pay over a certain amount as funds in his hands belonging to the estate of his wards, and that he personally pay the costs of the suit. *Held*, that the guardian had such an interest in the subject-matter as entitled him to appeal.

Appeal from superior court, King county; J. W. Langley, Judge.

Petition of Eliza Maud Hill for the removal of Eben Smith, as her guardian, and as guardian of the other heirs of Ellen K. Hill, deceased; for an accounting; and that petitioner be appointed as such guardian. There was decree for petitioner, and defendant appealed. Petitioner moves to dismiss the appeal. Defendant moves to strike out a portion of the record. Motion to dismiss denied. Motion to strike granted.

Thomas T. Littell and Hughes, Hastings & Stedman, for appellants. Hays & Humphrey, for respondent Eliza Maud Hill. A. W. Hastie, for guardian ad litem for infant respondents.

HOYT, J. Respondents move to dismiss the appeal herein for the reason (1) "that the appellant, as guardian, has no individual or beneficial interest in the subject-matter of the appeal;" (2) "because the order appealed from is not a final or appealable order, as in contemplation of law required."

The order appealed from was absolute and final, in that it required the guardian to pay over to one of those for whom he had been guardian, who had become of age, her proportion of certain moneys alleged to be in his hands as such guardian, and to account

to those of his wards who had not become of age for their proportion thereof. In our opinion, it was a final order in the proceeding, within the meaning of our statute regulating appeals. The order, by its express terms, directed the appellant to make payment regardless of the question as to whether or not there were sufficient funds in his hands belonging to the estate of his wards, and adjudged that he, personally, should pay the costs. Such being the requirements of the order, the appellant had such an interest therein as would authorize him to appeal therefrom. The motion must be denied.

There was presented at the same time a motion on the part of the appellant to strike from the transcript a certain part thereof, purporting to be a supplemental statement of facts, for the reason that, under the circumstances of the case, the court below had no jurisdiction to settle and certify the same. It appears from the transcript, or from facts made to appear by affidavit, that the original statement was properly settled after due opportunity had been given to the respondents to propose amendments thereto, if any they had; that they had neglected to propose any amendments, although the settlement of such statement had been several times continued by the court for the purpose of allowing them so to do. Under these circumstances, we think that the proceeding on the part of the respondents which led to the settlement of the supplemental statement by the court was irregular, and that such statement is no part of a proper transcript of the record. The motion to strike it out must be granted.

Appellant further moves to strike the brief of the respondents, but, without passing upon the question as to whether or not the order of the court below extending the time in which the respondents might file their briefs should be given force, we shall deny the motion for the reason that no substantial rights have been prejudiced by the delay.

DUNBAR, C. J., and STILES and SCOTT, JJ., concur. ANDERS, J., not sitting.

STATE v. MOODY.

(Supreme Court of Washington. Dec. 21, 1893.)

HOMICIDE—PROOF OF KILLING—JURY—ARGUMENT OF COUNSEL—REMARKS OF COURT—HARMLESS ERROR.

1. In a homicide case, there being no controversy as to the cause of death, the killing by defendant is sufficiently proven by evidence that defendant shot at deceased, who immediately fell, and in a few minutes died; that defendant, on being asked if he killed deceased, said he didn't know, and pointed at the body; and that there was fresh blood on deceased's clothes, over his breast.

2. Denial of a challenge for cause cannot be prejudicial, where the juror is excluded on a peremptory challenge, and the party does not exhaust his peremptory challenges.

3. In a homicide case, where no more favor-

able verdict could reasonably have been founded on the evidence, error in overruling an objection to improper argument of the prosecuting attorney, and reprimanding defendant's attorney for interposing the objection, will be held harmless.

Appeal from superior court, Skagit county; Henry McBride, Judge.

D. C. Moody was convicted of manslaughter, and appeals. Affirmed.

Millon & Houser, for appellant. Geo. A. Joiner, Pros. Atty., for the State.

HOYT, J. Defendant was charged with having committed the crime of murder in the first degree, in killing one James Warner. The jury returned a verdict of guilty of manslaughter, and from the judgment and sentence imposed therefor this appeal is prosecuted.

The first reason given by the appellant for reversal is that there was no sufficient proof of the killing of said Warner by the appellant; but in view of the fact, as stated in appellant's brief, that the defense presented was that the killing was justified, it is evident that there was no serious question raised as to the fact that the said Warner was killed, and that such killing was at the hands of the appellant. Such being the case, it would not require a very strong showing on the part of the prosecution to authorize the jury to find that the deceased came to his death in the manner claimed by the prosecution, and the proof offered was abundantly sufficient for that purpose. The undisputed proofs showed that, in the course of a controversy between the appellant and the deceased, the appellant drew his revolver, and, while standing at a distance of not more than six feet from the deceased, presented it directly at him, and fired; that deceased immediately fell to the ground, and in the course of a few minutes expired; that the appellant, when asked if he had killed him, said he did not know, and pointed to his body, then lying motionless upon the ground. In addition to this, the proof showed that there was fresh blood upon the clothing, over the breast. In the absence of any controversy over the question as to what was the cause of the death, we think these facts warranted the jury in finding that the death was proven, beyond a reasonable doubt, to have been caused by the shot fired by the appellant. If there had been any controversy as to what was the cause of the death, it might have been necessary for the prosecution to have shown more fully the nature of the wound, and that it was such as would ordinarily result in the death of the wounded party.

The next error alleged grows out of the refusal of the court to allow a challenge for cause to one Charles Nelson, who was offered as a juror; but the action of the court in regard thereto, if error, was without prejudice, for the reason that said Nelson

did not sit as a juror in the case, as he was peremptorily challenged by the appellant, who was in no manner injured by having to exercise his right in that regard, as he did not exhaust all of his peremptory challenges during the impaneling of the jury.

The next alleged error grows out of the action of the court in allowing the appellant, who offered himself as a witness, to be cross-examined as to the matters which it was alleged were in no manner inquired into upon his examination in chief. The cross-examination, no doubt, extended very nearly to the limit, but it is not evident from the record that there was any abuse of discretion in that regard on the part of the court below.

The only other error claimed on the part of the appellant is that the court allowed the prosecuting attorney, in his closing argument to the jury, to apply opprobrious epithets to the appellant, and to otherwise go outside of the evidence, and appeal to the prejudices of the jury in such a manner as to have a tendency to influence their verdict by matters outside of the record. We have carefully examined the statement of facts, and feel compelled to hold that there was an abuse of his privileges on the part of the prosecuting attorney in that regard, and an abuse of discretion on the part of the court, in allowing such conduct after his attention had been called thereto by an objection interposed by the attorney for the appellant. We feel compelled to go further than this, and to say that the action of the court, in not only peremptorily overruling the objection of the appellant's attorney to the course of the prosecuting attorney, but in apparently reprimanding him, in the presence of the jury, for interposing such objection, was such manifest error as, under any ordinary circumstances, would compel us to reverse the case, and award the appellant a new trial. But while we are satisfied that such action on the part of the court was an unjust reflection upon the attorney for the defendant, and tended to prevent proper efforts by him in behalf of his client, and therefore erroneous, we are not prepared to reverse the judgment and sentence on account thereof. A careful reading of the testimony offered at the trial, and especially that of the appellant himself, has satisfied us that such action on the part of the prosecuting attorney and the court could have worked no injury to the appellant, for the reason that no verdict more favorable to him could reasonably be based upon such testimony. The evidence of the appellant fails to disclose such a state of facts as would render the killing justifiable. It follows that, even upon his own showing, he was guilty of the crime of manslaughter.

A suggestion was made upon the argument as to the penalty imposed by the court, on account of its extreme severity, but there is nothing in the record which will authorize

us, upon an affirmance of the judgment, to interfere with the discretion rightfully vested in the lower court as to the penalty to be imposed, upon conviction. The judgment and sentence must be affirmed.

STILES and SCOTT, JJ., concur. DUNBAR, C. J., and ANDERS, J., did not sit at the hearing.

GOTTSTEIN v. SEATTLE LUMBER & COMMERCIAL CO. et al.

(Supreme Court of Washington. Dec. 22, 1893.)

CONTRACTS—RESCISSION—SURETY—ESTOPPEL—EVIDENCE—INSTRUCTIONS.

1. Changing a requested charge, that to authorize a finding of rescission it must be found that the minds of all the parties to the contract met and consented to the rescission, by striking out the word "all," and inserting after the word "contract" the words "and alleged rescission," is harmless error, both forms meaning the same thing.

2. In an action by G. on a contract whereby S. and E. agreed to build for G., it being claimed by S. that it was merely a surety, and was released by a rescission, a requested charge that it could not escape the obligations of the contract unless there had been an agreement by all the parties to rescind was properly denied, as, if S. was a surety, the fact that E. was not a party to the agreement to rescind would make no difference.

3. It not being conceded that S. was a mere surety, an instruction that, if G. and S. agreed to rescind the contract between G. on the one side and S. and E. on the other side, and acted on the agreement, the contract was ended for all purposes, as far as S. was concerned, was erroneous, G. not being bound by an agreement with one of the joint obligors to rescind unless he was only a surety.

4. Plaintiff in an action on a contract, having requested a charge that the jury must find the suretyship and rescission of the contract, on which one of the defendants relied, by a preponderance of evidence, cannot complain that the court did not require the evidence on those points to be clear and positive.

5. Instructions that if, by the acts of G. in agreeing with S. alone, without E., that the contract between G. of the one part, and S. and E. of the other part, should be abandoned, S. was led to refrain from doing anything to save itself from loss, G. would be estopped to deny the rescission, were erroneous, there being no evidence to show that it could have done anything to save loss.

6. Testimony of S. as to whom it looked for payment of material was incompetent, as it could in no way affect the rights of G. under the contract.

Dunbar, C. J., dissenting.

Appeal from superior court, King county; Richard Osborn, Judge.

Action by K. Gottstein against the Seattle Lumber & Commercial Company and M. W. Earp. Judgment for defendants. Plaintiff appeals. Reversed.

Hughes, Hastings & Stedman, for appellant. Burleigh, Gamble & Burleigh, for respondents.

STILES, J. Appellant brought this action to recover sundry damages for failure to perform a contract to furnish materials

tor, and to build, certain houses. The answer of the respondent the Seattle Lumber & Commercial Company set up, in the first place, that it was a surety, only, for its co-respondent, Earp; and, secondly, that shortly after the execution of the contract, by the mutual agreement of all the parties to it, it was rescinded and given up, the fire of June 6, 1889, at Seattle, having so changed the condition of appellant and the lumber company that they could not go on; and it was also claimed that if appellant had suffered damage in the construction of the houses by Earp, or in his failure to construct them, it was under some contract or employment of which the lumber company had no knowledge. Upon the trial the respondent lumber company alone appeared, (Earp having made default,) and it was developed that the claim that a rescission had taken place was based upon two alleged conversations occurring on June 10th, in which appellant was alleged to have suggested and requested that, on account of their common losses in the fire, the whole matter of building the houses be dropped. Appellant denied ever having requested or agreed to any such proposition, and insisted that, even if there had been such an agreement, the effect of it was obviated, and the contract was revived, by the conduct of all parties in subsequently proceeding with the erection of the buildings until they were nearly finished. He testified that, so far from having been embarrassed by the fire, he had just previously obtained a loan of nearly enough money to pay for the buildings, and that the money was in bank, and under the terms of the loan could be used only for the purpose of building. Earp, according to respondents' claim, was to be the builder, and the lumber company was to furnish the lumber and mill work, and guaranty his performance of the contract. It is conceded that, in July, Earp proceeded with the building, obtaining his materials where he could, the lumber company having lost its mill, and having gone entirely out of the business in which it was formerly engaged. The testimony of the two sides does not materially differ as to how the work came to be resumed. Earp demanded pay from appellant for the value of the work done and materials furnished before the fire, but appellant refused, and said: "You go ahead with the building." No money was due under the contract until the frames of all the houses were up, when a payment of \$3,000 was to be made. The amount demanded by Earp was only a few hundreds. The contract was not surrendered or changed, nor was any name erased therefrom. The architect, in making certificates of work done, from time to time, in all cases certified Earp and the lumber company as entitled to payment, and in several instances the lumber company indorsed on the certificates a direction to pay the amount named to Earp. When the buildings were

almost completed, it was found that large bills for labor and materials were unpaid, and Earp abandoned his place as manager of the construction, whereupon the manager of the lumber company—the same person who had signed the contract—was called in to a conference with appellant and the architect; and it was claimed that he there proposed, or gave his assent to a proposition, that appellant should proceed, under the terms of the contract, to finish the buildings at the expense of the contractors if there should be a deficit. None of the testimony showing the amount of the damage was controverted.

The principal errors urged by appellant are as follows:

1. Appellant's seventh request was: "You are further instructed that, the execution of the said contract having been admitted, before you are authorized to find that the same was abandoned and rescinded you must find, from the evidence, that the minds of all the parties to the said contract met and consented to such rescission." This request exactly expressed the law of the case, and if the modifications made by the court by striking out the word "all," and inserting "and alleged rescission," after the second occurrence of the word "contract," made the charge mean anything different from what it did before, it was error to make the changes. We think both forms mean the same thing, and should not reverse the case for any such cause; but, when counsel propose a proper charge, it ought to be given to the jury in the form submitted, if given at all.

2. In so far as appellant's eighth request was good, it was covered by the seventh, as above quoted. It was bad because it was open to the construction that under it, if the lumber company was a surety merely, it could not "escape the obligations" of the contract unless there had been an agreement to abandon and rescind by all the parties. One of the close points in the case was that Earp was not present at the conversation when the lumber company claimed appellant to have asked that the contract be dropped. But, if the lumber company was a surety merely, Earp's absence would have made no difference. Appellant would have had no right to lead a mere surety to suppose the contract was ended, and afterwards go on with the principal, without notice to the surety, and his assent to his continuing bond.

3. The eighth charge given was: "The court instructs you that the question of rescission—of whether that is a fact or not—must be proven by a preponderance of the evidence, and that the manner or the language of such rescission is immaterial. It is for you to determine, from all the facts in this case, whether that contract was rescinded or not. You have no right to pick out any particular part of the testimony, and say that that does, or does not, prove a res-

sion. You should take the whole of the testimony, and consider it; consider what the parties said,—what the evidence shows that they said. You are to determine what they said, and what was said between them, and from that determine whether the contract was rescinded or not. If it was rescinded, that was the end of it, as far as the Seattle Lumber & Commercial Company is concerned." We think the court should have ended this charge with the words: "You should take the whole of the testimony, and consider it." That part of it which directed the attention of the jury to what the parties said, and told them that from that they were to determine whether the contract was rescinded or not, was inaccurate and misleading, and could scarcely help producing the impression that what the court meant in the earlier portion of the charge by the "whole of the testimony," or "facts," was merely the conversations. The last clause was not a correct statement. The contract might have been an explicit oral agreement to rescind, and yet the rescission might never have been acted upon, and the conduct of the parties might have shown a clear intention to disregard the oral agreement.

4. Another charge was: "The court further instructs you, gentlemen, that if you find that by agreement between the plaintiff and the Seattle Lumber & Commercial Company that it was agreed that this contract for the building of these houses should be rescinded, and need not go ahead, and that, as a matter of fact, it was rescinded,—the contract was rescinded and acted upon,—then the court instructs you that any subsequent acts of the company by its president in signing any papers by which Earp, the other contractor, got his pay for work that he may have done under the contract, would not bind the company, because, if the contract was rescinded and ended, it was ended for all purposes, so far as that company was concerned." This charge could not have been the law of the case unless the lumber company had been conceded to be a surety only, which was very far from being the fact. Respondents insist that the instruction is based upon the supposition of a finding that the contract had in fact been legally rescinded, and the rescission acted upon, but it is impossible to so view it. The premises are an agreement between appellant and the lumber company, without regard to Earp, and that agreement was acted upon. The bond was a joint obligation upon its face, and appellant could not be bound by an agreement with one of the obligors to rescind, unless he was a surety merely. In this connection, appellant complains that no instructions were given, proper for the guidance of the jury in determining whether the agreement to rescind, if made, was executed to any extent, and whether there was a renewal of the contract by conduct; but it is enough

to say that no instructions of this kind were requested.

5. Appellant, having in his requests asked the court to charge that the jury must find the suretyship and the rescission by a preponderance of the evidence, cannot complain that the court did not require the evidence on those points to be clear and positive.

6. Certain instructions were given to the effect that if, by the acts of appellant in agreeing with the lumber company alone, without Earp, that the contract should be abandoned, it was led to suppose that nothing further would be done under it, and, relying thereon, it was induced to refrain from taking any action to save itself from loss, appellant would be estopped from denying that there had been a rescission. In our judgment, all instructions to this effect were improperly given, as there was no evidence in the case to require or justify them. The evidence fully covered the point that the lumber company did not itself do anything in the way of complying with its contract (supposing it to have been a principal) after the fire, but there was nothing to show that it would have acted in any different manner if nothing had ever been said about a rescission. It went out of and abandoned the mill business, and Earp took appellant's money, and bought materials elsewhere, which, for all that appears, is all that it could have done. There was no attempt to show that, if it had actively participated in the management of the business or work in connection with the building, the result would have been in any way different, or that any other diligence in its behalf would have put it into a better situation.

7. The question addressed to the witness Dobson, as to whom the lumber company looked for payment for the materials it furnished, was incompetent. Appellant's rights under the contract could not be affected by considerations of that kind.

8. The failure of the jury to find a verdict against Earp was a flagrant disregard of the charge of the court. We are not prepared to say what the practice ought to be where one of several defendants in a case like this makes default. All that such a defendant is entitled to is that there shall be a submission of the question of the amount of damages to a jury, and the failure of the jury to find according to the undisputed testimony ought to cause the court to set the verdict aside forthwith. Whether, in the absence of error as to the other defendants, the whole verdict should be set aside, and a new trial granted as to all, we do not now decide. Other errors assigned were immaterial, but for those mentioned, except the first, the judgment is reversed, and a new trial granted.

HOYT and ANDERS, JJ., concur. DUNBAR, C. J., dissents.

PAINE v. HILL et al.¹

(Supreme Court of Washington. Dec. 22, 1893.)

MASTER AND SERVANT—DISCHARGE.

Plaintiff's own testimony, that, after a disagreement between him and the vice president of the company employing him, the president told plaintiff that it was very disagreeable to have him there, that he was not fit for the business, and that he (the president) thought he had better go, coupled with the vice president's testimony that the president told him to leave the matter to him,—he would get rid of plaintiff,—authorizes a finding that plaintiff was discharged.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by John A. Paine against Joseph B. Hill and the Haley Grocery Company for wages, under a contract of employment. Judgment for plaintiff. The company appeals. Affirmed.

Bausman, Kelleher & Emory, for appellant. A. W. Hastie, for respondent.

DUNBAR, C. J. The first 16 pages of appellant's brief are devoted to a discussion of matters that are not at issue in this case. There is no question at issue as to the right of Hill, the president and manager of the company, to employ the respondent. Hill himself testifies that he employed him, and that he had a right to employ him. This is also conceded by Haley, the vice president of the company, who answered to the question, "What do you know, if anything, about Hill's right or privilege to select a secretary and treasurer?" by saying, "That was one of the considerations, when he went in;" and to the question, "What did he say to you about that, if anything?" by answering, "Well, that is something I did not converse with him much about, because he had that privilege. I didn't believe in interfering with his privileges." In the face of the testimony of the parties in interest, and the further fact that the president's right to employ the secretary was not questioned by the defendants at the trial, or raised in the pleadings, it is scarcely worth while to notice this proposition further. Neither is there any question at issue in regard to his actual employment, for Hill, the president of the company, testified that he did employ him; that he was to pay him the amount per month alleged by plaintiff in his complaint. So, also, with the incumbering of the record with the by-laws of the company, showing the duties of the secretary. The president himself testifies that he employed Paine with the understanding that there was to be an additional secretary, and that it was the custom of the company to employ two secretaries, and that the company never had been two hours without this additional help, and that the business was so large that it would be impossible to transact it without the additional secretary; and there is no dispute anywhere in the rec-

ord that Paine was employed with this special understanding.

Stripped of all verbiage and immaterial discussion, then, the sole question at issue was, did Paine, the respondent, quit the employment of the company of his own free will, or was he discharged by authority of the company? This was a question raised by the answer of the defendant company, together with the other affirmative defense that the plaintiff had other employment, and was therefore not damaged. On this latter proposition, however, all the testimony on the subject was the testimony of the plaintiff himself, which no doubt the jury took into consideration, in agreeing upon their verdict. So that the only question really at issue between the parties was the question of discharge, and on this question it seems to us that there is a plain conflict of testimony. It is claimed that the testimony of the plaintiff, taken as a whole, shows conclusively that he was not discharged, and that he left of his own free will. But we think this claim is not borne out by the testimony. Some difficulty had arisen between Haley, the vice president of the company, and Paine, the respondent, in regard to an extra bookkeeper. Haley had insisted that the extra bookkeeper must be discharged. Following his discussion with Haley, Paine testifies as follows: "Well, I didn't see Mr. Hill again until Saturday. That was on Friday,—the last talk with Mr. Haley,—and Saturday, at shortly after 1 o'clock, Mr. Hill came into the office, and he said: 'Well, you have got Haley down on you. He says you were talking to him about the other bookkeeper.' He says, 'You have got him down on you,' and he says: 'What you ought to have done— You ought to have discharged Ward, and kept the books yourself for a week or two, and I would have straightened everything out for you. Everything would have been all right.' And he says: 'You have got him down on you, and it is very disagreeable to have you here, and you are not fit for the grocery business.—I can see that,—and I think you had better go.'" We hardly see what stronger words of discharge could have been uttered by Hill, the president and manager of the company, or how he could more plainly have announced to Paine that his services were no longer required. There need be no set expression, to discharge an employee. If he is told, in substance, that his services are no further required, that it is disagreeable for him to be there, and, in so many words, that he is not fit for the business, and that he had better go, it seems to me that is sufficient; and the jury, if this testimony had not been disputed, would have been amply warranted in coming to a conclusion that Paine had been discharged. There is, however, some corroborative testimony, sworn to by Haley, the vice president of the company, and who is naturally an unfriendly witness, swearing against his own interest. In answer to the

¹ Rehearing denied.

question, "Did Hill discharge him?" witness Haley says: "Well, Mr. Hill told me himself — Now, of course, I know nothing about the discharging part. Mr. Hill told me himself that—well, now, I can't get those words—he is pretty fly. He said something about letting him down easy, but just what it was I don't remember. But he didn't say he would discharge him. He says: 'You never mind. You leave that between Mr. Paine and I. I will get rid of him.' Those are the words he said. Question. Hill said that to you? Answer. Yes. Question. He said, 'You leave that to me, and I will get rid of him?' Answer. Yes, sir." It seems to us that this testimony is very convincing, to the effect that these parties, the president and vice president of the company, were talking about discharging Paine; that they intended to discharge him; and that they there, in that conversation, determined upon the manner in which he should be discharged, namely, by Hill, who was to get rid of him,—and, coupled with a statement of Hill made to Paine, above mentioned, makes out a pretty clear case of discharge. It is true that Hill, in his testimony, denies positively that he ever discharged Paine; and there is testimony of other witnesses tending to corroborate him. But that simply creates, as we have said before, a conflict of testimony, and it is not important what this court may think of the plausibility or probability of Hill's statement or of Paine's statement. Another tribunal is clothed by law with authority to pass upon the credibility of the witnesses, and to weigh the testimony, and, having done so, this court is bound by their finding. So far as the question of accord is concerned, if there is any question of accord in the case, the testimony on that proposition was equally conflicting, and was passed upon by the jury.

No errors are alleged as to the admissibility of testimony or the instructions of the court, and this court does not feel justified in disturbing the verdict of the jury, rendered upon proper instructions given by the court. The judgment is therefore affirmed.

ANDERS, SCOTT, and STILES, JJ., concur. HOYT, J., dissents.

STATE v. BRODIE et al.

(Supreme Court of Washington. Dec. 22, 1893.)

CRIMINAL LAW—DENIAL OF SPEEDY TRIAL—SUFFICIENCY OF EXCUSE.

Where an information must be dismissed if defendant be not brought to trial within 60 days after the information is filed, unless good cause to the contrary be shown, (2 Hill's Code, § 1369,) it is not sufficient excuse for failure to try defendants within such time, that no term of court for which a jury was called was in session in the county during such time, in the absence of any good reason why a jury was not called. Hoyt, J., dissenting.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Edmund Brodie and Thomas Andrews were informed against for grand larceny, and, not being brought to trial within 60 days after the information was filed, they petitioned for a writ of habeas corpus, and moved for a discharge. From a judgment sustaining a demurrer to the petition, and denying the motion for discharge, they appeal. Reversed.

H. D. Allison, for appellants. Geo. A. Joiner, Pros. Atty., for the State.

SCOTT, J. On the 11th day of September, 1893, the defendants were arrested on a charge of grand larceny, and were, by a justice of the peace of Skagit county, upon an examination held by him on the 13th day of September, bound over to the next term of the superior court for trial. On the 18th day of said month the prosecuting attorney of said county filed an information against them, accusing them of said crime. Said defendants were unable at all times to give bonds, and since said 13th day of September have been confined in the county jail of said county. Not having been brought to trial on said charge, and more than 60 days having elapsed since said information was filed against them, they petitioned for a writ of habeas corpus to obtain their discharge. The petition sets up the facts above stated, and that the trial had not been postponed upon their application, and that they had not caused the delay thereof, but that they had at all times been ready and willing for trial upon the charge aforesaid; that a jury term of the superior court for said county should have been held on the fourth Monday of September, and that another jury term of said court should have been held the first Monday of December in said year; that both of said times had passed since they had been informed against, and that no such jury had been called, and that no cause for delay or failure to call the same had been filed or placed of record; but that the court had postponed the calling of such jury from time to time without any sufficient cause therefor having been shown; and they also moved for a discharge under 2 Hill's Code, § 1369.¹ The prosecuting attorney of said county demurred to the petition of the defendants, and on the 7th day of December, 1893, the same coming on for hearing, the court sustained said demurrer, and denied the motion of the defendants for a discharge, whereupon the defendants appealed.

The order denying the motion recites substantially, that the prosecuting attorney had not, in behalf of the state, asked for any

¹ 2 Hill's Code, § 1369, provides as follows: "If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his application, be not brought to trial within sixty days after the indictment is found or the information filed, the court must order it to be dismissed, unless good cause to the contrary be shown."

continuance of said action, but had always been ready for trial, but that said cause had not been tried for the reason that no term of court, for which a jury had been called, had been in session in said county since the filing of the information. As the record stands, we are of the opinion that no sufficient cause appears for not having brought the defendants to trial, and, in the absence of such cause, they were entitled to their discharge under said section. The failure to call a jury, without any good reason being made apparent why one was not called, was not sufficient to warrant holding them in custody beyond the time specified in said section. Reversed and remanded, with a direction to discharge the defendants.

DUNBAR, C. J., and STILES and ANDERS, JJ., concur.

HOYT, J., (dissenting.) I am unable to concur in the foregoing opinion: First. Because I think that the section of the Code upon which the appellants found their right to a discharge must be construed reasonably, and that, when so construed, it cannot be held thereunder that it is the duty of a court to call a jury, and put the county to the expense incident thereto, for the express purpose of trying a single person, regardless of the nature of the crime of which he is accused. In my opinion, the fact that, in the regular course of the business of a court, the judge has found that it was not necessary that there should be a jury called, is a sufficient reason for not bringing the accused to trial, as provided for in the section under consideration. If it should be made to appear that the court had willfully and wantonly refused to call a jury, a different question might be presented. But, until some such showing is made, his action in regard thereto must be held to have been in good faith, and that the absence of a jury, under such circumstances, could not be held to constitute any default on the part of the county or the prosecuting officers; and, since the accused could not be tried without the attendance of a jury, the fact that the court was, in the regular course of its administration, without one would constitute good cause for not bringing the accused to trial, within the meaning of the section above referred to. Second. In my opinion, the most that could be done in the case at bar, even in the light of the construction put upon said section by the majority of the court, would be to reverse the action of the lower court, and remand the case, with instructions to overrule the demurrer, and allow the prosecuting attorney to file an answer to the petition. That such would be the regular course is conceded by the majority, but, on account of some loose recitals in the order made by the court at the time it overruled the demurrer, they hold that an exceptional case is presented, which warrants the discharge of the

appellants. In my opinion the recitals in said order are no proper part thereof, and should not be held to be binding upon the prosecuting attorney. His demurrer having been sustained, he, of course, no longer paid any attention to the matter; and such recitals should not preclude him from making further defense, in the event of such demurrer being overruled.

DISTLER v. DABNEY. 1

(Supreme Court of Washington. Dec. 22, 1893.)

VENDOR AND PURCHASER—RESCISSION.

1. Where a complaint to rescind and recover price paid alleges that defendant never owned the land up to the date of the last tender, but that N. had title thereto, allegations of the answer that defendant held from N. a contract on the land, and had paid in full therefor; that N. had neglected to convey, and was out of the state; that plaintiff, having obtained an oral extension of five months, had sought to take advantage of N.'s absence, and defendant's inability to get a deed from him, by making his tender before the agreed time, and demanding his deed, in order to find a pretext to rescind, because the land had depreciated,—are relevant and responsive.

2. The complaint alleged a contract of sale; that plaintiff had tendered the last payment, and demanded a deed; that defendant failed to convey, and had no title, and prayed rescission, and judgment for the money paid. The answer averred that plaintiff got an extension on the last payment, in consideration of which defendant was not to convey till the same time; that defendant had a right to title from one N. at any time; that plaintiff's demand was in bad faith; that on such demand defendant agreed to get his deed from N. and to convey forthwith; that he got the deed the earliest possible day, and tendered plaintiff a deed. *Held*, that the case was equitable, and not in assumption.

3. Though the contract makes prompt payment of installments material, a vendee who has been repeatedly delinquent, and has made payments knowing that the vendor does not hold the legal title, and that the holder of such title is out of the state, cannot, when the last payment is due, at once tender it, and demand a deed, without giving the vendor a reasonable time to get title.

4. Affirmative relief cannot be granted defendant in the absence of anything in the nature of a cross bill or counterclaim.

Appeal from superior court, Chehalis county; Mason Irwin, Judge.

Action by Rudolph Distler against Joseph B. Dabney to rescind a contract, and to recover money paid thereunder. Judgment for plaintiff. Defendant appeals. Reversed.

T. D. Scofield, Geo. D. Schofield, and A. E. Griffiths, for appellant. M. J. Cochran and J. B. Bridges, for respondent.

STILES, J. The complaint set out the contract, under the terms of which prompt payment of the installments of purchase money was made material; and alleged the making and acceptance of several small payments, amounting in gross to the first, second, and third installments. As to the fourth and last installment, it was alleged

¹ For dissenting opinion, see 35 Pac. 1119.

that plaintiff was ready and willing to make payment on the day set, July 21, 1890, but that defendant could not be found on that day. Tender and demand for a deed were made on several subsequent days up to August 28th. As ground for rescission, it was alleged that defendant was at no time the owner of the real estate contracted for up to the date of the last tender, but that one Nims at all times during the life of the contract had the legal title thereto, wherefore defendant could not convey. A demand for a return of the money paid was also alleged to have been made September 1st, coupled with an offer to return the contract. Prayer for the rescission of the contract and judgment for the money paid.

Under this pleading we think it was error for the court to strike from the answer its sixth and seventh paragraphs, which were in response to paragraph 5 of the complaint, in so far as it might be held to charge a fraud on the part of defendant in contracting for the sale of land which he did not own. The stricken paragraphs alleged that defendant held from Nims a contract for the purchase of this and other land, and had paid in full therefor; that Nims had neglected to execute a deed, and was absent from the state; and that plaintiff, although he had solicited and obtained from defendant an oral extension of the time of performance of the contract from July 21st to about December 25th, had sought to take advantage of the absence of Nims, and the inability of plaintiff to reach him, and thus procure a deed, by suddenly, and long before the time agreed upon, making his tender, and demanding his deed, in order to find a pretext for the rescission of the contract, because the land had depreciated in value. The first proposition tended to relieve defendant of any charge of fraudulent conduct, and the second charged plaintiff with bad faith in seeking a rescission; both material matters in this kind of a case.

The second error of the court was in compelling the trial of the case as an action at law. Appellant maintains that this is an action for money had and received, and that he was entitled to recover it in assumpsit; but we think not. Time was not made of the essence of the contract, so far as the delivery of the deed was concerned, either by the terms of the instrument or by the showing of other facts; and there was no direct allegation of fraud in the making of the contract which would authorize the grantee to rescind of his own motion. In such a case it must appear that, upon the whole case, the grantee had an equitable right to rescind the contract, and that the grantor should not, in good conscience, be permitted to retain the money paid. Warv. Vend. pp. 942, 943. Moreover, the complaint asked the interference of the court to declare a rescission, and this was an invocation of its equity powers.

The answer presented wholly equitable defenses: (1) That plaintiff knew at the time he signed the contract that Nims had the legal title; (2) that at his request further time was given to plaintiff in April, 1890, to pay his last installment, and that, in consideration thereof, the defendant was not to be required to execute his deed until the payment of this installment, about Christmas, 1890; (3) that, although defendant did not have the legal title, his transaction with plaintiff was in good faith, he having a contract with Nims, under which he could at any time take title; (4) that plaintiff's action in making demand for a deed in July and August was in bad faith, in view of the change that had been made in the date of closing the matter from July to December; (5) that, as soon as plaintiff made his demand, defendant waived the full time agreed upon, and agreed to procure his deed from Nims as soon as he could reach him, and then himself forthwith convey; (6) that he got Nims' deed at the earliest possible day,—September 25th,—and immediately thereafter—October 2d—tendered a deed to plaintiff. Under the issues made by the pleadings, plaintiff had nothing to prove. A tender of the last payment was not necessary, if, in fact, defendant had not title. If he had no title, and no equitable excuse for not having it, his contract would have been a fraud on the plaintiff, who could have rescinded it at any time; but, if he had an equitable excuse, plaintiff's tender could not put him in the wrong. Thus the whole case rested upon the equitable defenses of the answer, for the denials of payments alleged in the complaint were sham and false; sham because they related only to the payments on particular dates, and false because they had in fact been made. The sole question was whether plaintiff was entitled to have the contract rescinded after the showing proposed to be made by defendant's answer, and that was a question for the court.

Treating the general verdict of the jury as though it were a specific finding upon the two vital facts (1) whether plaintiff knew the title to be in Nims, (2) whether there was an agreement to extend the time of payment and delivery of the deed, and considering it as advisory merely, we are unable to agree with it. In the first place, the plaintiff admitted, when on the stand, that defendant told him in April, when he was making one of his partial payments, that if he wanted an extension of time on the contract he (defendant) would give it, and that he would therefore not have to get the deed from Nims; and that before that he knew defendant did not have the title. Having made payments after such knowledge, he could not take advantage of defendant's want of title until after full payment or tender thereof. Warv. Vend. pp. 836, 882. Secondly, in our judgment, the clear prepon-

derance of the evidence was that, if there was not an agreement for an extension, there was, at least, a waiver of strict performance on both sides. There was direct and positive testimony by three witnesses of the agreement to extend, with no contradiction except by the plaintiff himself. There was testimony, also, that when plaintiff was making his tender and demand in August he was charged with having agreed to the extension, and that he did not deny having so agreed. Although the times of payment were made of the essence of the contract, plaintiff did not make either the second or the third payment on time, or in one sum, but defaulted, and made only partial payments subsequently. Plaintiff admitted asking for extensions, and to having made a request of that character in April; but he claimed to confine them to all but the last payment. Yet if they were so confined, according to his understanding, he must have seen that defendant did not so consider it, or he would not have referred to the matter of getting the deed from Nims. There was nothing about the transaction which showed any reason why either party should strictly perform. Defendant could not claim it as long as he did not have the title, and plaintiff, with his knowledge that the title was in Nims, and his frequent delinquencies, was in no position to require his deed on the last day. Defendant acted in perfect good faith at all times. As soon as he learned of plaintiff's anxiety for a deed, he proceeded at once to obtain the title from Nims, for which he had a contract, and was ready to convey within 30 days after plaintiff's demand of August 28th. On the 2d of October he tendered a deed, and plaintiff refused to receive it. Even if there was no agreement to extend until Christmas, there was a waiver of strict performance, and defendant had a reasonable time to convey after demand; and 30 days, under the circumstances of Nims' absence from the state, was certainly not unreasonable. The case looks to us very much as though the charges in the answer that there was an oral extension, and that the course of the plaintiff was taken with a view to surprise the defendant, and exact the refunding of the money paid, was sustained. An honest intention to comply with the contract, and rely upon its terms for his rights in the premises, would have dictated that plaintiff stop paying money when he learned in April that defendant did not have the title, if he intended to stand upon legal considerations only.

Appellant asks this court, if the judgment be reversed, to decree a specific performance of the contract by directing a judgment against the respondent for the last installment of the purchase money, with interest, in exchange for the deed, which was brought into court, and tendered with the answer. But the difficulty with that proposition is

that there was no cross bill by way of counterclaim, as good pleading would require there should be if affirmative relief is demanded. Had there been a demurrable counterclaim, even, in an equity case, we should regard the facts proven, and disregard the defects in the pleading; but there is no pleading at all upon which to base affirmative relief, and it would be error to grant it. To dismiss the case, however, might jeopardize rights of both parties which they are entitled to preserve, and we shall therefore simply reverse the judgment, and remand the cause for a new trial, with leave to defendant to amend his answer by adding thereto a proper counterclaim. So ordered.

HOYT and ANDREWS, JJ., concur. DUNBAR, C. J., and SCOTT, J., dissent.

WOOD v. NICHOLS et al.

(Supreme Court of Washington. March 10, 1893.)

RESCISSION FOR FRAUD — TENDER OF CONSIDERATION.

A bill by a vendor to compel a reconveyance for fraud should not be dismissed because the vendor did not tender the purchaser, before instituting the suit, the consideration received, as the court could require the return of the consideration as a condition to granting the relief sought, and thus protect the rights of the purchaser. Per Hoyt, J., dissenting.

For majority opinion, see 32 Pac. 1055.

HOYT, J., (dissenting.) I am unable to concur in the affirmance of the judgment in this cause. I agree with the majority of the court that the transaction was such that the plaintiff was entitled to have it avoided, and have his lots returned to him. I also agree with them that he could only have this done upon payment to the defendants of the \$300. In my opinion, however, equity having jurisdiction of the matter, it should not dismiss the action, but should allow plaintiff the relief to which he is entitled, upon such conditions as will fully protect the rights of the other parties. It does not consist with my idea of equity to dismiss a plaintiff who is shown to be entitled to relief upon the performance by him of certain conditions, simply for the reason that he did not tender a compliance with such conditions at the time he commenced his action. I think the proper course in such a case is for the court to grant the relief upon condition that plaintiff shall do what he ought to have offered to do before the commencement of the action, and impose such further terms by way of the costs of the action as will put the defendants in as favorable a condition as they could have been if the tender of the conditions had preceded the suit. Under this rule the judgment in the case at bar should be reversed, and the cause remanded, with instructions to grant

the relief prayed for by plaintiff upon condition that he reconvey the lots conveyed to him, by deed warranting against his own acts, and pay to the defendants the said sum of \$300, and interest thereon from the time he received it, and all costs of the action.

McHARRY v. STEWART. (No. 15,187.)

(Supreme Court of California. Dec. 30, 1893.)

HOMESTEAD OF WIFE AND HER CHILDREN — CONVEYANCE OF PART BY WIFE TO HUSBAND — TITLE OF HUSBAND — GOVERNMENT LAND CONTESTS — QUESTIONS DETERMINED ON APPEAL — REVIEW BY STATE COURT.

1. Code Civil Proc. § 1468, provides that, if deceased left also a minor child or children, one-half the real estate of which deceased died seised shall "belong" to his widow, and the remainder to the child or children. Section 1485 provides that persons succeeding to the title of "successors to homesteads" have all the rights of the persons whose interests they acquire. *Held*, that a wife, having minor children by a former, deceased husband, could convey to her second husband a certain 60 acres of 175 acres of land which were set apart to her and her children as a homestead out of the lands of her deceased husband.

2. Code Civil Proc. § 764, provides that when it appears, in an action of partition, that one or more of the tenants in common has conveyed in fee to another person a specific part of the common land, the land so conveyed shall be allotted in partition to such purchaser, etc., if such tract can be so allotted without material injury to the other cotenants. *Held*, that such purchaser's right to file upon an "adjoining farm homestead" under Rev. St. U. S. §§ 2289, 2290, cannot be defeated by the possibility that, on the partition, other land not adjoining that filed upon may be allotted him, instead of the specific part conveyed to him.

3. Rev. St. U. S. § 2273, provides that all questions as to the right of pre-emption, arising between different settlers, shall be determined by the register and receiver of the district within which the land is situated, and for "appeals from the decision of the district officers." *Held*, that, in the absence of any statute limiting the power of the commissioner of the land office and secretary of the interior on appeal, the power will not be denied to the commissioner and secretary to decide questions arising on evidence, which were not decided by such district officers.

4. Where the secretary of the interior, in a land contest, decided on the evidence that the residence of a claimant of land as an "adjoining farm homestead," under Rev. St. U. S. §§ 2289, 2290, on his own land adjoining the tract claimed, was not such as to entitle him to such tract, the supreme court of California has no jurisdiction to review such question in ejectment against such claimant by one claiming the same land under the pre-emption laws of the United States.

Commissioners' decision. Department 1.

Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action of ejectment by Daniel S. C. McHarry against James Stewart. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Theo. Wagner and G. W. Bowie, for appellant. Charles E. Wilson and Wm. Wells, for respondent.

HAYNES, C. The complaint is in ejectment, in the usual form, and the plaintiff's title is evidenced by a patent from the United States. Defendant answered, denying all the allegations of the complaint except that alleging defendant's possession, and filed a cross complaint setting out facts upon which he claims that plaintiff should be adjudged a trustee of the legal title for his benefit, and be required to convey the same to him. Plaintiff's demurrer to the cross complaint was sustained, and judgment thereon, as well as upon the issues raised by defendant's answer, which were tried by the court, was rendered against the defendant, who now appeals from the judgment; and the only question presented is as to the sufficiency of the cross complaint.

On December 10, 1893, the defendant filed upon the demanded premises as an "adjoining farm homestead," under sections 2289 and 2290, Rev. St. U. S., defendant then claiming to be the owner of about 60 acres of adjoining lands, upon which he resided. On December 13th of the same year, the plaintiff, claiming a residence upon a subdivision of government lands adjoining the demanded premises, filed a pre-emption claim including the demanded premises. Upon these conflicting claims, a contest arose before the local land office, and testimony was taken. The cross complaint sets out the facts which defendant claims were proven upon the hearing, and, by exhibits attached thereto, sets out the decision of the register and receiver thereon, the decision of the commissioner of the general land office upon appeal, the decision of the secretary of the interior upon appeal from the commissioner, and also the decision of the secretary upon a petition for review. The land which defendant claimed to own, and upon which he claimed to reside at the time he filed upon the demanded premises, was formerly a part of the Pinole rancho, in which one James McClellan owned an undivided interest, which, after his marriage, was set off to him in that part of the rancho adjoining the demanded premises. McClellan died in December, 1871, leaving his widow, Getta, and two minor children, surviving him. In February, 1876, a homestead containing 175 acres was set apart by the probate court, for the use of the widow and minor children, in that part of the land partitioned to McClellan which adjoined the demanded premises. Afterwards, in March, 1876, the widow married the defendant, Stewart. On October 2, 1882, Mrs. Stewart conveyed to her husband (the defendant) a portion of the homestead, containing about 60 acres, adjoining the demanded premises, the children being still minors. Upon these facts, and without considering the other evidence before them, the register and receiver held that defendant acquired no right or title by his purchase from his wife, and therefore was not entitled to

an "adjoining farm homestead" under the statute, and awarded the land to McHarry. On appeal to the commissioner, this decision was reversed, and the land was awarded to Stewart; and, upon appeal to the secretary, the commissioner's decision was reversed, and the land again awarded to McHarry. The evidence taken before the register and receiver principally related to two points, viz. Stewart's ownership and title to the land conveyed to him by his wife, and his residence thereon. It is conceded that, after Stewart filed upon the demanded premises, his residence was principally at Martinez, where he had gone into business. He claimed, however, that he left the land in consequence of assaults made upon him by the McHarrys, and threats which put him in fear. The register and receiver did not pass upon this evidence, but rested their decision solely upon want of title to the adjoining lands, while the commissioner held his title sufficient, and that his absence from the land was excused by the acts of McHarry. The secretary held against Stewart on both points. So far as questions of fact are concerned, all courts are bound by the decision of the land department, unless such decision has been obtained by fraud or imposition. In this case we find nothing to justify a review of questions of fact. *Shanklin v. McNamara*, 37 Cal. 371, 26 Pac. 345; *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249, and cases there cited. The principal questions are therefore—First, whether Stewart's ownership and title were sufficient to entitle him to an additional farm homestead; and, if that is answered in the affirmative, second, whether his residence on the land conveyed to him by his wife was such as the law required for the purpose of securing such additional homestead.

The land set apart by the probate court as a homestead was the separate property of the deceased, James McClellan. Such homesteads, when not community property, can only be set apart for a limited time. The estate in the lands so set apart vests, however, in those declared by the statute to be entitled to it, but subject to the assignment of such homestead by the court, and at the expiration of the time limited for its existence is subject to partition as though no homestead had been created. Section 1468, Code Civil Proc., (act of March 24, 1874, as well as the act of 1881,) provides: "If the deceased left also a minor child or children, the one-half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children if there be more than one." In *Estate of Moore*, 57 Cal. 444, it was said: "The right to have a homestead set apart is no estate, either in law or in equity." It was accordingly there held that the deed of the widow, made before the homestead was set apart, did not nor could convey away the right to a homestead; but it was

not held that the deed was not operative to convey all her interest in the estate which she took by succession, such interest being subject to the power of the court to set apart a homestead. Her grantee therefore took the estate, and was the owner of it, but subject to the homestead afterwards set apart by the court. If this were doubtful under the provisions of the Code above referred to, section 1485, Code Civil Proc., makes it clear. It is there provided: "Persons succeeding by purchase or otherwise to the interests, rights and title of successors to homesteads, or to the right to have homesteads set apart to them, as in this chapter provided, have all the rights and benefits conferred by law on the persons whose interests and rights they acquire." The obvious intent of this section is to confirm to purchasers of the estate all the rights and interests which the grantor had or could enjoy, subject to the homestead right, and, at the termination of the homestead, the unincumbered estate. The words "successors to homesteads" certainly imply this. Stewart therefore had title to the land, and was the owner. But it is contended by respondent—and the secretary of the interior seems principally to have relied thereon—that he took but an undivided interest in the homestead, and, when the land came to be partitioned, the land set off to him might not adjoin the demanded premises. Section 764, Code Civil Proc., provides, among other things, as follows: "Whenever it shall appear, in an action for the partition of lands, that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds, out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs or assigns, or in such manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be so allotted or set apart without material injury of the rights and interests of the other co-tenants who may not have joined in such conveyance." To defeat Stewart's right upon this ground, it must be assumed that partition cannot be made so as to give him the part of the land conveyed to him, or some part of it, adjoining the public lands in question, or that the bare possibility of such result is sufficient to defeat the right to an adjoining homestead. It will hardly be contended that, if Stewart's ownership and title were otherwise unquestioned, the existence of a mortgage upon it would defeat his right to an additional homestead, because his title, at some time in the future, might be taken away by foreclosure and

sale; yet respondent's contention, carried to its logical conclusion, would seem to lead to that result. The contingency in question does not destroy or affect Stewart's ownership for the purposes of the homestead right, and the register and the receiver and the secretary erred in so holding.

The question of Stewart's residence is one of greater difficulty. It may be conceded that the cross complaint shows that his residence upon the land purchased from his wife was not continuous; but facts are alleged which, if satisfactorily proved, would excuse his absence from it. The cross complaint, however, sets out in full, as exhibits, the decision of the commissioner of the general land office in his favor upon that question, and the decision of the secretary of the interior reversing that decision, thus presenting the question of the jurisdiction of the court to re-examine it. It is contended by appellant that all the questions presented by the contest before the register and receiver, upon which evidence was introduced, should have been decided by them, and that the commissioner and secretary had no power to pass upon questions of fact not passed upon by the register and receiver; that it was the duty of the commissioner, when he reversed those officers upon the only question passed upon by them, to send the case back with instructions to pass upon all the other questions. And this contention is placed by appellant upon section 2273, Rev. St. U. S., which provides that "all questions as to the right of pre-emption arising between different settlers shall be determined by the register and receiver of the district within which the land is situated," and which provides for "appeals from the decision of the district officers" to the commissioner; and this right to have all the questions of fact decided by the local officers, he insists, is an important and substantial one, as the weight to be given the testimony of the different witnesses can be better estimated by them than by those who had no opportunity to observe the witnesses while giving their testimony. Prior to the act of July 4, 1836, (5 Stat. 107,) there seems to have been no express power given to the commissioner of the general land office to revise the decisions of the local land officers; but where an entry was made on ex parte affidavits, which were impeached before the commissioner by another claimant, the course was to return the proofs to the local office, and direct that the parties be notified, and after proofs taken to report the proceedings to the general land office, with their opinion as to the effect of the proof. See *Barnard's Heirs v. Ashley's Heirs*, 18 How. 44. By section 11 of the act of September 4, 1841, (5 Stat. 456,) all questions arising between different settlers were required to be "settled by the register and receiver of the district within which the land is situated, subject to an appeal to, and a revision by, the secretary of the treasury;"

and by the act of June 12, 1838, (11 Stat. p. 326, § 10,) the latter clause of section 2273, Rev. St., was enacted. The power of the commissioner and secretary upon appeal to decide all questions arising upon the evidence taken by the register and receiver is not limited in any of the statutes relating to appeals, and the practice of so deciding all questions upon appeal is too well settled to justify us in denying them that power. That the error of law committed by the register and receiver, and affirmed by the secretary of the interior, had a far-reaching effect cannot be disputed. Stewart had been in possession of the demanded premises many years before the township plat was filed, and the same was fenced in with the land upon which he resided, and he filed his adjoining homestead claim thereon the day the township plat was filed. No question seems to have been made as to his place of residence at the time of his filing, nor at the time McHarry filed, which was but three days thereafter. That being true, McHarry's filing was illegal, the land being then in the rightful possession and occupation of Stewart. But if Stewart, by reason of his failure to reside on the adjacent land, was not entitled to it, the question whether McHarry was entitled was one between him and the government, in which appellant is not concerned. The question of residence being one of fact, and having been litigated before the land department, we would not have jurisdiction to examine it, even if the evidence was before us, in the absence of a clear showing that the decision was procured by fraud or imposition, and we find no such allegation of fraud or imposition in the cross complaint as would justify the submission of the question of residence to a court of justice.

It is argued by appellant, however, that in the case of an adjoining homestead, the requirements of the law applicable to other homesteads upon the public lands do not apply. The rulings of the land department have been otherwise, and we think correctly. *Carnes v. Smith*, 10 Dec. Dept. Int. 100; *Box v. Cochran*, 3 Dec. Dept. Int. 394. Residence upon the public land filed upon is excused because that, with the land owned, is regarded as one homestead, and residence upon any part is sufficient; but residence is essential to a homestead of either kind. The judgment appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PATERSON, J. For the reasons given in the foregoing opinion, it is ordered that the judgment appealed from be affirmed.

HARRISON and GAROUTTE, JJ. We concur in the judgment upon the ground that the decision of the land department that Stewart was not residing upon the premises at the time he made the homestead entry is a conclusive determination against

his claim to the land. Whether the conveyance by the widow of McClellan of her interest in a portion of the premises that had been set apart as a homestead for the benefit of herself and her minor children during the existence of the homestead transferred to her grantee any title therein is a question which does not arise in this case, and is of too much importance to be unnecessarily determined. See *Gagliardo v. Dumont*, 54 Cal. 493; *Phelan v. Smith*, (Cal.) 34 Pac. 667.

MULCAHY v. BUCKLEY. (No. 14,669.)

(Supreme Court of California. Dec. 23, 1893.)

MECHANICS' LIENS—PLEADING—INFORMATION AND BELIEF—PUBLIC RECORDS—ATTORNEY'S FEES—FINDINGS.

1. Code Civil Proc. § 437, permitting a defendant who has no information or belief sufficient to answer an allegation of the complaint to place his denial on that ground, does not authorize such a denial of a public record to which he has access, he having the means of information.

2. Under Code Civil Proc. § 1195, providing that in actions to enforce mechanics' liens the court must allow as part of the costs the money paid for filing and recording the lien, and reasonable attorney's fees, avowment of the amount thereof in the complaint is not necessary.

3. The allowance being for attorney's fees "in the superior and supreme court" does not include the amount paid for preparing claim of lien.

4. In an action on a contract for doing work and furnishing material for the reasonable value, an answer denying conjunctively that plaintiff agreed to do the work "and" furnish the material, and denying that he did "all" the work, raises no substantial issue.

5. A finding that plaintiff agreed to do certain work and furnish certain material, and that, in pursuance of the contract as in the complaint mentioned, he did the work, and furnished the material, is a substantial finding as to the agreement.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by James Mulcahy against C. F. Buckley to enforce a mechanic's lien. Judgment for plaintiff. Defendant appeals. Affirmed.

Sullivan & Sullivan, for appellant. Reddy, Campbell & Metson, for respondent.

VANCLIEF, C. This is an appeal from a judgment enforcing a mechanic's lien for the value of labor performed and materials furnished in repairing and altering certain buildings and structures on two lots of the defendant, situate in the city and county of San Francisco, and comes here on the judgment roll without any bill of exceptions. The cause was tried by the court without a jury, and the only points made by appellant are that the court erred in that it failed to find on certain alleged issues.

1. In paragraph 8 of the complaint it is alleged in due form that plaintiff filed and recorded his claim of lien in the recorder's

office in the city and county of San Francisco, "in the words and figures following," (here follows a copy.) The only answer to this paragraph of the complainant is that defendant "has no information or belief upon the subject sufficient to enable him to answer the allegations or any allegation contained in paragraph eight of said complaint; and, placing his denial upon that ground, he denies each and every allegation in said paragraph contained." The court disregarded this part of the answer, holding that all the material allegations of the eighth paragraph of the complaint should be deemed admitted; but appellant contends that this answer was sufficient to put in issue every material allegation of the paragraph to which it relates. I think the court did not err in this respect. Section 437 of the Code of Civil Procedure provides: "If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground." But a defendant is not at liberty to answer an allegation in this form, when he may be presumed to know, or when he is aware, before answering, that he has the means of ascertaining whether or not such allegation is true. In this case it appears, at least, that the defendant knew before answering that he could certainly ascertain whether or not plaintiff had recorded his claim of lien as alleged in the complaint by examining a public record in the city and county in which his lots, upon which the lien is claimed, were situated. *Hathaway v. Baldwin*, 17 Wis. 616; *Goodell v. Blumer*, 41 Wis. 444. I am unable, however, to find that the provision of the Code above quoted has ever been held inapplicable to a case in which the defendant was merely conscious of having the means of obtaining knowledge as to whether the allegation denied was true; nor have I found anything to the contrary. The question seems to be open in this state. The case of *Read v. Buffum*, 79 Cal. 77, 21 Pac. 555, cited by appellant, is not in point. In that case the allegation denied for want of information or belief was that of an assignment to plaintiff of the account on which the action was brought, and there is nothing indicating that defendant had any knowledge or means of ascertaining whether the account had been assigned to plaintiff or not, and that the question was not mooted. The corresponding provision in the Codes of other states generally is that a denial of "any knowledge or information" of the allegation controverted, "sufficient to form a belief," without expressly denying it, will raise an issue. Speaking of these, Mr. Bliss, in his work on Code Pleading, (section 326,) says: "The obligation to verify the pleading implies an obligation to state the truth; hence the permission to deny any knowledge or information, etc., is not absolute. If the fact charged is evidently within the defendant's

knowledge,—as, an act done by himself and within the period of recollection, or where he has the means of information,—a denial of information in the language of the statute would be clearly false or evasive, and such an answer should be disregarded." In *Goodell v. Blumer*, 41 Wis. 444, the complaint alleged the execution and recordation of a deed, and set it out in *haec verba*. The defendants traversed the allegation by averring "that they have not sufficient knowledge or information to form a belief, and therefore deny the same." The court, by Cole, J., said: "It seems to us that when a party is pointed to the record of an instrument in the pleadings, he is not permitted to answer that he has no knowledge or information sufficient to form a belief whether there is such an instrument or not. There is a public record which he can consult, and which it was intended he should resort to in order to inform himself upon the subject, [citing cases.] The principle of these decisions is that a party cannot plead ignorance of a public record to which he has access, and which affords him all the means of information necessary to obtain positive knowledge of the fact. We therefore hold that the answer practically admitted the execution of the deed of Samuel Stout and wife to the plaintiff, and that no proof of it was necessary." The practice act of 1851 of this state (section 46) authorized the traverse of an allegation by denial "of any knowledge thereof sufficient to form a belief;" but this was repealed in 1854, and was not re-enacted until it was incorporated in section 437 of the Code of Civil Procedure, in July, 1874. In speaking of the repeal of this provision of the practice act, Mr. Justice Field, in *Curtis v. Richards*, 9 Cal. 38, said: "In practice, this mode of denial was found to furnish a convenient pretext for evading the statute. In some instances defendants became critical in their judgments as to the extent of knowledge sufficient to form a belief, and would, without hesitation, deny, in that form, facts upon the existence of which they did not hesitate to act in other matters. In 1854 the forty-sixth section was amended to the present language, and the wisdom of the amendment is well illustrated by the present case." In the interim between 1854 and 1874 there were but two forms in which the allegations of a verified complaint could have been controverted so as to raise an issue: First, positively, when the facts were within the knowledge of the defendant; and, second, upon information and belief, when the facts were not within his personal knowledge. During that interim, and since, it has been decided that an allegation of a verified complaint could not be controverted on information and belief when the alleged fact was presumably within the knowledge of the defendant, nor when the defendant had the means of ascertaining whether or not it was true. *San*

Francisco Gas Co. v. San Francisco, 9 Cal. 467; *Loveland v. Garner*, 74 Cal. 298, 15 Pac. 844. In the first of these cases Mr. Justice Field said: "But the statute imposes upon the defendant, if a natural person, and, if a corporation, upon its officers and agents, the duty of acquiring the requisite knowledge or information respecting the matters alleged in the complaint, to enable them to answer in the proper form." Is not the same duty imposed upon a defendant who proposes to deny an allegation on the ground that he has "no information or belief?" I think it is, under the circumstances and facts disclosed by the record upon which this appeal is presented. Beyond this it is unnecessary to express an opinion.

2. In paragraph 10 of the complaint it is alleged that plaintiff had paid, as necessary expenses, \$25 for preparing his claim of lien, and \$3.25 for recording it; and that \$250 would be a reasonable attorney's fee for prosecuting his suit in the superior court. This paragraph also was denied on the ground that defendant had no information or belief in regard to it; and it is claimed that the court improperly disregarded this denial, and made no finding on the issue raised by it. As a conclusion of law, the court found that plaintiff was entitled to a lien "for said sum of \$991.20, together with the further sums of \$100 attorney's fee and \$28.25 for preparing and recording said lien." Section 1195 of the Code of Civil Procedure provides that in actions to enforce liens of mechanics "the court must also allow, as a part of the costs, the money paid for filing and recording the lien, and reasonable attorneys' fees in the superior and supreme courts, such costs and attorneys' fees to be allowed to each lien claimant whose lien is established," etc. The averments in the complaint as to what had been paid by plaintiff for filing and recording the claim of lien, and as to what sum would be a reasonable attorney's fee, were unnecessary. The right to recover these, like the ordinary right to recover costs, was a necessary incident to the judgment establishing plaintiff's lien, and did not depend upon any averment in the complaint, except such as were necessary to establish the lien. *Carriere v. Minturn*, 5 Cal. 435; *Rapp v. Gold Co.*, 74 Cal. 532, 16 Pac. 325; *Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231. In this last case this court, upon affirming the judgment foreclosing a mechanic's lien, directed the court below "to allow plaintiff, under section 1195 of the Code of Civil Procedure, a reasonable fee for services of its attorney in this court." As to the averment in the tenth paragraph of the complaint that plaintiff had paid \$25 for preparing his claim of lien, I think he was entitled to recover nothing upon it, in any event, whether it was denied or not. That averment should have been stricken from the complaint, and probably would have been, had defendant moved the court

to strike it out. The attorneys' fees paid by a party can be recovered from the defeated party only in exceptional cases, of which it is true an action to enforce a mechanic's lien is one; but the exception provided for in this class of cases does not extend to fees for services not pertaining to such action "in the superior" or "supreme court." The preparing of a claim of lien to be recorded is no more nearly related to an action to foreclose the lien than is the drafting of a contract for the performance of the labor upon which such action may be partly founded.

3. It is contended that the court failed to find the contract set forth in the complaint. It is alleged in the complaint that "plaintiff entered into a contract with said defendant, under and by which said plaintiff agreed to perform the labor and furnish the brick, lumber, lime, cement, hardware, and other materials necessary to repair and alter both of said above-described buildings or structures and premises in the following particulars." Here follows a minute description of the repairs and alterations to be made, namely, to build a brick wall and fence on the rear line of such lots, and a division fence between them; to construct entrances in said brick walls, and hang doors thereon; to build stairs on each of said above-described buildings or structures; to repair windows and sinks therein; to build a shed attached to one of the buildings; to put down plank walks and repair sidewalks on each side of said lots; and that defendant agreed to pay plaintiff for all of said work and materials the reasonable value thereof. Also alleged that plaintiff fully performed the contract on his part, and that the reasonable value of the work done and materials furnished was \$691.20. The answer "denies that at any time plaintiff entered into a contract with defendant, under or by which plaintiff agreed to perform the labor and furnish the brick, lumber, cement, hardware, and other materials necessary to alter the buildings or structures and premises described in said complaint;" but "admits that plaintiff and defendant did enter into a contract for the performance of the brickwork and the furnishing of the materials for such brickwork required in the alteration and repair of the premises described in said complaint. Admits that, pursuant to said contract, said defendant did perform said brickwork and furnish said materials required in the alteration and repair of said premises;" But "denies that, pursuant to said or any contract, plaintiff performed any work or furnished any materials required in the alteration or repair of said premises, other than said brickwork and said materials required in the performance of the same; denies that, under or according to the terms of any agreement between plaintiff and defendant, plaintiff furnished all the materials to be used, or which were actually used,

in the alteration or repair of both or either of the buildings described in said complaint, or performed all the labor necessary to complete the same; denies that the reasonable market value of the labor performed and materials furnished by plaintiff in the alteration and repair of said buildings are or were the sum of \$691.20; denies that there is or was due from defendant to plaintiff the sum of \$691.20, or any greater sum than \$——;" but does not deny that plaintiff did the work and furnished the materials as alleged in the complaint. The court found "that plaintiff entered into a contract with defendant, under and by the terms of which plaintiff agreed to perform the labor, furnish the brick, lumber, lime, hardware, and other materials necessary to repair and alter the buildings situate on the premises in the complaint mentioned; that, in pursuance of said contract and agreement as in the complaint mentioned, and with defendant's knowledge and consent, plaintiff did perform the labor upon said premises and did furnish brick, lumber, lime, cement, hardware, and other materials necessary to repair and alter the buildings situated on the premises in the complaint mentioned;" and further found that the value of the labor done and materials furnished, as aforesaid, "is and was the sum of \$691.20." (The italicizing in the above quotations is not in the originals.) If the whole substance of the agreement alleged in the complaint was not expressly admitted in the answer, it is obvious that the qualified and copulative denials relating to the contract were insufficient to raise a substantial issue. Besides, I think, the agreement alleged was substantially found. I think the judgment should be modified by deducting therefrom \$25, which was allowed for preparing plaintiff's claim of lien, and, as so modified, should be affirmed; neither party to recover costs of the appeal.

We concur: TEMPLE, O.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is modified by deducting therefrom \$25, which was allowed for preparing plaintiff's claim of lien, and, as so modified, is affirmed; neither party to recover costs of the appeal.

PORTER et al. v. ARROWHEAD RESERVOIR CO. (No. 19,245.)

(Supreme Court of California. Dec. 24, 1893.)
CONTRACTS—BREACH—DEFAULT IN PAYMENT—RESCISSION—QUANTUM MERUIT.

Default in a payment on a contract for work is a breach justifying a rescission and action of quantum meruit by the contractor.

Department 1. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by W. R. Porter and W. E. Van

Slyke against the Arrowhead Reservoir Company. Judgment for defendant. Plaintiffs appeal. Reversed.

O. W. C. Rowell and E. E. Rowell, for appellants. Willis & Cole, for appellee.

GAROUTTE, J. Appellants brought an action of quantum meruit to recover \$4,207.04 for labor performed in the building of a wagon road. The defendant filed an answer denying the allegations of the complaint, and also filed a cross complaint alleging, among other things, that plaintiffs had entered into a contract in writing to build a certain wagon road for the sum of \$6,000; that plaintiffs entered upon the construction of said road under the contract, and performed labor thereunder until about September 3, 1891; that at such time plaintiffs, without right, and without the consent of the defendant company, ceased work and abandoned said contract; and defendant asked for damages for such alleged breach. Plaintiffs answered the cross complaint, admitting the contract, and that the labor performed was done thereunder, but alleged a rescission thereof by them upon the 3d day of September, 1891, by reason of default on the part of defendant to make a partial payment upon the work, as covenanted in said contract. As disclosed by the writing, the contract price of \$6,000 was to be paid as follows: "On the first day of each and every month after beginning of work on said road, in the following manner and proportions, to wit, that, as the amount of work done previous to said first day of the month shall bear according to the lineal feet of the construction of said road to the whole distance between the terminal points mentioned in this contract, which amount is to be ascertained by the engineer of the company, and the payments to be made in such proportion less ten per cent. of said sum due on the first day of each and every month." Judgment was rendered for defendant in the sum of \$610.18 and costs of suit, and this appeal is from such judgment, and the order denying a new trial.

The brief of respondent is composed, to a great extent, of the opinion of the learned judge of the trial court, and his position as to the law of the case is there fully and forcibly set forth. We will not enter into a detailed review of the alleged errors relied upon for a reversal of the judgment, for we think the views of the trial court upon the principles of law here involved are not sound, and that a new trial must be ordered for that reason. The error of the court has arisen from a misconception of the legal principles declared in the somewhat historical case of *Cox v. McLaughlin*, reported in various volumes of our reports,—among others, 54 Cal. 605, and 76 Cal. 60, 18 Pac. 100. We quote from the views of the trial judge, as indicated in his opinion, found in the re-

spondent's brief: "It is evident, without citation of authority, that the plaintiffs' right to maintain this action on a quantum meruit depends on the abrogation of the contract referred to between the plaintiffs and the defendant corporation. If that contract existed, and was in force, it would be a direct answer to plaintiffs' claim to recover in the present form of action. To effect the abrogation of the contract, in the light of the facts presented in this case, there must have been some such substantial violation of its terms on the part of the defendant as would have authorized the plaintiffs to rescind; and such violation must, under the authority of *Cox v. McLaughlin*, have amounted to either actual or technical prevention." And, again: "After a careful review of the testimony, I am of the opinion that there was no showing of any prevention, either actual or technical, on the part of the defendant, as regards the plaintiffs."

Prior to the decision of *Cox v. McLaughlin*, reported in 76 Cal., 18 Pac., supra, this court repeatedly and always held that, unless *McLaughlin's* prevention of the execution of the contract by *Cox* was alleged and found as a fact, plaintiff was not entitled to recover on the contract; and the court further held that a mere failure or refusal to pay an installment upon the contract price as it became due was not a condition precedent in the contract, was not prevention, and did not authorize the plaintiff to abandon the work, and recover the profits he would have made if the work had been completed under the contract. Under the last decision (76 Cal., 18 Pac.) the complaint had been amended. The contract was no longer relied upon, and for the first time the action was before the court upon a quantum meruit, and it was then sustained. There was no question of "prevention" involved in the case upon that appeal. That element is not considered in the opinion of the court; but a failure to pay an installment of the money due was necessarily held a breach of the contract, for without a breach there could have been no action of quantum meruit, and necessarily no recovery had thereon. There is a wide distinction between "prevention" upon the part of the employer of the further carrying on of the work, and other breaches of the contract. The law says breaches amounting to prevention must be of conditions precedent, and the payment of an installment upon the contract price is not such a condition, as *Cox v. McLaughlin* repeatedly decides. At the same time, that case conclusively holds that a default in payment is such a breach as to justify a rescission and an action of quantum meruit, and that long litigation was concluded upon that principle. There is no question but that nonpayment, as agreed upon, is a breach of the contract, of some character; and Justice McKinstry said in the 54th Cal., supra: "Assuming that the failure to pay, as alleged, constituted a breach of the contract,

the plaintiffs could have treated the specific contract as rescinded, and have brought suit upon the implied promise of defendant to pay the value of the work actually done." And in the very case of *Palm v. Railroad Co.*, 18 Ill. 219, from which Justice McKinstry quotes in extenso to establish that nonpayment does not amount to prevention, the Illinois court said: "The contract provides for no other penalty or liability, and the law imposes no other, except, perhaps, that this violation of the contract by the defendant, in failing to make the payment, may justify the plaintiff in treating the contract as rescinded, and in suing for the amount due, in an action for goods sold and delivered." In *Schwartz v. Saunders*, 46 Ill. 18, the owner failed to pay the contractor in the erection of a building an installment of the contract price, when due, and the court said: "That he had a right to abandon the work, under the circumstances, seems a proposition so plain as to require no argument." A failure to pay an installment of the contract price, as provided in the contract, is a substantial breach of the contract, and gives the contractor the right to consider the contract at an end, cease work, and recover the value of the work already performed. As we have seen, *Cox v. McLaughlin* is authority to support this principle, and there is also ample precedent from the decisions of the courts of other states. *Canal Co. v. Gordon*, 6 Wall. 561; *Evans v. Railroad Co.*, 26 Ill. 189; *Preble v. Bottom*, 27 Vt. 249; *Dobbins v. Higgins*, 78 Ill. 440; *Shaw v. Turnpike*, 3 Pen. & W. 445; *Reybold v. Voorhees*, 30 Pa. St. 116; *School Dist. v. Hayne*, 46 Wis. 511, 1 N. W. 170.

From the foregoing views, it follows that, to entitle the plaintiffs to recover in the present action, it is only necessary that they prove a substantial failure upon the part of defendant to comply with its agreement as to the payment of an installment upon the contract price, and, in addition thereto, that they rescinded the contract by reason of such failure, and upon these lines a new trial should be had. It is ordered that the judgment and order be reversed, and the cause remanded.

We concur: PATERSON, J., and HARRISON, J.

WILSON v. SAMUELS et al. (No. 15,333.)¹
(Supreme Court of California. Dec. 26, 1893.)

CONTRACTS—VALIDITY—CONSIDERATION—INTERPRETATION—SUPPLYING BLANKS—PERFORMANCE.

1. Creditors of an insolvent contractor held liens for materials furnished to erect a building, and agreed with him, in writing, to assign their liens to the owner of the building if he would pay the money still due, before a certain day, by first paying in full the claims for labor, and then dividing the remainder proportionately among all other lien claimants. Held, that the agreement was valid, and binding on each signer, as the contract of each was a sufficient consideration for the contracts of the others.

2. The fact that blank spaces as to the amount due were left in the agreement did not render it incomplete, since they could be supplied from the agreement.

3. A signer could not recover in an action to enforce his lien against the contractor and owner, where the owner had paid out the money due to the contractor, as authorized by the agreement, except the pro rata share of such signer, which was tendered, but refused, and, on the bringing of action, was deposited with the court.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by J. H. Wilson against D. Samuels and W. A. Van Dervort to foreclose a mechanic's lien. From a judgment for plaintiff, and an order denying a new trial, Samuels appeals. Reversed.

Naphtally, Freidenrich & Ackerman and Alex. G. Eells, for appellant. Geo. D. Collins, for respondent.

SEARLS, C. This is an appeal from a judgment in favor of the plaintiff in an action to foreclose a mechanic's lien, and from an order denying defendants' motion for a new trial. Defendant Samuels was the owner of a lot of land in San Francisco. He entered into a written contract with W. A. Van Dervort, the other defendant, by the terms of which the latter was to construct for him certain buildings upon said lot. The contract was duly filed with the recorder of the city and county. Plaintiff, Wilson, furnished materials and labor to the contractor for and in the construction of the buildings, for which there was due him \$1,200. For this amount he filed a mechanic's lien against the buildings at the proper time, and in due form. There was due the contractor from Samuels, on account of the contract, \$6,312. Twelve other liens were filed, for amounts aggregating \$8,875.69, on account of materials furnished; also, liens for labor, aggregating \$310.50. There were therefore liens filed, exclusive of the labor liens, and including that of plaintiff, amounting to \$10,075.69. The contractor, Van Dervort, seems to have been insolvent. Before the liens were filed, the creditors met, and endeavored to adjust their claims so as to avoid the expense and necessity of filing liens, but failed in their efforts. After the liens were filed, the lienholders met again, and learned the exact amount due from defendant Samuels on the contract, except that there was thought to be something due on account of extra work on the building; but the precise amount thereof, if anything, was not known. The amount of the several liens was also reported to the meeting. Thereupon, an agreement in writing was prepared and executed by all the lienholders, the plaintiff included, except Glosser & Gallagher, who refused to assent thereto. The following is a copy of the agreement:

"We, the undersigned creditors of W. A. Van Dervort for work done and materials

¹ For modification of opinion, see 35 Pac. 550.

furnished in the erection of a certain structure for D. Samuels, situated on Greenwich street, near Buchanan street, hereby agree that if said D. Samuels will pay, on or before the first of July, 1891, the money still due on said building, to wit, \$—, the same may be paid as follows, to wit: First, all the claims for labor, amounting to \$310.50, shall be paid in full; second, the remainder, \$—, shall be distributed among all the other lien claimants in the proportion which each of said claims bears to the whole amount of such other lien claims filed against said building, said proportion being — per cent. of each of said claims. And, in consideration of said payment being made, we, and each of us, will, on receipt of our said proportionate shares, respectively assign our said liens to said D. Samuels, with the agreement that we, and each of us, will furnish the testimony necessary to prove and establish the validity of our respective lien in any litigation growing out of the refusal of one or more of the lien claimants to accept his said proportion, and that, if said respective liens are not so proved by us, we will, respectively, refund the moneys so paid for such invalid liens. And the said W. A. Van Dervort hereby agrees to the payment of said money as above provided for, and hereby waives his own liens for any and all moneys so paid. [Signed] W. A. Van Dervort. San Francisco, June —, 1891."

Name of Claimant.	Amount of Lien.
C. E. Doty & Co.....	\$1,545 65
Keenan Withington.....	30 40
J. H. Wilson.....	1,200 00
L. E. Clawson & Co.....	122 00
E. Platz.....	507 00
A. I. Sanborn.....	200 00
Latson Hardware Company.....	93 00
C. D. McGown & Co.....	244 93
Fulda Bros.....	79 79
Huntington, Hopkins & Co., per W. F. S.....	518 19

As before stated, the parties did not know the amount due on account of extra work, and hence the blanks in the agreement. The clause in reference to proving amount due and validity of liens was inserted to meet the case in the event that some of the lienholders refused to accept the arrangement, and in order that such dissenters might not receive more than their pro rata share. Defendant Samuels was made acquainted with the agreement, and thereupon, through D. H. Bibb, paid off all the lien claimants their pro rata share of the \$6,312 due the contractor, except the plaintiff, who refused to accept less than the full amount due him. Glosser & Gallagher, who refused to sign the agreement, finally accepted their pro rata share with the others. Before the 1st day of July, 1891, \$720 was tendered to plaintiff, and refused by him, and, after this suit was brought, said sum was paid into court for him. This was slightly in excess of the pro rata share due him. The several liens so paid off pro rata were, with

the consent of Samuels, assigned to one Greenwald, who brought suit upon them, which action was pending at the date of the trial herein. W. A. Van Dervort, the contractor, joined with Samuels as a defendant, made default, and Samuels alone is appellant here.

The position of respondent, in support of the judgment, is: (1) The agreement is not a composition agreement, and is not binding as such. (2) The agreement is fatally inchoate and incomplete by reason of the existence of the blanks therein relative to the pro rata the claimants were to receive. (3) The agreement, by its very terms, was to be obligatory only upon those who accepted the pro rata. (4) That, at the very most, the agreement was only an accord, which could be disregarded at any time before satisfaction, and therefore the respondent was at liberty to indorse his claim for the full amount.

In briefly noticing these propositions, it may be said of the first that a composition is an agreement made upon a sufficient consideration between an insolvent or embarrassed debtor and his creditors, or a considerable proportion of them, whereby the latter, for the sake of immediate or sooner payment, agree to accept a dividend less than the whole amount of their claims, to be distributed pro rata in discharge and satisfaction of the whole. Considered in the light of this definition, the agreement herein set out is not, technically, a composition agreement, for the reason that it is not one for the payment by the debtor of any sum or thing, and for the further reason that it does not purport to be and was not intended as a release of the debtor. It does not follow, however, from these reasons, that the agreement was inoperative or void. The defendant Van Dervort, as a contractor, was indebted to his creditors on account of materials furnished and labor performed in a sum in excess of \$10,000. To the extent of \$6,312, they had or were entitled to liens upon the buildings constructed. To the extent of this last sum, the property of defendant Samuels was liable; but, as there was no personal liability against him, he was not at liberty to pay, without the consent of all the parties, the amounts claimed upon these liens. Had he done so, it would have been a mere voluntary payment without authority on his part, and would at least have devolved upon him the burden of proving, as against the contractor and lienholders, the validity of the demands and regularity of the liens. *Covell v. Washburn*, 91 Cal. 560, 27 Pac. 859. To collect these several amounts through the instrumentality of suits to foreclose the several liens would take much time and involve large expense, all of which would come out of the fund in the hands of Samuels. The counsel fees, judging from that allowed to plaintiff herein, would have approximated \$1,000. The

creditors and their debtor, combined, had the power to release Samuels from their claim upon his property, or to agree upon any mode or time of payment or amount to be paid they saw fit, subject to his approval, without suit. The law could only enforce the liens upon the property of Samuels by a foreclosure. All the parties in interest were at liberty to obtain the sum for which the property was liable by any other lawful method by which they could contract.

It is said that Samuels occupied the position of a garnishee towards the creditors, by reason of his indebtedness to the contractor. Grant the position, and what follows? Can it be doubted that the creditor and debtor may release the garnishee, if they see fit, or provide by agreement when, where, and to whom he shall pay the debt covered by the process of garnishment? We think not. It is true, as claimed by respondent, that Samuels did not seek any compromise or composition of the claims for which his property was liable. So far as appears, he was at all times willing to pay all that he owed to the contractor, in the mode provided by law. It was not for his benefit that the agreement was made, but for that of the creditors of the contractor. It was in part for the benefit of the plaintiff here, who signed the agreement with the contractor, and all of the creditors, except a single firm, which afterwards accepted its terms. All parties have abided by the contract except the plaintiff, who now seeks to be rewarded as a result of his violation of it. There was sufficient consideration for the agreement. In such cases the contract of each creditor is a sufficient consideration for the contract of all the others. When they mutually agreed to forego their right to pursue the usual method of enforcing their demands in consideration of being paid at a given time, the engagement of each was a sufficient consideration for the engagement of the others to do the same. In this respect, it is, in principle, not distinguishable from a composition agreement. *Pierson v. McCahill*, 21 Cal. 129. Again, the acceptance of the agreement by Samuels, and payment by him, was a sufficient consideration for the agreement.

It is claimed that the contract is incomplete by reason of the blanks left therein relative to the pro rata to be paid the lien claimants. The agreement was in substance, that "we, the undersigned, hereby agree that if Samuels will on or before July 1, 1891, pay the money still due, etc., as follows: First, all the claims for labor, amounting to \$310.50 in full, the remainder among all the other lien claimants, in proportion which each bears to the whole amount of such other lien claims filed," etc.,—"we will assign our claims to him, and will, if any one or more claimants shall refuse to accept his proportion, prove our claims valid or return the money paid to us. Van Dervort agrees to the above, and to

waive his right to liens for money so paid." This is signed by the creditors, with the amount of their liens affixed. The rule enunciated by Parsons in his work on Contracts, (volume 2, p. 693,) in reference to blanks in agreements, is as follows: "Thus, if a blank be left in an instrument, or a word or phrase of importance omitted by mistake, the omission may be supplied, if the instrument contains the means of supplying it with certainty." In the present case, the contract affords the means for supplying the blanks in the agreement. It was the money due from Samuels that was to be divided, and it was to the demands due the creditors of Van Dervort that it was to be applied ratably. Those demands were all of record, and the proofs introduced without objection showed that the parties had a complete list of them at the meeting when the agreement was decided upon. The amount due from Samuels was also well known at the meeting, except that Van Dervort thought there was something in addition for extra work. The contract afforded a criterion by which to ascertain the amount due, and its disposition. Had the agreement been simply to divide the sum due from Samuels to Van Dervort on account of, etc., among the lienholders on the property, without other or more accurate specification, it would have been ascertainable and valid. A. agrees to sell to B. all the corn on ship C., at a specified price per bushel. The quantity is not known, but is ascertainable. "As to the parties or the subject-matter of a contract, extrinsic evidence may and must be received and used to make them certain, if necessary for that purpose." 2 Pars. Cont. p. 680. The essential thing, under the contract, to be done, was to pay in full certain liens for labor, and then to distribute the residue of the money "among all the other lien claimants." It was to be thus distributed, irrespective of the pro rata, and irrespective of the validity of the liens. In other words, the contracting parties assumed that all the lien claimants had valid liens. Else, why was Samuels authorized to distribute the balance of the fund "among all the other lien claimants?"

Respondent contends, further, that the agreement was to be obligatory only upon those who accepted the pro rata, and that, as to any of those signing and refusing to accept, special provision was made. We do not so construe the contract. Those who signed the agreement were bound by it, but it appeared that one or more refused to execute it. Hence the necessity for providing a method by which they should be prevented from obtaining a larger share of the fund than those who became bound by the contract. To suppose that the parties who signed the contract did so with the view that they were not to be bound by it if Samuels consented to pay them the money under it is to assume that they lack intelligence, or that they were seeking to practice a fraud

upon Samuels, neither of which we are willing to assume. The court below found that defendant Samuels had not paid any part of the sum in his hands, except the amount paid on the labor liens, the payment of which was admitted. This finding is in the face of the evidence, which is to the effect that Samuels accepted the agreement, and promised to pay it; that Bibb advanced the money on the agreement, and paid it out to the lienholders; and that Samuels repaid it to him. There is no conflict in the evidence on this point, and the finding is in direct conflict with the evidence. The evidence shows, beyond controversy, (1) that plaintiff signed the agreement; (2) that prior to July 1, 1891, defendant, pursuant to said agreement, paid the entire funds in his hands owing to the contractor, Van Dervort, except the sum of \$720, which was the proportion of said fund to which plaintiff was entitled; (3) that said amount was tendered to plaintiff prior to July 1, 1891, and was deposited in the court below for plaintiff by the defendant, upon filing by him of his answer in this cause. All these things did not amount to an accord between the parties, but did constitute a valid and binding agreement, which authorized defendant to disburse the fund in hand, as has been done as to all the other claimants; and to permit the plaintiff to repudiate such executed agreement as to all the other parties, and recover from defendant the entire sum due him from Van Dervort, would be to permit him to take advantage of his own wrong, and equivalent to offering a premium for wrongdoing. The judgment and order appealed from should be reversed, and the court below directed to enter a judgment in favor of plaintiff for \$720, the amount in court, but without costs, and with costs of the court below in favor of defendant, the appellant herein, and that appellant have and recover his costs on this appeal.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the court below directed to enter a judgment in favor of plaintiff for \$720, the amount in court, but without costs, and with costs of the court below in favor of defendant, the appellant herein, and that appellant have and recover his costs on this appeal.

RITCHEY v. McMICHAEL. (No. 19,231.)
(Supreme Court of California. Dec. 26, 1893.)
DEBIT — WHEN ACTION LIES — PRINCIPAL AND
AGENT — RIGHTS AND LIABILITIES INTER SESE.

1. Plaintiff authorized defendant to buy for him land from one B. for \$2,750, agreeing to pay one-third cash, one-third in six months, and the balance in a year. Thereafter defendant represented that B. would not sell except for one-half cash and the balance in a year; that

he had taken a deed to himself on those terms, and would convey to plaintiff on the terms agreed on between them. He then forwarded a contract of sale to plaintiff, and drew on him for \$918.08. Plaintiff executed the contract, and paid the draft. Defendant's representation as to his purchase of the land from B. was false, B. having agreed to sell it to another for \$1,375. Held, that plaintiff could recover the amount paid on the draft.

2. In such case the relation of principal and agent existed between plaintiff and defendant, and the latter was accountable for the money paid him by plaintiff to carry out the purposes of the agency.

Department 1. Appeal from superior court of Los Angeles county; William P. Wade, Judge.

Action by J. T. Ritchey against J. G. McMichael for moneys of plaintiff fraudulently converted by defendant. From a judgment for plaintiff, defendant appeals. Affirmed.

Anderson & Anderson, for appellant. Lacey & Trask and D. K. Trask, for respondent.

HARRISON, J. In April, 1888, one Buell was the owner of an interest in certain lands in Los Angeles county, and the defendant was the owner of a similar interest therein. The defendant was a resident of California, but was at that time in Louisville, Ky., where he had formerly resided, and where the plaintiff was then residing. He had known the plaintiff, and had been on friendly terms with him, for many years, and while there represented to him and one Curtice that Buell would sell his interest in the lands for \$2,750, and urged them to purchase this interest, representing that it was of much greater value, and offered to make the purchase for them at the lowest price for which he could induce Buell to sell it. Neither the plaintiff nor Curtice had ever seen the lands, nor had they any knowledge of their value, or of the price at which Buell would sell his interest, but, relying upon the representations of the defendant, authorized him to make the purchase for them from Buell on terms of one-third cash, one-third in 6 months, and one-third in 12 months, thereafter. The defendant returned to California, and on the 9th of May wrote to the plaintiff to the effect that he had effected the purchase, but that Buell would not accept the terms proposed, but insisted on having half cash, and half in 12 months; and therefore he had had the contract from Buell made directly to himself upon these terms, but that the plaintiff and Curtice might have the benefit of the terms upon which they had agreed to make the purchase. Inclosed with the letter he sent a contract in duplicate to be executed by the plaintiff and Curtice, one of which they were to retain, and the other to return to him, by which he agreed to sell, and they to purchase from him, these lands for \$2,750, payable one-third cash, one-third in 6 months, and one-third in 12 months, the deferred payments to be evidenced by their promissory notes; and at the same

time made a draft upon them for \$916.66. The draft was paid by them upon its presentation, but neither the contract nor the notes were executed or returned to him. When the second payment was about to mature, the plaintiff telegraphed the defendant to make his draft for both deferred payments with a deed attached, and they would be paid. To this request the defendant paid no attention, and does not appear to have made any subsequent attempt to collect the money. Subsequent investigation having satisfied the plaintiff that the defendant had defrauded them in the transaction, he brought this action to recover the amount of money paid on the draft, setting forth in his complaint the facts constituting the fraud, and that Curtice had assigned to him his interest in the money. The court finds that the representations of the defendant to the plaintiff in his letter of May 9th were false and untrue; that at the time he was in Kentucky, urging the purchase of Buell's interest for \$2,750, Buell had authorized him to sell that interest for \$1,650; that Buell did not refuse to sell the property upon the terms proposed by the plaintiff and Curtice, and that the defendant had never made such offer on their behalf to Buell; that defendant did not give Buell half of the purchase price in cash, and had not taken the property in his own name, or given Buell any cash; that, on the contrary, Buell did agree to sell his interest to a Mrs. Canine for \$1,375, in terms of one-third cash, one-third in 6 months, and one-third in 12 months. The agreement for this sale was dated May 9, 1888, but the cash payment thereon—\$458.33—was not made until July 24th. The defendant offered in evidence a deed from Mrs. Canine for this interest, purporting to have been made by her on May 9th, but which was acknowledged on the 15th of September, in the state of Kentucky. It does not appear that Mrs. Canine ever became the owner of the land, or that Buell ever made any conveyance of the land to any one. The court found that the defendant procured the \$916.66 to be paid to him upon his draft by means of false and fraudulent representations, and that he had been guilty of fraud and deceit in the transaction, and rendered judgment in favor of the plaintiff.

The rule is so familiar as to be trite that the obligation of an agent to his principal demands of him the strictest integrity and the most faithful service. He is not permitted to acquire any adverse interest in the subject-matter of the agency, and is accountable to his principal for any gains that he may have made in violation of those obligations. So long as he retains his position of agent he is accountable to his principal for all property which he may have received from him with which to carry out the purpose of his agency, and for the faithful disposition of his property in accordance with the principal's directions. The defendant herein must be regarded as the agent of the

plaintiff in all his transactions respecting the purchase of the lands in question. He had undertaken to effect the transfer of Buell's interest in the lands to the plaintiff and Curtice as their agent, and while that relation existed between them he was not at liberty to acquire any interest in the lands adverse to them. Even if it had been established at the trial that he had made a contract in his own name for the purchase from Buell of this interest, his relation to the plaintiff and Curtice would have made him a trustee of that interest for their benefit. In the first letter which he wrote to the plaintiff upon his return to California, in which he sent the notes and contracts for execution, he says: "Buell would not take one-third cash, one-third six months, one-third twelve months, but insisted upon one-half cash; so I had him to contract to me one-half cash, one-half twelve months, and make the terms to suit you all. The difference is small, and I gave it to him so as to fix you all up." And again: "I have taken the property in my own name, and consented to your terms, and I pay Buell one-half cash, one-half twelve months." And on the next day he telegraphed from California to the plaintiff: "Papers gone forward, and draft for one-third of the amount." The scheme which the defendant fraudulently devised for the transfer to Mrs. Canine of the right to purchase Buell's interest, and her assignment of this right to himself, did not divest him of his obligation to fidelity towards the plaintiff, or give to him any rights in the property which he could assert as against the plaintiff and Curtice. The money which the plaintiff and Curtice paid upon the defendant's draft was not for the purpose of discharging any obligation on their part to the defendant, or in pursuance of any transaction between them and the defendant as separate contracting parties, but it was merely placing that amount of money in his hands as their agent for the purpose of carrying out the object of the agency; and as soon as they learned that their agent had not applied this money as they had directed, but had proved faithless to his trust, they had the right to demand its return. Whether the money was paid upon the draft of the defendant, or had been personally placed in his hands, or forwarded to him, is immaterial. In either case it was at all times the money of the plaintiff and Curtice, given to the defendant for a special purpose.

The proposition of the appellant that the plaintiff cannot recover the amount of the draft without tendering to the defendant an assignment or reconveyance of any interest he may have in the lands, cannot be maintained. The relation of vendor and vendee never existed between them, nor was there ever any contract between them which required a rescission. The defendant could not, as we have seen, so long as he held the relation of agent to the plaintiff for the pur-

chase of these lands from Buell, acquire any interest therein which he could hold as against his principals, or of which he could become the vendor. Equally untenable is the proposition that, inasmuch as the defendant was himself the owner of an interest in the lands equal to that of Buell, the contract between himself and the plaintiff is valid, and that the plaintiff cannot recover the money sued for until the defendant has made default upon this contract. The plaintiff never had any negotiations with the defendant for the purchase from him of his interest in the lands, and the defendant could not become the vendor of this interest without the assent of the plaintiff to purchase it. Even if he had intended to assume the relation of a vendor of his own interest, the agreement sent by him to the plaintiff can only be regarded as a proposition or offer from him, and would not be binding upon the plaintiff until his acceptance; and it is not claimed that the plaintiff ever executed the agreement, or manifested to the defendant any acceptance of the proposition. The money which he paid upon the defendant's draft was not upon any agreement to purchase the defendant's interest, but was for the purpose of making a payment for the Buell interest. If the defendant made a fraudulent use of this money, the plaintiff could at any time at his discretion repudiate his action and sue for the money. The judgment and order are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

LOS ANGELES COUNTY v. LANKERSHIM.
(No. 19,235.)¹

(Supreme Court of California. Dec. 26, 1893.)

COUNTY TREASURER—PAYMENT OF FRAUDULENT WARRANT.

1. A county treasurer is required (County Government Act, § 70) to disburse only on auditor's warrants issued on orders of the board of supervisors or superior court, "or as otherwise provided by law" to pay (section 73) warrants presented, but not until he has received from the clerk of the supervisors the certified list of orders made, and (section 80) to settle his accounts each month, and deposit all warrants redeemed, taking the auditor's receipt therefor. Pol. Code, § 1543, bases school-fund warrants on requisitions of the superintendent on orders of the school trustees or board of education, and does not provide for furnishing the treasurer with any list or notice of them. In an action on a treasurer's bond for the amount paid on a school warrant, brought three years after the payment, defendant produced the auditor's receipt for said warrant. The court found that the treasurer paid the sum to some person unknown on what purported to be an auditor's warrant, payable to D., of whose existence no evidence could be given, nor could the warrant be found; that no requisition therefor was made by the superintendent on the auditor, nor order made by any board of trustees or of education, and said purported warrant was fraudulent. *Held* insufficient to sustain judgment on the bond, since, in view of the

presumption in favor of official acts, the treasurer should have been clearly charged with notice of the fraud.

2. A finding that the payments were made by the treasurer wrongfully, and without right or authority, and in violation of his duty, is a mere conclusion of law, or, if of fact, then too general.

3. A surety on an official bond is not discharged by the obligee's failure to present its claim to the deceased officer's executor in due time.

4. Additional findings of fact cannot be made after entry of final judgment.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by the county of Los Angeles against James B. Lankershim on the official bond of J. W. Broaded, deceased. Judgment for plaintiff. Defendant appeals. Reversed.

Graves, O'Melveny & Shankland and S. M. White, for appellant. H. C. Dillon, Dist. Atty., and Houghton, Silent & Campbell, for respondent.

VANCLIEF, C. The defendant was one of the sureties on the official bond of J. W. Broaded, treasurer of plaintiff, for the term of two years commencing on the first Monday of January, 1887; and this action is upon that bond, to recover \$7,910.80 for alleged delinquencies of the treasurer during that term. Broaded died November 29, 1889, and this action was commenced May 5, 1890. The cause was tried by the court, and judgment rendered for plaintiff for the sum of \$7,371.60. The defendant has appealed from the judgment, and also from an order denying his motion for a new trial. The judgment includes the sum of \$3,840 alleged to have been paid out of the school fund by the treasurer in June, 1888, to some person unknown to plaintiff, upon an auditor's warrant not based upon any order of the board of supervisors, nor upon any order of the superior court, nor upon any authority otherwise provided by law, with interest thereon from June 30, 1888, until the date of the judgment. The residue of the judgment is conceded to be right, so that the only points made by appellant relate to the question, whether or not the treasurer justifiably paid out of the school fund said sum of \$3,840.

As to this payment from the school fund, the court originally found as follows: "(5) That in the month of June, 1888, said treasurer also paid out of the general school fund of said county the sum of \$3,840 to some person unknown; that said payment was made upon what purported to be a county auditor's warrant made payable to one C. H. Delevan, of whose existence no evidence was given, and which warrant cannot be found; that no requisition of said last-named money was ever made by the county superintendent of public schools upon the county auditor of said county; nor was any order therefor made by any board of trustees or by any board of education in or of said

¹ Rehearing denied. See 35 Pac. 556.

county, and said purported warrant was fraudulent, and wholly without right, and was not based upon any claim against the school fund of said county." The original findings, including the above, were filed July 23, 1892, and the judgment, signed by the judge, was filed and docketed on the same day, and entered on the next day,—July 29th. On August 3, 1892, the judge filed the following additional finding: "The court makes the following additional finding herein, the facts having been established on the trial of this action, to wit: The paper referred to in finding 5, as said finding 5 appears in the findings already filed in this cause, and which it is therein stated purported to be a county auditor's warrant, was regular on its face, was executed by the auditor or deputy auditor of said county, and the amount named therein, and for which said warrant purported to be drawn, was \$3,840. W. H. Clark, Judge of said Court. [Indorsed] Filed Aug. 3, 1892." Counsel for appellant contend that upon finding 5, and the above additional finding, the judgment should have been for defendant, as to the sum of \$3,840 paid from the school fund. But respondent contends—First, that the additional finding is immaterial; and, second, that if it is material it cannot be deemed a finding in the case, because made after the entry of the judgment, and without notice to respondent.

Assuming, without deciding, that the additional finding is equivalent to a finding that the warrant was genuine and contained in proper form, substantially, all things which the law requires in a warrant on the school fund, I think the additional finding is material, unless the treasurer had actual or constructive notice that the warrant was not based upon a lawful requisition of the county superintendent of schools. The law has provided the treasurer with a check upon the auditor in all cases where warrants are drawn for claims allowed by the board of supervisors. Section 20 of the county government act requires the clerk of that board, immediately after the adjournment of each meeting, to prepare and certify duplicate lists "of all claims allowed and orders made for the payment of money," etc., to be countersigned by the chairman of the board, one of which lists must be delivered to and left with the treasurer, who is forbidden to pay any warrant for a claim allowed by the board unless the claim or order upon which the warrant is based appears on such list. Warrants upon the school fund, however, are not based upon orders of the board of supervisors, but upon requisitions of the superintendent of schools, which requisitions are based upon orders of the school trustees or board of education. Pol. Code, § 1543. But the treasurer is not furnished with any list of the requisitions of the school superintendent, nor of the orders of the school trustees

or board of education. Nor is there any provision of law requiring notice to the treasurer of the orders or requisitions upon which warrants upon the school fund are based. Section 70 of the county government act provides that the county treasurer must "disburse the county moneys only on county warrants issued by the county auditor, based on orders of the board of supervisors, or upon order of the superior court, or as otherwise provided by law." Section 73 of the same act provides: "When a warrant is presented for payment, if there is money in the treasury for that purpose, he must pay the same, and write on the face thereof 'Paid,' the date of payment, and sign his name thereto, provided, however, that the treasurer shall not receive, or pay, or indorse, any warrant until he shall have received from the clerk of the board of supervisors the certified list mentioned in subdivision four of section twenty of this act, and not then unless the claim or order upon which said warrant is based appears upon such list." It is obvious that the proviso in this section was intended to apply only to warrants based on orders of the board of supervisors, since the claim or requisition upon which a warrant on the school fund is based could not appear upon any list of claims allowed by the board of supervisors. Therefore, when this section is to be applied to warrants on the school fund, the proviso should be omitted. Thus read, the section absolutely commands the treasurer to pay a genuine auditor's warrant on the school fund, if there "is money in the treasury for that purpose." And this is perfectly consistent with subdivision 6 of section 70, above quoted, which restricts the disbursement of county moneys to the payment of warrants "based on orders of the board of supervisors, or upon order of a superior court, or as otherwise provided by law." Section 73, omitting the proviso, is a provision of law for the payment of warrants on the school fund, otherwise than on the condition that they are based on orders of the board of supervisors or superior courts; and fully answers the intention and purpose of the last clause of subdivision 6 of section 70, above italicized. It must have been intended by the legislature that a genuine auditor's warrant upon the school fund, in regular and legal form, should justify the treasurer in paying it, unless the treasurer has notice that it was not based upon a lawful demand, or has notice of facts sufficient to put an ordinarily prudent treasurer upon inquiry, which, if diligently prosecuted, would lead to a discovery of the illegality of the claim upon which the warrant was founded; otherwise, the legislature would have provided for him a check upon the auditor, and all others for whose delinquencies he is to be held responsible, of the same kind as that provided in cases of warrants based on claims allowed by the board

of supervisors, in which cases the treasurer may properly and without hardship be held severally liable with the auditor, if the warrant is not founded upon an apparently lawful order of the board. But suppose the order of the board of supervisors is only apparently lawful, but really fraudulent and illegal. Should either the auditor or treasurer be held liable, in case the warrant is drawn and paid? If not, why not? I think neither should be held liable, for the reason that neither had notice of the fraud or illegality, both being misled by the apparently regular and lawful order of the board.

Again, suppose the warrant on the school fund in this case had been based on an apparently valid requisition of the superintendent of schools, but that such requisition was not founded upon any order of the board of school trustees or board of education. Would either the auditor or treasurer be liable for the \$3,840 paid on the warrant? If either would be liable, why not extend the liability a step further back, and hold them accountable for any delinquency or fraud of school trustees or board of education, of which they had no notice? When a genuine warrant upon the school fund, in legal form, is presented for payment, to what extent must the treasurer review the action of the auditor, superintendent of schools, and board of school trustees, before he may safely pay it? If such genuine auditor's warrant does not justify the payment, I see no reason why the addition of a genuine requisition of the superintendent of schools, based upon no order of school trustees or board of education, should justify it, since the treasurer can no more be presumed to have notice of the want of a proper requisition of the superintendent upon the auditor than of the want of a proper order of the school trustees or board of education upon the superintendent. If the treasurer is to be made responsible for the delinquencies of the auditor, the superintendent of schools, and the school trustees, he should be supplied with lists of all requisitions of the superintendent upon the auditor, and of all orders of school trustees and boards of education upon the superintendent; and even then fraudulent claims might be allowed by school trustees or boards of education, upon which genuine requisitions, in due form, might be made by the superintendent upon the auditor.

While it has been often decided that treasurers and their sureties are responsible on their official bond for losses of public money by means of forgery, theft, and robbery, (Murfree, Off. Bonds, § 197,) no case has been cited by counsel, and I have found none, in which they have been held accountable for a loss resulting from payment of a genuine auditor's or comptroller's warrant in due form, without notice, actual or constructive, of any fraud or infirmity in the claim upon which such warrant was based; and it would seem that to hold a treasurer ac-

countable for the frauds, mistakes, or other delinquencies of the auditor, of which he has no notice, would be to hold that the so-called auditor's warrants for the payment of money from the treasury are delusive misnomers, since they warrant nothing. I am of opinion, however, that the additional finding, though material, cannot be deemed a valid finding in the case. After the entry of final judgment the court had no power to change the findings of fact in any material respect. The superior court has power to set aside judgments and findings upon various grounds, as provided in the Code of Civil Procedure; but there is no provision of law authorizing any change in the findings of fact after the entry of final judgment thereon, while the judgment is allowed to stand. The entry of final judgment terminates the jurisdiction of the court over the cause and the parties, except as otherwise expressly provided by law. Hence, it is wholly immaterial whether the additional finding in this case was made upon notice to plaintiff or not. The court had no more power to make it upon notice than without notice. Whether, and to what extent, findings may be changed by consent and agreement of the parties, is not here involved; but, however this may be, a change of findings thus made would be the act of the parties, and not of the court. The following cases bear more or less directly upon the question as to the power of the court to change findings: *Condee v. Barton*, 62 Cal. 1; *Bate v. Miller*, 63 Cal. 233; *Wunderlin v. Cadogan*, 75 Cal. 618, 17 Pac. 713; *Smith v. Taylor*, 82 Cal. 544, 23 Pac. 217; *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52. Yet I think the original findings, filed before the entry of judgment, insufficient to support the judgment for the sum paid out of the school fund on warrant No. 1,712, payable to Delevan. "There is always a presumption of law that officers perform their duty, and, whenever there is a charge made of official default, the burden of proof is upon the party making the allegation. If, in an action on an official bond, the breach laid is the failure of the officer to discharge the duties of his office, by refusing or neglecting to account for and pay over, as required by law, money which came into his hands, it is incumbent upon the plaintiff to prove what money did come to his hands, what amount he has not truly accounted for, and in what respects he has failed to do his duty." Murfree, Off. Bonds, § 593. And such presumption in favor of the officer inures to the benefit of his sureties. Id. § 596. In the face of this presumption of law, the original finding, No. 5, utterly fails to show that the treasurer failed to perform his duty in any respect, unless he was responsible for the delinquency or fraud of the auditor in drawing the warrant without a proper requisition therefor from the superintendent of schools, of which fraud or delinquency he had no notice. The finding that the "warrant was fraudulent, and wholly

without right," is not a finding that the treasurer was guilty of any fraud or wrong; and, from the finding that "said payment was made upon what purported to be a county auditor's warrant made payable to one C. H. Delevan, of whose existence no evidence was given, and which warrant cannot be found," the presumption must be, in the absence of any finding to the contrary, that the warrant was genuine, and complied with the law in form and substance; in other words, that it was what it "purported" to be. Nothing against the treasurer can be inferred from the fact that the warrant could not be found at the time of the trial. The trial was three years after the warrant had been paid, and presumptively deposited with the auditor, as required by section 80 of the county government act. That section requires the treasurer, on the first Monday in each month, to settle his accounts relating to the collection and disbursement of public revenue, and at such settlements to deposit all warrants redeemed by him, and take the auditor's receipt therefor. Such a receipt from the auditor of all county warrants paid in the month of June, 1888, amounting to \$188,162.74, including the sum of \$3,840, for which the warrant in question was drawn, was offered in evidence by the defendant. But, even if this receipt had not been produced, the presumption would be that the warrant, (which "cannot be found,") if not in the possession of the auditor, who was the legal custodian thereof, must have been lost, destroyed, or otherwise disposed of by him.

The sixth finding, "that all of said payments were made by said treasurer wrongfully, and without right or authority, and in violation of his duty as such treasurer," consists of mere conclusions of law; and, even if it could be regarded as a statement of facts, it is too general and indefinite.

The finding "that the said treasurer did not, during his said term of office, keep any books as required by subdivision 3 of section 70 of the county government act," does not state any particular in which the treasurer's books were deficient, and consequently does not show that any deficiency or irregularity in his bookkeeping contributed anything to the cause or causes of the loss of the money paid on the warrant to Delevan.

The liability of the defendant on the bond of Broaded was not discharged by the failure of the plaintiff to present its claims arising on that bond to the executor of the estate of Broaded, for allowance, within the period of 10 months after publication of notice to creditors, and in so ruling the court did not err.

I think that so much of the judgment as appears to be based upon the payment by the treasurer, Broaded, of the auditor's warrant on the school fund for \$3,840, payable to C. H. Delevan, should be reversed, and a new trial granted on the issue as to whether the defendant is accountable for the money paid on that warrant, but, as to the residue

of the judgment, not based upon the payment of that warrant, the order and judgment should be affirmed; costs of the appeal to be taxed to the respondent.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, so much of the judgment as appears to be based upon the payment by the treasurer, Broaded, of the auditor's warrant on the school fund for \$3,840, payable to C. H. Delevan, is reversed, and a new trial is granted on the issue as to whether the defendant is accountable for the money paid on that warrant. As to the residue of the judgment, not based upon the payment of that warrant, the order and judgment appealed from are affirmed; costs of the appeal to be taxed to the respondent.

STEWART et al. v. SUPERIOR COURT. (No. 15,482.)¹

(Supreme Court of California. Dec. 27, 1893.)

INJUNCTION—APPEAL—STAY OF PROCEEDINGS— CONTEMPT.

In an action for injunction, commanding defendant not to interfere with plaintiff in connecting with defendant's water conduit, which right plaintiff claimed under a contract, there was judgment for plaintiff, but defendant appealed, and gave bond. Plaintiff had had no connection with the conduit, except pending a temporary injunction, which had been dissolved. Held, that the appeal stayed the operation of the judgment, so that defendant was not in contempt for preventing the connection.

Department 1.

Application of Julia V. Stewart and W. B. Prentice for writ of review to annul an order of the superior court of San Diego county. Order annulled.

Gibson & Titus and V. E. Shaw, for petitioner. E. W. Britt, for respondent.

PATERSON, J. This is an application for a writ of review to annul an order of the court below, adjudging petitioners guilty of contempt for the disobedience of its judgment. It appears that the petitioners, Julia V. Stewart and W. B. Prentice, entered into a contract with one Hill, whereby they agreed to deliver to the latter, or his executors, representatives, and assigns, at a certain point on the line of their pipe, water not to exceed 10 miners' inches, in perpetual flow, under a 4-inch pressure, for a term of 20 years. Thereafter, Hill sold and assigned all his rights under the contract to one J. W. Sefton, who constructed a pipe line extending from the point mentioned in the contract to his ranch, and thereupon demanded of Stewart and Prentice that he be allowed to make a direct connection between his pipe and the pipe line of Stewart and Prentice, and to divert from the flume two inches of water. This demand was re-

¹ For modification of opinion, see 35 Pac. 351.

fused by Stewart and Prentice, who claimed that he had no right to make such connection, whereupon Sefton instituted an action against them, in which, upon proper allegations made, he prayed that an injunction might issue, commanding the defendants not to interfere with the plaintiff in effecting a connection of his pipe with the conduit of the defendants, and for the sum of \$1,000 damages. Thereupon, the court issued a temporary injunction in accordance with the prayer of the complaint, which was afterwards, on motion of the defendants, dissolved, and the plaintiff was ordered to detach his pipe from the pipe line of the defendants, the connection having been made during the pendency of the temporary injunction. A trial was had upon the merits, and judgment was entered in favor of the plaintiff, awarding to him one dollar damages, and the right to connect his line of pipe as prayed for. It was further decreed that the defendants desist and refrain from interfering with the plaintiff in making the connection of his pipe with the pipe line of defendants, and thereafter, and for the period of 25 years, in any manner interfering with or preventing the flow of water from defendants' pipe, to the extent of two miner's inches. Immediately after the entry of the judgment, the defendants perfected an appeal to this court by giving and filing a notice of appeal, and executing and filing an undertaking in the sum of \$300. Thereafter, the plaintiff, notwithstanding the fact that notice of appeal had been filed and served, and an undertaking given, entered upon the premises of the defendants, cut into their water pipe, and connected his own pipe therewith. The petitioners herein, acting under the advice of counsel that the perfecting of the appeal stayed all proceedings, cut the connection, and restored the pipe and line to the condition in which it had existed prior to the time the connection was made. Again the plaintiff in the action cut the pipe of the defendants, and connected his pipe therewith, and proceeded to take water therefrom, whereupon the petitioners herein again broke the connection, and restored the water way to its previous condition. Thereupon, they were cited to show cause before the superior court why they should not be punished for the acts set forth; and after a hearing the order adjudging them guilty of contempt, above referred to, was made. A stay of proceedings was granted for a period of 30 days to enable the petitioners to make this application.

We think that the appeal in *Sefton v. Prentice et al.* operated as a supersedeas against the judgment, in so far as it authorized the plaintiff therein to connect his pipe with the pipe of the defendants. The decree was, in effect, a mandatory injunction, although prohibitory in form. Neither Hill nor Sefton had ever connected his pipe with

the pipe line of the defendants prior to the commencement of the action; and the main question in the case was whether, under the contract and the acts alleged to have been done by the plaintiff, he was entitled to make such connection. It is true that such connection had been made under the preliminary injunction, but when that injunction was dissolved the defendants' property was restored to the condition in which it had theretofore existed. The purpose of an injunction is to hold the subject of the litigation in statu quo until a final determination. It is doubtless true, as a general rule, that an injunction is not dissolved or suspended by an appeal; but there are exceptions to the general rule, and these exceptions are where the judgment commands or permits some act to be done. In such cases a stay of proceedings can be had. *Hicks v. Michael*, 15 Cal. 107. An appeal would in many cases be useless, if the execution of a decree which authorizes or permits the plaintiff to use the property of the defendant cannot be stayed during the pendency of the appeal. "During the pendency of the appeal, the court below could do no act which did not look to the holding of the subject of the litigation just as it existed when the decree was rendered." *Dewey v. Superior Court*, 81 Cal. 68, 22 Pac. 333. In *Bullion, etc., Min. Co. v. Eureka Hill Min. Co.*, (Utah,) 13 Pac. 174, the court said: "The taking of the appeal and the giving of the supersedeas bond did not make void, or nullify or suspend, the judgment, nor the injunction contained therein, but all affirmative action looking to the execution of the terms of the decree was suspended. *Slaughterhouse Case*, 10 Wall. 273; *Swift v. Shepard*, 64 Cal. 423, 1 Pac. 493. But the lower court could nevertheless take such action as was necessary to hold the property intact, and enforce a continuance of the statu quo. However, the district court, during the pendency of the appeal, could do no act which did not look to the holding of the subject of litigation just as it existed when the decree was rendered. *Hovey v. McDonald*, 109 U. S. 161, 3 Sup. Ct. 138. In the exercise of its authority to preserve the property, the district court was empowered to punish as for contempt the violation of any provision of the injunction, where the parties were not allowing the property to remain as it was at the date of the decree. * * * Taking all the evidence together, we do not see that the appellants, at the time they are charged with having violated the injunction, occupied any other or different place on the lode in question than they did when the judgments containing the injunction were rendered, or that they were in manner hindering or obstructing the respondent company from working its lode. This being so, an injunction could not be used to eject them, and it was no violation of the injunction for the appellants to remain as they were when

the injunction was granted." The office of a writ of injunction, as its name imports, is peculiarly a preventive, and not a remedial, one. It is to restrain the wrongdoer, not to punish him after the wrong has been done, or to compel him to undo it. An injunction, though restrictive in form, if it have the effect to compel the performance of a substantive act, is mandatory, and necessarily contemplates a change in the relative positions or rights of the parties from those existing at the time the injunction is granted or the decree is entered. To hold that an appeal from a judgment granting such an injunction does not stay the operation of the judgment would often render a reversal of the judgment entirely ineffectual,—"a barren victory." *Dewey v. Superior Court*, supra; *Mining Co. v. Fremont*, 7 Cal. 182. We think that the court below exceeded its jurisdiction, in adjudging the parties guilty of contempt.

The order of the court below is annulled.

We concur: DE HAVEN, J.; HARRISON, J.

SUTTON v. SYMONS et al. (No. 18,163.)
(Supreme Court of California. Dec. 28, 1893.)

APPEALABLE ORDERS—MOTION FOR NEW TRIAL—SUFFICIENCY OF NOTICE.

1. An appeal will not lie from an order refusing to vacate an order striking a statement on appeal from the files.

2. A notice of an intention to move for a new trial, that is not filed with the clerk until after the expiration of the time allowed, though served on the opposite party within such time, is insufficient, under Code Civil Proc. § 659.

Department 1. Appeal from superior court, Tuolumne county; Joseph H. Budd, Judge.

Action by Fred Sutton against William Symons and others. Judgment for plaintiff. From an order denying a motion for a new trial, and from an order refusing to vacate an order striking a statement on appeal from the files, defendants appeal. Affirmed as to order denying a new trial, and dismissed as to order refusing to vacate order.

Moses G. Cobb and J. B. Curtain, for appellants. F. W. Street, for respondent.

HARRISON, J. Judgment was rendered and entered in this action, in favor of the plaintiff, October 7, 1890, and the time for serving and filing a notice of intention to move for a new trial was extended by stipulation and by an order of the court until January 5, 1891. January 3, 1891, the defendants served upon the plaintiff a notice of their intention to move for a new trial, stating therein that it would be made upon a statement of the case, but the notice was not filed with the clerk until January 10, 1891. At the same time with serving this notice, the defendants served upon the plaintiff their proposed statement of the case, to which the

plaintiff afterwards proposed amendments. We have assumed, in accordance with the admission by counsel for both parties, that this statement was afterwards settled by the judge and filed with the clerk, but the record fails to show these facts. The plaintiff afterwards moved the court to strike this settled statement from the files, and on the 13th of September, 1891, this motion was granted. The motion for a new trial came on to be heard September 13, 1892, at which time the defendants asked the court to vacate its previous order striking the statement from the files, which was denied; and on the next day the court made an order denying their motion for a new trial, from which the defendants have appealed. They have also appealed from the order refusing to vacate the order striking the statement from the files. An appeal was also taken at the same time from the order striking out the statement, but this appeal was dismissed March 8, 1893, upon the ground that it had not been taken in time. 97 Cal. 475, 32 Pac. 588. The order refusing to vacate the order of September 13, 1891, is not an appealable order, and for that reason the appeal therefrom must be dismissed. The order striking the statement from the files was itself appealable, (*Calderwood v. Peyser*, 42 Cal. 110; *Clark v. Crane*, 57 Cal. 633;) and the rule is well settled that an appeal cannot be taken from an order refusing to vacate an order which is itself appealable, (*Harper v. Hildreth*, [Cal.] 33 Pac. 1108.) When the motion for a new trial came on to be heard, there was no statement before the court upon which it could entertain the motion, and for that reason its order must be affirmed. The court was also required to deny the motion upon the ground that the notice of intention therefor had not been filed with the clerk in time. Section 659, Code Civil Proc., requires the party who intends to move for a new trial to serve the notice of his intention upon the adverse party, and also to file it with the clerk within 10 days after notice of the decision, or such additional time as may be allowed by the court. Although the notice in the present case was served upon the plaintiff within due time, it was not filed until after the time allowed by the court had expired. The order is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

McCANN v. PENNIE. (No. 15,241.)
(Supreme Court of California. Dec. 28, 1893.)

TRANSITORY ACTIONS—BREACH OF CONTRACT—ACTION AGAINST ADMINISTRATOR—SUFFICIENCY OF COMPLAINT—PRESENTATION OF CLAIM—WRITTEN CONTRACT.

1. A cause of action for breach of an executory contract during the life and after the death of the promisor is transitory, and the action may be maintained against the administrator of the promisor without reference to where

the contract was made, or to the fact that it was to be performed in a foreign country.

2. A complaint in an action against an administrator on a claim against decedent's estate is not bad on general demurrer, where it alleges that the claim was properly presented and rejected, because it fails to allege that it was presented within the time limited in the notice to creditors.

3. A complaint in an action on contract need not allege that it was in writing, since such fact will be presumed if necessary to the validity of the contract.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by William F. McCann against James C. Pennie, as administrator of Thomas H. Blythe, deceased, for breach of contract. From a judgment sustaining defendant's demurrer to the complaint, plaintiff appeals. Reversed.

Mich. Mullany, Aylett R. Cotton, and Wm. Grant, for appellant. Naphtaly, Friedenrich & Ackerman and John A. Wright, for respondent.

HAYNES, C. Judgment was entered against the plaintiff upon demurrer to his complaint, and this appeal is from that judgment.

In May, 1882, Blythe claimed to be the owner and was in possession of a tract of land in Mexico containing about 1,800,000 acres, and at that date entered into a contract with the plaintiff by which the plaintiff and his family should go from San Francisco to Mexico, and live upon the land, and conduct and manage the business of breeding, raising, and selling hogs, cattle, horses, and mules thereon from that time until December 31, 1887; and as compensation for plaintiff's services he was to receive \$50 per month, 50 acres of said land to be conveyed to him at the expiration of the contract, a certain number of cows, with their increase, and a percentage of the profits resulting from the business; Blythe to furnish a designated number of hogs, cows, brood mares, etc., and to make the improvements necessary for conducting the business. Plaintiff entered upon the performance of the contract, and continued upon the land in charge of the business until August, 1887. Blythe resided in the city of San Francisco, and died in said city April 4, 1888, leaving a large estate in said city and county. On June 12, 1888, Philip A. Roach was appointed administrator of his estate by the superior court of said city and county, and qualified the same day.

After stating the terms of the contract very fully, and assigning several breaches of the same, and alleging the damages sustained therefrom, and other matters not necessary to be stated here, the complaint further alleged that the next day after the appointment and qualification of Roach as administrator, he informed him of his said contract, and the particulars of it, and re-

quested immediate and full performance of it on the part of the administrator; that the administrator recognized the validity of the contract, and from that time acted under and partially performed the same; that the court and judge in which the administration proceedings were conducted also recognized the validity and obligation of the contract as against the estate, and at various times from that date until August, 1887, ordered and appropriated sums of money out of said estate, aggregating over \$20,000, for the purpose of carrying out said contract on the part of the estate, which sums were expended by the administrator for that purpose; that said cause of action did not fully accrue until January 1, 1888; and that on the 19th of February, 1888, he presented to the administrator his claim, amounting to \$1,226,743, supported by his affidavit, and that his said claim was rejected on the 19th of March, 1888. The original complaint was filed March 20, 1888. Roach died after suit was commenced, and James C. Pennie became administrator of said estate, and was substituted in place of Roach. The demurrer was general and special.

1. It is contended in support of the demurrer that, in so far as the complaint sets up a cause of action accruing after the death of Blythe, the contract out of which it arose was to be executed in Mexico; that the administrator had no control over the lands and interests of his intestate in Mexico, and could not protect plaintiff from the wrongful acts of the Mexican citizen who dispossessed him; and that he had no authority to send funds or property into Mexico for the purpose of fulfilling the contract.

The special grounds of demurrer assigned do not reach these objections to the complaint, and as the objection only goes to a part of the cause of action, viz. that occurring after the death of the intestate, the demurrer cannot be sustained upon that ground. But the fact that the services to be performed under the contract were to be or were performed in a foreign country does not affect his right to maintain an action in the courts of this state against an administrator appointed here. It is not contended that the contract did not survive, nor are any authorities cited to sustain respondent's contention. In *Janin v. Browne*, 59 Cal., at page 44, it is said: "Where the contract of the deceased is of an executory nature, and the personal representative can fairly and sufficiently execute all the deceased could have done, he may do so, and enforce the contract, (Pars. Cont. 131;) e converso, the personal representative is bound to complete such a contract, and, if he does not, may be made to pay damages out of the assets, (*Siboni v. Kirkman*, 1 Mees. & W. 418.)"

In 1 Chitty on Contracts, (11th Amer. Ed.) 138, it is said: "It is a presumption of law that the parties to a contract bind not only

themselves, but their personal representatives. Executors, therefore, are held to be liable on all contracts of the testator which are broken in his lifetime, and, with the exception of contracts in which personal skill or taste is required, on all such contracts broken after his death; and such parties may likewise sue on a contract, although they are not named therein."

The cause of action is transitory in its nature, and might have been maintained against Blythe, had he lived, in any jurisdiction in which he might have been served with process; and hence his administrator is properly sued here without reference to where the contract was made, or was to be performed.

2. Respondent further contends that the complaint fails to state a cause of action, because it does not allege that plaintiff presented his claim to the administrator within the time limited in the notice to creditors; that it appears from the complaint that Roach qualified as administrator June 12, 1883, and that his claim was presented to the administrator February 29, 1888, and was rejected March 19, 1888.

The complaint does not show nor allege that notice to creditors was given. If the complaint had alleged that notice to creditors had been given, the complaint would be bad if it alleged a presentation at a date after the time limited in the notice had expired. But a claim may be presented before the notice is published, and such presentation is good. *Ricketson v. Richardson*, 19 Cal. 330; *Society v. Hayes*, 58 Cal. 306; *Field v. Field*, 77 N. Y. 294. In *Janin v. Browne*, 59 Cal., it was said at page 43: "It is not the publication of notice which is the prerequisite to the maintenance of an action on a claim, but the proper presentation of a claim and its rejection." I am not aware of any case holding that a complaint is bad, on general demurrer, where it is alleged that the claim was presented in due form, but contained no allegation touching publication of notice to creditors.

In *Wise v. Hogan*, 77 Cal. 184, 19 Pac. 278, the complaint alleged a presentation of the claim "within ten months next following and succeeding the first publication of notice to creditors." It was claimed in that case that the complaint stated no cause of action, inasmuch as the notice may have required the presentation of claims within four months; but the court held that such objection could not be raised by general demurrer, and said: "Although defectively stated, there is an allegation of the presentment of the claim;" and cited several cases in support of that proposition. The language of section 1500, Code Civil Proc., that "no holder of any claim against an estate shall maintain any action thereon unless the claim is first presented," etc., is analogous to the statute of frauds, which declares that no action shall be maintained on, etc., unless, etc.;

and the bar of the statute must be pleaded in defense, unless the complaint shows upon its face that the contract is void under the statute; and a similar rule prevails in regard to the statute of limitations.

The special demurrers (b) and (c) go to the same point, and are sufficiently covered by what has been said. Special demurrer (a) is that it does not appear that the contract between the plaintiff and Blythe was in writing. Even though the contract were void if not in writing, it is not necessary to allege that it was in writing. If necessary to its validity, it will be presumed that it was in writing. *Broder v. Conklin*, 77 Cal. 330, 19 Pac. 513, and cases there cited.

The judgment should be reversed, with directions to overrule the demurrer, with leave to the defendant to answer.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment be reversed, with directions to the court below to overrule the demurrer to the complaint, with leave to the defendant to answer.

NEVIN v. THOMPSON et al. (No. 19,318.)
(Supreme Court of California. Dec. 28, 1893.)

PLEADING—COMPLAINT—SUFFICIENCY AS AGAINST
GENERAL DEMURRER—PARTIES.

1. A complaint averred that defendant T. gave to plaintiff a note for \$700; that, six months afterwards, defendants D. as principal, and S. and C. as sureties, gave T. a \$3,000 bond, which was set out, conditioned that whereas T. and T. J. C. (who was not made a party) "are now indebted to parties hereinafter named in the sums set opposite each name, and that the purpose of this obligation is to relieve the said T. from any and all liability on said indebtedness, as follows, and we hereby agree to assume and pay the same, to wit, two promissory notes of \$700 each, and the interest thereon: * * * Now, if the said T. J. C., or any of the parties save and except the said T.," shall pay such sums, the bond shall be void, etc.; that T. was then indebted to plaintiff on two notes, one of which is the one sued on; and that the only indebtedness from T. to plaintiff was that evidenced by such notes. Held, that such complaint was not subject to a general demurrer, because the bond was to relieve T. from liability on a joint indebtedness of T. and T. J. C., while the debt sued on was T.'s only.

2. Nor was such complaint demurrable because T. J. C. was not a party, as he was not a necessary party.

3. Such complaint was not defective for uncertainty as to whether the suit was on the note or on the bond.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Nathan Nevin against Frank C. Thompson, T. J. Daley, A. R. Schulenberg, and H. T. Christian on a promissory note executed by Thompson, and on a bond whereby the other defendants assumed and agreed to pay such note; and also to reform

such bond. From a judgment for plaintiff, defendants appeal. Affirmed.

J. L. Copeland and Gibson & Titus, for appellants. J. Z. Tucker, for respondent.

TEMPLE, C. This appeal is upon the judgment roll. The complaint shows that defendant Thompson, in June, 1890, executed and delivered to plaintiff a promissory note for the sum of \$700, which note plaintiff still owns and holds, and which has not been paid; that, on the 11th day of December following, the defendants Daley, Schulenberg, and Christian executed and delivered to defendant Thompson an instrument in writing, which is set out in the complaint. This instrument, it was averred, as written, did not truly express the intention of the parties to it, and the plaintiff asked to have it reformed. This was done, and no point is made here as to that procedure. As it is alleged the parties meant to have it read, and as it is made to read by the judgment and decree of the court, it is a penal bond executed by Daley as principal, and Schulenberg and Christian as sureties, who are held and firmly bound to Thompson in the sum of \$3,000, jointly and severally; and is conditioned "that whereas the said Frank C. Thompson and one Thomas J. Cambron are now indebted to the parties hereinafter named in the sums set opposite each name, and that the purpose of this obligation is to relieve the said Frank C. Thompson from any and all liability on said indebtedness, as follows, and we hereby agree to assume and pay the same, to wit, two promissory notes of \$700 each, and the interest thereon: * * * Now, then, if the said Cambron, or any of the parties save and except the said Thompson, shall well and truly pay the said amounts, then this obligation is to be null and void, and otherwise to remain in full force and effect." It is alleged that Thompson was then indebted to plaintiff upon two notes, one of which is the note set out in the complaint, and that the only indebtedness from Thompson to plaintiff was that evidenced by the two notes. It is then averred that these notes are wrongly described in the bond, and the court is asked to reform the instrument so as to correctly describe them.

The complaint was demurred to generally for insufficiency of the statement of facts; for uncertainty as to whether the suit is on the note or bond; for nonjoinder of Cambron as a party defendant; and for misjoinder, in that Christian is not a proper party defendant. The point is made that the bond is to relieve Thompson from liability upon a joint indebtedness of Thompson and one Cambron, while the indebtedness upon which suit is brought is an indebtedness of Thompson alone. Therefore, as Daley, Schulenberg, and Christian have only undertaken to pay a joint indebtedness of Thompson and Cam-

bron, it does not appear that they have undertaken to pay the debt averred. This point is certainly very plausible, but I think must be overruled. The complaint is undoubtedly very defective, but the objection is raised only on general demurrer. That does not reach a case where the facts are insufficiently stated, if it can be seen that the facts inartificially stated would, if properly stated, have been sufficient. The complaint does substantially aver that the indebtedness sued upon is the same as that described in the bond, and, the bond being a part of the complaint, a correct description is there found, and, as against a general demurrer, this allegation, which amounts to a statement that the debt described and sued upon is the debt assumed by the appellant, is enough. Nor is the other description of the indebtedness, as an indebtedness of Thompson upon a promissory note, which appears to have been signed by Thompson alone, absolutely inconsistent with the statement in the bond that the indebtedness is that of Thompson and Cambron. Both may be true. The indebtedness may have been a joint one, although secured by the note of Thompson alone. As to this general demurrer, if this could be so, we must assume it. The findings do, in fact, show that the note was signed by Thompson and indorsed by Cambron, and it is said that they were given for a horse purchased from plaintiff by Thompson and Cambron. This is, of course, only stated in lieu of a supposable case showing that the statements may both be true.

Although Cambron was also liable for the debt, it was not necessary to make him a defendant in this case, and the defendants are not injured by the fact that his liability is not more particularly averred.

There is no uncertainty as to whether the appellants are sued on the bond. They cannot doubt that it is sought to hold them liable upon it, and it is equally plain that they are not sued upon the note. As to them, at least, the averments as to the note are mere matters of inducement showing the consideration of their promise. No other points are raised here, and, if other objections might be suggested, they are not decided. The judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

NEVIN v. THOMPSON et al. (No. 19,188.) (Supreme Court of California. Dec. 28, 1893.)

Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Nathan Nevin against Frank C. Thompson, Thomas J. Daley, A. R. Schulenberg, and H. T. Christian on a promissory

note executed by Thompson, and on a bond whereby the other defendants assumed and agreed to pay such note; and also to reform such bond. From a judgment for plaintiff, defendants appeal. Affirmed.

J. L. Copeland and Gibson & Titus, for appellants. J. Z. Tucker, for respondent.

PER CURIAM. The judgment in this case is affirmed on the authority of *Nevin v. Thompson*, (No. 19,318; this day decided in this department,) 35 Pac. 160.

PEOPLE ex rel. CONNOLLY v. CITY OF CORONADO. (No. 19,239.)

(Supreme Court of California. Dec. 28, 1889.)

POWERS OF LEGISLATURE—AMENDING CHARTER OF CITY.

Const. art. 11, § 8, which provides that the charter of a city "may be amended at intervals of not less than two years by proposals therefor, submitted by the legislative authority of the city to the qualified electors thereof," refers only to amendments made by and at the instance of the officers and electors of the city.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Proceedings by the people, on the relation of James Connolly, against the city of Coronado, to have defendant city excluded from all corporate rights, privileges, and franchises, and to dissolve said corporation. Judgment for defendant. Plaintiff appeals. Affirmed.

Atty. Gen. Hart and C. H. Rippey, for appellant. J. S. Callen and Gibson & Titus, for respondent.

BELCHER, C. A general demurrer to the complaint in this action was sustained by the court below, and, the plaintiff declining to amend, judgment was entered in favor of the defendant, from which the plaintiff appeals. The facts stated in the complaint are, in substance, as follows: Under the provisions of section 8 of article 11 of the constitution of this state, a charter for the city of San Diego was framed by 15 freeholders, ratified by a vote of the electors, and on March 16, 1889, approved by the legislature. St. 1889, p. 643. On March 19, 1889, an act was passed by the legislature, entitled "An act to provide for changing the boundaries of cities and municipal corporations, and to exclude territory therefrom." Id. p. 356. On March 17, 1890, proceedings were commenced, under the provisions of this act, to change the boundaries of the city of San Diego as described in its said charter, and to exclude therefrom certain territory known as "Coronado Beach," the boundaries of which were specifically described. These proceedings were conducted and carried on in strict conformity to the provisions of the said act, and resulted, in October following, in the exclusion of the said territory, if the provisions of the act were applicable to the city of San Diego, and

the proceedings could be taken at that time. Afterwards, in November and December, 1890, the excluded territory was regularly organized as a municipal corporation of the sixth class, called the "City of Coronado," pursuant to the provisions of an act of the legislature approved March 13, 1883, and entitled "An act to provide for the organization, incorporation and government of municipal incorporations." St. 1883, p. 93. It is alleged that said pretended corporation, the city of Coronado, has "usurped and exercised, without any warrant, charter, or grant, the franchises of a municipal corporation of California, to wit, a city of the sixth class, and continues so to do, and has exercised, and still continues to exercise, franchises of a city of the sixth class, without any right so to do;" and the prayer is for judgment "that the defendant, the city of Coronado, be excluded from all corporate rights, privileges, and franchises," and that said corporation be dissolved.

It is admitted by counsel for appellant that the facts stated in the complaint show "the due incorporation and organization of the defendant city in all respects, if the stated proceedings had for the purpose of excluding territory from the city of San Diego were effectual for that purpose;" and it is said: "Our point of contention is that these segregation proceedings were wholly ineffectual to segregate the territory therein described from the city of San Diego; that the said territory remained, and still is, a part of the city of San Diego; and that therefore the incorporation and organization of the defendant city within the territorial limits of San Diego was and is void." The constitution, in section 8 of article 11, provides that any city containing a certain named population may frame a charter, commonly called a "freeholders' charter," for its own government, "consistent with and subject to the constitution and laws of this state," and that the charter so framed, when ratified by the qualified electors of the city and approved by the legislature, shall become the charter of such city and the organic law thereof; and also that "the charter so ratified may be amended at intervals of not less than two years, by proposals therefor, submitted by the legislative authority of the city to the qualified electors thereof, at a general or special election held at least sixty days after the publication of such proposals, and ratified by at least three-fifths of the qualified electors voting thereat, and approved by the legislature as herein provided for the approval of the charter." The constitution also, in section 6 of article 11, provides that "cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws." It is argued for appellant that the description of the boundaries of the city of San Diego, as found in its charter, constituted a

part of the charter, and that the change of its boundaries by excluding therefrom Coronado beach was in effect an amendment of the charter, which, under the constitutional provision above quoted, could not be made for at least two years after the charter became the organic law of the city. The argument is unsound. It rests on the assumption that the constitutional provision referred to inhibits the amendment or change of a freeholders' charter, in any way, at intervals of less than two years, when, as clearly appears, the provision relates only to amendments made by and at the instance of the officers and electors of the city. The constitution plainly declares that all charters of cities, framed or adopted by its authority, shall be subject to and controlled by general laws, and there is no limit of time as to when such laws may be passed and take effect. The act of March 19, 1889, providing for changing the boundaries of cities, and under which the proceedings complained of were had, was a general law, and was constitutional. *People v. Common Council of San Diego*, 85 Cal. 369, 24 Pac. 727. This being so, the proceedings were authorized and must be sustained.

There are several decisions of this court which are in harmony with, and tend to support, the views above expressed, but we do not deem it necessary to cite them. The case of *People v. City of Oakland*, 92 Cal. 611, 28 Pac. 807, cited by appellant, is not in point. In that case a freeholders' charter for the city of Oakland was approved by the legislature on February 14, 1889. After the charter was framed, and before it was approved, certain territory was annexed to the city under the provisions of the act of March 13, 1883, (St. 1883, p. 93,) but this annexed territory was not included within the boundaries of the city, as described in the new charter. It was held that the old charter, which was amended by the proceedings to annex additional territory, was wholly superseded by the new charter, and the effect of such new charter was to detach the territory so annexed. We advise that the judgment be affirmed.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

PEOPLE ex rel. FLEMING v. SHORB et al. (No. 19,377.)

(Supreme Court of California. Dec. 26, 1893.)

COUNTY TREASURER — VACATION OF OFFICE — ABSENCE FROM STATE — QUO WARRANTO — SUFFICIENCY OF COMPLAINT.

1. Under Pol. Code, § 996, providing that an office shall become vacant before the expiration of the term on the incumbent's absence from the state, without permission of the legislature, beyond the period allowed by law; and section 4120, forbidding a county officer to

absent himself from the state for more than 60 days, or for any period, without the consent of the board of supervisors,—such absence, ipso facto, creates a vacancy in his office, and in the office of each of his deputies, and the appointing board may appoint another to fill the office.

2. The fact that such treasurer was necessarily absent from the state on account of his health is immaterial.

3. In quo warranto against such treasurer and his deputies, on the relation of one claiming title to the office by appointment, a general demurrer to the complaint was properly overruled, though it failed to show title in relator, since a judgment ousting defendants would not rest on the want of relator's right to the office, (Code Civil Proc. § 803 et seq.) and since such demurrer, for that reason, did not raise the question of relator's right.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Quo warranto by the people, at the relation of T. J. Fleming, against J. De Barth Shorb and others. There was judgment for relator, and all the respondents, except said Shorb, appeal. Affirmed.

Smith & Winder, for appellants. McLachlan & York and Atty. Gen. Hart, for respondent.

VANOLIEF, C. The defendant Shorb was elected treasurer of the county of Los Angeles in November, 1892, and, having duly qualified, commenced to discharge the duties of that office January 2, 1893. The other defendants are his appointed and duly-qualified deputies, who were acting as such before and at the time of the commencement of this action. The action is of the nature of a quo warranto information, and is prosecuted by the attorney general, on the relation of T. J. Fleming, who claims the office of treasurer by virtue of an appointment thereto by the board of supervisors of Los Angeles county. The plaintiff alleges, in substance, that on July 14, 1893, Shorb left this state, and has ever since remained, and now (September 25th) is absent from this state, without the consent of the legislature, and without the consent of the board of supervisors of said county, for a longer period than 60 days, from July 14, 1893; that, by reason of such absence from the state, the office of treasurer of said county became vacant on September 13, 1893; that on September 15, 1893, the board of supervisors of said county appointed the relator, T. J. Fleming, to fill the vacancy; that, after having duly qualified, Fleming, on September 25, 1893, demanded of the defendants, who were then conducting the business of the office as deputies of Shorb, the records of the office, together with all moneys of the county deposited in the office and then in their custody; but that said deputies refused to comply with such demand. The prayer of the complaint is for judgment that none of the defendants are entitled to the office of deputy treasurer, nor to the custody of the records or moneys apper-

taining to that office, and that the relator, Fleming, is entitled to the office of treasurer, and that he be put in possession thereof, and of all records and moneys belonging thereto. The defendant Shorb was not served with process, and did not appear, and as to him the action was dismissed. The other defendants filed a general demurrer to the complaint, and answered at the same time, and plaintiff filed a general demurrer to the answer. The demurrer to the complaint was overruled, and the demurrer to the answer was sustained. The answer not being amended, judgment was rendered in favor of plaintiff, against the defendants other than Shorb, according to the prayer of the complaint. The defendants, except Shorb, have appealed from the judgment upon the judgment roll, without any bill of exceptions. The answer admits all the facts alleged in the complaint, but, as affirmative new matter of defense, alleges, in substance, that Shorb has been unwillingly, but necessarily, absent from the state on account of his serious and dangerous illness—severe nervous prostration—for proper treatment of which he was advised by his physicians it was necessary that he should go to the city of Philadelphia; that, pursuant to such advice, he left this state, and has not sufficiently recovered his health to enable him to return without danger of fatal consequences; but that defendants have such information of his convalescence as warrants their expectation and belief that he will soon return to this state.

1. It is contended for appellants that the absence of Shorb from the state for any period would not, ipso facto, effect a vacancy of his office; that the vacating of an office by absence of the incumbent from the state is a statutory penalty, of the nature of a forfeiture, which can be enforced only through legal proceedings in which the incumbent must have his day in court. I think, however, this position cannot be sustained, as it seems to depend upon a misconstruction of sections 996 and 4120 of the Political Code, which are as follows: "Sec. 996. An office becomes vacant on the happening of either of the following events before the expiration of the term: (1) The death of the incumbent. (2) His insanity found upon a commission of lunacy issued to determine the fact. (3) His resignation. (4) His removal from office. (5) His ceasing to be an inhabitant of the state, or, if the office be local, of the district, county, city or township for which he was chosen or appointed, or within which the duties of his office are required to be discharged. (6) His absence from the state without permission of the legislature beyond the period allowed by law. (7) His ceasing to discharge the duties of his office for the period of three consecutive months, except when prevented by sickness, or when absent from the state by permission of the legislature. (8) His conviction of a felony, or of any offense involving a violation of his offi-

cial duties. (9) His refusal or neglect to file his official oath or bond within the time prescribed. (10) The decision of a competent tribunal declaring void his election or appointment." "Sec. 4120. A county officer shall in no case absent himself from the state for a period of more than sixty days, and for no period without the consent of the board of supervisors of his county." The 10 events mentioned in section 996 are merely conditions, upon the occurrence of any one of which the legislature has declared the office shall become vacant, not as a penalty or forfeiture, but simply as the legal effect of the happening of any one of the events mentioned. It is true that the occurrence of some of these events are conclusively established against the incumbent of the office by the finding or judgment of a competent tribunal, namely, his insanity, his removal from office, his conviction of a felony, and the invalidity of his election. But in all these cases he has his day in court; and section 997, Pol. Code, requires that "the body, judge, or officer before whom the proceedings were had must give notice thereof to the officer empowered to fill the vacancy." But no official notice to the appointing power of the happening of any of the other events mentioned in section 996 is required; and therefore, upon any kind of satisfactory evidence of the occurrence of any one of them, the appointing officer or board may make an appointment, though the incumbent of the office is not thereby concluded as to the fact of the occurrence of such event. He may still question and contest the allegation of that fact, either before or after the installation of the appointee,—before such installation, if he refuse to vacate the office, in an action by the people to oust him; or, after such installation, in an action by the people on his relation to oust the appointee. Thus, he may always have his day in court before it can be conclusively adjudged against him that the office was vacant at the time the appointment was made. The absence of Shorb from the state, as alleged and admitted, ipso facto, effected a vacancy of the office of treasurer, and consequently a vacancy of the office of each of his deputies, the appellants, who have had their day in court, and have admitted all the facts essential to plaintiff's cause of action against them. Of course, Shorb is not concluded by their admissions, since they do not represent him in this action, and he is not a party to it. I think the foregoing construction (section 996, Pol. Code) warranted by the decision of department two of this court in case of *People v. Brite*, 55 Cal. 79.

2. The complaint shows that the official bond of the relator was approved by only four of the six judges of Los Angeles county, the other two judges having been absent from the county at the time; and for this reason it is claimed that the general demurrer to the complaint should have been sus-

tained. By section 69 of the county government act, the bond is required to be approved "by the judge or judges, if there be more than one, of the superior court." The judgment ousting the defendants does not rest upon the want of the relator's right to the office, (Code Civil Proc. § 803 et seq.) and therefore they were not interested in the question as to whether his bond had been properly approved, and their general demurrer did not raise that question. The complaint being good as against them, their demurrer was properly overruled. *Flynn v. Abbott*, 16 Cal. 359. It is therefore unnecessary to decide whether or not the approval of relator's bond was sufficient.

3. What is said under the first head sufficiently answers appellants' contention that the absence of Shorb from the state was necessary to his health, and that its continuance beyond the period limited by law was inevitable by reason of his sickness. The legislature has made no exception to, or qualification of, the rule that the continuous absence of a county officer from the state, for a period exceeding 60 days, without consent of the legislature or board of supervisors, shall absolutely effect a vacancy of his office, which may be filled by appointment; and courts have no power to interpolate any exception or qualification. The object and effect of the rule are to protect the interest of the public, and it is not perceived that it works the least injustice to an incumbent of an office. In effect it is only a contingent limitation of the term of an office, subject to which the office is voluntarily taken and generally eagerly sought. I think the judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

STEVENS v. SAN FRANCISCO & N. P. R. CO. (No. 15,371.)

(Supreme Court of California. Dec. 23, 1893.)

MASTER AND SERVANT — ACTION FOR PERSONAL INJURIES — FELLOW SERVANTS — EVIDENCE — INSTRUCTIONS.

1. Though a steamboat engineer has power to employ and discharge an oiler working under him, they are fellow servants, under Civil Code, § 1970, providing that those are fellow servants who are employed by the same master in the same general business.

2. In an action for the death of plaintiff's intestate through the negligence of defendant's steamboat engineer, an instruction asked by plaintiff, that if an engineer should be perfectly competent to run an engine by reason of his knowledge and skill, yet he would not be a competent engineer within the meaning of the law if he should be unsteady and unreliable on account of habits of intoxication, is misleading, since it ignores the question whether defendant knew of such habits.

3. Plaintiff's intestate, an oiler on defend-

ant's steamboat, was in such proximity to the machinery when the engine was started that he was crushed. Plaintiff sought to show that he was entitled to notice from the engineer before starting the engine. Defendant gave evidence that the rule of defendant's engineer was to have intestate inform him when he was going into a dangerous place, and, if he was not in his engine room, to withdraw the starting bar, and place it on the floor, as notice to the engineer not to start; that plaintiff followed this rule until the day of the accident, when he failed to give any notice, and, as a consequence, was killed by the machinery. *Held*, that it was proper to charge that, if it was intestate's duty to give such notice, and he failed to do so, plaintiff could not recover, even though the engineer was intoxicated and careless.

4. Plaintiff having introduced witnesses, who testified as to their own knowledge of the engineer's sobriety, the court properly refused to permit him to prove his general reputation for sobriety among his fellow employees, as such evidence would be mere hearsay.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Catherine Stevens against the San Francisco & North Pacific Railroad Company. From a judgment for defendant, and from an order denying a motion for new trial, plaintiff appeals. Affirmed.

Henry E. Highton, for appellant. Charles F. Hanlon, for respondent.

SEARLS, C. Defendant had judgment in this cause. Plaintiff moved for a new trial, and this appeal is prosecuted from an order denying such motion.

The action is by plaintiff, as administratrix of her deceased husband, Joseph Stevens, to recover damages for his death while in the employ of the corporation defendant, alleged to have been caused by its negligence. The defendant, at the time of the injury complained of, was conducting a steam ferry between the city of San Francisco and Point Tiburon, in Marin county, using for that purpose a steamer called the James M. Donahue. On the 16th of August, 1887, the deceased was a fireman and oiler on said steamer under W. H. Wiggins, who was engineer of the vessel. The complaint avers that the business of oiling some part of the machinery when the engine was in motion was dangerous and full of peril to the life of the oiler; that it was the custom among oilers to attend to the oiling of the more dangerous portions while the steamer was lying idle at its landing, and the engine motionless; that it was the duty of the engineer to give the oiler notice before starting the engine; that on the 16th day of August, 1887, while the steamer was at Tiburon, and deceased was engaged in oiling the machinery, the engineer, without notice, started his engine, whereby deceased, without fault or negligence, was jammed by the crank of the engine against the frame supporting such engine, and crushed so that he died. The complaint further avers that Wiggins was, and for many years had been, the engineer of the

steamer; that he was reckless, careless, and negligent in the discharge of his duty as an engineer, was given to habits of intoxication while on duty, and had been twice discharged by the defendant for drunkenness and negligence; all of which was known to defendant, but unknown to deceased, who had been employed on the steamer but 10 days. Defendant denies all of the foregoing allegations of the complaint imputing negligence to it or its engineer, or that he was careless, negligent, or intoxicated, or addicted to intoxication, and avers that he was a sober, skillful engineer, and denies that he was ever discharged; avers that the deceased had been in the employ of defendant for about 15 years, a portion of the time on the steamer James M. Donahue, and the remainder upon other steamers, and was well acquainted with the character and habits of Engineer Wiggins. Denies that it was necessary to oil the machinery when at rest, and avers negligence and carelessness on the part of deceased whereby he was injured. There was a substantial conflict upon all these issues, and the verdict in favor of defendant is conclusive, unless errors of law intervened by which the rights of the plaintiff were violated.

The James M. Donahue was, and for ten days to two weeks had been, running as a regular passenger ferryboat in place of the Tiburon, which was hauled off for repairs. She ran in connection with trains on the North Pacific Railroad. A train was due on that road at Point Tiburon from the north at 1:55 P. M., and the habit of the boat was to leave for San Francisco as soon thereafter as the passengers, baggage, and express matter could be transferred, which would usually be about 2 P. M. The steamer usually at this midday trip remained at Tiburon, say, one hour, during which time deceased, as oiler, was accustomed to oil the machinery. It is conceded on all hands that, when the engine ceases to run, water accumulates in the cylinder and fills the vacuum, and, before starting, it becomes necessary to start the machinery slowly, and give it a few revolutions to expel this water and restore the vacuum. The weight of testimony is to the effect that this movement of the engine usually takes place about five minutes before the time for starting the steamer, by which time the oiling is supposed to be completed; and that many engineers give notice before turning the machinery for such purpose by calling out "All clear" as a signal to the oiler. There was testimony, however, to the effect that this moving of the machinery to clear the engine may occur at irregular intervals, and that engineers have different methods by which oilers are notified. The engineer of the Donahue testified that his method was to have the oiler, when about to go into a dangerous place, notify him if in the engine room, and, if not, to take out the starting bar, and place it on the floor of the engine

room, which was a signal to him not to start; that when deceased came under him as an oiler he notified him of this, his rule, and deceased replied he was acquainted with such rule, and that he (deceased) observed it, and often removed the starting bar, gave him notice, etc. There is also a conflict in the testimony as to the time at which the engine was started on the occasion upon which deceased was caught by the crank shaft and killed. Some three witnesses on behalf of plaintiff testified that it was at 20 minutes before 2 P. M. Defendant proved without contradiction that the train arrived at 1:55 P. M. on that day, and several witnesses, including the captain and other officers of defendant, testified that the engine was started after or about the moment the train arrived. The precise position occupied by deceased when killed by the accident is not clear. He had been seen on the upper deck not long before, but, as he was killed by the crank, and was found in the crank pit, had oiled on one side of the crank and not on the other, it may fairly be inferred he had come down from the upper deck, and was engaged in oiling about the pillow blocks and crank, when caught by the starting machinery and crushed.

The testimony in reference to the habits of W. H. Wiggins, the engineer, as to sobriety, was, as on other issues, contradictory. That he partook of intoxicants to a moderate extent was admitted by him at the trial. That he was ever intoxicated when on duty was disputed. There was testimony that he had drank from one to three times on the day Stevens was killed, which was contradicted beyond the statement that he had taken a single drink; and no one testified as to his apparent intoxication on that day, while as many as seven witnesses testified as to his apparent sobriety. At the trial counsel for the plaintiff asked the court to instruct the jury as follows: "If you believe from the evidence that the engineer, Wiggins, on board the steamer James M. Donahue, at the time of the accident, August 16, 1887, had charge of a department,—that is, the engineering department on board that boat,—with full control over the fireman and oiler, and with power to employ or discharge them, and that he occupied his position for and on behalf of defendant, then, and in that event, you are instructed that the said engineer, Wiggins, was what is termed in law a vice principal or agent for the defendant, and was not a co-employee of the oiler, Stevens; and, if the accident resulted from the negligence of the said engineer within the rules and principles otherwise laid down by the court, the defendant was responsible, whether it had or had not exercised due diligence and care in the selection of said engineer." The court refused the instruction, and subsequently, and on its own motion, gave the following instruction: "Now

gentlemen of the jury, I instruct you that, as a matter of law, Wiggins, the engineer, and Stevens, the deceased, were fellow servants, and that section 1970 of the Civil Code of this state is the law which must control your verdict in this matter, subject to the facts as you may find them to be. That section reads as follows, (as far as it applies to this case I will read it to you:) 'That an employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the negligence of another person employed by the same employer, in the same general line of business, unless he has neglected to use ordinary care in the selection of the culpable employee.' Now, the complaint avers, and the evidence shows, that Wiggins and Stevens were both employed in the same general business by the defendant. That on the day of the accident Mr. Wiggins, the engineer, started the engine of the steamboat, and Mr. Stevens, who was then and there acting as oiler, was caught in the machinery and killed. Now, under the pleadings and the evidence shown in this action, I instruct you that, in order to arrive at your verdict in this case, you must determine the following question: Did the death of Stevens occur through the defendant neglecting to use 'ordinary care,' as defined to you heretofore, in the selection and retention of Mr. Wiggins? The plaintiff claims it did, and the defendant claims it did not. It is for you to determine that question. Now, keeping this rule of law and this question which I have just read to you in your minds, and remembering that the evidence is that Mr. Wiggins moved the engine at the time of the accident, it then remains for you to answer this question: Did the death of Stevens occur through the carelessness or neglect of Mr. Wiggins, caused by the use of intoxicating liquors, used then or theretofore by Mr. Wiggins, and of which the defendant knew, or ought, by reason of the fact shown, to have known? The plaintiff claims it did; the defendant claims it did not. This is wholly for you to determine, and it is a great and important question in this case, for it is, in fact, a part of the question of 'ordinary care,' and to which I have just called your attention. Now, subject to the next instruction as to contributory negligence,—which I will give you,—if you should find that the defendant did not use this 'ordinary care' in the selection and retention of its engineer, Wiggins, then your verdict will be for the plaintiff. But if, on the other hand, you should find that the railroad company defendant did use this 'ordinary care' in the selection or retention of its en-

gineer, Wiggins, and that the accident occurred by reason thereof, then you will be obliged to answer this question: Did the killing of Stevens occur without contributory negligence on the part of Stevens? Contributory negligence is that degree of negligence on the part of the decedent, in this case, which would have contributed proximately or directly to the injury complained of, and it is here to the loss of life of decedent. The plaintiff says it did, and the defendant says it did not, and it is for you to determine. If the plaintiff is correct on this point, she would be entitled to a verdict in her favor; if, on the other hand, the defendant is correct on this point, then the railroad company, defendant, would be entitled to a verdict in its favor." The court also, at the request of defendant, gave the following: "If the defendant corporation here has used ordinary care in the selection and retention of Wiggins as engineer, then, if Stevens was free from all fault, and Wiggins was to blame altogether for the accident, it is a matter between co-employees, and the corporation, I instruct, has discharged its duty, and your verdict must be against the plaintiff and in favor of the defendant corporation."

The contention of appellant is that, as to the fireman and oiler on the steamer Donahue, the defendant had abdicated its authority to Wiggins, and that the latter had full power to employ and discharge them; and, as he had complete management and control of them, that, as to them, Wiggins was their master. That, under such circumstances, the engineer was a representative of his principal,—a vice principal, and not a fellow servant of the deceased,—and, as a sequence, defendant is liable to the same extent that it would be for its own carelessness or neglect, had it directly managed the engineer's department. Many cases are cited in support of this theory, and among them *Brown v. Sennett*, 68 Cal. 225, 9 Pac. 74. There is much contradiction between the decisions of the several states upon the question involved in the proposition presented by appellant's instruction. In this state, however, it is believed the recent decisions have settled the question adversely to the contention of the appellant. The deceased oiler and Engineer Wiggins were fellow servants, employed in the same general business; and the fact, if it was a fact, that the engineer employed and discharged the firemen and oilers who worked under him at will, did not alter their relations as fellow servants. *Collier v. Steinhart*, 51 Cal. 116; *McLean v. Mining Co.*, Id. 255; *Daves v. Railroad Co.*, 98 Cal. 19, 32 Pac. 708. Being fellow servants, it was incumbent upon plaintiff to show that the death of Joseph Stevens was proximately caused by the negligence of the engineer, and that the latter was incompetent, and that there was negligence upon the part of the defendant in employing him in

the first instance, or in retaining him in its service after notice of his incompetency. *Holland v. Railway Co.*, (Cal.) 34 Pac. 666. Section 1970 of the Civil Code has placed in the category of "fellow servants" all those who are employed by the same employer in the same general business. The section has been construed so often by this court, and with such uniformity and unanimity of opinion, that further remarks on the subject are not deemed necessary. *Congrave v. Railroad Co.*, 88 Cal. 360, 26 Pac. 175; *Yeomans v. Navigation Co.*, 44 Cal. 71; *Hogan v. Railroad Co.*, 49 Cal. 128; *McDonald v. Hazeltine*, 53 Cal. 35; *Brown v. Railroad Co.*, 72 Cal. 523, 14 Pac. 138; *Fagundes v. Railroad Co.*, 79 Cal. 97, 21 Pac. 437; *Stephens v. Doe*, 73 Cal. 26, 14 Pac. 378. The case of *Brown v. Sennett*, relied upon by appellant, was commented upon in *Congrave v. Railroad Co.*, supra, and evidently is not regarded as authority in cases like the present. The conclusion is reached that the instruction asked by appellant and refused did not properly embody the law applicable to the case, and that the instructions given by the court on its own motion contained correct expositions of the law.

Plaintiff asked an instruction as follows: "If an engineer should be perfectly skillful and competent to run an engine by reason of his intelligence, knowledge, skill, and experience, and yet should be unsteady and unreliable on account of a habit of drinking intoxicating liquors to excess, he would not be a competent engineer, within the meaning of the law." The court refused the instruction as asked, and modified it by adding the following: "If the employer knew of the fact, or had means of obtaining such knowledge;" with which addition it was given, and to which addition by the court plaintiff excepted. The instruction as asked may be conceded to be correct as an abstract proposition of law. As asked, however, it was well calculated to mislead the jury, for the reason that there was some evidence to the effect that the engineer, Wiggins, was addicted to drunkenness; and whether or not knowledge of such drunkenness (if the jury found it to exist) had been brought home to the defendant was an issue in the case; an issue which the instruction, as asked, entirely ignored. Again, the court had, in the 13th, 16th, 27th, 28th, 30th, 32d, 33d, 34th, 36th, and 39th instructions given at the request of the plaintiff, and in the instructions given on its own motion, correctly declared the law upon the question involved in the modified instruction; and, had it refused this instruction altogether, it would not have been error.

Exception is also taken to the following instruction given on behalf of defendant: "The plaintiff, in her complaint, alleges a duty in regard to the engineer on the question of signals, but she nowhere refers in her complaint to any corresponding duty on

the part of the oller to give a signal to the engineer. Now the defendant has adduced testimony to show that it was the duty as well as the practice of Stevens, during the period immediately before the accident, to give notice to the engineer by taking out the starting bar, or by notice whenever he desired the machinery to remain still while the ship was lying still at the ferry slip. Therefore, if you find that the accident was caused by Stevens failing to give any signal, and that it was the practice and rule on that boat at that time for him to give it, and he was thereby killed, then, even if Wiggins was intoxicated, or was careless, or was to blame, it would make no difference, as I instruct you that in that case the contributory negligence on the part of Stevens would defeat plaintiff's action, and would make it your duty to bring in a verdict against the plaintiff and in favor of the defendant corporation." In this instruction, and another, involving negligence on the part of Stevens if he needlessly placed himself in the way of the machinery, etc., appellant contends that the instructions are erroneous, in that they hold that mere negligence on the part of defendant would defeat a recovery, whereas the negligence which defeats a recovery must be a negligence which directly conduces to the injury; and, while the injured party may have been negligent, yet, if the injury was caused by the failure of defendant, after such notice as would put a prudent man upon his guard to use ordinary care for the purpose of avoiding such injury, the party injured is entitled to recover, etc. The immediate cause of Stevens' death was not in dispute. It was conceded on all hands that he was in such proximity to the machinery of the steamer that when it was started it caught and crushed him. The real question involved related to his being rightfully in such position that starting the machinery would produce this result. Plaintiff sought to show that the deceased was entitled to notice from the engineer before starting the engine. Defendant, on the other hand, introduced evidence tending to show that different engineers had different rules: that the rule of the engineer, Wiggins, was to have the oller inform him when going into a dangerous place, and, if not in his engine room, to withdraw the starting bar, and place it on the floor of the engine room, which was notice to him not to start; that he instructed Stevens as to this rule when the latter first came with him; that the latter replied that he was familiar with the rule, and acted upon it until the day in question, when he gave no notice, and, as a consequence, was killed by the starting of the machinery. If this was true, there can be no serious question but that Stevens was in fault.

The court is not required to instruct upon phases of the law not involved in the case, and what the duty of defendant's engineer

would have been had he in fact known the position of Stevens when he started his engine did not concern the court or jury, for the reason that there is nothing in the testimony to show that the engineer or any one else on the boat saw or knew what the position of Stevens was until the engine started, when he cried out, and the engineer at once stopped the engine, the crank not having moved over two or three feet, when he was found crushed. It follows that the hypothesis contended for was foreign to the case. If the jury believed the theory of plaintiff, that it was the duty of the engineer to give notice before starting the engine, then, as to that branch of the case plaintiff was in the right, irrespective of knowledge of the whereabouts of Stevens by the engineer.

Another exception of appellant is founded upon the refusal of the court to permit plaintiff to prove the general reputation of Wiggins for sobriety among those employed in the ferry service. Intemperance, sobriety, and drunkenness are facts to be proven like other facts. The proffered evidence was hearsay, concerning which Greenleaf, at section 99, vol. 1, of his work on Evidence, says: "Hearsay evidence, as thus described, is uniformly held incompetent to establish any specific fact which in its nature is susceptible of being proved by witnesses who can speak from their own knowledge." Plaintiff had already introduced witnesses upon the subject, who had testified as to these specific facts; and upon the face of the offer the testimony was not admissible. There are some exceptions to the general rule enunciated by Greenleaf, but the offer of plaintiff failed to bring the proffered testimony within any of the exceptions; in other words, the offer was general. In his brief, counsel for appellant argues that this evidence was proper, as tending to bring knowledge of the habits of the engineer home to defendant. If offered for that specific purpose, it should have been so specified, which was not done. Where evidence is admissible, not generally, but for some specific purpose, the offer should designate the purpose.

We have patiently examined the record bearing upon the numerous exceptions reserved at the trial. To comment upon all of them in detail would swell the decision beyond reasonable limits, and, as they are either without merit, or not of sufficient importance to call for a reversal, no useful purpose will be subserved by their elaboration. The cause was properly tried, and the verdict of the jury was in consonance with the weight of testimony. The order denying plaintiff's motion for a new trial should be affirmed.

We concur: VANOLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying plaintiff's motion for a new trial is affirmed.

PACIFIC MUT. LIFE INS. CO. v. BECK
et al. (No. 15,332.)

(Supreme Court of California. Dec. 28, 1893.)

MORTGAGES—FORECLOSURE—PURCHASING MORTGAGEE—RIGHT TO RENTS AND PROFITS.

1. Where a receiver was appointed in a suit to foreclose a mortgage, and the mortgagee purchased the mortgaged premises at the foreclosure sale for the full amount of his debt and costs, the rents and profits of the mortgaged premises in the hands of the receiver at the time of the sale belonged to the mortgagor, and not to the mortgagee.

2. The mortgagee did not become owner by purchasing at the foreclosure sale, so as to entitle him to rents payable 10 days after the sale, since his title was not changed thereby, except that the amount of his debt was fixed, and his right to a deed or to a sum paid to redeem within six months became absolute.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by the Pacific Mutual Life Insurance Company against John Beck and Priscilla Beck and another to foreclose a mortgage. From an order directing a receiver of the mortgaged property to pay rents and profits in his hands to the mortgagor, the mortgagee appeals. Affirmed.

Kellogg & King and Fox, Kellogg & King, for appellant. J. W. Harding, for respondents.

TEMPLE, C. This appeal is from an order made after judgment. The action was to foreclose a mortgage executed by the defendants Beck to plaintiff, in which it was stipulated that, when proceedings to foreclose were instituted, a receiver might be appointed.

November 17, 1890, a suit to foreclose having been commenced, an application was made for the appointment of a receiver. By consent a receiver was appointed, who in the order was directed and authorized "to take charge of the property, and prevent waste thereon, and to collect and receive the rents and profits thereof, and especially to farm or lease or cultivate said land, and to care for, protect, and at the proper time harvest and thresh or otherwise prepare for market and sell the product of said premises, holding the same and all moneys collected or received by him hereunder subject to the further order of this court in that behalf, reporting to the court, from time to time, his doings hereunder," etc. The receiver was appointed, and duly qualified, and took possession of the mortgaged premises, which consisted of a farm.

In pursuance of the authority, the receiver leased the property for the cropping season of 1891, "but in no event to exceed nine months from January 1, 1891, at the rent of one-fifth of all crops raised thereon during said demised term, payable as follows: Hay, well baled; wheat, barley, and similar products, sacked in good sacks,—and all the fore-

going products delivered in a seasonable time for harvesting and gathering same at warehouse in Livermore, free of all expense to receiver." The proceedings not having been ended in 1891, the lease was renewed for the cropping season of 1892 on the same terms. Besides the terms above recited, the lease contained a stipulation that the tenant would cultivate the land "in a farmer-like manner, using the same for the purpose of raising hay, wheat, barley, and similar crops."

The questions involved in this appeal have reference to the crops of 1892. They were all harvested, and the portion paid as rent was delivered in the warehouse, as stipulated, before September 7, 1892. At that time the receiver obtained warehouse receipts for it. On the 21st day of September, 1892, the premises were sold under a decree of foreclosure entered in the suit. At that sale the mortgagee purchased, paying the full amount of its debt and costs. September 30, 1892, the receiver filed a report, showing that he had in his hands hay, wheat, and barley, the crop of 1892. Thereupon a contest arose between appellant and the defendants Beck, each claiming the property. It was given to the defendants, and plaintiff appeals from that order.

As the mortgage debt and all costs had been fully paid, it is difficult to comprehend upon what rational ground the mortgagee can claim the crops which were in the hands of the receiver. Counsel argues that the rents were collected by the receiver for the purpose of having them applied to the mortgage debt. Let that be admitted; still they did not belong to the mortgagee. They were held as security only. The mortgagee was not entitled to his debt and the rents and profits, but to his debt only. The debt having been fully paid from the property of the debtor, the securities which remain belong to the debtor.

Counsel seem to argue, in the opening brief, that the lease did not expire until October 1st, and they put in proof that it was generally thought that the cropping season ended at that time. They then contend that the rents were not due until the end of the term, and that plaintiff, when he purchased the mortgaged premises at the foreclosure sale, which was nine days before October, became the owner of the premises, and, as such, entitled to all rents which fell due after his purchase. I think it clear that counsel are mistaken in all these propositions. The term expired at least as soon as the crops were harvested and removed from the premises. The term was for the cropping season, and it was stipulated, in effect, that the premises were to be used for the purpose of raising these crops only. If, however, it be conceded that the term continued until October, the crops were to be delivered to the receiver as soon as convenient after harvesting, "in a seasonable time after the proper and suitable time for harvesting and gather-

ing same." If they had not been so delivered, it would have been the duty of the receiver to compel such delivery. And, lastly, if it be admitted that the rent was payable after the sale under the foreclosure, still the plaintiff would have no right to them. He did not become owner by purchasing at the sale. His title was not at all changed by that fact, except that the amount of his debt was fixed, and his right to a deed, or a sum paid to redeem within six months, absolute. His rights as purchaser are carefully defined in the Code of Procedure.

It is suggested, rather than clearly stated, that his title dates back to the date of the mortgage. It cannot be that it is really claimed that any such relation affects plaintiff's rights in this case. The relation is allowed only to cut off intervening rights, but the purchaser has the rights of an owner only when he becomes entitled to his deed. Jones, Mortg. § 1661. I advise that the order be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

BANK OF UKIAH v. PETALUMA SAV. BANK et al. (No. 15,022.)

(Supreme Court of California. Dec. 28, 1893.)

UNRECORDED MORTGAGES—JUDGMENTS—PRIORITIES.

An unrecorded mortgage, being valid between the parties and those having notice. (Civil Code, § 1217,) and being declared void by section 1214, only as against subsequent purchasers or mortgagees for value and in good faith, takes precedence over an attachment or judgment lien obtained after execution of the mortgage.

Commissioners' decision. Department 2. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action of the Bank of Ukiah, a corporation, against the Petaluma Savings Bank, a corporation, Pierce Asbill, and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Haskell & Meyer, for appellants. J. A. Cooper, for respondent.

TEMPLE, C. Appeal from the judgment. A simple question of law is presented by this appeal. The learned judge of the trial court, in an opinion which respondent has printed in his brief, presents that question thus: "Will the lien of an unrecorded mortgage, given to secure a loan, take precedence over an attachment or judgment lien obtained after the execution of the mortgage?" There is no law in this state which requires conveyances to be recorded. Section 1217 of the Civil Code provides that "an unrecorded instrument is valid as between the parties

thereto and those who have notice thereof.' This section implies that a mortgage, though unrecorded, is a lien upon the real estate mentioned therein, and our supreme court has said that the mortgage lien attaches when the instrument is executed, though recorded afterwards. *Root v. Bryant*, 57 Cal. 48; *Walker v. Buffandeau*, 63 Cal. 312." The mortgage covered property situate in Sonoma county, and also property in Trinity county. It was recorded in Sonoma, but not in Trinity. Shortly after it was executed, appellant brought suit against the mortgagors, and caused an attachment to be levied on the land in Trinity county. Subsequently, a judgment having been obtained, a transcript of the original docket was filed with the recorder of Trinity county, as provided in section 674, Code Civil Proc. The judgment was rendered July 3, 1890, and this suit was commenced to foreclose plaintiff's mortgage May 14, 1891, which was after the levy of the attachment and the filing of the judgment docket. The trial court held that the lien of the judgment was subject to the lien of the mortgage, and defendants appeal.

The lien being created by the mere execution and delivery of the mortgage, the next question is whether the lien is lost, as to a judgment or attaching creditor, because the mortgage is not recorded. It is enough to say that the statute does not so provide. 'The mortgage unrecorded is only declared void as against subsequent purchasers or mortgagees for value and in good faith. Civil Code, § 1214. An attaching creditor takes only whatever interest the debtor has. "An attachment and the levy of an execution or a judgment lien are not much different, and an attachment creditor cannot be considered as a bona fide purchaser. The creditor is entitled to the same rights as the debtor had, and to no more." Ping. Chat. Mortg. § 665. See, also, *Foorman v. Wallace*, 75 Cal. 553, 17 Pac. 680. I find some cases from other states which at first view seem to sustain the position of appellants. So far as I have examined such cases, they all depend upon some statutory provision which is wanting here. In some states an unrecorded instrument is made void as to creditors under certain circumstances. I think the judgment should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

MORE v. ELMORE COUNTY IRRIGATION CO., Limited.

(Supreme Court of Idaho. Dec. 20, 1893.)

ACTION ON CONTRACT—PLEADINGS.

A contract may be declared in *haec verba*, or according to its legal effect. When the former mode is adopted, the instrument in-

corporated into the complaint must show upon its face in direct terms, and not by implication, all the facts which the pleader would have to allege had he elected to set it forth by averment.

(Syllabus by the Court.)

Appeal from district court, Elmore county; C. O. Stockslager, Judge.

Action by Mary A. J. More against the Elmore County Irrigation Company, Limited, for breach of contract. Plaintiff had judgment, and defendant appeals. Reversed.

E. M. Wolfe, for appellant. Texas Angel and D. T. Miller, for respondent.

HUSTON, C. J. Plaintiff commenced her action in the district court by filing complaint, of which the following is a copy:

"Complaint:

"In the fourth judicial court in and for Elmore county, of the state of Idaho. October term, 1892. Mary A. J. More, Plaintiff, vs. Elmore County Irrigation Company, Limited, a Corporation, Defendant. The plaintiff complains and alleges: (1) That defendant is a corporation organized and existing under the laws of the state of Illinois, and doing business as such corporation in Elmore county, Idaho, with principal place of business in Cook county, Illinois. (2) That this plaintiff, on the 29th day of April, 1892, owned and controlled, for her own use and benefit, certain water rights on the following described lands in Elmore county, to wit: The N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 24, and the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 25; also, the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 25,—all in Tp. 4 S., R. 6 E. B. M. (3) That defendant desiring to procure of this plaintiff a surrender of her said water rights, title, and interest therein, and to divert said water to defendant's use and benefit, and in consideration of this plaintiff surrendering to defendant her said right, this plaintiff and defendant entered into a certain written contract whereby said defendant agreed to furnish this plaintiff a perpetual water right to said premises, and especially without charge for the year 1892. A copy of said contract is hereto attached, and marked 'Exhibit A,' and made a part hereof. (4) That under and by virtue of said contract the said defendant appropriated said water of this plaintiff to its own use and benefit, but failed to supply this plaintiff with water in time and quantity as agreed, and her land, and crops growing thereon, were damaged by drouth; and, by reason of said defendant's failure to supply plaintiff with water in time or by terms of said contract, plaintiff has been damaged in her lands and crops in the sum of nineteen hundred and seventy-five dollars, (\$1,975.00.) Wherefore plaintiff prays for judgment in the sum of nineteen hundred and seventy-five dollars, (\$1,975.00.) together with interest and costs of this action. Will H. Dial & D. T. Miller, Attor-

neys for Plaintiff." Duly verified September 10, 1892. Filed September 19, 1892.

"Exhibit A.

"Mountain Home, Idaho, April 29, 1892. It is herein agreed, by and between the Elmore County Irrigation Company, Limited, and Mary A. J. More, in consideration of the surrender and assignment of all the water rights, and interests in water rights, held and owned by the said Mary A. J. More, in water rights to the following described land, to wit: The north half of the northwest quarter, section 24, and the southwest quarter of the northwest quarter of section 25; also, the south half of the southwest quarter of section 25, —all in township 4 south, range 6 east, Boise meridian, in consideration of a perpetual water right from the said Elmore County Irrigation Company, Lt'd. It is further agreed the Elmore County Irrigation Company, Limited, will not charge said Mary A. J. More for use of water upon said land for the year 1892 A. D. Elmore County Irrigation Company, Lt'd. Thomas J. Farrel, President. Mary A. J. More."

To this complaint, defendant demurred, generally, that complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled, answer filed, trial had before court with a jury, and verdict for plaintiff. From the judgment rendered on said verdict, defendant appeals.

The only error relied upon by appellant in this court is in the overruling of the demurrer by the district court. "A contract may be declared on according to its legal effect, or in haec verba, * * * but, to enable the pleader to adopt this latter mode, the instrument which is thus adopted as a part of the complaint must show upon its face in direct terms, and not by implication, all the facts which the pleader would have to allege under the former mode of pleading by averment." *Joseph v. Holt*, 37 Cal. 253. We are admonished that, under our statutes, pleadings should be liberally construed. While fully recognizing the obligation imposed upon us by that provision of the statute, we must still insist that there is a limit to judicial generosity in this behalf, and we know of no existing system of pleading under which the complaint in this case can be sustained against a general demurrer. We are limited, in our consideration of this case, to the errors assigned and discussed; with the merits of the case we have nothing to do. Many of the authorities cited by counsel for respondent, and much of his argument, go to the merits of the case; but we are confined in this decision to the one question raised by the record, to wit, the sufficiency of the complaint. There is no consideration expressed in the contract; there is a proposed consideration, but no evidence that any consideration ever passed, either from the plaintiff to the defendant, or vice versa. This action was brought to recover damages for the

failure of defendant to furnish water for the purpose of irrigating certain lands during the year 1892. There is no agreement by defendant, expressed in the contract, to furnish the plaintiff with water for the year 1892. The terms of the contract are: "It is further agreed the Elmore County Irrigation Company, Limited, will not charge said Mary A. J. More for use of water upon said land for the year 1892 A. D." We are not permitted to infer from this statement in the contract an obligation on the part of the defendant to furnish plaintiff with any amount of water at any time. By so doing we should not construe the contract, but make one. There is no averment in the complaint on the contract that plaintiff ever transferred to defendant any water right or water rights whatever, and we are not at liberty to imply or infer such transfer. As before stated, we can consider nothing in this case except the error assigned, and that is the overruling of the demurrer to the complaint. This was error, and for such error the judgment of the district court is reversed, and the cause remanded to the district court for further proceedings; costs awarded to appellant.

MORGAN and SULLIVAN, JJ., concur.

BAKER v. KNOTT.

(Supreme Court of Idaho. Dec. 6, 1893.)

PRACTICE ON APPEAL—LACHES—JUDICIAL NOTICE.

1. Where the record fails to show the date of the adjournment of the term of district court at which the order vacating judgment was made, laches will not be presumed.

2. This court cannot take judicial notice of the adjournment of the terms of the district courts.

(Syllabus by the Court.)

Appeal from district court, Owyhee county; E. Nugent, Judge.

Action by J. Orville Baker against William B. Knott. From an order vacating a default judgment for plaintiff, he appeals. Affirmed.

Geo. H. Stewart, A. A. Fraser, and W. E. Borah, for appellant. E. J. Curtis and Texas Angel, for respondent.

HUSTON, C. J. This is an appeal from an order of the district judge of the third district, vacating judgment, rendered in favor of the plaintiff, and against the defendant, at the July term, 1892, of the district court for the county of Owyhee. Suit was commenced by filing complaint, and issuing summons on the 8th day of July, 1892. Summons was served on the 22d day of July, 1892, returned on the 23d same month. It would seem from the record that a demurrer was filed by defendant, although none appears in the record, and that the same was overruled, and on the 2d day of August, 1892, default of defendant for want of answer and judgment on default was entered against defendant for the sum of \$1,512, and costs. On

January 30, 1893, the defendant filed his motion to vacate the judgment, and also an answer and affidavit of merits on the 20th day of February, 1893. The judge of said district court, after a hearing had upon said motion, made and entered his order vacating said judgment, and allowing defendant to answer the complaint in said action, upon terms. From said order of the judge of said district court this appeal is taken.

It is contended by appellant that more than five months having elapsed after the adjournment of the term of the district court at which said judgment was entered before application was made to vacate the same, and no reasonable excuse appearing for such delay, it was an abuse of discretion on the part of the district judge to allow said motion, and make the order vacating said judgment. The authorities cited by appellant would seem to support this contention; yet there is a principle underlying this class of cases which should not be overlooked,—that is, that each case must be considered in the light of all the circumstances surrounding it. An appellate court will hesitate before deciding that the lower court, or the judge thereof, has abused its discretion in a matter in regard to which such court must of necessity have been better informed than the appellate court can be. Section 4229, Rev. St. Idaho, provides, among other things, that "when, for any reason satisfactory to the court, or the judge thereof, the party aggrieved has failed to apply for the relief sought during the term at which such judgment, order, or proceeding complained of was taken, the court, or the judge thereof in vacation, may grant the relief upon application made within a reasonable time, not exceeding six months after the adjournment of the term." Now, the record nowhere shows upon what day said term of the district court adjourned. The judgment, it appears, was entered on the 2d day of August, 1892, and the motion to vacate was filed January 30, 1893, but the six months mentioned in the statute begin to run only from "the adjournment of the term." Having nothing, therefore, in the record, to warrant us in so doing, we can hardly say that any laches are strictly chargeable against the respondent; especially when the district judge has held otherwise, upon a fuller knowledge of the facts than is attainable from the record before us.

The adjournments of the district court are matters of which this court has no judicial knowledge. That the July term of the district court for the county of Owyhee adjourned on some day between August 2, 1892, and January 30, 1893, is, perhaps, inferable from the record; but upon what particular day between these dates said district court adjourned is, from aught that appears in the record, purely a matter of conjecture. Under the rules of the district court of the third district, the action could not properly have been placed upon the calendar for the July

term, except by consent of both parties. No such consent appears in the record, although the record does show that one Mr. Badger appeared and argued the demurrer, and submitted to a judgment against his client. But the defendant repudiates the action of Mr. Badger in the premises, and avers that he was misled by said Badger. Of all these matters the district judge was better informed than we can be by an inspection of this record. The affidavit and answer of the defendant certainly show a meritorious defense. We find nothing in the record that warrants us in disturbing the order and judgment of the lower court. The order of the district court is affirmed, with costs.

MORGAN and SULLIVAN, JJ., concur.

RICH v. FRENCH et al.

(Supreme Court of Idaho. Dec. 20, 1893.)

APPEAL—RECORD—BOND.

1. When the transcript contains matter not properly a part thereof, such improper matter will be stricken out on motion.

2. The record on appeal must show that an undertaking on appeal, in due form, has been properly filed, or that the same has been waived by stipulation of the parties.

(Syllabus by the Court.)

Appeal from district court, Bear Lake county; D. W. Standrod, Judge.

Action by S. J. Rich against Annie E. French and others. There was judgment for plaintiff, and defendants appealed. Plaintiff moves to strike out a portion of the record. Motion granted, and judgment affirmed.

Spence & Chalmers, for appellants. Hawley & Reeves, S. J. Rich, and John A. Bagley, for respondent.

SULLIVAN, J. This is an attempted appeal from the judgment. Respondent moves to strike from the record appellants' notice of "intention to move for a new trial," also the "notice of settlement of statement," also the order of the court below refusing to settle statement, also "statement on motion for new trial," and "affidavits on motion for new trial," on the grounds (1) that no statement on motion for new trial was ever settled; (2) that no order was made by the court below either granting or refusing a new trial. Subdivision 2, § 4456, Rev. St. 1887, provides, in cases of this kind, that the judgment roll shall consist of "the pleadings, a copy of the verdict of the jury or findings of the court or referee, all bills of exceptions taken and filed, and a copy of any order made on demurrer or relating to a change of parties, and a copy of the judgment." Upon an examination of the record, we find that no statement of the case, nor bill of exceptions, has been settled by the court below. That being true, under the section above referred to the parts of the transcript cov-

ered by said motion as above indicated are no part of the record on this appeal, and must be stricken out.

Respondent moves to dismiss this appeal, on the ground that the record fails to show that an undertaking on appeal has been filed, as required by law. We find the objection sustained by the record. The record fails to show that an undertaking on appeal has been given, or that such undertaking has been waived. Section 4821, Rev. St. 1887, provides, among other things, in appeals from a final judgment, that the record on appeal "must be accompanied by the certificate of the clerk or attorneys, that an undertaking on appeal in due form has been properly filed or the stipulation of the parties waiving an undertaking." The attempted appeal is dismissed, at appellants' costs, and the judgment of the court below affirmed.

HUSTON, C. J., and MORGAN, J., concur.

FLEISCHNER v. CITIZENS' REAL-ESTATE & INV. CO.

(Supreme Court of Oregon. Dec. 26, 1893.)

NUISANCE—LIABILITY OF LANDLORD — ACTION TO ENJOIN—DAMAGES—JURISDICTION IN EQUITY.

1. D. leased premises to C. for three years, with an option to renew for two years. Before the expiration of the three years, C. assigned the lease to W., and D. sold the premises to defendant. W. sublet the premises to tenants, who used them in such manner as to injure plaintiff's property. Defendant sued W. for possession, and compromised with W. by executing a new lease. Held a surrender of the old lease, which gave defendant a right of entry, and that defendant was liable to plaintiff for injuries resulting from a maintenance of the nuisance after the execution of the new lease.

2. Where filth from defendant's premises penetrated plaintiff's cellar, thereby rendering it unfit for occupancy, equity will enjoin such nuisance, under Hill's Code, §§ 333, 380, giving relief against a nuisance in equity.

3. Such court, having jurisdiction to grant an injunction, might, as an incident thereto, award damages.

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Action by L. Fleischner against the Citizens' Real-Estate & Investment Company. There was judgment for plaintiff, and defendant appeals. Affirmed.

The other facts fully appear in the following statement by MOORE, J.:

This is a suit to restrain the defendants from maintaining a private nuisance, and for the recovery of the damages resulting therefrom. The facts show that the plaintiff is the owner of lots 5, 6, and 7, in block 20, as shown upon the recorded plat of the city of Portland, and that the defendant, the Citizens' Real-Estate & Investment Company, a private corporation, is the owner of lot 8 in said block, which joins plaintiff's property on the north. That on September 28, 1888, John Donnerberg owned said lot 8,

and on that day leased it and the building thereon to Richard Clinton and wife, to be used as a theater for the term of three years from October 1, 1888, at the monthly rental of \$250. The lease, among other things, provided that it should be optional with the lessees to renew it for a term of two years after the expiration of the first term, upon the payment of \$300 per month, they agreeing to keep the building in good repair, and to make no improper use of the property, nor sublet it, without the written consent of the lessor. That on December 5, 1888, the said Donnerberg entered into a contract with the Citizens' Real-Estate & Investment Company, whereby, in consideration of \$5,000 paid down, and the payment of \$20,000, and the execution of a note and mortgage for \$25,000, within six months thereafter, he agreed to execute and deliver to it a warranty deed for said property. Said contract further provided that until the deed was executed and delivered Donnerberg should collect the rents under the lease. That on March 6, 1890, said Clinton and wife, with the written consent of Donnerberg, assigned their interest in said lease to F. W. Eagles, as trustee for John Cort. After the lease was assigned, the use of the building as a theater was abandoned, the first floor was cut up into saloons, stores, shops, and booths, and the second floor partitioned into lodging rooms, and all let to Chinese tenants, who placed sinks, closets, and urinals therein, which were so imperfectly connected with the sewer that the slops and liquids therefrom saturated the soil beneath the building. That about the time these changes were made the plaintiff commenced to excavate a cellar upon his lots for the purpose of erecting a six-story brick building, and the water, filth, and foul matter from said lot 8 poured into the excavation to such an extent that the work was impeded, whereupon the tenants and landlord were notified by the chief of police, and temporary relief was obtained, whereby the plaintiff was enabled to erect one story of his building, which was roofed over, with the intention at some future of completing the other stories. After plaintiff's building was completed, the water and foul matter from the premises occupied by said Chinese percolated through and moistened a portion of his cellar wall about 60 feet long and 2½ feet high, creating a slimy substance thereon that caused foul and noisome odors, rendering the plaintiff's premises unwholesome and sickly, and weakening the said wall. That on July 31, 1890, Citizens' Real-Estate & Investment Company made final payment, and received the deed from Donnerberg and wife for said lot, and nine days thereafter commenced a suit in the circuit court of the state of Oregon for Multnomah county against John Cort, Charles Green, and others, to enjoin them from interfering with the possession of said premises, and a restraining order was

issued, but, before it could be served upon them, said F. W. Eagles and John Cort filed their bill in the circuit court of the United States for the district of Oregon against the said company, and obtained a provisional injunction therein, whereupon said Cort and Green appeared in the state court in the said suit against them, filed a plea in abatement, and upon their motion said suit was dismissed. The Citizens' Real-Estate & Investment Company appeared in said suit in the United States court. Issues were joined, testimony taken, and on October 16, 1891, a decree was rendered therein enjoining and restraining said corporation from interfering with said premises until the expiration of said lease. That after the said decree was rendered the corporation secured possession of a portion of the premises claimed by it, and commenced an action in the state court against the tenants in possession of said lot, whereupon said F. W. Eagles, John Cort, and one Sigmund Schwabacher, who had acquired some interest therein, appeared in said action, and, being substituted for the tenants, filed their petition and bond for the removal of said cause, and it was by order of the court removed to the federal court, where, upon a trial of the issues, judgment was rendered against the corporation, from which it appealed; but, pending the appeal, a compromise was effected, and under the option provided in the contract the corporation executed a lease to said Eagles and others, whereby, in consideration of the payment of \$400 per month, it demised to them said premises for a term to expire December 31, 1892, and said appeal was dismissed. The plaintiff alleges the existence of the nuisance, and its effect upon his building; that he had notified the defendants to abate it, but that they had failed to do so, and that, in consequence thereof, his property had been damaged in the sum of \$3,000; and prayed that said nuisance be abated, the defendants prohibited from continuing it, and for his damage. The Citizens' Real-Estate & Investment Company, after denying the allegations of the complaint, allege the facts hereinbefore recited. The testimony having been taken and submitted, the court rendered a decree in favor of the plaintiff for the abatement of the nuisance, and awarded him \$500 damages, from which the company alone appeals.

A. H. Tanner, for appellant. W. Minor, for respondent.

MOORE, J., (after stating the facts.) The appellant contends that the execution of the lease on December 14, 1891, was not a reletting of the premises, and that it is not liable for any of the damages sustained by plaintiff. The authorities are uniform in holding that a landlord out of possession is not responsible for a nuisance occurring after the execution of the lease, unless he is in some

manner at fault for its creation or continuance. *Wolf v. Kilpatrick*, 101 N. Y. 146, 4 N. E. 188. When the landlord has not covenanted to keep the premises in repair the duty is imposed upon the tenant, under the implied covenants of the lease, to so use the property as to avoid the necessity for repairs, (*Powell v. Railroad Co.*, 16 Or. 33, 16 Pac. 863;) and in such cases, if the property were in good condition at the time of the demise, and leased for a purpose that would not create a nuisance, the tenant, and not the landlord, is liable to third persons for injury from the creation or maintenance of any nuisance upon the leased premises, (*Fisher v. Thirkell*, 21 Mich. 1.) The reason for this rule is put upon the theory that the lease gives to the tenant the exclusive possession of the premises, and thereby excludes the landlord's right of entry; and, his right of entry and possession being suspended during the term, it follows that his liabilities in respect to the possession are also suspended, except as to such defects in the premises at the time of the demise as might in the manner of their use produce injury to third persons. The general rule of law is that the tenant, and not the owner, is responsible for injuries received in consequence of a failure to keep the premises in repair. To this general rule the authorities recognize these exceptions: (1) When the landlord has, by an express agreement between the tenant and himself, agreed to keep the premises in repair, so that in case of a recovery against the tenant he would have his remedy over against the landlord, then, to avoid circuity of action, the party injured by the defect and want of repair may have his action in the first instance against the landlord. (2) When the premises are let with a nuisance upon them, by means of which the injury complained of is received. (3) Where a landlord rents premises for a purpose which, in the very nature of things, would become a public nuisance. *Manufacturing Co. v. Lindsay*, 10 Ill. App. 583; *Wood, Nuis.* § 73. The lease from John Donnerberg to Richard Clinton and wife, under which the tenants claimed possession, until the execution of the new one, contained an express covenant that the lessees would keep the buildings in repair. The evidence shows that the premises were in good repair when Clinton went into possession, and also in good repair at the time the deed from Donnerberg and wife was executed and delivered to the Citizens' Real-Estate & Investment Company; that the lease for a theater was a lawful use, and would not, in its nature, become a public nuisance, but that thereafter the assignee of the lease, without the consent and against the protest of the owner, sublet the premises to Chinese tenants, who created the nuisance that caused the injury. Under this state of facts, if no new lease had been executed, by all the authorities the company would not have been liable for any injury arising from a use of the

property by the tenants. The lease from Donnerberg to Clinton contained a provision that the lessees, at their option, might have the privilege of continuing in possession of the premises for two years after the expiration of the first term, upon the payment of \$300 per month. This was a covenant that passed with the land, (*Wood, Landl. & Ten.* 666,) and upon the exercise of the option and performance of the conditions precedent by the lessees a court of equity would have decreed a specific performance of the covenant by the lessor, (*Id.* 271,) and this option, when exercised, created a valid lease for five years; and such additional term is not a new demise, but a continuation of the old one, (*Id.* 675.) and hence the term did not expire on the 1st day of October, 1891, nor until two years thereafter. On December 14, 1891, after the Citizens' Real-Estate & Investment Company had failed in the state and federal courts to gain possession of the premises, and realizing that it would probably be impossible to do so before the term had expired, it compromised with the lessees, and executed a new lease, by which the tenants were permitted to continue in possession until December 31, 1892, upon the payment of \$400 per month. By the terms of this lease the lessees paid the owner \$1,300 more than the first agreement required, and the term was shortened 10 months. This was taking a new lease, the legal effect of which was the surrender of the old one. *Tayl. Landl. & Ten.* § 340. Upon the surrender of the old lease, the company was invested with the right of entry, and, as the nuisance was in existence upon the premises, it must be presumed to have been aware of the fact, and hence it is liable for its continuance under the exception to the general rule that it had demised premises with a nuisance then in existence thereon. The law is well settled that if the tenant creates a nuisance upon the premises during the term, by an unusual or extraordinary use thereof, although the landlord cannot be made chargeable for the consequences in the first instance, yet, if he subsequently renews the lease with the nuisance thereon, he becomes chargeable for its continuance. *Rosewell v. Prior*, 2 Salk. 460; *Whalen v. Gloucester*, 4 Hun, 24.

Section 333, Hill's Code, in substance, provides that any person whose property is affected by a private nuisance, may maintain an action at law for damages therefor, and, if judgment be given for the plaintiff in such action, he may, in addition to the execution to enforce the same, on motion, have an order allowing a warrant to issue to the sheriff to abate such nuisance; and, if it appear that such remedy is inadequate, the plaintiff may proceed in equity to have the defendant enjoined. From this the appellant contends that the statute furnishes a complete and adequate remedy at law, and for that reason a court of equity could acquire no jurisdiction, except as an auxiliary remedy in aid

of the legal action. Section 380 of said Code further provides that the enforcement or protection of a private right, or the protection from or redress for an injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate, and complete remedy at law, and may be obtained thereby in all cases where courts of equity have been used to exercise concurrent jurisdiction with courts of law, unless otherwise specially provided in this chapter. The chapter containing this section nowhere provides that courts of equity shall not entertain jurisdiction to enjoin a nuisance, and this court has, upon the theory that courts of equity have been used to exercise concurrent jurisdiction with courts of law in such cases, fully established the rule that when a person has sustained irreparable injury, or would be compelled to bring a multiplicity of actions to recover the damage, he may invoke the aid of a court of equity, and obtain an injunction to prevent the continuance of a private nuisance. *Parrish v. Stephens*, 1 Or. 73; *Luhrs v. Sturtevant*, 10 Or. 170; *Waltz v. Foster*, 12 Or. 247, 7 Pac. 24; *Esson v. Wattier*, (Or.) 34 Pac. 756. Courts of equity, then, have concurrent jurisdiction with courts of law in certain cases to prevent the maintenance or continuance of a nuisance. It should only be invoked, however, where the injury complained of is irreparable, such as the destruction of property, or when it menaces the life or health of the plaintiff or of his family, or where the guilty party is not able to respond in damages for the injury. But when compensation for the injury caused by a private nuisance is the gist of the complaint, the remedy is by an action at law for the damages. In the case at bar it is alleged that the water, slops, filth, and other matter from the sinks, closets, and urinals penetrated the plaintiff's cellar wall, and caused noxious and offensive pools to form in the cellar, and a slimy substance to gather along the walls, thereby tainting and corrupting the premises, and rendering them unfit for occupancy. This allegation is fully supported by the evidence, and was sufficient to warrant the court in granting the injunction. The court, then, having jurisdiction of the cause for the purpose of granting the injunction, could it, in view of section 17 of article 1 of the constitution, which provides that "in all civil cases the right of trial by jury shall remain inviolate," award damages for the injury resulting from the nuisance? The English rule was that the court of chancery, having jurisdiction for the purpose of granting the injunction, will prevent the circuity and expense of a trial in equity for an injunction and at law for damages, and, although it cannot decree damages for the plaintiff's loss, will substitute an account of the defendant's profits, (*Adams, Eq.* 219; and that this rule applied to cases of nuisance, (*Id.* 208.) This rule probably proceeds upon the theory that the tort has

been waived, the defendant treated as an involuntary trustee for plaintiff's benefit, and required to account for the profits he has made out of the maintenance of the nuisance; and yet there must be many cases in which no profit has been realized by the defendant, and for that reason the plaintiff would be without remedy in equity.

The better rule, though not universal, seems to be embraced in the doctrine that if a court of equity acquires either exclusive or concurrent jurisdiction it may go on to complete adjudication, and establish purely legal rights and grant legal remedies, which would otherwise be beyond the scope of its authority. Pom. Eq. Jur. § 181. This principle has been applied to cases in which a court of equity had obtained jurisdiction for the purpose of granting an injunction to restrain a private nuisance, and, having obtained jurisdiction for the purpose of awarding the special relief, the court retained the cause, and decreed full and final relief, including damages and abatement of whatever caused the nuisance. Id. § 237. "As an incident to the relief by injunction, courts of equity will, in proper cases, consider and settle the question of damages; but no bill will be entertained merely for the purpose of settling damages, that being regarded as the proper practice of the courts of law." *Bassett v. Manufacturing Co.*, 43 N. H. 249. "A court of equity," says Orton, J., in a suit to abate a nuisance, "having otherwise jurisdiction of the case, can award the damages as well as a court of law." *Mills Co. v. Henry*, 73 Wis. 229, 40 N. W. 809. Courts of equity, in this state, prior to the adoption of the constitution, had exercised concurrent jurisdiction with courts of law in cases of private nuisance. *Parrish v. Stephens*, 1 Or. 73. In *Tribou v. Strowbridge*, 7 Or. 156, Boise, J., interpreting this section of the constitution, said: "This language of the constitution indicates that the right of trial by jury shall continue to all suitors in courts in all cases in which it was secured to them by the laws and practices of the courts at the time of the adoption of the constitution," and held that, as the practice prior to the adoption permitted a court of law to refer long accounts for computation, the right to do so continued, notwithstanding the prohibition of the constitution. In *Phipps v. Kelly*, 12 Or. 213, 6 Pac. 707, it was held that, where a court of equity originally had jurisdiction of any class of cases for which the proceedings at common law did not then afford an adequate remedy, such jurisdiction will not be lost by reason of subsequent legislation conferring jurisdiction on a court of law to decide such cases, unless there are negative words excluding the jurisdiction of equity. It is true that there was a complete remedy at common law in cases of private nuisance prior to the adoption of section 333, supra, but, since that section has no words negating the jurisdiction of equity, and as, in

certain cases, equity had jurisdiction to enjoin a private nuisance prior to the adoption of the constitution, it follows that the court had authority to render judgment for the damages as an incident to the suit for an injunction. The appellant, then, is liable in damages for some amount, and, as this is difficult of ascertainment, and as no positive rule can be established as a measure, we see no error in the court's allowance of the amount awarded, and for that reason the decree is affirmed.

BROWN v. DESCHUTTES BRIDGE CO.¹

(Supreme Court of Oregon. Oct. Term, 1885.)

VENUE—TRANSITORY ACTIONS—WRITS—SERVICE—JURISDICTION.

1. Subdivision 1, § 45, Hill's Code, providing for a change of venue when the action has not been brought in the proper county, does not apply to transitory actions, since in such actions any county where service of summons may be had is a proper county.

2. In all transitory actions, service upon the defendant within the county where the action is brought is essential to the jurisdiction. Service in any other county is a nullity, but a voluntary appearance is equivalent to personal service.

Action by W. H. Brown against the Deschuttes Bridge Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Fecheimer & Ach, for appellant. Spriggs & Richardson, for respondent.

PER CURIAM. The defendant is a corporation, with its principal office at Albany, in Linn county. The respondent brought an action against it in the circuit court of Crook county, and the summons was served by delivering a copy thereof to the secretary of the appellant in Linn county. The appellant appeared and answered, and afterwards moved to change the venue to Linn county, on the ground that the action had been commenced in the wrong county. This motion was denied, and, upon a trial, judgment went for the plaintiff. From that judgment, defendant appeals, alleging as error the denial of its motion to change venue. The action, being for damages, was transitory, and might be brought within any county within the state where the defendant resided or might be found at the commencement thereof. Subdivision 1 of section 44, Civil Code, (Hill's Code, § 45), provides that the court or judge thereof may change the place of trial when it appears that the action has not been brought in the proper county. But this provision, we apprehend, does not apply to transitory actions. In such case it cannot be said that the action has been brought in the wrong county, since it may be brought in any coun-

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ty where service of summons may be had. But in all such cases it is essential to the jurisdiction of the court that service upon the defendants, or some of them, be had in the county where the action is brought; otherwise the court will be without authority to render a valid judgment. In this case the service upon the defendant in Linn county was a nullity. But it voluntarily appeared and filed an answer, and contested the case to the end. Such an appearance was equivalent to a personal service. Civil Code, § 61 (Hill's Code, § 62.) There was no error, and the judgment must be affirmed.

EVERDING v. MCGINN, District Attorney.
(Supreme Court of Oregon. Nov. 21, 1889.)

STATUTES — CONSTRUCTION — DISCRETION OF DISTRICT ATTORNEY — QUO WARRANTO — NATURE OF WRIT.

1. In adopting the statute of another state, we adopt along with it the judicial construction which it had received in the former state prior to its adoption here. *Crawford v. Roberts*, 8 Or. 324; *McIntyre v. Kamm*, 7 Pac. 27, 12 Or. 253; and *Trabant v. Rummell*, 12 Pac. 56, 14 Or. 17,—approved and followed.

2. Hill's Code, § 357, vests in each district attorney a discretion whether he will institute a prosecution under said section to try the title to an office, and mandamus will not lie to control such discretion.

3. The proceeding authorized by Hill's Code, § 357, to try the title to an office, is a public prosecution, instituted and conducted by the public prosecutor under his official obligation and responsibility.

Appeal from circuit court, Multnomah county.

Application by Richard Everding for mandamus to compel Henry E. McGinn, district attorney of the fourth judicial district, to institute a proceeding to try the title to the office of police commissioner of the city of Portland, to which office plaintiff claims to have been elected. A peremptory writ was ordered to issue, and defendant appeals. Reversed.

Upon the filing of the petition, the court allowed an alternative writ, to which writ the district attorney returned, among other things, that, upon application being made to him by the petitioner to prosecute an information in the nature of a quo warranto against Joseph Simon, the person alleged to have usurped and intruded into said office of police commissioner, he examined into the right and title of said petitioner to have and exercise said office, and the right and title of the said Joseph Simon to continue to hold and exercise said office, and from the examination so made by him he became convinced that petitioner, Richard Everding, had no claim of title to said office; that the term of office of said Joseph Simon, the present incumbent thereof, had not expired; and that he would continue to hold said office

until the legislature of the state of Oregon would adopt some further legislation on the subject. The district attorney further claims in his answer that the prosecution of such a proceeding is a matter wholly within his discretion as district attorney, and that the exercise of such discretion ought not to be, and could not be, controlled by said circuit court. He further showed in his answer to the writ that he had offered to institute such proceeding as the petitioner desired on certain terms and conditions, which was declined by the petitioner. The particular terms and conditions are not necessary to be specified, for the reason that they do not affect the question to be determined. The plaintiff demurred to this return, which demurrer was sustained by the court, and an order made directing a peremptory writ to issue, from which judgment the district attorney appeals.

C. H. Carey and Alfred F. Sears, Jr., for appellant. Geo. H. Williams and Edw. B. Watson, for respondent.

STRAHAN, J. The first and material question presented by this record is whether or not the district attorney may be compelled by writ of mandamus to institute and prosecute a proceeding to try the title to a public office; or, stating the question in a different form, is the power to institute such proceeding confided to the district attorney by the constitution and laws of this state, to be exercised in his discretion, when he shall determine that a case exists requiring the exercise of such power? Hill's Code, § 357, provides: "An action at law may be maintained in the name of the state, upon the information of the prosecuting attorney, or upon the relation of a private party against the person offending, in the following cases:—

(1) When any person shall usurp, intrude into, or unlawfully hold, or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation either public or private, created or formed by or under the authority of this state; or, (2) when any public officer, civil or military, has done or suffered an act which, by the provisions of law, makes a forfeiture of his office; or, (3) when any association or number of persons act within this state, as a corporation, without being duly incorporated." This section is copied almost literally from the Revised Statutes of the State of New York, published in 1859. (volume 3, p. 578, § 432.) It therefore becomes necessary for us to inquire what construction this statute had received in the state of New York prior to its adoption here, for the reason that in adopting it we adopted along with it the judicial construction of that state whence it was taken, as understood at that time. *Crawford v. Roberts*, 8 Or. 324; *McIntyre v. Kamm*, 12 Or. 253, 7 Pac. 27; *Trabant v. Rummell*, 14 Or. 17,

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12 Pac. 56. This precise question first came before the supreme court of New York in 1856, in *People v. Attorney General*, 22 Barb. 114. It was a motion for a mandamus against the attorney general, requiring him to institute the necessary proceeding against Henry E. Davis to oust him from the office of justice of the supreme court, and that the relator might be adjudged to be entitled to said office; but the court held that, under the provisions of the Revised Statutes and the Code, it was for the attorney general, and not the supreme court, to determine whether in any particular case it was proper that an action to try the right to an office should be brought or not, and that consequently a mandamus would not lie to compel the attorney general to prosecute an action of that nature. In disposing of that case the court, after a very learned and exhaustive review of the authorities, said: "The language of the statute, too, is guarded. An action may be brought by the attorney general. It is permissive. The power merely is conferred. It is for him to determine whether a fit case is presented. As to everything but the form, the proceeding stands as it did at common law. The usurpation of an office, though it frequently involves little else than private rights, is, in the eye of the law, a public offense. The only remedy is by an action in the name of the people. It is a public prosecution, instituted and conducted by the public prosecutor under his official obligation and responsibility. It is not the province of the court to control his discretion, or to authorize a private prosecutor to assume his office, and in his name to wield the power of public prosecutor." And this decision has been followed in that state. *People v. Fairchild*, 8 Hun, 334; *In re Gardner*, 68 N. Y. 467; *People v. Fairchild*, 67 N. Y. 334. The language of the Florida Code is in effect the same as New York and Oregon, and it has received the same construction that has been given to the Code of New York. *Robinson v. Jones*, 14 Fla. 256. And in a case involving an analogous principle this court has decided the same way. *State v. Oregon Cent. R. Co.*, 2 Or. 255; *State v. Douglas Co. Road Co.*, 10 Or. 198. In the latter case the action was brought under section 356 of Hill's Code, where leave of court must first be obtained for the purpose of annulling the existence of a private corporation; and the question arose as to the power of the court to control the district attorney in the conduct of said action after such leave had been obtained. The precise question involved was whether or not this court could so far control the district attorney as to prevent the dismissal of the appeal in this court in a case where it was claimed that private rights were involved, and where private counsel had been employed to assist the district attorney in the prosecution; and this court held it had no such power, saying, by

Waldo, J.: "Our statute limits the power of the district attorney, acting ex officio, in requiring him to get leave; but, where leave has been granted, the discretionary power of the court has been expended. The district attorney is the law officer of the state within the limits of his district, with the powers, in the absence of statutory regulation, of the attorney general at common law." These authorities are decisive of the question presented by this record. Upon the argument here, distinguished counsel for the respondent, feeling the force of these authorities, urged that they did not state the correct rule of law, and that the court ought to disregard them. This we have no power to do. We cannot make law, no difference how great the supposed hardship may be. We can only declare and administer it as we find it. Nor can we ignore the binding force of adjudged cases, unless we are prepared to demonstrate that they contain an erroneous exposition of the law. Neither our own individual views nor the views of learned counsel are sufficient for that. On such a subject other adjudged cases containing sounder expositions must be presented for our guidance. This has not been done. In fact, no authorities whatever countervailing those already cited, or even stating a different principle, have rewarded the researches of the able counsel who represented the respondent in this court. Without expressing any opinion upon the ultimate right to the office, it is not amiss to say the very able argument of counsel indicates that the question in the present state of the law is involved in much doubt and uncertainty. Let the judgment appealed from be reversed, and the cause be remanded to the court below, with directions to dismiss respondent's petition.

MORA v. PEOPLE.

(Supreme Court of Colorado. Dec. 22, 1893.)

MURDER—CONFESSIONS—DECLARATIONS—VERDICT
—HARMLESS ERROR—DATE OF EXECUTION—OBJECTIONS WAIVED.

1. Statements of a person accused of murder, which tend to explain incriminating circumstances brought against him, and to show him innocent of any crime, are not confessions, are admissible, though not made voluntarily, and may be proved false by the prosecution after it has proved that accused made them.

2. Where the defense in a murder trial is that the murder was committed by a person who was with defendant before and after the murder, and who was killed by officers in resisting arrest, a declaration made by such person shortly before death was not a dying declaration, and was inadmissible either for or against defendant.

3. Objection to the admission of testimony on a subject which defendant's counsel opened cannot first be raised by defendant on appeal.

4. A misleading direction of the trial court to the jury to separate their verdict of guilty of murder in the first degree from their recommendation of defendant for mercy was

cured where the court subsequently instructed the jury, while the verdict was under their control, that the punishment for such crime was fixed absolutely, and the jury, on being polled thereafter, affirmed such verdict.

5. Where the execution of a murderer is stayed on writ of error till after the date of execution as fixed by the trial court, the supreme court has statutory authority, in case of affirmance, to fix the date of execution.

Error to district court, Park county.

Librado Mora was convicted of murder in the first degree, and brings error. Affirmed.

Defendant was charged in the first and second counts of the indictment with the murder of Andrew Peterson, and in the third with the murder of Nels O. Anderson, and was found guilty upon both the first and third counts.

V. G. Holliday, for plaintiff in error. Robinson & Love, amicus curiae. Eugene Engly, Atty. Gen., and C. A. Wilkin, for the People.

HAYT, C. J. It appears from the evidence that Anderson and Peterson were partners in business and warm personal friends. Their occupation was that of common laborers, and as such they had found employment in various grading, mining, and other camps in this state, for several years immediately prior to their death, which occurred on or about the 9th day of July, 1891. At the time, they were passing through Park county on foot, in search of work, and were last seen by any witness produced at the trial at about 9 o'clock on the morning of Thursday, July 9, 1891, at Como. Two days thereafter their dead bodies were found about seven miles from that town, and near the Red Hill stage road. Peterson's body was found first. He had been killed upon the highway, and his body dragged into the timber, about 75 or 100 yards from the road. The next day Anderson's body was found, about 8 or 10 yards from the road. Both bodies, at the time of discovery, were hidden from view from the road. It was shown by expert testimony that death in each instance was produced by pistol-shot wounds, which were necessarily almost immediately fatal. The murder was for some 10 days shrouded in mystery. The first clue to the perpetrators was found by a ranchman who happened to be passing. His attention was attracted to a roll of blankets in a secluded place near the scene of the homicide. Further investigation revealed, in addition to these blankets, two pairs of overalls, a pair of trousers, and some other articles. The trousers were of a peculiar pattern sometimes worn by Mexicans, but not by others. The overalls bore the evidence of having been used in sheep shearing. Further investigation led the officers to suspect the defendant, Mora, and one Candido Costilla, as the perpetrators of the crime.

These men were traced to Huerfano county, and the arrest of Mora effected. Costilla was killed while resisting arrest.

At the trial in the district court, the state, after proving the corpus delicti, introduced proof of the following, among other, facts tending to show that Mora participated in the homicide: It was shown that plaintiff in error, Mora, and Candido Costilla, were also partners and friends; that in the month of June, 1891, they were together in the northern part of the state, shearing sheep when such work was to be had, and also gambling at odd times. Early in the month of July they left the neighborhood of the town of Byers, in Arapahoe county, and started in a southerly direction. They made this trip upon horseback. A few days after starting, they were seen at Castle Rock, in Douglas county, and at other places at different periods within the next few days, at points between Castle Rock and Park county. Upon this trip, Mora carried a silver-mounted pistol with a white handle. It was of 41 caliber. Costilla had a Colt's revolver. Although the caliber of this pistol was 45, either 44 or 45 cartridges could be used in firing it. On Thursday morning, July 9th, between the hours of 10 and 11 o'clock, Mora and Costilla called at the store of Samuel Cohen, in the town of Fairplay. Mora did the talking. He asked for cartridges for a 44 or 45 Colt's revolver. Mr. Cohen did not have either of these sizes, and Mora purchased a box of 41-caliber Colt's cartridges. The money was furnished by Costilla. He handed it to Mora, and he in turn handed it to Mr. Cohen. With these cartridges the plaintiff in error, Mora, loaded his pistol before leaving the store. After this was done, they both went out, got on their horses, and went off. At about the same time that Mora and Costilla were at this store, Anderson and Peterson were shown to have been at the store of Mr. Pike, in Como, Como being about 10 miles distant from Fairplay. The witnesses for the prosecution describe in detail the dress of Anderson and Peterson at this time. Upon the person of Anderson was a silver watch, with a peculiar buckskin string, about one-half or three-quarters of an inch wide, tied to the buttonhole.

The uncontradicted evidence of the state shows that Anderson's death was caused by a 41-caliber bullet, and Peterson's by a 44-caliber bullet, such as were carried by Mora and Costilla, respectively; that the overalls and blankets found near the place of the killing belonged in part to Mora, and in part to Costilla. In addition to this, it was shown that the silver watch with the buckskin string, worn by Anderson immediately prior to his death, was traced into the possession of Mora shortly after the homicide, at which time he exhibited it to a ranchman living in the vicinity, for the purpose of having it set. Various articles of clothing that were

identified as the property of Anderson and Peterson were shown to have been in possession of Mora and Costilla shortly after the homicide, and some blankets found in possession of Mora and Costilla were identified as those carried by Anderson and Peterson shortly prior to the homicide.

It was further shown that both Peterson and Anderson, when last seen, were strong, powerful men, in the very prime of life, and in the full enjoyment of vigorous health. The weight of Peterson, who was the larger of the two, was estimated by witnesses for the state at from 170 to 185 pounds, and, in the opinion of these witnesses, the body could not have been dragged from the road to the place where found by one person. The trail, for a part of this distance, was up quite a steep incline, and here the tracks of two men were distinctly visible, the tracks indicating that the men were engaged in dragging a heavy body. It was also shown that Costilla's face, just before the killing, was covered with a heavy growth of beard, and that he was cleanly shaven immediately thereafter, rendering identification difficult. Mora, when seen the day after the homicide, was wearing a pair of overalls much too long and too large for him. These, or a similar pair, he had on at the time of his arrest. After arrest he was taken to Fairplay in charge of an officer. Being obliged to change cars at Pueblo on this trip, Mora was taken off the train from the south, and placed in the Pueblo jail, awaiting the west-bound train. During this interval he took off these overalls, and secreted or destroyed them, leaving his person exposed so that the officer had to procure another pair to enable him to complete the journey..

When Mora was first arrested he denied knowing anything about the homicide, and that he was ever in Park county. Afterwards, from time to time, as he was confronted by evidences tending to show his participation in the crime, he undertook to explain away the unfavorable circumstances. This he did upon several occasions, the last being at the time of his preliminary examination before a justice of the peace in Park county. At this examination he was acting under the advice and direction of counsel. He went upon the witness stand voluntarily, and repeated the statements which he had previously made, going into details for the purpose of explaining the incriminating circumstances brought out by the witnesses for the state. At the trial in the district court the accused did not go upon the witness stand, but the state, as part of its case against him, was allowed to introduce, over the objections of defendant, these various statements theretofore made by him, and afterwards introduced evidence tending to prove their falsity. The objection urged to the admissibility of these statements is that they were confessions induced by some hope or promise of a benefit, and therefore not

voluntary. While we think the preponderance of the evidence tends to show that these statements were freely and voluntarily made, yet their admissibility in evidence does not depend upon such fact.

An examination of these statements discloses that, instead of being a confession of guilt of the crime charged on the part of Mora, they are explanations of the incriminating circumstances brought against him, evidently intended to show his innocence of any crime. The gist of these statements is as follows: That he was a resident of Huerfano county, Colo., and 19 years of age at the time of the preliminary examination. That in June, 1891, he started out with 10 companions for the purpose of shearing sheep. That he had seen Costilla in Huerfano county previous to this trip, but had no acquaintance with him. That afterwards they sheared sheep together in the vicinity of Byers. From Byers they went south to Douglas, in El Paso county, to get work. Mora said he desired to go back home, but that Costilla prevented him from going, and told him that he knew of a place where they could get work. They were at Castle Rock on the 4th of July; on the 5th at Monument; on the 6th at Woodland Park, and stayed there that night; and at Dudley's on the 7th; on the 8th slept at Chalmer's ranch; then came to Fairplay. Had a 41-caliber pistol on the trip, and Costilla had a 45. That he did not wish cartridges for his pistol, but that Costilla urged him to buy some. That at that time he had ascertained that Costilla was a bad man, and was afraid of him. That Costilla gave him the 41 cartridges for his (Mora's) pistol, but that he was without experience in shooting, although he had practiced some when a boy 10 years of age, but never allowed himself to shoot after he was 11 years of age. That he wanted to get away from Costilla, but he was compelled to stay with him.

Mora further testified, in substance, as follows: "After buying the cartridges at Fairplay, we camped at a 'dry camp' about three or four miles from town. In the afternoon Costilla went away, and left me at camp. I can go and point out this place. He took my revolver with him. I was alone, without any revolver, from three to dark. I dared not leave for fear he would kill me. Costilla brought back with him these overalls and blankets. He made me put on a pair of the overalls. I did not want to do it, but was afraid of him. Afterwards, Costilla went up in the mountains to a cabin, and shaved off his whiskers. He had the silver-plated watch with the buckskin string. It would not run, and he made me take it for the purpose of having it examined and set by some one. I had nothing to do with the killing, and knew nothing about it until told by the officers in Huerfano county." From the foregoing it will be seen that the declarations objected to are in no sense a confession.

On the contrary, they are a denial of guilt, and of all knowledge of the crime.

A confession is an admission or declaration made by a party who has committed a crime or misdemeanor of his agency or participation therein, and is generally restricted to acknowledgments of guilt. 1 Greenl. Ev. § 170; 3 Amer. & Eng. Enc. Law, 439; People v. Parton, 49 Cal. 632; People v. Velarde, 59 Cal. 457; People v. Le Roy, 65 Cal. 613, 4 Pac. 649; State v. Red, 53 Iowa, 69, 4 N. W. 831; State v. Carr, 53 Vt. 37. Abbott, in his work entitled "Criminal Trial Brief," (section 481,) says: "A declaration made by one accused of a crime, denying any criminal act, and explaining suspicious circumstances for his own advantage, is not a confession, and does not come within the rule that confessions must be voluntary to be admissible." Again, (at section 513,) the author says: "Evidence of falsehood on the part of the accused in giving an account of himself, or of the transaction or his relation to it, is competent as affording a legitimate presumption of guilt. For this purpose the prosecution may prove such declarations of the accused, and then prove their falsity." It is evident that the assignment of error based upon the admission of this evidence is not well taken.

The defense offered to introduce a declaration claimed to have been made by Costilla shortly before his death. The state objected to this evidence, and it was excluded by the court. The nature of the alleged statement is not disclosed. This is not material, as the evidence was not admissible for any purpose. It is *res inter alios acta*, and could not have been introduced by the state if against the accused; neither was it competent for the defendant if it tended to exonerate him. Upon what ground it was claimed to be competent we are not advised. Presumably, as a dying declaration. A dying declaration is only admissible where the death of the declarant is the subject of the charge of homicide on trial, and the circumstances of the death are the subject of the declaration.

The next assignment of error relates to the admission of evidence to the effect that Mora refused to point out to the officers the camp at which he stayed at the time when Costilla went away, supposed to be at the time of the killing. The evidence with reference to the refusal of Mora to go with the officers, and point out the dry camp described by him, at which he alleged he sojourned during the absence of Costilla on the afternoon of the murder, seems to have been admitted, not only without objection, but at the wish of both the state and the accused. The evident purpose of the state in offering such evidence was to create the inference in the minds of the jury that such a camping place was entirely mythical. On the other hand, counsel for the accused, by showing Mora's willingness to go at any time when his counsel would accompany him, and then showing that his counsel refused to go, hoped to estab-

lish the presumption that Mora's statements were true in reference to such a camp, and the occurrences detailed in connection therewith, tending to exonerate him from any connection with the murder. Whether this matter should have been inquired into is not now for this court to determine. The defendant was defended at the trial by able counsel, who invited and encouraged this inquiry. They did not ask that it be excluded then, and cannot be heard to object to it for the first time in this court.

The next assignment brings up for review the form of the verdict, and the proceedings at the time of receiving the same. The first verdict returned by the jury is as follows: "We, the jury, find the defendant guilty of murder in the first degree, as charged in the first and third counts of the indictment herein. We, the jury, recommend the defendant to the mercy of the court." Upon the attention of the court being called to the recommendation to mercy, the jury were directed to separate the finding and the recommendation. Thereupon the jury retired to their room, and thereafter returned to the court a verdict in accordance with the court's instructions. Thereupon counsel for defendant asked that the jury be polled, and that they be first instructed by the court that no discretion existed in the court in regard to the penalty or sentence to be pronounced upon the verdict as it then read, the penalty being absolutely fixed by law. Thereupon the court instructed the jury in writing, as follows: "The penalty for murder of the first degree is absolutely fixed by the statute, and cannot be varied or changed by the court." After this instruction had been given, the jury was polled at the request of defendant's counsel, and each juror answered that the verdict returned was and is his verdict. In cases of this character in this state, jurors have nothing whatever to do with fixing the punishment. In this instance the punishment for the offense is fixed absolutely by the statute, and it was only for the jury to ascertain, under the evidence, whether or not defendant was guilty of the crime charged. The record discloses that the verdict of guilty was found before anything was said by the court with reference to the penalty. The action of the court in directing the jury to separate from their verdict the recommendation for mercy was objectionable, in that it was misleading; but this objection was afterwards cured by the instruction given, to the effect that the punishment was absolutely fixed by law for murder of the first degree. This was given while the verdict was yet under the control of the jury. Subsequently, the jury were polled, and with this information each returned an affirmative answer to the question, "Was this, and is this now, your verdict?"

The court, in fixing the week for the execution, overlooked the fact that a calendar week should have been designated, i. e. a

period of time extending from 12 midnight Saturday until 12 midnight the following Saturday. In re Tyson, 13 Colo. 482, 22 Pac. 810. The defendant was relieved by the governor before the week designated commenced to run, and the execution was thereafter stayed by this court pending this review; consequently, the date fixed by the trial court is no longer material. In this state there is direct statutory authority given this court to fix the date of execution in case of affirmance, where the execution has been stayed upon a writ of error or supersedeas. It is now urged that, as the judgment of the district court cannot be affirmed as to the time of execution, the prisoner must be discharged, or remanded for a new trial. This would be to render the statute meaningless. In no case does this court affirm the sentence as to the time of execution, as such time necessarily elapses before the case reaches a determination in this court. To give the statute any force or effect whatever we must uphold the power of this court to now fix the week for the execution. Moreover, there is authority in support of this right, in the absence of any statute expressly conferring the power. Whart. Crim. Pl. (9th Ed.) § 927; Daniels v. Com., 7 Pa. St. 371; Beale v. Com., 25 Pa. St. 11.

The argument based upon the youth of the prisoner at the time of the murder, and the power and influence wielded over him by his older companion, may properly be addressed to the executive. It can have no weight upon this review. The trial appears to have been fairly conducted in the court below. The prisoner was defended by able counsel. He was found guilty by an impartial jury, and no reason appears why this court should interfere to prevent the sentence of the law from being inflicted in his case. An order will therefore be entered of record, designating the calendar week commencing January 7, 1894, as the week for carrying the judgment of the district court into effect. Affirmed.

WEBER, Sheriff, et al. v. BULLOCK.¹

(Supreme Court of Colorado. Oct. 16, 1893.)

CORPORATE STOCK—ASSIGNMENT—TRANSFER ON CORPORATION BOOKS—RIGHTS OF ATTACHING CREDITORS.

1. The obligor on a bond deposited with plaintiff a certificate of corporate stock as collateral security, and subsequently assigned such certificate to him, in trust for the obligees on the bond, in consideration of a release from liability thereon; the assignment providing that the obligor should not be released till a perfect, unincumbered title should be transferred to plaintiff on the books of the corporation. Plaintiff accepted the certificate, and repeatedly, but ineffectually, demanded such transfer on the books. Held, that the absolute title passed to plaintiff, as against creditors of the obligor.

2. Equity will not permit assigned corporate stock to be attached by creditors of the

assignor because not transferred on the books of the corporation within 60 days after assignment, as required by Gen. St. 1883, § 269, where the assignee has used due diligence in demanding such a transfer, but the company has neglected to make it.

Error to district court, Arapahoe county.

Suit by R. S. Bullock, as trustee, against A. H. Weber, as sheriff of Arapahoe county, Maria L. Russell, Edward Yoxall, and D. E. Young, as partners under the firm name of Yoxall & Young, and Frank A. Bunnell, to enjoin the sheriff from selling corporate stock attached as the property of George W. Middleton, and about to be sold under executions issued on judgments recovered by the sheriff's codefendants. Judgment for plaintiff, and defendants bring error. Affirmed.

The other facts fully appear in the following statement by GODDARD, J.:

This suit was instituted on the 2d day of August, 1888, in the district court of Arapahoe county, to enjoin the plaintiff in error A. H. Weber, as sheriff, from selling 6,000 shares of the capital stock of the Marrs Consolidated Mining Company, theretofore attached by him as the property of George W. Middleton, and about to be sold under executions issued on judgments recovered by his coplaintiffs in error against the firm of Marrs, Middleton & Hunter. These actions against the firm were commenced in the year 1888, and the attachments and executions were levied on the stock in question in the month of May, 1888. At the time they were levied the stock stood in the name of George W. Middleton, on the books of the Marrs Consolidated Mining Company, and its successor, the Swansea Mining Company. The defendant in error claims ownership of the stock by virtue of an assignment of the certificate to him, in trust for certain beneficiaries, prior to the levy of said attachments and writs. The court below rendered judgment in favor of defendant in error; to review this judgment this writ of error is prosecuted. The facts as disclosed by the record are, substantially, as follows: On the 1st day of November, 1881, the Marrs Consolidated Mining Company, a corporation duly organized under the laws of this state, issued to George W. Middleton certificate numbered 16, for 6,000 shares of its capital stock. During that fall, Middleton sold certain other shares of the capital stock of this company to parties residing in Kentucky, with a guaranty that the company would, after January 1, 1882, pay to the holders of the stock so sold a dividend equal to 3 per cent. per month of the purchase price thereof, for the period of 12 months, and that the shares should be redeemed at the end of that period, if the holders desired, at the price paid. To secure the performance of this guaranty, Middleton and others executed a bond, and as additional security he placed in the hands of R. S. Bullock, in trust, this certificate, No. 16, for 6,000 shares of stock.

¹ Rehearing denied January 8, 1894.

On the 9th day of March, 1886, written agreements were entered into between the Kentucky stockholders and George W. Middleton, wherein it was provided that in consideration of the release of said guaranty, and the discharge of all obligation or liability thereon, the full, complete, and unincumbered title to the 6,000 shares of stock so held in trust by said Bullock, were to be transferred to him upon the books of the company, for the purpose of distribution among the several parties interested. At the time said agreements were made, the certificate of stock, which had been deposited in the German National Bank of Denver, had been misplaced, and could not then be found, and was not found until several months thereafter. Before the certificate was found these written agreements were presented to the company, and a transfer of the stock upon its books demanded. Other and repeated demands were made upon the company, by representatives of Bullock, for a transfer of the stock upon the books of the company to R. S. Bullock, pursuant to these agreements, during the years 1886 and 1887, and the fore part of 1888, both before and after the certificate of stock was found; and after the certificate was found, and in April, 1887, the same was presented to the officers of the company by Mr. Golding, a representative of Mr. Bullock, and the issuance of a new certificate demanded in lieu thereof. And again, on the 31st day of March, 1888, the certificate was presented to the company, by Mr. Pence, as attorney for Bullock, with an offer to surrender the same, and a demand for the issuance of a new certificate to Bullock, as Middleton's assignee. All of these demands were refused by the company, by reason of some discrepancy appearing upon their books in regard to the issue of certificate No. 16. In the month of May, 1888, it was agreed by the officers of the company that, if the company were indemnified by a proper bond, they would make the transfer. While such bond was being procured, in Kentucky, these writs were levied. The defendant in error offered to show by the sheriff himself, and also by Pence, that at the time the writs were issued, and before the same were levied, the sheriff was notified that Mr. Bullock, as trustee, claimed to be the owner of said stock.

Sullivan & May, Coe & Freeman, and T. J. O'Donnell, for plaintiffs in error. Pence & McGinnis, for defendant in error.

GODDARD, J., (after stating the facts.) The foregoing statement sufficiently discloses the material facts established by the evidence, that are pertinent to the inquiry before us, or essential to the determination of the rights of the respective parties to the stock in controversy. Plaintiffs in error rely upon two grounds for a reversal of the judgment of the court below: First, that, irrespective of our statute relative to the trans-

fer of stock by corporations, the plaintiff below was never vested with any title to the stock in question; second, under section 269, Gen. St. 1883, and the pleadings and evidence, the defendant in error cannot maintain this action against plaintiffs in error.

It is contended, in support of the first proposition, that the defendant in error was never vested with the title to the stock in question, even as trustee, for the reason that the terms of the agreements, in pursuance of which it was transferred, were never complied with, in this: that it is therein expressly provided that, before the release and discharge of Middleton and his co-obligors from the guaranty given by them, there should be transferred to Bullock, upon the books of the company, a full, complete, and perfect unincumbered title to the stock, and that, as this condition had never been complied with, the title did not pass to him under these assignments. We think this position is untenable. The certificate was placed in Bullock's possession in 1881 as collateral security, and on March 9, 1886, under the agreements referred to, the absolute title to the stock, so far as Middleton could convey it, was transferred to him, for the purpose of its distribution among the respective beneficiaries. Bullock assumed the ownership of the stock, as trustee. He not only accepted the certificate, but, through his agents and attorneys, repeatedly demanded a transfer of the stock upon the books of the company, and is here. In this action, asserting his ownership in behalf of the beneficiaries. Whether, by reason of the proviso thus relied on by plaintiff in error, the failure to transfer on the books of the company a clear legal title leaves Middleton and his co-obligors still liable on the guaranty, is immaterial. It certainly does not affect the ownership of Bullock to the stock acquired and vested in him by the transfer of the certificate. The parties to the agreement, and those whose rights, if any, are affected thereby, are not denying the validity of the transfer of the stock to Bullock, and it certainly does not lie in the mouths of plaintiffs in error to raise this objection. So far as they are concerned, the facts in evidence show that Bullock, for the purposes of the trust, is vested with title to this stock, and that, as such trustee, he is entitled to avail himself of any proper remedy to protect such ownership.

It is further insisted that, notwithstanding the transfer to Bullock may be held valid and effective in transferring such title as Middleton had in the stock, yet by section 269, Gen. St. 1883, the defendant in error is precluded from asserting such or any title to the stock in question, as against the plaintiffs in error; that the fact, appearing, that no transfer of the stock upon the books of the company was made within 60 days from the date of the assignment of the stock to

him, is sufficient to defeat the acquisition of any title acquired thereby, and that no exercise of diligence on his part will avail him, or excuse the want of such actual transfer. In support of this interpretation of the statute, the case of *Conway v. John*, 14 Colo. 30, 23 Pac. 170, is relied on. In that case it was held that by this statutory provision a different mode for the transfer of the stock of a corporation was established than existed at common law, and that under the facts of that case the attempt to transfer by indorsement and delivery of the certificate, without a transfer of the stock on the books of the company, was insufficient to vest the title in the assignee, as against the vendor's creditors, and that the stock remained subject to attachment at their suit. The facts in that case disclosed a transaction unaffected by any equitable considerations, and called simply for the interpretation of the statute as applied to those facts, which were as follows: A certificate of stock was assigned to Conway by one Ireland on November 22, 1881. No transfer of the stock was made upon the books of the company, and it still stood in the name of the assignor, on the books of the company, on April 19, 1882, when it was attached as his property. On May 22, 1882, it was sold on judgment rendered in that action, and purchased by John, without notice that Conway had any claim thereto; and not until November, 1883, did he learn that the judgment debtor had assigned the stock to Conway. Upon these facts the court well held that "there must be at least a substantial compliance with the requirement, in order to protect the property against future assignments or levies." No question of diligence on the part of the assignee of the stock to procure a transfer was involved, and it was not claimed that the purchaser at sheriff's sale had any notice of Conway's rights. In *Ditch Co. v. Elliott*, 10 Colo. 327, 15 Pac. 691, it is held that "certificates of stock are assignable, and pass from hand to hand by indorsement, as bills of exchange and promissory notes pass, and holders of such certificates are prima facie presumed to be bona fide owners thereof." And while, in *Conway v. John*, it is held that such title is not sufficient to protect the stock so transferred from attachment at the suit of the creditors of assignor, or to defeat the acquisition of title by an innocent purchaser, it is not to be taken as establishing the doctrine that the assignee of stock, having used diligence to comply with the requirements of the law, and having done all in his power to procure a transfer upon the books of the company, shall be deprived of his property by the mere failure or neglect of the company to make such transfer. Shares of stock are liable to attachment, and are the subjects of sale, the delivery of possession being an essential to a complete transfer of title, as in the sale of other personal property. The evident intent and purpose of the statute is to guard

against the fraudulent or secret disposition of stock, by making it the duty of the holders thereof to procure a transfer upon the books of the company, and thus furnish record evidence of their title and possession; and a vendee or assignee of stock, who ignores, or willfully disregards, the requirements of the statute, by neglecting to have the same transferred upon the books of the company, may suffer the penalty of having the stock subjected to the payment of his vendor's debts. But upon the same principle that the retention of the possession of chattels by a vendor may be explained by showing that a delivery was impossible, thereby rebutting any inference of fraud, the failure to have the transfer of the stock made upon the books of the company may be shown to be without fault on the vendee's part, and that such failure occurred notwithstanding his honest but ineffectual effort to comply with the requirement of the statute. And notwithstanding a compliance with the requirement of the statute is essential to a transfer of the legal title to the stock, as held in that case, non constat that courts of equity will not protect such title or equitable right as the assignee of the certificate may have, when the question lies between such assignee and the attaching creditor of his assignor, as to which has the better title, when it appears that the assignment is prior in time to the attachment, and made in good faith and upon a valuable consideration, and where the assignee has done all in his power to comply with the requirements of the statute, and is prevented from obtaining such transfer as the law requires by the fault of others, and not from any neglect on his part.

In *Colt v. Ives*, 31 Conn. 25, a case involving the construction of a statute like ours, upon a similar state of facts, in distinguishing that case from those wherein the supreme court of Connecticut had laid down the doctrine followed in *Conway v. John*, Hinman, C. J., speaking for the court, said: "If a good reason is shown * * * for the failure to procure a transfer of stock on the books of a corporation, as in this case, which would have been sufficient to excuse the taking possession of personal chattels sold, then, upon the same principles upon which the taking possession in the latter case would be excused, it would seem that the act which is ordinarily required in order to perfect an assignment of a chose in action, or of stock in a corporation, ought in equity, certainly, to be also excused." And again: "It is true, there will sometimes be cases where a mere technical title will prevail, but it is desirable, so far as practicable, that the substantial and equitable ownership should be sustained, rather than a technical title; and so far as the rule was intended to be punitive in its application, in order to compel a conformity to the policy of the law, there is no reason why a party who has done all that he possibly could should be made to suffer any

penalty." The case at bar illustrates the obvious injustice of a contrary rule. The assignment of the stock to defendant in error was long prior to the attachment; was made in good faith, and upon a valuable and adequate consideration. The defendant in error, diligent in the discharge of his duty as trustee, demanded, within a few days after the assignment of the certificate to him, a transfer of the stock upon the books of the company, and repeatedly and persistently, through his agents and attorneys, sought to comply with the requirement of the statute. We think that, under the facts of this case, the defendant in error has shown good reason for failure to procure a transfer of the stock in question to be made upon the books of the company, and has done all he could to conform to the policy of the law, and that it would not only be inequitable, but a perversion of the true intent and meaning of the statute, to subject him to the loss of his property solely for the fault of the officers of the company. Nor can we agree with counsel for plaintiffs in error that an action against the company, to recover the statutory penalty and damages, is his only remedy, but are of the opinion that he may also maintain this action, and that he has clearly shown his right to the relief demanded. The judgment of the court below is accordingly affirmed.

AUTREY et al. v. WRIGHT.

(Court of Appeals of Colorado. Dec. 11, 1893.)

ACTION AGAINST SHERIFF — SEIZURE OF EXEMPT PROPERTY—TITLE OF PLAINTIFF—INSTRUCTIONS.

In an action against an officer to recover the statutory damages for the seizure under attachment of exempt property, there was evidence that, at the time of the levy, the property was under mortgage; that the mortgage contained a condition giving the mortgagee the right to take possession if the property should be seized under attachment; and that, when the officer came to take the property, plaintiff endeavored to deliver it to the mortgagee, who, he claimed, was entitled to possession by virtue of the mortgage. *Held*, that the jury should have been instructed that, if the mortgagee was in possession at the time of the seizure, plaintiff could not recover, as in such case he would have no title.

Appeal from district court, Boulder county.

Action by Friend E. Wright against Edward Autrey and others to recover the statutory damages for the seizure of certain exempt property by defendant Autrey under a writ of attachment. Judgment for plaintiff. Defendants appeal. Reversed.

The other facts fully appear in the following statement by BISSELL, P. J.:

In the month of May, 1891, the appellee, Wright, was doing business in Lyons, Colo., and at that time was indebted to the Hallack Lumber & Manufacturing Company for some goods and material which that company had sold him. About that date an at-

tachment, which had been issued in the suit of the company against Wright, was levied upon the property in dispute in this action. This consisted of a pair of horses, a set of harness, and a bedstead. This suit was pending for some time, and, under an order of the court, the property was sold, the proceeds being held to await the result of the action. After the sale the present suit was brought against the officer to recover treble damages, under the statute, on the ground that the property was exempt, as the work team of plaintiff. The exemption of the property was fairly established by the evidence. Prior to the sale the horses were in Wright's stable, and they were sold from that place by the deputy, who took them. The present controversy springs from the circumstances surrounding this sale. It appears that, prior to this levy and sale, Wright had mortgaged the horses to R. G. Sutphen, who sold the security to one Mumford. This fact was shown on the trial. The mortgage was introduced in evidence, without objection, and appears to be regular in form, and to cover the property in dispute. It contained the ordinary condition that, if the mortgaged property should be seized under attachment, all debts should mature, and the mortgagee have a right to take possession. When Thorne, who was the officer holding the writs, came to take the horses, Mumford and Wright went into the stable, harnessed the animals, and Wright, so far as he was able, delivered them to the mortgagee. They were taken out of the barn by Wright and Mumford, who insisted that the horses were not then the property of Wright, but belonged to the mortgagee, to whom possession had been surrendered. Mumford claimed title. Wright asserted that the mortgagee was in possession after default, and the owner, and insisted that they should not be sold under the process. Thorne disregarded the claims and protests of the parties, took them away from the mortgagee, and proceeded to sell them. At the time of these occurrences, Wright, it seems, claimed to the officer that the property was exempt, under the statute, and that he himself had a right to hold them free from sale, because they were his work animals, and the only ones which he owned. The officer had been indemnified by a bond, disregarded all claims, sold the horses to one Burdett, and presumably applied the proceeds. After this transaction the present action was instituted, and all these facts were developed without objection on the trial. The court instructed the jury as to exempt property and the law governing it, but refused to charge the jury that, if the mortgagee was in possession at the time of the seizure after forfeiture, then the right of action did not inure to the plaintiff, since he was without title to what he claimed was exempt. The jury found a verdict for \$714, and the case comes here by appeal.

Rogers, Outhbert & Ellis and Reginald Heber Smith, for appellants. O. F. A. Greene, for appellee.

BISSELL, P. J., (after stating the facts.) Very recent decisions of this court determine the questions involved in favor of the appellants. The statute giving the right of action for treble damages in certain cases received very full consideration in a case decided at the present term. *Madera v. Holdrege*, (Colo. App.; Sept. term, 1893,) 35 Pac. 52. It was there decided, following the cases of *Harrington v. Smith*, 14 Colo. 376, 23 Pac. 331, and *Behymer v. Cook*, 5 Colo. 395, that wherever a levy was made on exempt property, and it was established by the record that what was seized was all the exemptioner owned, the seizure was illegal, regardless of any claim or assertion of right by the attachment defendant. The duty of selection only rests on the defendant where he has other property than what is claimed to be exempt. The court below did not depart from these well-established rules in its instructions to the jury; but it declined to charge the jury as to the legal effect of the mortgage, and the acts of the owner and mortgagee in reference to the attempted enforcement of that security. The officer pleaded these facts as a defense. The plea was a perfect bar to the action, if sustained by proof which satisfied the jury. It has been repeatedly decided in this state that, after a default and a valid change of possession, the legal title to mortgaged property vests absolutely in the mortgagee, who has the unconditional right of possession; and unless these principles be varied by equitable considerations, which do not appear in this case, or by some facts surrounding the maturity of the mortgage and the assumption of control which will interfere with the mortgagee's title, it becomes perfect, and neither the mortgagor nor his creditors can acquire any right with reference to it. *Atchison v. Graham*, 14 Colo. 217, 23 Pac. 876; *Newman v. People*, (Colo. App.; Sept. term, 1893,) 34 Pac. 1006. If these principles are applicable to the present case, they are decisive of the controversy, and compel us to reverse the judgment. While the issue as to the title was not very clearly and clearly presented by the pleading, still there was such a denial of the plaintiff's right and ownership that testimony might, unless objection was raised, be introduced to show what the facts were concerning the maturity of the mortgage and the mortgagee's rights. No objection of any sort was made to the proof offered on this subject, and it very clearly appeared that there was an outstanding valid mortgage held by Mumford on the identical property seized by the officer. The proof was very satisfactory that the mortgagee did all that he was able, or that was necessary, to assume possession of the property prior to the time the sale occurred. Both Wright, the

present claimant, and Mumford, the mortgagee, testified there was a breach in the condition; that Wright surrendered so far as he could, and Mumford assumed control of the property. From these facts it is evident that the title to the property was no longer in Wright, the exemptioner, but had become absolutely vested in the mortgagee, who must be taken, under the present proofs, to have been in the possession and control of the property at the time of the seizure and sale. It is unimportant to determine whether he had the legal right to take the property when he did, because of the antecedent levy of the writ of attachment, and because the property might perhaps be taken to be in custodia legis, so as to compel a suit for its recovery. The facts surrounding the matter are stated in this manner simply for the purposes of demonstrating that the exemptioner had lost title prior to the sale, and prior to the suit, and consequently was disqualified to maintain the present action. If, on another trial, under proper instructions, the jury shall find the issue concerning the mortgage to be sustained, Wright, the exemption claimant, cannot be permitted to recover, since he must have title in order to justify the suit. For the error committed by the court in failing to submit this matter to the jury, and to give the instruction asked, this judgment must be reversed, and the case remanded.

HORNBEIN et ux. v. BLANCHARD.

(Court of Appeals of Colorado. Nov. 27, 1893.)

APPEAL—REVIEW—MATTERS NOT APPARENT ON RECORD—BITE BY VICIOUS DOG—OWNERSHIP—LIABILITY.

1. In an action against a man and his wife for injury caused by the bite of a vicious dog, both defendants denied the ownership of the dog, but judgment was entered on a verdict against them. There was no bill of exceptions in the record, and it was not shown whether the issues as to ownership were tried, nor what facts were disclosed by the evidence. *Held*, that the supreme court could not determine whether or not an instruction relating to the liability of defendants in case the dog was kept at their house was correct.

2. Defendants were liable, regardless of ownership of the dog, if they kept him on their premises, and exercised rights of ownership over him, knowing his vicious character.

Appeal from district court, Arapahoe county.

Action by Mary Blanchard against Samuel Hornbein and Matilda Hornbein, his wife, to recover damages caused by the bite of a vicious dog. From a judgment entered on the verdict of a jury in favor of plaintiff, defendant Samuel Hornbein appeals. Affirmed.

Perry & Bliss, for appellant. Ross & De-weese, for appellee.

REED, J. Appellee brought suit against appellant and his wife, Matilda, alleging

that the defendants kept and owned, upon premises jointly occupied by them, a large, black, vicious dog, of whose ferocity they had full knowledge; that plaintiff called at the house of her sister, residing next door to appellant, and on such premises was attacked by the dog, severely lacerated, bitten, and injured, by reason of which she was disabled and made sick, and had to incur an expense of \$150 in medical attendance and nursing; claiming damages of \$5,000. The defendants answered generally, denying each and every allegation. Upon the issues so made the case was tried to a jury, resulting in a verdict and judgment against defendants for \$750 and costs. The facts, as stated in the complaint, appear to be conceded. The errors assigned (13 in number) are upon the instructions given by the court and those asked by defendants and refused.

The responsibility of parties, by the keeping of an animal of that character, knowingly, for injuries inflicted, is so well established that the citation of authorities is unnecessary. The contention of appellant's counsel is that the dog was the individual property of the wife, not of the husband, nor of both jointly; and, being the individual property of the wife, under the laws of this state, the husband could not be held liable. It appears by the answers that both husband and wife denied the ownership. No bill of exceptions is brought up. It is not shown whether the issues as to ownership were tried, nor what facts were disclosed by the evidence. There appears to be a discrepancy between the statement of the verdict in the abstract and as it appears in the record. In the former it is said that the judgment was rendered against the defendant Samuel. As recorded, it is against both.

The instruction given by the court and relied upon by counsel as erroneous is as follows: "The court further instructs you that if you believe by such preponderance of the testimony that the dog in question was kept at the house of the defendants, it appearing from the testimony that they are husband and wife, and that the dog was kept partly for the use of the children, and that they exercised apparent ownership and control of the dog, then they are in law liable for injuries which he may have occasioned, providing you further find, by a preponderance of the testimony, that the dog was a cross and vicious dog, and that they knew of the same." The correctness and pertinency of an instruction of this character can only be tested by reference to the case made by the evidence; consequently we have no means of examination. It is assumed in argument and contended that the dog was the property of the wife, and an able and ingenious argument is made in regard to the marital relation at common law and under our statutes, the liability of the wife for injuries inflicted by animals

owned by her individually, and the nonresponsibility of the husband. We are not prepared to say the contention is not correct, nor are we required to say it is incorrect, as a legal proposition. The question of ownership, whether individual in either or jointly in both or in neither, whether the animal was a waif or borrowed, if important at all, was a question of fact to be determined by the jury, and it appears to have found the parties jointly responsible. We have no means of reviewing the correctness of this conclusion, and must assume that it was warranted by the evidence. The instruction objected to is but one paragraph of the charge. That and the succeeding, taken together, may have been eminently proper on the case made. The jury was told that if the parties were husband and wife, residing together, and the dog was kept at their house, they, exercising apparent ownership and control, and knowing his vicious character, were liable for the injuries inflicted. In the next paragraph it was told that the principal questions for it to determine were whether the dog was of a vicious nature, and, if the defendants knew the fact, then they were liable. Taken as a whole, we see no error. Their liability was not alone dependent upon the ownership of the brute. The facts might render them, or one of them, liable, regardless of ownership. Keeping him upon the premises, and exercising rights of ownership, knowing his ferocity, was sufficient to fix the liability. The word "owner" will include the person in possession and control of any article of personality, "as the one who hires a carriage." *Camp v. Rogers*, 44 Conn. 298. In the absence of all other data upon which the verdict may have been predicated, the judgment should be affirmed.

MORRIS v. PEOPLE.

(Court of Appeals of Colorado. Nov. 27, 1893.)

FALSE PRETENSES—WHAT CONSTITUTES—PROOF—CONSTRUCTION OF STATUTE.

1. Gen. St. 1883, § 884, provides that if any person, by false representations, in writing, of his own responsibility, wealth, or mercantile connection, "shall obtain a credit thereby, defraud any person" of any valuable thing, or if any person shall cause others "to report falsely of his honesty, wealth, or mercantile character, and, by thus imposing on any person, obtain credit, and thereby fraudulently get into possession" of any valuable thing, every such offender shall be deemed a swindler. Held, that the first clause should be construed as if it read "shall obtain a credit, and thereby defraud;" and that proof both of obtaining credit on false representations and of resulting harm to the giver of the credit is necessary to a conviction.

2. To obtain goods on credit from a company, defendant made a true statement, in writing, of his financial condition, and added the following promise: "If any change occurs to lessen my responsibility, I bind myself to give the * * * company immediate notice; otherwise, I shall be held for transactions thereat."

made, as under this statement, this standing good till notice of change." *Held*, that defendant was not criminally liable, under Gen. St. 1883, § 884, where his financial condition subsequently changed for the worse, and he purchased goods thereafter from the company on credit without giving notice of the change.

Error to district court, Las Animas county. Adolph Morris was convicted of swindling, and brings error. Reversed.

The other facts fully appear in the following statement by BISSELL, P. J.:

The people prosecuted Adolph Morris, the plaintiff in error, by information containing several counts, which charged him with a violation of the following section of the Criminal Statutes: "If any person, by false representations in writing of his own responsibility, wealth or mercantile correspondence and connection, shall obtain a credit thereby, defraud any person or persons of money, goods, chattels or any valuable thing, or if any person shall cause or procure others to report falsely of his honesty, wealth or mercantile character, and by thus imposing on any person or persons, obtain credit, and thereby fraudulently get into possession of goods, wares, merchandise or any valuable thing, every such offender shall be deemed a swindler, and on conviction shall be sentenced to return the property so fraudulently obtained, if it can be done, and shall be fined not exceeding one thousand dollars, and imprisoned in the county jail not exceeding six months." Gen. St. 1883, § 884. The information and the proof show that the acts charged to be criminal were these: In 1891, Morris was in partnership with his brother, doing business as grocers, in Trinidad, Colo. About the month of October, Morris purchased his brother's interest, with the purpose of carrying on the business thereafter for his own benefit, at the same place. The firm had been doing business prior to that time with the Forbes Mercantile Company, whose organization as a corporate body under the statute is unquestioned. To secure for himself a credit, which would enable him to successfully prosecute his enterprise, he called on the company, and made a statement of his financial condition, which the company took as the basis of their estimate. The statement is as follows: "City of Trinidad, County of Las Animas, State of Colorado, October 3, 1891. Adolph Morris makes this statement, which is true and accurate, of my assets and liabilities at this date, upon which I desire to purchase goods of the Forbes Mercantile Company. If any change occurs to lessen my responsibility or materially change my condition, I hereby bind myself to give the Forbes Mercantile Company immediate notice; otherwise, I shall be held for transactions thereafter made, as under this statement, this standing good until notice of change. Am doing business under the name of A. Morris. The firm is composed of Adolph Morris, in the business of retail groceries. Insured for \$3,000, which

I will keep good to this amount." It is conceded that the statement was absolutely true when it was made, and was a fair, honest, and accurate representation of the financial condition of the accused person. It so far continued true for several months that it is conceded no prosecution could have been based thereon. During the spring of 1892, Morris became embarrassed by divers losses which may be left unexplained, and as indefinite as they are in the record; and in the month of April he made an assignment for the benefit of his creditors. This developed the fact to be that at the time when he made several purchases from the Forbes Company, in April, the representation contained in the statement, had it then been repeated, would not have been true. It is conceded that Morris failed to inform the Forbes Company of any change in his condition, and bought his goods at that time in the same manner that he had theretofore. The record shows that the original statement was made to the Forbes brothers, who were the responsible heads of the corporation, and that possibly some of the purchases were made from them. The testimony discloses that the general course of the dealing between Morris and the company was like that which ordinarily prevails in cases of this sort. Sometimes the goods were ordered directly of the company at their store, and sometimes the orders were given to the company's solicitors, who were in the habit of seeking orders by going about from store to store. On this case and other proof, which does not alter nor change the record with reference to the propositions on which it is decided, Morris was convicted and sentenced. From the judgment of conviction, he prosecutes this error.

John Gordon and Thomas, Bryant & Lee, for plaintiff in error. Eugene Engley, Robert T. Yeaman, and Yeaman & Parsons, for the People.

BISSELL, P. J., (after stating the facts.) The disposition of two questions out of the many urged by counsel and legitimately presented by the record will serve to confirm the rights of the plaintiff in error, and so construe the statute that the adjudication may serve as a precedent to prosecuting officers in the state. That section of our Criminal Code which is cited in the statement first appears in the Acts of 1861. It remained unchanged in the compilation known as the "Revised Statutes of 1868," and reappears in the General Statutes of 1877 and 1883 in the same identical form. From the original act down to the Statutes of 1883 there was always an omission of a conjunction preceding the word "thereby," and a similar omission of any auxiliary verb preceding the verb "defraud." Of course, it is impossible to tell the source of the legislation, or what occasioned these omissions. As a general proposition, it has always been recognized in this state that a large part of our early legislation was

borrowed from Illinois, and the acts and decisions of that commonwealth have always been much referred to, to aid in determining what should be the proper construction of a particular statute. The act in question is precisely like the Illinois statute, with the exception of the omission of the word "and" preceding the word "thereby." The conjunction is in the Illinois enactment, and is not in ours; otherwise the two are identical.

Great stress was laid in the argument on behalf of the plaintiff in error on the necessity to show intent to defraud, it being contended that, in respect of this matter, the court committed grave errors in the various instructions which it gave to the jury. On the other hand, the people insisted that the instructions were accurate expositions of the law, because the offense was committed by the obtaining of credit, whether any person was or was not defrauded of any valuable thing. One feature of the people's argument was based upon the apparent importance to be given to the omission of the copulative conjunction, and it was insisted that it must have been the purpose of the legislature to provide for the punishment of two crimes in the first part of the section; in other words, a crime which would be committed by the obtaining of credit on a false representation, whether anybody was defrauded or not, and one perpetrated by the making of a false representation, whereby some person was defrauded of some valuable thing. No attempt will be made to determine the accuracy of the court's instructions in this particular, since the conclusion which the court has reached concerning the representation itself will determine the noncommission of any crime. But, for the purposes already indicated, the construction of the statute will be pursued, since the question is legitimately presented by the record, and the purpose of the court will consequently be thereby accomplished.

We cannot agree with the contentions of the people. All statutes must be so construed as to carry out the evident purpose of the legislature, and accord with the natural and reasonable significance of the words and sentences used, if no violation be thereby done to any recognized canon of statutory construction. The conclusion at which we have arrived is not based upon any consideration of a necessity to defraud in order to commit a crime, where the statute directly provides that the obtaining of credit on a false representation, without more, may constitute the offense. The profession well understands that, where a party was indicted at the common law for a substantive offense, he could not be convicted on proof of an attempt; but that an attempt under some circumstances may constitute a crime, and the party be punished therefor when properly charged with the offense, there is no question. The particular statute under consideration here, however, as we conceive, requires

the union of two elements in order to render the party guilty of the offense against which this particular law is aimed. The two sentences of the clause were in the original act of 1861, but were separated from that portion of the section which relates to the procurement of a false report by others by a semicolon, which divided it into two parts; and, by a very natural rule of construction, this circumstance would strongly support the position which we take concerning it. Whenever the same identical statute has been carried forward from the time of its enactment into all subsequent compilations, and has remained unaltered in any of its features, the court may look at the original act for the purposes of determining whether they have the right to apply a very well-settled rule concerning the construction of statutes, which permits the insertion of the conjunction "and" where it has been evidently omitted, or where its insertion is plainly necessary to give expression to the apparent legislative intent. Potter's Dwar. St. c. 7, p. 199. Unless this rule be applied to the present statute, the first paragraph of the section, which relates to the obtaining of credit by false representations made by the person charged with the crime, is incomplete, ungrammatical, and lacking what is manifestly necessary to the natural, obvious, and accurate expression of a legislative purpose. The idea is very strongly supported by the impossibility to insert the word "or," or to treat the last clause of the first paragraph as separate and distinct from the first sentence, ending with the words "shall obtain a credit." Had this been the legislative intention, grammatical construction renders it necessary that the auxiliary verb "shall" should precede the verb "defraud," because wherever there is the disjunctive conjunction, and a statute is enacted for the purpose of providing punishment for crimes which occur in the future, the word "shall" is the almost universal and natural auxiliary used in the legislative declaration. Had the auxiliary "shall" preceded "defraud," then the necessary and natural purpose of the sentence would be to provide for the punishment of two distinct crimes which might be committed by the obtaining of credit without damage, or the obtaining of credit, to be followed by the procurement of some valuable thing. An insignificant alteration in the phraseology, or the omission of a word of this description in the adoption of a statute of another state, or in the revision of a statute, does not necessarily imply an intention to alter the construction of the act. It is equally settled that, wherever there is an apparent mistake on the face of a statute, the character of the error may often be determined by reference to other parts of the enactment, which may always be legitimately referred to in order to determine its legitimate construction. When the section under consideration is examined, it will be observed, when we reach that por-

tion of it following the disjunctive conjunction "or," which provides for the punishment of a crime which has been committed by the procurement of others to make false report, it is distinctly enacted that the obtaining of some valuable thing, whereby some person is defrauded, is an essential ingredient of the offense. It must be true, where one section of a statute declares an act to be criminal, whether done by oneself or by another by procurement, and provides the same punishment for both forms of the offense, and one subdivision clearly requires there should be proof that another has been defrauded, and the same requirement would be an indispensable ingredient of the other, but for the evident omission of a copulative conjunction, which is indispensable to an accurate, grammatical construction of the statute, no violence is done to any canon of construction to insert it to supply this evident omission. We, therefore, conclude that the statute is to be read as though the word "and" was inserted between the words "credit" and "thereby," and the offense can only be committed by the obtaining of credit on false representations, coupled with proof that, as a result of it, some person has suffered harm.

The resolution of the other inquiry suggested at the outset will determine the rights of the plaintiff in error. The matter is not wholly free from difficulty, and the case is apparently one of first impression. It is not difficult of solution when the character of the legislation is considered, and the nature of the offense legislated against is carefully kept in view. If the states, in their legislation on this subject, had only provided for the punishment of the well-known and thoroughly understood common-law crime, very little difficulty would have been experienced in enforcing the statutes, and in determining whether or not the offense charged was within the terms of the legislation. In many states, however, as in ours, the lawmaking bodies have seen fit to create many new offenses, which may be committed in divers ways by ingenious assaults on the confidence of the mercantile community. Of this, our quick, sagacious, and far-seeing merchants have not been slow to take advantage. Upon these statutes there has been built up in modern times a practice, which has not always been made the subject of judicial commendation, to bring a large portion of all mercantile transactions apparently within the scope of the Criminal Statutes. By this means the merchant is able, not only to resort to the civil tribunals for the purpose of enforcing his debts, but frequently to compel profitable compromises by instituting prosecutions of which the purpose is rather the collection of debts than the enforcement of the laws of the land. Under these circumstances, wherever it is charged the defendant has been guilty of a crime created by a statute directed against

that class of offenses known as "obtaining goods by false representations," it may be said to be a prevailing rule of judicial decision to require that the proof must bring the case clearly and distinctly within the terms of the act, holding the state probably to stricter and more satisfactory proof in these cases than in the case of crimes more dangerous to the safety of the person or the property of the citizen. Notwithstanding this fact, the courts never hesitate to enforce these statutes by proper judgments when the case is clearly brought within the language of the act, and is evidently within the mischief which the statute seeks to prevent. It cannot be seen that the present case is brought even remotely within the purview of the statute, or that the acts proven can legitimately be taken as included in the evil against which the legislation was directed. Ever since the king's bench attempted to define the offense of cheats at the common law, or to interpret the subsequent parliamentary acts relating to false pretenses, it has been a cardinal principle of all the adjudications that the ingredients of the offense are the obtaining of money by false pretenses, with intent to defraud. If there was any failure on the part of the state to prove the falsity of the pretense, the prosecution necessarily failed. While it was never possible to absolutely prove a negative, yet the proof must establish a very strong possibility that the misrepresentations were false in fact, and by its force cast on the defendant the burden of establishing the affirmative, if it was within his power to do so. It was equally indispensable that the proof demonstrate that the representations or the pretenses were the operative cause of the transfer of the goods, and must relate to an existing fact. It was never permitted that the case should be *post hoc*; it must be *propter hoc*. These fundamental and primary principles are all that are requisite for the purpose of demonstrating that the present prosecution was without any legal basis, when it rested solely on the written representation which the thrifty merchants had required to be sworn to, with provident regard for what might happen in the future.

On October 3, 1891, Morris stated to the Forbes Mercantile Company that he had certain assets, and owed certain debts, and that his balance sheet showed a definite amount of capital which he had invested in his business. This was true at that date, and continued to be true for several months thereafter. It then follows that the statement on which the prosecution rests was not a false representation, made for the purpose of obtaining credit, nor a false representation, made for this purpose, whereby the Forbes Mercantile Company was defrauded of its goods. It may be conceded that the Forbes Mercantile Company extended a line of credit to Mr. Morris in his grocery busi-

ness, based upon the strength of this sworn statement, which he filed with them for the purpose of enabling them to decide what credit, if any, they would extend to him in their subsequent dealing. Had the representation been false, and a credit been thereby procured, and the Forbes Mercantile Company suffered harm, under proper proofs Morris could have been convicted; but, as is seen from this simple statement, the case fails to show one of the fundamental ingredients of the crime, to wit, the obtaining of a valuable thing by a false representation. A very learned and elaborate argument was made by counsel on behalf of the people to support the judgment of conviction, on the theory of a continuing misrepresentation, somewhat on the theory of a continuing pretense, which finds support in *Com. v. Lee*, 149 Mass. 179, 21 N. E. 299; *Smith v. State*, 55 Miss. 513; *Queen v. Martin*, L. R. 1 Cr. Cas. 58. We regard the two cases as wholly distinct and separate, and the principle of those cases to be totally inapplicable to the case made by the record. Those decisions proceeded upon the theory that where there is a false representation, upon which the vendor places reliance, and, because of the confidence begotten by the statement, he subsequently delivers the goods which the cheat has ordered, whether the goods were or were not in existence at the time of the making of the statement, the pretense being shown to be the operative cause of the transfer, the case shall be brought within the principle of *propter hoc*, and the party adjudged guilty. It seems to us that the case can be well justified upon legal principles, and that there need not be an absolute concurrence in point of time between the false pretense and the delivery of the goods. It is simply essential that the party make a false statement, and the proof show that, on account of it, the goods were transferred. In other words, the misrepresentation must be the operative cause of the transfer. In this case no such connection was made by the proof, nor, except by legal fiction or intendment, can it be adjudged that the party was guilty of the crime. When the state concedes that the representation was absolutely true, and they seek to prove their case by showing that months afterwards the statement was not a true representation of Morris' financial condition, this truthful representation of his cannot be so rendered false by proof that there was a change in his financial condition, which he failed to report, according to the terms of the promise contained in the original writing, as to sustain a prosecution. The promise was for some purposes undoubtedly operative, and, morally speaking, it might be there was a failure on the defendant's part to observe that strict rule of morality which begets unlimited commercial confidence; but in this case the criminal law does not happen to

be auxiliary to the ethical code. There was an entire absence of an attempt on the part of the state to prove that, at the time of the various purchases which were charged to be offenses, he made any statement whatever, either to the principal officers of the company, or to the persons from he bought the goods. The company simply took the statement as the basis for their line of credit, and, relying apparently upon the solvency and financial ability of the defendant, proceeded afterwards to deal with him as with merchants generally, and without inquiring of him concerning his financial condition. Subsequent to the original writing, he made no statement whatever to any person, either true or false, concerning his financial condition, and it cannot be held that a representation, true when made, can, by any intendment of construction, or by a promise contained in it, be held to be a representation which shall continue to be true for all time, and be made, under changed conditions, the subject of a criminal prosecution. So far as known, a judgment of conviction can only be supported by proof of a criminal act. The defendant was not shown to have committed any crime. The judgment will be accordingly reversed, and the cause remanded.

DENVER MACHINERY CO. v. MERCHANTS' PUB. CO.

(Court of Appeals of Colorado. Nov. 27, 1893.)

APPEAL—SUFFICIENCY OF RECORD.

On appeal, when the error assigned is the refusal of the trial court to give certain instructions, and the paper book does not contain any of the instructions given, the appellate court cannot determine whether any error was committed or not.

Appeal from district court, Arapahoe county.

Action by the Merchants' Publishing Company against the Denver Machinery Company to recover money alleged to be due on a contract. Judgment for plaintiff, and defendant appeals. Affirmed.

Browne, Putnam & Preston and Willard Milligan, for appellant. J. B. Willsea, for appellee.

BISSELL, P. J. Early in 1890, the publishing company, which is the appellee herein, was engaged in the publication of a paper in the city of Denver called the *Western Irrigator*. In April the Denver Machinery Company was organized, and, by their articles of incorporation, sundry persons, among whom were Henshall and Lytle, were named as officers and directors for the first year of the corporate existence. At about this date, negotiations were had between the two corporations, through the admitted officers of the publishing company, on the one side, and Lytle, on the other, looking to the publication of a very considerable edition of the

paper, to be devoted to the spread of information about the qualities of the merchandise carried and offered for sale by the machinery company, and the benefits to be gained by the public in dealing with that concern. In April, what is denominated the "first edition," of 12,000 copies, was printed, and delivered to the company. Subsequently, the two corporations entered into a written contract for the publication of two further editions of the paper, to be devoted to the same general purposes, with some modifications of form and size and technical construction, which need not be stated. There is nothing in the case which requires us to set out the details of these contracts, or the history of the business, further than to refer to the fact that after the April edition was out, and subsequent to the publication of the remaining two issues, bills for the work were frequently presented to the machinery company, numerous promises were made by recognized officers, for payment, and some small amounts were paid on the account. This will serve to emphasize the issue between the parties. When the bills were not paid, the publishing company brought suit against the other corporation to recover what was due. The machinery company defended on the ground that they were not responsible for the first edition of the paper, because of the want of authority on the part of Lytle to contract on behalf of the corporation. All these issues of fact in the case were settled in favor of the publishing company by the jury, who found a verdict for the sum shown to be due.

No complaint is made on this hearing concerning the sufficiency of the evidence, or the rulings of the court made at the time of its introduction. The whole contention here rests on the refusal of the court to give some 10 instructions asked by the attorneys for the defendants, which are set out in the abstract. This paper book contains none of the instructions which were actually given, nor from it are we able to determine whether the action of the court was fully justified by the situation. As a general proposition, it may be said that the trial court is fully invested with discretion to determine the form as well as the substance of the instructions which shall be given to the jury, and the appellate tribunal will never interfere with that discretion, when it has been rightfully and carefully exercised. It is equally true that the court is bound to inform the jury on every legal proposition essential to enable the jury to arrive at a just conclusion concerning the rights of the parties, and ordinarily courts do not hesitate to read to the jury whatever instructions counsel may ask, even though they are but little better than abstract propositions of law, and may not largely serve to enlighten that body. They are not bound, however, to do this, and may, if they see fit, restate these propositions, and couple them with directions to the jury that they are only applicable in case they find certain facts, and,

in general, do what may be necessary to enable the jury to reach an intelligent conclusion. *Marsh v. Cramer*, 16 Colo. 331, 27 Pac. 169; *Hill v. Corcoran*, 15 Colo. 270, 25 Pac. 171. Under this well-established practice, it furnishes no cause of complaint that the court refused to give the instructions asked, if the law essential for the guidance of the jury was embraced in the charge which the court gave. From the statement made, it is very evident that this court is unable to determine, from an inspection of the abstract, whether any error was committed by the trial court. Our rules and our practice do not require us to look beyond that for information essential to enable us to determine the appeal. Out of abundant caution, and with the desire to see that the rights of the parties were amply protected, we have departed from our very well settled practice in this matter, and taken the trouble to look into the record, to examine what was improperly omitted from the abstract. As a result of that examination, we are entirely satisfied that the trial was eminently fair, the jury accurately and fully instructed, and the rights of the parties amply protected by the charge of the court. Since this is the only error to which our attention is called, and it is without basis, the judgment of the court below must be affirmed.

TOOTLE et al. v. COOK et al.

(Court of Appeals of Colorado. Nov. 27, 1893.)

JUDGMENT BY DEFAULT—PARTNERSHIP—DISSOLUTION—ASSUMPTION OF FIRM DEBTS—RIGHTS OF CREDITORS.

1. Where a judgment by default is rendered against one of two defendants, it is error, on a trial against the other, to render a judgment against plaintiffs, and in favor of both defendants, without vacating the prior default.

2. A bank to which a draft against a firm is sent for collection cannot bind the drawers by taking the acceptance of only one of the partners; and the taking of such acceptance does not release the other partner from liability for the firm debt to the drawers, though the bank had knowledge that the firm had been dissolved, and that the accepting partner had assumed firm debts.

3. Where a firm creditor has no knowledge of the assumption of the firm debts by one of the partners on the dissolution of the firm, an extension in the time of payment granted, not to him, but to the firm, does not release his co-partner from liability, on the theory that the latter is merely a surety for its payment.

Appeal from district court, Pueblo county.

Action by Tootle, Hosea & Co. against Cook & Davis for goods sold and delivered. From a judgment for defendants, plaintiffs appeal. Reversed.

Betts & Vates, for appellants. James McKeough, Jr., and Dixon & Dixon, for appellees.

THOMSON, J. Kate Tootle, W. E. Hosea, H. W. Wheeler, and Joshua Motter,

copartners as Tootle, Hosea & Co., merchants, at St. Joseph, Mo., brought their action against the defendants, John Davis and Thomas W. Cook, copartners as Cook & Davis, merchants, doing business at Trinidad and El Moro, Colo., to recover a balance due from the defendants for goods sold and delivered. Default, for want of appearance, was duly entered against the defendant Davis. Cook answered separately, and, as between him and the plaintiffs, the issues were duly joined. A trial was had, and notwithstanding the prior default against Davis, which had not been vacated, but remained in force, judgment was rendered against the plaintiffs, and in favor of both defendants. This error, which of itself would demand a reversal of the judgment, is so manifest that it was probably the result of oversight. But the record presents other questions, which, for the purposes of justice between the parties, require determination. The only defense to the action was made by the defendant Cook. The evidence shows the sale and delivery of the goods, and an unpaid balance. As to this, there is no controversy in the argument.

The defense set up by Cook is that on March 5, 1888, himself and Davis were copartners under the firm name of Cook & Davis; that on that day the copartnership was dissolved, by mutual consent; that in the dissolution, for a valuable consideration, Davis assumed the firm's indebtedness to plaintiffs; that the plaintiffs were promptly notified of the dissolution, and of the assumption by Davis of the indebtedness; that after such notice the plaintiffs, on April 27, 1888, made their draft on Cook & Davis for the balance then due, payable to their own order, five days after sight, which draft was sent to the First National Bank of Trinidad for collection, and was on April 30, 1888, accepted by Davis; that such acceptance was received by plaintiffs in full satisfaction and discharge of the indebtedness; and that on April 27, 1888, the plaintiffs, for a valuable consideration, entered into a contract with Davis, by which, without the consent of Cook, they extended the time of payment. It is shown by the evidence that the defendants, during the existence of their partnership, conducted two stores,—one at Trinidad, managed by Davis, and one at El Moro, managed by Cook; that this indebtedness was contracted on account of the Trinidad store; and that, by the terms of their agreement of dissolution, Davis assumed the debts at Trinidad, and Cook those at El Moro. It is also in evidence that, immediately upon the dissolution, Cook sent to the plaintiffs, by mail, a notice of that fact, and subsequently paid plaintiffs, by his individual check, for bills of goods purchased by him for the El Moro store, which, after the dissolution, was conducted by him in his own name; that Davis afterwards corresponded with the plaintiffs, and talked

with their traveling agent, and told them that the partnership was at an end; and that about June 30, 1888, Davis became insolvent. The plaintiff Wheeler, who had charge of the correspondence, and had exclusive management of all the claims and collections of the plaintiffs, denies that any notice of the dissolution was ever received by the plaintiffs, but from the fact that orders for goods were subsequently received from Cook individually, and from some other circumstances, they inferred that a dissolution had taken place. There is no evidence that plaintiffs were ever advised that Davis had assumed this, or any, indebtedness of his firm. On April 9, 1888, the plaintiffs received the following letter: "Trinidad, Colo., April 3rd, 1888. Tootle, Hosea—Gents: Your statement to hand yesterday, and find correct. If you be kind enough to wait until the 25th of this month, will remit, as we had contract with the railroad company for ties, and haven't received our money yet. You can charge interest, and we are willing to pay it. We are, truly, Cook & Davis. By J. D." To this letter the plaintiffs replied as follows: "Cook & Davis, Trinidad, Colorado—Gents: In reply to yours of the 5th inst., asking us to wait on you until the 25th of April for balance past due on our account, saying you would pay interest from the time after maturity of bills, we will cheerfully comply with your request. Please let your payment come promptly on April 25th, and much oblige, yours, truly, Tootle, Hosea & Co." On the 27th of April, 1888, the indebtedness being unpaid, the plaintiffs drew on Cook & Davis, at five days' sight, for \$2,618.94, the amount due, and sent the draft to the First National Bank of Trinidad for collection. The bank presented the draft to Davis, who accepted it individually. It was not presented to Cook, because he was absent at El Moro. The bank retained the draft, and payments were made upon it from time to time by Davis, which were by the bank forwarded to plaintiffs as payments on the draft, without stating by whom made. The bank had knowledge of the dissolution. After the draft was sent, several letters were written by plaintiffs to Cook & Davis, urging its payment. Subsequently to the dissolution, Cook dealt with the plaintiffs in his own name, and paid them for goods purchased by his individual check. The letter from Cook & Davis, asking time and promising interest, was written by Davis, without the knowledge of Cook; and he knew nothing of plaintiffs' reply, or of the draft, or its acceptance by Davis. After he had terminated his partnership relations, and sent a notice of the dissolution to plaintiffs, Cook gave the subject of this indebtedness no further attention. The contention on behalf of defendant Cook is: First, that the bank, with knowledge of the dissolution of the firm, by presenting the

draft to Davis, taking his individual acceptance, and failing to report it to the plaintiffs as dishonored, made the draft its own, and became liable therefor to plaintiffs, and that the indebtedness of Cook & Davis was discharged by Davis' obligation to the bank; second, that the bank was the agent of the plaintiffs, so that its acts and its knowledge in the premises were the acts and knowledge of plaintiffs, and bound them, and that, therefore, when the bank, with knowledge of the dissolution, took the individual acceptance of Davis, that act operated to release Cook from any further liability; third, that the agreement of the plaintiffs, giving Davis an extension until April 25th in which to pay the debt, in consideration of the promise of Davis to pay interest on the amount, was a discharge of Cook, on the hypothesis that by the dissolution of the partnership, and the assumption by Davis of the debt, the relation of principal and surety was created between Cook and Davis; and, fourth, and based upon the same hypothesis, that making the draft payable five days after sight was such valid extension to the principal debtor as to relieve the other.

It is true that the bank to which the draft was sent might have been so negligent in the performance of the duties with which it was charged as to incur a liability to plaintiffs; and if, through its negligence in making the collection, or not reporting to plaintiffs matters concerning it which they were entitled to know, the debt had been lost, the amount would have been recoverable against it by the plaintiffs as damages, and after payment of the amount by it to them their claim against the defendants would have been extinguished. The bank would, in such case, be subrogated to the plaintiffs, and their controversy with the defendants would be transferred to the bank. But until payment of the claim, or a disposition of it satisfactory to the plaintiffs, defendants remained the debtors of the plaintiffs, and liable to them for the debt. Defendants purchased the goods. By the purchase, plaintiffs became entitled to demand payment from them of the purchase price, and no act of theirs or of the bank, to which plaintiffs were not parties, or to which they did not give their assent, could divest them of that right. There is no question that the bank was the agent of plaintiffs, and hence the argument that when it took the individual acceptance of Davis upon the draft against Cook & Davis, with knowledge that the firm of Cook & Davis had ceased to exist, the plaintiffs were bound by its act, the effect of which, as urged, was to discharge Cook. The mere taking of the acceptance of Davis, alone, would probably not have the effect claimed, but it is needless to consider that question here. A principal is not bound by the acts of his agent, unless they are done within the scope of his authority, in the transaction of the business of his principal.

So, also, in order that a principal may be affected by his agent's knowledge, the knowledge must be acquired while he is agent, and must pertain to the business in which he is authorized to act. The bank was the agent of plaintiffs for the collection of the draft. No authority is shown in the bank, except the general authority which accompanies the forwarding to it of an instrument for collection. Under that authority it could collect the money due, and if it had done so the debt would have been discharged, notwithstanding the bank might have failed to forward the amount to the plaintiffs. But it had no power to compound the indebtedness, or release a debtor, or receive anything except money in payment, or do anything whatever which would operate to change the rights of the creditors or the liabilities of the debtors. Under this general authority, it could present the draft for acceptance, in accordance with its terms, but it could not bind the drawers by receiving a defective acceptance. The knowledge, therefore, which the bank had of the dissolution, or its act in taking the acceptance of one drawer, and not of the other, or any other act outside of the general authority which it had, cannot for a moment affect the prior relations between the defendant partnership and the plaintiffs.

Whether, under any circumstances, a retiring partner has the rights of a surety against creditors, is not, as we think, very important, in this case. The authorities are not unanimous upon this question. Counsel claim that, by the terms of the agreement of dissolution, Davis became the principal debtor, and Cook the surety; and, applying to them the law of principal and surety, counsel argue that the plaintiffs, by their agreement, in consideration of interest to be paid, extending to Davis, the principal debtor, the time in which payment of the claim might be made, released Cook, the surety. This reasoning is seriously faulty, in that it assumes a state of facts which does not appear in the record. First. Even the authorities which hold to the doctrine that such relationship may be created, so as to affect creditors, confine it to cases in which creditors actually know of the fact that the continuing partner has assumed the debts. There is no evidence in the record that the plaintiffs had any knowledge whatever of the assumption by Davis of any debts of Cook & Davis. Second. The extension was given, not to Davis, but to Cook & Davis; and it was in consideration that they, and not he, would pay interest for the delay, that it was granted. The same observations apply to the draft. It was payable five days after sight, and not at sight. It therefore operated as a further extension. But the draft was made upon Cook & Davis, and not upon one of them. The facts being thus, we may go to the full extent claimed by counsel, and concede that plaintiffs had actual

knowledge, not only of the dissolution, but that Davis had assumed the debts, and so became a principal debtor, and that Cook was invested with all the rights of a surety; still the record discloses nothing on the part of the plaintiffs that would tend to impair any claim which they had against the defendants jointly. These goods were sold on the credit of the firm, and the firm comprised both the defendants. Nothing which took place between themselves after the sale could alter the obligation which they had contracted. Their contract of dissolution was binding *inter se*, and each could enforce it against the other; but no rights of third parties, which had vested before the dissolution, could be at all affected by it, without their own consent. Where one of the partners takes the assets and assumes the indebtedness, creditors may, of course, if they choose, become parties to the agreement; and, if they do so for a consideration, they will be bound by it, and cannot sue the retiring partner. There is, in such case, something like a novation. The firm debt is discharged, and a new one created. The assent to the agreement need not be express. It may be inferred from acts which cannot be explained otherwise; and when the assent is found, according to some of the authorities, slight evidence of consideration will suffice to sustain it. Still, there must be an assent, either direct, or deducible from some act which clearly indicates that purpose. The rights of a creditor against a partnership must be voluntarily relinquished, or they remain. We search the record in vain for any such assent, or for evidence of any act from which it could be inferred that the plaintiffs ever intended to relinquish their claim against either defendant. They consistently and continuously asserted their demand against the firm, and never, either in their correspondence with the parties themselves, or in any direction to the bank, indicated, in the slightest degree, any purpose to waive any of their rights, as they originally existed. Upon the evidence the judgment should have been for the plaintiffs against both defendants, and, because it was erroneously given otherwise, it will be reversed.

WRIGHT v. CHICAGO, B. & Q. R. CO.

(Court of Appeals of Colorado. Nov. 27, 1893.)

LIABILITY OF CARRIERS—ASSAULT ON PASSENGER IN CAR.

1. Plaintiff, on entering defendant's train, was struck and jostled by three men, and, missing his pocketbook, he shouted for help, saying that he was being robbed, and accused the men of robbing him. The pocketbook was found on the floor, and restored to him, but the dispute was renewed, and plaintiff, though calling loudly for help, was set upon, and severely injured. No one came to his assistance. *Held*, that though defendant employed a proper number of train and depot men to protect passengers in ordinary contingencies, it was liable

if any of these could have heard plaintiff's cries, and failed to respond thereto.

2. Whether plaintiff's cries were loud enough to be heard by the trainmen, or some of them, if they were in their proper places, and whether defendant should have had an employe stationed in the car where plaintiff was assaulted, were questions for the jury.

Error to district court, Arapahoe county.

Action by Samuel B. Wright against the Chicago, Burlington & Quincy Railroad Company for personal injuries. Judgment for defendant, and plaintiff brings error. Reversed.

H. N. Haynes and A. P. Rittenhouse, for plaintiff in error. Wolcott & Valle and Henry F. May, for defendant in error.

THOMSON, J. The facts of this case are as follows: On the evening of March 18, 1890, the plaintiff below, Samuel B. Wright, purchased a first-class passenger ticket from the agent of the defendant company, entitling him to transportation by defendant, as its passenger, from Denver to Roggen, a station on its railroad. About five minutes before the time when defendant's train was scheduled to leave, he started for the train, which consisted of an engine, a baggage car, a smoking car, a chair car, and a Pullman sleeping car. The train was ready to receive passengers. Plaintiff, having reached the train, ascended the forward steps of the chair car, and undertook to enter the car. Preceding him, three men ascended the rear steps of the smoking car, and went upon its platform. The rear platform of the smoking car and the front platform of the chair car joined. As plaintiff was stepping upon the platform of the chair car, one of these men ran against him, and he stopped. The men were crossing from the smoking to the chair car at the time, and entered the latter car. Plaintiff then went through the door into the entrance or vestibule of the chair car, on one side of which was a water-closet, and on the other a wash stand. As soon as he had passed through the door, one of the men, who was standing about four feet inside the car, backed up against him, striking him in the stomach, and crowded him into the corner made by the wash stand and door facing. The other two then rushed upon him, and the three united in jamming him into the corner. Plaintiff, having relieved one of his arms, discovered that his pocketbook, containing some money and papers, which he had placed in an inside pocket of his coat, was gone, and, seizing one of the assailants, and moving him into the car door, he accused him of taking the pocketbook. One of the men suggested that he might have dropped it, and, with the others, apparently commenced a search for it. It was found upon the floor, some little distance from where the plaintiff had been. One of the assailants had something in his right hand, which plaintiff thought was a revolver. After he had recovered his pocket-

book, the altercation was renewed. He told one of the men that he wanted him, and ordered him to stand. He had retreated into the corner, and two of the men again rushed upon him. He grasped them, and the third struck him upon the head three times with great violence, cutting the scalp, rendering him unconscious, and inflicting upon him serious wounds, from the effects of which he has suffered permanent injury. At the time plaintiff missed his pocketbook, and charged one of his assailants with taking it, he called loudly for help, saying that he was being robbed. He called again when he had recovered his pocketbook. His calls could have been heard at some distance from the place where he was standing. The crew of the train consisted of an engineer, fireman, conductor, brakeman, messenger, porter, and Pullman car conductor and porter. None of the trainmen came to plaintiff's assistance.

This action was brought to recover from the railroad company the damages sustained in consequence of the assault, on the ground of the failure of the company to protect the plaintiff against the violence which he suffered. There is no controversy over the facts. The questions to be determined arise upon instructions given and refused, and are, therefore, purely of law. Although the doctrine is of comparatively recent growth, it is now firmly established that a carrier of passengers must exercise the same degree of care to protect them from violence from their fellow passengers or from intruders that is required for the prevention of casualties in the management and operation of its trains. While carriers are not insurers of the safety of passengers as they are of freight committed to them for shipment, still they are held to the utmost care, vigilance, and precaution to guard against accident, consistent with the mode of conveyance, and with its practical operation; and no distinction is made between casualties resulting from the negligent equipment or operation of their trains and those arising from the misconduct of passengers upon them. *Railroad Co. v. Hinds*, 53 Pa. St. 512; *Flint v. Transportation Co.*, 34 Conn. 554; *Britton v. Railway Co.*, 88 N. C. 536; *King v. Railroad Co.*, 24 Fed. 335; *Railroad Co. v. Pillow*, 76 Pa. St. 510; *Mullan v. Railroad Co.*, 46 Minn. 475, 49 N. W. 249; *Railroad Co. v. Burke*, 53 Miss. 200; *Weeks v. Railroad Co.*, 72 N. Y. 50; *Railroad Co. v. Pillsbury*, 123 Ill. 9, 14 N. E. 22. In all the cases coming under our observation in which this question has been the subject of adjudication, the agents and servants of the carrier either knew of the actual existence of a disturbance, and made no attempt to quell it, or had knowledge of the presence on board of disorderly or dangerous persons, from whose language or actions there was reasonable ground to apprehend danger, and failed to take any precaution to avert it. As the safe-

ty of passengers is not warranted, and the ground of the carrier's responsibility for injuries received is negligence or want of that care which the law requires, knowledge of the existence of the danger, or of facts or circumstances from which danger may be reasonably anticipated, seems to be necessary to fix a liability upon the carrier for damages sustained in consequence of failure to guard against it. The utmost diligence and care is required, and the slightest negligence against which human prudence or foresight may guard will render the carrier responsible for consequent injury; but it is not accountable for something which is not known, or, in the nature of things, cannot be foreseen. The rule laid down by Judge Shipman in his charge to the jury in *Flint v. Transportation Co.*, *supra*, and which has been recognized in subsequent cases as correct, is as follows: "The defendants were bound to exercise the utmost vigilance and care in maintaining order and guarding the passengers against violence, from whatever source arising, which might reasonably be anticipated or naturally be expected to occur in view of all the circumstances and of the number and character of the persons on board." In this case there is nothing in the record to indicate that the assault upon the plaintiff could have been anticipated, or could possibly have been foreseen; so that the defendant incurred no responsibility for failing to guard against it. Whether it was known while in progress is another question. If the cry for help was loud enough to be heard by the agents or employees of the defendant attached to the train, supposing each of them to be at his post of duty on or near the train, they will be presumed to have heard it. The vigilance which is exacted of them requires them to be alert, and to keep their eyes and ears open; and, whether they heard the call or not, if it was loud enough to reach them, they should have heard it, and so should have responded at once by going to plaintiff's assistance. They will be held to have known what they ought to have known.

The plaintiff requested several instructions, which are faulty, in inferentially assuming facts which it was the province of the jury to determine. Whether the cry for help was loud enough to be heard by the trainmen, or some of them, wherever they were, provided they were in their proper places, and whether it was the duty of the defendant to have any of its employees stationed in the car where the assault was made, were questions to be submitted to the jury. We do not see that the court erred in refusing these requests.

The court gave the jury the following, among other, instructions: "(2) It was not the duty of the defendant company to furnish its trains, while standing ready to receive passengers at the depot, with a police force which would be adequate to meet sudden and extraordinary emergencies,—such

emergencies as could not have reasonably been foreseen or anticipated. All it was bound to do with regard to furnishing men for the train was to have a sufficient number, whether of trainmen or policemen or other employes at the depot, with qualifications to perform the necessary duties on or about the train, to meet the ordinary demands while passengers were waiting and taking seats in the passenger train, and to furnish ready help sufficient to protect the passengers from any attack which might reasonably be expected to occur. (3) The plaintiff, when he purchased his ticket for the journey he proposed to take, had a right to suppose that the train was furnished with the proper hands for the conduct of the train, but not with a police force to protect him from the violence of highwaymen who might have been quietly lurking about the train, and from whom violence could not reasonably have been expected. It was the duty, however, of the company to have about its trains a sufficient number of men, so that, while the conductor and brakemen or other employes were away temporarily, attending to their respective duties, there would be some one near the train, clothed with authority to do what ordinarily might become necessary to meet the ordinary wants of the passengers while they are going to and were taking seats in the cars of the train. If a requisite number were employed on this train, and they were momentarily absent from that part of the train where the assault was made upon the plaintiff, and at the time there was nothing from which the assault in question could have been anticipated, then the defendant is not liable in this action. (4) If, however, the company did not furnish enough men to meet the ordinary demands of the train, as I have explained, then the presumption of negligence on the part of the defendant would arise. As I said before, gentlemen, these are questions which it is your duty, under the evidence that has been introduced, and the instructions of the court, to determine. (5) If the defendant fails to furnish a sufficient number of men to attend to the ordinary duties which might arise, or might be expected to arise, while passengers were getting on the train and taking seats, and for the general control and care of the train, and necessary to guard the wants and necessities of the passengers as they were going to the train, then, as I said before, the presumption of negligence arises. If you find otherwise,—that there were a sufficient number of employes there at that time to meet the wants as I have explained,—then the defendant is not liable." These instructions are essentially erroneous, in that they substantially declare that, if the defendant furnished a sufficient number of men in and about the train to meet the ordinary wants and demands of passengers while going to and taking seats in the cars of the train, and to protect the passengers from any

attack which might reasonably be expected to occur, it performed its full duty, and was entitled to a verdict. Now, it is immaterial how many men the defendant furnished to attend to passengers and look after the train, if the men so furnished neglected their duties. The defendant is responsible for the wrongful or negligent acts and omissions of its servants and agents without regard to their number. There might have been an army there; but if, while the plaintiff was being attacked with their knowledge, they failed or refused to come to his relief, the defendant is chargeable with their neglect. It, of course, devolved upon the defendant to man its train with a sufficient force, and the instructions in that particular correctly declare the law, but the mere fact that it furnished men in plenty is no defense. An important question in the case is whether the men who were furnished performed their duty to the plaintiff, or whether, through their negligence, he suffered harm; and that question was ignored by the court in all of its instructions. For this error the judgment must be reversed.

MACKENZIE et al. v. HALLACK PAINT, OIL & GLASS CO.

(Court of Appeals of Colorado. Dec. 11, 1893.)

APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

The appellate court will not disturb the judgment, where only questions of fact are presented for review, and there is evidence to support the finding of the trial court.

Appeal from district court, Arapahoe county.

Action by the Hallack Paint, Oil & Glass Company against Thomas S. Mackenzie and others on account. Judgment for plaintiff. Defendants appeal. Affirmed.

Ezra Keeler, for appellants. J. Warner Mills, for appellee.

REED, J. The action was brought by appellee to recover the balance due on an open account between the parties for goods sold to appellants by the appellee at various times from April to December, 1890. The plaintiff claimed something over \$2,000 as due and unpaid, which was denied by the answer, admitting \$376.35 to be due, and that amount only. The questions to be determined were purely those of fact,—an accounting, and the finding the amount due. The case was tried to the court, resulting in a judgment for the plaintiff in the sum of \$1,860.17. No question of law is presented by the errors assigned. They are to the effect that the court erred in its finding of the facts, principally in failing to allow certain credits claimed by the defendants. The evidence was very conflicting and contradictory. It appears to have been simply a question as to which set of witnesses was worthy of credit. The court gave credit to those of the plaintiff. It is

urged in argument that the court misunderstood the facts, and that through such misunderstanding defendants failed to get credits admitted to have been received, to a large amount; that the credits were indorsed upon notes, and that such notes and the book account were for the same indebtedness. We cannot determine from the evidence that such was the fact. It seems impossible that such a blunder could occur with the defendants represented by counsel, and, had it occurred, the court, even after its finding, had attention been called to it, would unquestionably, have corrected the error. The attention of the court should have been called to it by a motion for a new trial, but none appears to have been made. Where the evidence is contradictory, and there was evidence to support the finding, and the questions presented for review are only those of fact, the judgment will not be disturbed. This rule has been so often stated and reiterated, both in the supreme court and in this, that no citation of decisions is necessary. The judgment of the district court must be affirmed.

JOHNSON v. TABOR.

(Court of Appeals of Colorado. Dec. 11, 1893.)

ACTION ON NOTE—SUFFICIENCY OF ANSWER.

In an action on defendant's individual note, an answer alleging that the note was executed in payment of a joint debt of defendant and one P., and secured by a mortgage on their joint property; that the property was taken by plaintiff, and by him intrusted to P., as his custodian; and that P., being indebted to defendant, delivered it to defendant, selling him all his interest therein,—was properly stricken from the files as presenting no defense.

Appeal from district court, Arapahoe county.

Action on a note by H. A. W. Tabor against H. B. Johnson. There was judgment for plaintiff, and defendant appeals. Affirmed.

H. B. Johnson, in pro. per. A. B. Seaman, for appellee.

REED, J. Appellee brought suit upon the individual note of appellant for \$277.93, with interest at 10 per cent. Complaint is in the usual form, alleging \$429 to be due and unpaid, to which the defendant filed the following paper for an answer: "The defendant, for answer to the complaint in the above-entitled cause, says that, as he is informed and believes, he is not indebted to plaintiff, in any sum whatever, on the note set forth in plaintiff's affidavit for attachment, or otherwise; that said note was executed in payment of a debt owed jointly by affiant and one Daniel E. Parks; that said note was secured by a chattel mortgage on certain property owned jointly by affiant and said Parks, and certain other property of affiant; that, upon maturity of said note, said property was taken possession of by plaintiff, and

turned over to the said Parks, as custodian and agent of plaintiff; that the value of said property largely exceeded the amount due on said note; that on or about December 1, 1889, the said Parks, being justly indebted to affiant in the sum of about thirty thousand dollars, and for a valuable consideration, released said property from said seizure by plaintiff, restored the possession of the same to affiant, and sold and delivered to affiant all the right, title, and interest which he had in and to the same, by which, affiant is informed and believes, said note became paid, in so far as affiant is concerned, and said Parks assumed, and justly became liable for, the payment of the same, and said plaintiff is now required to look to said Parks for such payment. D. J. Haynes, Attorney for Defendant." (Verified by the defendant.) Plaintiff's counsel moved to strike out the answer on the ground that it was "sham," and interposed for delay; also, for judgment on the pleadings. The motions were sustained. Such judgment upon the motions is brought here for review.

By section 60 of the Civil Code, it is provided: "Sham and irrelevant answers and defenses and so much of any pleading as may be irrelevant, redundant, immaterial or insufficient, may be stricken out on motion and upon such terms as the court in its discretion may impose." Consequently, there was no question in regard to reaching the answer in that way, if the causes alleged in the motion existed. The judgment must be affirmed. The answer is an anomaly in the way of pleading, no precedent can be found for it in all the code pleading devised by human ingenuity. Comments upon it, or an analysis, are unnecessary. It is stated and verified on information and belief. If each allegation had been established by proof, it would have interposed no defense to his individual note in the hands of the plaintiff. A claim and cause of action against Parks might have been disclosed, or a moral or legal obligation of Parks to pay, but we are at loss to see how the plaintiff's claim could be affected by it. If the facts in regard to the chattel mortgage, as stated, were true,—that the chattels were taken by the plaintiff, by him entrusted to Parks, as his agent or custodian, and by him were delivered to the defendant, and were by neither subjected to the payment of the debt,—we cannot see how it would extinguish it, and release the maker of the note. The only way such matter could be made available would be by showing some transaction, in which the plaintiff participated, whereby the defendant was released, and Parks substituted. Falling in that, or in showing payment, it presented no defense to the action, and might be stricken from the files on motion. The defendant failing to ask leave to file another answer, the court very properly allowed judgment. Affirmed.

HORNE v. HEGWER SALT & LUMBER CO.

(Supreme Court of Kansas. Jan. 6, 1894.)

REFUSAL TO ACCEPT GOODS BOUGHT—DAMAGES—QUESTION FOR JURY.

Where there is any evidence fairly sustaining all the facts necessary to a recovery, a demurrer to the evidence ought not to be sustained.

(Syllabus by the Court.)

Error from district court, Reno county; L. Houk, Judge.

Action by Benjamin F. Horne against the Hegwer Salt & Lumber Company for breach of contract. From a judgment for defendants, plaintiff brings error. Reversed.

Wright & Stout, for plaintiff in error. W. M. Whitelaw, for defendants in error.

ALLEN, J. The defendants ordered a car load of barrel heads to be shipped by the plaintiff, whose place of business is East St. Louis, Ill., to them at Hutchinson, Kan., and the shipment was made as ordered. The defendants failed to receive or pay for them, and, after some delay, the plaintiff went to Hutchinson, tried to sell the heading to one Price, to whom the defendants had in the mean time sold out their business, but was unable to sell to any one, and thereafter reshipped them to St. Louis. Under the facts disclosed by the testimony the plaintiff had a perfectly plain remedy to sue upon his contract of sale for the damages resulting from the refusal to accept and pay for the goods ordered. The whole difficulty in this case arises from the want of a clear statement in the plaintiff's bill of particulars of his real cause of action. The case was originally commenced before a justice of the peace. The bill of particulars alleges a sale of a car load of merchandise by plaintiff to defendants, and then seeks to recover freight charges on a car load of heading shipped to the defendants on their order, and refused, and expenses of the plaintiff to and from Hutchinson. Plaintiff obtained judgment before the justice of the peace, but, on appeal to the district court, a demurrer to plaintiff's testimony was sustained, the case withdrawn from the jury, and judgment entered in favor of defendants for costs.

The plaintiff's cause of action is certainly very defectively stated, but pleadings before a justice of the peace, as has often been held by this court, are to be construed with great liberality. If the plaintiff had stated his full cause of action for the breach of the contract, the full measure of his recovery would, as contended by counsel for the defendants, be the difference between the contract price and the amount realized from a resale; but, in order to uphold the ruling of the district court in this case, there must be an utter failure of testimony to show a right of the plaintiff to recover any part of the freight charges for which he sues. The evidence

clearly shows that the defendants, both by letter and by telegram, ordered the heading shipped to them at Hutchinson. It appears that Mr. Hegwer himself tried to sell the property to Price, to whom he had sold his salt plant, but failed; that Horne went to Hutchinson, and tried also to sell the goods, but failed; that he thereafter reshipped them, and, owing to the fact that they were of unusual size, could not find any purchaser for them on the general market at any price. We think these facts sufficient to have been submitted to the jury, though we express no opinion as to how much of the freight charges should, under the testimony before us, have been allowed; nor is it necessary for us to say more than that there is testimony in the record which the court should have submitted to the jury. Under properly framed pleadings, and evidence corresponding therewith, there should be no difficulty in doing justice between these parties. The judgment is reversed, and a new trial ordered.

HORTON, C. J., (concurring.) I concur in the judgment to be rendered in this court in this case only upon the theory that the car load of barrel heads shipped by the plaintiff to the salt and lumber company at Hutchinson could not be sold in that city after the company refused to accept or pay for them, and therefore they were of no market or other value at Hutchinson. As the company ordered the barrel heads, and refused to accept or pay for them, the plaintiff was damaged at least the freight charges paid by him; and the evidence offered upon the trial showed damages for the amount of the freight charges from St. Louis to Hutchinson. Upon a proper bill of particulars, or petition sounding in damages, the plaintiff would have been entitled to recover the contract price, if any price had been agreed on and shown; or, if no price had been agreed on, then the market value of the goods sold and delivered; or, if plaintiff had been compelled to resell by reason of the failure of defendants, then the difference between what plaintiff received for the goods upon such resale, fairly made, and what he ought to have received from defendants under his contract with defendants.

JOHNSTON, J. I concur in the result.

BIGELOW v. WYGAI, et al.

(Supreme Court of Kansas. Jan. 6, 1894.)

INSTRUCTIONS—HARMLESS ERROR.

Where a jury are correctly instructed by the trial court upon all the law questions involved in the case, and the court, in addition, gives a slightly contradictory instruction, which clearly appears, from the special findings of the jury, not to have misled them, such additional instruction will not, under the circum-

stances, entitle the defeated party to a new trial.

(Syllabus by the Court.)

Error from district court, Miami county; John T. Burris, Judge.

Action by S. G. Bigelow against D. Wygal and others to foreclose a mortgage. There was judgment for defendants, and plaintiff brings error. Affirmed.

W. B. Brayman, for plaintiff in error. Selyn Douglas and W. T. Johnston, for defendants in error.

HORTON, C. J. This is the second time this case has been in this court. 42 Kan. 477, 22 Pac. 612. The facts of the case are fully shown in the statement of the former case. After the judgment of the court below was reversed by this court, a new trial was had, and it was found upon that trial that the market value, in cash, of the property described in the chattel mortgage, which was purchased by S. G. Bigelow, the mortgagee, at the mortgage sale, on January 28, 1887, for \$2,600, was \$4,558.67. Wygal & Son also obtained a general finding that the notes secured by the mortgage sought to be foreclosed had been fully paid, and were no longer a lien upon the property mentioned therein. They recovered judgment against Bigelow for \$600.67 and costs, taxed at \$275.40.

Counsel for the plaintiff in error presents one exception, only, to the judgment. He insists that the court erred in informing the jury that the sale of the chattel property in a lump, or in two lumps, would be an unfair mode of sale, if the property brought less than its actual value. Prior to giving this instruction the court charged the jury as follows: "In this case the defendants claim that the sale was conducted in a fraudulent manner, whereby the property was sacrificed. They claim that Bigelow had the property put up at public auction, and sold in bulk, instead of selling the property in detail and separately, and for the purpose and with the intent of having the property sold cheaper, and at a loss to them. This is what the defendants claim, and it is a question of fact for you to determine from all the evidence, whether Bigelow did make such a sale with such intent and for that purpose. Before you can find from the evidence that Bigelow did make such a sale, you must find from the evidence that he did it for the very purpose of having the property sold at a sacrifice, and below what it would otherwise bring at such sale. If Bigelow made an honest mistake of judgment as to which mode of sale the articles would realize the most money, he is not liable to the defendants for such mistake. If the jury believe from a preponderance of the evidence that the plaintiff, in taking possession of the personal property under the chattel mortgage, in advertising it for sale, in causing it to be

sold in two lots only, and in bidding it off at \$2,600, and in all other matters connected with said sale, acted in good faith, then the jury ought to find for the plaintiff in the sum that they may find to be still due on the five notes, after giving the credits for interest paid on said notes as hereafter in these instructions referred to, and after giving credits for the said sum of \$2,600, the amount realized on the sale of the said personal property under the said chattel mortgage." The argument is that the instruction about the sale in a lump or two lumps being unfair was erroneous, and, further, that as the instructions were contradictory the jury were misled, and plaintiff below prejudiced thereby.

It is hardly probable, in view of the very full instructions given, that the instruction complained of could have misled the jury in any way. If there were any doubt about this, the findings of the jury are conclusive that a new trial ought not to be granted. The jury found specially, in their answers to questions of fact, that the property described in the chattel mortgage would have brought more in the aggregate, had it been offered for sale separately, than it did bring, in the manner in which it was sold, and that Bigelow, the mortgagee, had the property offered and sold in the manner it was for the purpose of having it bring a less sum of money than it otherwise would. These findings show that Bigelow did not make an honest mistake of judgment, in offering and selling the property, but that he acted in bad faith towards the parties giving the chattel mortgage. He intentionally offered and sold the property in bulk to sacrifice the same for his own benefit; that is, that he might purchase the same at less than its actual value. Upon the special findings of the jury, Wygal & Son were entitled to judgment. If any error was committed in any variance in the instructions, it plainly appears from the special findings of the jury that they were not misled thereby. The judgment will be affirmed. All the justices concurring.

SHELDON et ux. v. PRUESSNER et al.

(Supreme Court of Kansas. Jan. 6, 1894.)

MORTGAGE—FORECLOSURE BY ASSIGNEE—VALIDITY OF ASSIGNMENT—HOMESTEAD EXEMPTION—Costs.

1. The courts, in the due administration of justice, will not enforce a contract in violation of law, or permit a plaintiff to recover upon a transaction against public policy, even if the invalidity of the contract or transaction be not specially pleaded.

2. Where a mortgagee, residing in this state, owns and has in his possession a note for \$1,700, secured by a mortgage upon real estate in this state, and pretends to transfer, by merely indorsing his name thereon, but without actually delivering the same, such note and mortgage to his father in another state, without any demand being made upon him to do so, to secure \$450 and interest for prior borrowed money, but really for the purpose of evading the payment of taxes justly due the

state, *held* that, in an action brought in the name of the father to recover upon the note and mortgage, the mortgagee, on account of his acts in evading the payment of taxes, and thereby defrauding the revenues of the state, cannot have any recovery in the name of his father or otherwise on any part of the note or mortgage belonging to him. *Held*, also, that if the father did not have any knowledge of such alleged transfer, and his name is used to collect such note and mortgage without his consent, or if he merely accepted the note and mortgage as a particeps criminis, to defraud the revenue laws, no recovery of any amount thereon can be had in his name.

3. Where a husband and wife jointly convey a homestead in exchange for other real estate to be occupied by them as a new homestead, upon which there is a prior mortgage, and the husband, with the consent of the wife, takes the conveyance of such real estate in his own name, and expressly assumes the payment of the mortgage thereon, the wife cannot, in an action to foreclose the mortgage, defend against it upon the ground that the real estate so purchased is a homestead, and therefore that the prior mortgage thereon at the date of the exchange is null and void.

4. Where a higher rate of interest is expressly reserved to be paid after maturity, such amount is recoverable, if not prohibited by statute.

5. Where a judgment is rendered upon two different notes, and for the foreclosure of two different mortgages given to secure the same,—one in favor of the plaintiff, and one in favor of a codefendant,—and the judgment on the note and the foreclosure of the mortgage in favor of the plaintiff are erroneous for want of sufficient evidence, it is error for the trial court to provide in the decree that upon the sale of the real estate all of the costs involved in the case, including the costs taxed upon the erroneous judgment, shall be first paid from the proceeds of such sale.

(Syllabus by the Court.)

Error from district court, Shawnee county; J. B. Johnson, Judge.

Action by Simon Pruessner against Joseph L. Sheldon and others to foreclose a mortgage. From the judgment rendered, defendants Sheldon and wife bring error. Reversed..

The other facts fully appear in the following statement by HORTON, O. J.:

This action was brought in the district court of Shawnee county by Simon Pruessner against Joseph L. Sheldon et al., May 5, 1891, to foreclose a mortgage given by Joseph L. Sheldon and wife to Henry S. Pruessner to secure the sum of \$1,700 and interest. Afterwards Lewis M. Motter filed his answer, setting up and claiming a mortgage of \$1,000, given by Henry S. Pruessner and wife as a prior lien upon the lands and tenements described in plaintiff's mortgage, being the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 16, township 12, range 16, in Shawnee county. Joseph L. Sheldon and his wife, Lizzie S. Sheldon, filed separate answers to the plaintiff's petition, and also filed separate replies to the answer of their codefendant, Lewis M. Motter. The case was tried on the 5th of December, 1891, and judgment rendered for Simon Pruessner for \$1,700, and interest at 7 per cent. per annum, and his mortgage foreclosed and adjudged to be a second

lien upon the premises described. Judgment was also rendered in favor of Lewis M. Motter against Henry S. Pruessner and wife for the sum of \$1,000 and interest at 12 per cent. per annum from date of default, which sum was adjudged to be a first lien upon the same premises. Joseph L. Sheldon and his wife, Lizzie S. Sheldon, bring the case to this court.

H. C. Root, for plaintiffs in error. A. Bergen and Bishop Crumrine, for defendants in error.

HORTON, O. J., (after stating the facts.) In the answer of Joseph L. Sheldon to the petition of Simon Pruessner upon the note and mortgage executed by Sheldon and his wife to Henry S. Pruessner on June 6, 1883, for \$1,700, with interest, it was denied, among other things, that Simon Pruessner was the holder or owner of the note and mortgage; and it was also denied that he had any interest therein, the allegation being that the alleged transfer to him was colorable only, and without consideration. It appears from the evidence of Henry S. Pruessner that his indebtedness to his father before the transfer of the note and mortgage was \$450. If he had given the note secured by the mortgage to his father, or if he had sold the note in good faith to his father for \$450 only, or for any other sum, Simon Pruessner might be entitled, as the holder and owner thereof, to recover the amount, with interest, and also to have a foreclosure of the mortgage. If it were not for the general finding of the trial court in favor of Simon Pruessner, there would be no trouble whatever in this case. Simon Pruessner, the father, lives in Missouri. Henry Pruessner, the son, lives in Shawnee county, in this state. Henry testified, among other things, as follows: "In order to get rid of paying taxes on the note and interest I owed, I sold the note to my father. In fact, I have not got anything of the money. Therefore I sold to father, being I owed a part to him; and in case I want any more I will get it of him, because I am a poor man, and I cannot afford to pay taxes on an amount I have not got, and pay interest on the same amount at the same time. Q. How did you sell it (the note) to him, (your father?) A. I wrote him. Q. What did you write him? A. A letter. Q. What were the contents of the letter? A. It was being I owed him some money. Q. For what? A. I borrowed it. Q. When? A. Just before I made that transfer. Q. How much did you borrow? A. Four hundred and fifty dollars. Q. Four hundred and fifty dollars? A. Yes, sir. Q. How was that four hundred and fifty dollars given to you? A. By note. Q. What was the date of the note? A. I could not say. Q. Was the note ever paid? A. No, sir. Q. What cash did you ever get from your father? A. That much cash. Q. When? A. I could not state the exact time. Q. How did you get it?

Did he pay you cash in hand? A. He sent a part and paid a part in cash. Sent by money order and registered letter. Q. Can you locate the year in which the four hundred and fifty dollars was paid? A. No, sir. Q. Was it 1890? A. No, sir. Q. Was it 1888? A. It was before we had any transaction,—before I disposed of the property. Q. That would make it before 1888? A. Yes, sir. Q. Before Sheldon bought? A. Yes, sir. Q. What about the balance of this mortgage? How much do you claim the Sheldons are owing you? A. Seventeen hundred dollars. Q. What was to become of the balance of the seventeen hundred dollars, when collected, after the paying of the four hundred and fifty dollars? A. Father holds it. Q. For you? A. Yes, sir." The note and mortgage were not transferred at the time that any of the money was borrowed. No demand was made upon Henry for security by his father, or for any transfer of the note or mortgage. They bear the blank indorsement of Henry, but it does not appear that they were delivered personally to Simon Pruessner, or that he employed the attorney to commence this action. It does appear that one of his brothers supports him; that Henry employed the attorney; and that the note and mortgage have been either in his possession or the possession of the attorney all the time. Henry was present at the trial, and seems to have been very much interested. Simon Pruessner was not present at the trial; neither was his deposition read. Construing all of the evidence as favorably as possible for Simon Pruessner, it appears that the note was merely transferred by Henry to evade the payment of taxes justly due in this state, and thereby to defraud the revenues of the state. His claim that he wanted to secure \$450 of borrowed money due his father seems rather a mere incident of the transfer,—the excuse, but not the controlling motive. The uncontradicted evidence is that the transfer of the note and mortgage was made "to get rid of paying taxes." We could fairly sustain the general finding of the trial court upon the Pruessner mortgage if Henry had not testified that the transfer was made "to get rid of paying taxes," and because "he was a poor man, and could not afford to pay taxes." This evidence does not seem to us to have been fully considered by the trial court. Perhaps it was not considered because the illegality of the transfer was not specially pleaded in either of the answers; but this was not necessary. The courts, in the due administration of justice, will not enforce a contract in violation of law, or permit a plaintiff to recover upon a transaction against public policy, even if the invalidity of the contract or transaction be not specially pleaded. *Oscanyan v. Arms Co.*, 103 U. S. 281, and cases cited. Henry had no hesitation in stating the illegal purpose for which he, in part, transferred the note and mortgage, and cannot complain if

this court gives it full effect. Notes and mortgages are subject to taxation in this state. *Pars.* 6846, 6847, 6849, *Gen. St.* 1889; *Association v. Hill*, 51 Kan. 636, 33 Pac. 300. Cooley, in his work on Taxation, says: "There is not only a necessity for taxation, but it is eminently just and equitable that it should be as nearly equal as possible. Hence it is the policy of the law to require all property, except such as is specially exempted, to bear its proportion of the public burdens." "He who saves a sum of money by evading the payment of a tax does exactly the same injury to society as he who steals so much from the treasury, and is therefore guilty of as great immorality, or as great an act of dishonesty." 1 *Shars. Bl. Comm.* p. 58, note; *Railroad Co. v. Morris*, 7 Kan. 210. Whatever tends to interfere with the beneficial operation of the statute is unlawful, as against the policy of the law. Whatever tends to obstruct duty by defeating the letter or spirit of the law is also unlawful; and the courts will not enforce any agreement or contract for the benefit of one through whose direction or assistance the law is violated, or public policy contravened. The law attempts to close the doors to temptations by refusing such parties recognition in the courts. 87 *Cent. Law J.* 313. "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to rise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because it will not lend its aid to such a plaintiff." *Valentine v. Stewart*, 15 Cal. 389; *Wilcox v. Ellis*, 14 Kan. 588; *Gaston v. Drake*, 14 Nev. 175; *Drexler v. Tyrrell*, 15 Nev. 114. If Simon Pruessner is a bona fide owner and holder of the note for \$450 and interest, we think he may be permitted to recover that amount, and have his foreclosure; but, if Henry transferred the note and mortgage to evade the paying of taxes on his interest therein, he cannot be permitted, through Simon Pruessner, to recover any part of the note and mortgage for his own benefit. As before stated, if the note and mortgage had been transferred in good faith as a gift, sale, or as collateral security, without any wrongful intent or purpose on the part of Henry to defraud the revenue laws of the state, the whole amount thereof might be recovered by any owner or holder of the same. But the evidence of Henry, as appearing in the record, unexplained, prevents, in this case, the rendition of the judgment upon the note and mortgage taken by him from the Sheldons, and now attempted to be enforced in the name of his father.

The claim that Joseph L. Sheldon did not own the mortgaged property on the 6th day of June, 1888, at the time of the execu-

tion of the note and mortgage, and therefore that there was no consideration given for the \$1,700 note, is not tenable. Henry S. Pruessner, and Joseph and Lizzie S. Sheldon exchanged places; the Sheldons conveying by joint deed their homestead in the city of Topeka to Henry S. Pruessner for the 40 acres of land described in the petition, and giving the \$1,700 note, secured by the mortgage. Henry S. Pruessner may not have actually delivered the deed to the land to Joseph Sheldon until a day or two after the mortgage to him, but at the time of the execution of the note and mortgage the negotiations for the exchange were completed. The deed to Joseph L. Sheldon is dated the 5th day of June, 1888, and was acknowledged on the 8th day of June, 1888. The mortgage is dated the 6th of June, 1888. It was acknowledged on the 11th day of June, 1888, and recorded on the 14th day of June, 1888. Therefore we suppose all of the papers were exchanged about the same time; that all the conveyances were a part of the same transaction. The note and mortgage were really a part of the purchase money, and the mortgage operates at least upon the estate acquired from Henry, the mortgagee. The only estate attempted to be foreclosed is that obtained from Henry S. Pruessner, and it is not contended that the Sheldons succeeded to any after-acquired title from any one except from Pruessner.

Another contention in the case is that the Motter mortgage of \$1,000 was not entitled to be recorded, because it was acknowledged before an interested party, and therefore that Mrs. Sheldon had no constructive or valid notice thereof. The note held by Motter was originally given to J. N. Stricker, cashier, by Henry S. Pruessner and wife, and the mortgage was taken to J. N. Strickler, as cashier. The acknowledgment was taken before L. H. Pounds, notary public. There is nothing upon the face of the mortgage tending to show that Pounds was an interested party. It appears from the evidence, outside of the mortgage, that J. N. Strickler was the cashier of the Investment Banking Company at Topeka, and that T. L. Pounds was the vice president of that company; not L. H. Pounds, the person taking the acknowledgment. There is no evidence in the record that L. H. Pounds, the notary public, is or was interested in the Investment Banking Company. When the deed of the mortgaged premises was executed by Henry S. Pruessner and wife to Joseph L. Sheldon, the latter accepted the same upon the expressed condition that he assumed the payment of the Motter mortgage; therefore he not only had personal knowledge of the mortgage, but agreed to pay the same to obtain the conveyance of the property. The amount of the prior mortgage was in the nature of purchase money. No property is exempt from the payment of obligations contracted for the purchase

thereof. Further than this, it appears from the evidence that Joseph L. Sheldon was absent on business during a part of the negotiations for the exchange of properties, and that his wife, Mrs. Sheldon, had very much to do with the exchange. It is probable that she had actual notice of the Motter mortgage, or rather of the prior incumbrance on the premises received in exchange for her homestead. The note held by Motter was dated February 1, 1888, and matured in three years thereafter. The rate of interest per annum specified in the note was 8 per cent. until maturity and 12 per cent. after maturity. Where there is an express stipulation that a certain rate of interest shall run after maturity, interest at that rate is recoverable. 11 Amer. & Eng. Enc. Law, pp. 416, 417, and cases cited in note; 3 Rand. Com. Paper, p. 823, § 1713, and cases cited; Ansel v. Olson, 39 Kan. 767, 18 Pac. 939.

The judgment of the trial court as rendered and entered of record is erroneous as a whole, because the judgment includes not only the amount of the note and mortgage given by the Sheldons to Henry S. Pruessner, but also provides that all of the costs, including the costs in the litigation over the Pruessner note and mortgage, as well as the Motter mortgage, are to be first paid from the proceeds of the sale of the mortgaged premises. The order of sale also contains this erroneous feature. As the costs were improperly adjudged against the Sheldons upon the Pruessner note and mortgage, those costs ought not to have been included in the judgment or the order of sale. Under these circumstances, the judgment will be set aside, and the cause remanded for further proceedings. All the justices concurring.

SHELDON et ux. v. PRUESSNER et al.

(Supreme Court of Kansas. Jan. 6, 1894.)

MORTGAGE FORECLOSURE — VALIDITY OF SALE — PAYMENT BY CHECK — VACATION OF DECREE — EFFECT ON SALE.

1. Greenwood v. Butler, 34 Pac. 967, 52 Kan. —, followed.

2. Where land is advertised to be sold for cash in pursuance of a judgment of foreclosure, and the sheriff accepts a certified check as cash, which is afterwards paid, the acceptance of the certified check for cash is not of itself a sufficient reason to defeat the sale.

3. Where a judgment under which land has been sold is held to be erroneous, and is reversed, and it appears that the land was bid in at the sale by a third person, who was acting for and in behalf of the judgment creditor, and that the purchase was actually made for such judgment creditor, the purchaser is not entitled to the protection provided for in section 467 of the Civil Code. The reversal of the judgment defeats the title of the purchaser, and the sale should be set aside.

(Syllabus by the Court.)

Error from district court, Shawnee county: Z. T. Hazen, Judge.

Action by Simon Pruessner against Joseph

L. Sheldon and others to foreclose a mortgage. There was judgment of foreclosure and sale, and from the order of confirmation defendants Sheldon and wife bring error. Reversed.

H. C. Root, for plaintiffs in error. Bishop Crumrine and A. Bergen, for defendants in error.

JOHNSTON, J. This proceeding is brought to review the ruling of the district court confirming a sale of real estate made in pursuance of a judgment foreclosing two mortgages thereon, which judgment has been reversed at the present sitting of the court. Sheldon v. Pruessner, 35 Pac. 201. The judgment of foreclosure was rendered December 5, 1891, and provided for the sale of the land without appraisal, and for the application of the proceeds. While this judgment was brought up to the supreme court for review, no supersedeas bond to stay execution was given, and, after due notice, a sale of the property was made April 24, 1893. The bid was made by E. S. Gresser for the price of \$3,450, but it appears that he was acting for Simon Pruessner, and that the purchase was actually made by Pruessner. Subsequently a motion was made to confirm the sale, which was resisted by the plaintiffs in error. Their principal contention was that the redemption law of 1893 was applicable, under which the sheriff should issue to the purchaser a certificate conditioned that, unless redemption was made within 18 months, a deed would be issued. This objection to the sale is not sufficient, as the judgment of foreclosure was rendered long prior to the enactment of the redemption law of 1893. Under the recent decision of Greenwood v. Butler, 52 Kan. —, 34 Pac. 907, that law does not affect nor change the terms of a judgment duly rendered before its passage.

Another objection to confirmation was that the sheriff accepted a certified check for \$1,454.20, which was the amount of the Motter judgment, interest and costs, when he had advertised to sell the premises for cash. If this was the only objection, it would afford the plaintiffs in error no ground for complaint. The sheriff might have objected to the certified check, and required a cash payment; but, as he did not, and as the money has been paid, it furnishes no ground to set aside the sale.

A more serious objection to the confirmation is that there is no judgment upon which it can rest. There has been a complete reversal of the judgment which decreed the sale, and the purchaser cannot be regarded as a stranger to that judgment. Under section 467 of the Code the reversal of a judgment will not affect the title of a bona fide purchaser of land sold under such judgment, but it has been held that this provision has application solely to bona fide purchasers who are not parties to the erroneous judg-

ment, nor responsible therefor. Hubbard v. Ogden, 22 Kan. 671. Although a bid of \$3,450 was made by E. S. Gresser, only \$1,454.20 was actually paid. An attempt was made to satisfy the balance of the bid by a receipt for \$1,900, given to the sheriff by Simon Pruessner; and it is expressly admitted by counsel for plaintiffs in error that Gresser's bid was made for and in behalf of Simon Pruessner, and not for himself. The sale must, then, be regarded as having been made to Pruessner, the judgment creditor, who was not within the protection of section 467 of the Civil Code. This case was argued and submitted with the foreclosure case, and, the judgment having been reversed, the sale necessarily falls with it, and therefore the order of the district court confirming the sale will be reversed, and the sale will be set aside. All the justices concurring.

SELLERS et ux. v. CROSSAN.

(Supreme Court of Kansas. Nov. 11, 1893.)

ADVERSE POSSESSION—POSSESSION OF GRANTOR AFTER CONVEYANCE—ESTOPPEL.

1. Where an owner executes and places upon record a warranty deed purporting to convey the complete title of land occupied by himself and family, his subsequent possession will generally be considered as in suberviency to the record title.

2. The parties in possession, husband and wife, having joined in the execution of the conveyance, which apparently transferred the complete title, and having subsequently disavowed any interest in the land, are estopped from claiming a homestead interest in the premises so conveyed as against the mortgagee of their grantee, who had no notice that the conveyance made by them was other than what it purported to be.

(Syllabus by the Court.)

Error from district court, Miami county; J. P. Hindman, Judge.

Action by A. K. Sellers and another against Rebecca Crossan to set aside a judgment. There was judgment for defendant, and plaintiffs bring error. Affirmed.

W. H. Browne, for plaintiffs in error. Crossan & Lane, for defendant in error.

JOHNSTON, J. This was an action brought by A. K. Sellers and Nettie Sellers, his wife, to vacate and set aside a judgment obtained by Rebecca Crossan against D. O. Sellers and Clara N. Sellers, foreclosing a mortgage against real estate in Paola. The grounds for vacation of the judgment were that D. O. Sellers and Clara N. Sellers, who executed the mortgage which was foreclosed, were not the actual owners of the property mortgaged, but the plaintiffs were the owners, and had occupied it since a long time before the mortgage was made as their homestead, and were so occupying it at the time the judgment was rendered. It was alleged that Rebecca Crossan, the judgment creditor, was acquainted with the homestead character

of the premises, and with the ownership of plaintiffs. It appears that the property claimed by plaintiffs was conveyed by them to Clara N. Sellers in January, 1880. The instrument was a warranty deed, conveying the absolute title, with the usual covenants, and the consideration named was \$190. In July, 1887, D. O. Sellers and Clara N. Sellers borrowed from Rebecca Crossan the sum of \$275, and to secure its payment executed a mortgage on the premises in question, signed only by themselves, in which it was covenanted that they were the lawful owners of the premises, selsed of a good and indefeasible estate of inheritance therein. Default being made in the payment of the secured indebtedness, judgment was recovered for the amount due, and for a foreclosure of the mortgage. There was testimony to show that at the time the mortgage was given and the judgment rendered the property was occupied by the family of A. K. Sellers, which consisted of himself, his wife, and daughter. It was also shown that prior to 1880 the title to the property stood in the name of Nettie Sellers, and plaintiffs claim and offered testimony to show that the conveyance by them to Clara N. Sellers, although a deed in form, was actually a mortgage made to secure the payment of \$190 which had been borrowed by them from Clara N. Sellers and her husband, D. O. Sellers; and, further, that there was an agreement that upon the payment of the debt the property should be reconveyed. The plaintiffs endeavored to show that the agent of Crossan was informed that they were the equitable and actual owners of the premises when the mortgage was executed and foreclosed, but this was denied, and, like all other facts upon which there was conflicting testimony, it has been conclusively determined in favor of the defendant. The plaintiffs insist that the deed from them to Clara N. Sellers, having been made to secure a debt, is only a mortgage, which did not transfer title; that the premises were their homestead, and that, as the mortgage to Crossan was not signed by them, it was absolutely void. It is true, as contended, that a mortgage lien cannot be created upon a homestead without the joint consent of the husband and wife, but, like every other interest, it may be surrendered, transferred, or lost. The action of the parties holding such an interest may be such as to operate as an abandonment, or to estop them from claiming such interest. Although they did not sign the mortgage, they had previously executed a warranty deed, which, upon its face, transferred every vestige of title from them. Whatever the fact may have been with reference to the agreement of the grantees to reconvey upon the repayment of the stated consideration, it is conceded that the legal title remained in Clara N. Sellers until the Crossan mortgage was made, and until after the debt had matured, and the mort-

gage had been foreclosed, in 1888. There is testimony that during all this time Clara N. and D. O. Sellers were claiming the title to the property and A. K. and Nettie Sellers were disclaiming that they had any interest in the premises. A few days previous to the execution of the Crossan mortgage the agent of Crossan, finding that A. K. Sellers and wife had previously signed a mortgage on the premises, obtained a statement from Nettie Sellers, made under oath, to the effect that she and her husband signed the mortgage through a mistake, that the title to the property was in Clara N. Sellers, and that she and her husband, A. K. Sellers, had no interest in the property whatever. Again, when the Crossan mortgage matured, and default was made, an action of foreclosure was begun, when D. O. Sellers applied to Crossan for an extension of time within which to pay the debt. The agent of Crossan, having heard that A. K. Sellers and Nettie Sellers claimed some interest in the property, and desiring to have that question set at rest before granting any extension, inquired with reference to that claim, and was informed that a written disclaimer from A. K. Sellers and Nettie Sellers would be obtained. Accordingly the following written disclaimer was executed, and handed to Crossan: "Know all men by these presents, that we, the undersigned, claim no right, title, or interest, either legal or equitable, in or to the south half of lots 9 and 10, and the south half of the east half of lot 8, all in block 91, as the same is designated on the recorded plat of the city of Paola, Kansas. Witness our hands, this 21st day of January, 1888. Nettie Sellers. A. K. Sellers." Upon the strength of this disclaimer, the debt secured by the Crossan mortgage was extended for several months. More than this, it appears that A. K. Sellers and wife received the greater part of the money borrowed from Crossan, and knowingly permitted other mortgages to be made and placed on record by Clara N. and D. O. Sellers. After this conduct, the plaintiffs invoke the equitable jurisdiction of the court to accomplish what would be an obvious injustice. Their action in putting upon the record a deed by which they conveyed the absolute title to the grantee, and their subsequent disavowal of title or interest, estops them from setting up any secret arrangement or title of which Crossan had no knowledge. Having executed a conveyance and acted so as to induce the belief that they had surrendered the homestead right, they will not be permitted to impeach their deed, or deny that they granted the premises which their deed purported to convey. It is true that a deed absolute in form, but intended as a mortgage, will be held to be a mortgage as between the grantor and grantee, and as to all others who had actual knowledge of the real character of the instrument. The finding of the court

puts the question of notice at rest, and hence we must assume that Crossan had no knowledge that the deed was intended as a mortgage, or that it was anything else than a complete transfer of the whole title. It is insisted that the occupation of the premises by the plaintiffs and their family required every one dealing in the property to take notice of the title which they actually held, and of the homestead interest to which their occupancy entitled them. It is true, the general rule is that the possession of land is notice of the title under which the occupant claims, but this rule has no application where the party in possession has put upon the record a title inconsistent with his possession. In such cases the possession is to be considered as in subserviency to the record title. *McNeil v. Jordan*, 28 Kan. 7. In the absence of actual notice, Crossan had a right to rely upon the declaration made in plaintiffs' deed that their conveyance was absolute and without reservation. If the deed was intended as a mortgage, and any one is to suffer for the mistake, it should be the one whose conduct caused the loss. Both of the plaintiffs having joined in the alienation of the land, they are, under the circumstances of this case, estopped from impeaching or contradicting it, or setting up any secret claim or interest therein as against the defendant. We think the court below reached a just and correct conclusion, and therefore its judgment will be affirmed. All the justices concurring.

YOUNT v. DENNING et al.

(Supreme Court of Kansas. Jan. 6, 1894.)

UNLAWFUL CONTRACTS—FOR COMMISSIONS BY REAL-ESTATE AGENT WITHOUT LICENSE.

The mayor and council of the city of Winfield provided by ordinance that no person should carry on the business of a real-estate agent without having obtained a license so to do, and imposed a semiannual license tax of \$10 on each person engaged in the business, and a fine for a violation of the ordinance. The plaintiffs below carried on the business of real-estate agents in said city without having paid the license tax, and in violation of the provisions of the ordinance. In this case they sue for a commission on a sale negotiated by them while so carrying on said business. *Held*, that the transaction is unlawful on their part, and they cannot recover.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Action by Walter Denning and another against Mary A. Yount, administratrix of the estate of George W. Yount, deceased. Plaintiffs had judgment, and defendant brings error. Reversed.

Pollock & Love, for plaintiff in error. McDermott & Johnson, for defendants in error.

ALLEN, J. Walter Denning and Mahlon E. Johnson brought suit against George W.

Yount before a justice of the peace, alleging that they were partners, and that the defendant was indebted to them in the sum of \$265 for commission on a sale of a quarter section of land, negotiated by them for the defendant. The defendant denied liability. The justice of the peace rendered judgment in favor of the defendant for costs. Plaintiffs appealed to the district court, where they obtained judgment for the full amount claimed, and the defendant brings the case here.

It appears from the undisputed facts in the case that the plaintiffs were real-estate agents, doing business in Winfield, a city of the second class. That, at the time of the transaction for which they seek to recover, there was in force in said city an ordinance containing the following provisions: "Section 1. That no person, firm, company or corporation, shall conduct, carry on, or operate in the city of Winfield, Cowley county, state of Kansas, any of the callings, businesses, or occupations hereinafter specified, without first having obtained a license so to do, and having paid the license tax hereinafter prescribed for any such calling, business or occupation so intended to be pursued, carried on, or conducted by any such person, firm, company or corporation." "Sec. 17. Each person engaged in the business of real estate and loan agents, or brokers, shall pay a semiannual license tax of \$10.00." Section 43 of the same ordinance prescribed a fine of not less than \$10, nor more than \$100, for a violation of any of the provisions of the ordinance. It is conceded that the plaintiffs had not paid the tax, and were consequently carrying on business in violation of the ordinance when they performed the services for which they seek to recover in this action. The general rule that no person can recover in a court of justice on a cause of action founded on a violation of law is not controverted, but the contention is that the ordinance of the city was passed solely for the purpose of collecting revenue; that a city council has no power, under the statutes of the state, to prohibit persons from carrying on the business of real-estate agents; that the limit of their power is to levy the tax, and impose fines for its non-payment. The power to impose burdens for the purpose of raising revenue is essential, not only to the existence of national and state governments, but to those of municipalities as well. To that power, when rightfully exercised, the citizen must yield. The modes of raising revenue vary according to the views of those imposing the tax, and the changing circumstances affecting each case. The revenue of the United States government is raised almost wholly by indirect taxation, and violations of its revenue laws are generally punished by severe penalties, often by confiscations, and contracts founded on a violation thereof are generally held utterly void. It is urged that there is

a distinction between those kinds of business, which, because of their character, are deemed subjects of regulation, and on which license taxes are imposed in connection with restrictions and regulations of the mode of conducting the same, and those businesses which are regarded as altogether proper and legitimate, requiring no such regulation. By section 48, c. 19, of the act governing cities of the second class, the city council is given exclusive authority to levy and collect a license tax on a very great variety of occupations, including real-estate agents. In this section are named businesses which it is ordinarily thought necessary to regulate and restrict, together with those not so regarded, but the power to impose a license tax on each is precisely the same. The term "license" is defined by Webster: "Authority or liberty given to do or forbear any act; especially, a formal permission from the public authorities to perform certain acts; a grant of permission; as, a license to preach, practice medicine, sell gunpowder, and the like." A license tax differs from other forms of taxation mainly in that it is imposed as a condition to entering upon the conduct of the business. The authorities do not uphold the distinction between the power to impose a license tax on those callings which are regarded as altogether right and proper, requiring no restriction or regulation, and those over which it is necessary to exercise supervision for police and sanitary purposes. Judge Cooley, in his work on Taxation, (2d Ed., p. 572,) says: "When the tax takes the form of a tax on the privilege of following an employment, convenience in collections will commonly dictate the requirement of a license, and the person taxed will be compelled to pay the tax as a condition to the right to carry on the business at all. In such a case the business carried on without a license will be illegal, and no recovery can be had on contracts made in the course of it." In 1 Dill. Mun. Corp. (4th Ed.) § 308, it is said: "Although the proposition that the legislature of the state is alone competent to make laws is true, yet it is also settled that it is competent for the legislature to delegate to municipal corporations the power to make by-laws and ordinances, with appropriate sanctions, which, when authorized, have the force in favor of the municipality, and against persons bound thereby, of laws passed by the legislature of the state. A penalty imposed by an ordinance authorized by the legislature for the doing of certain specified acts amounts to a prohibition, and the prohibited acts become thereby unlawful." The validity of city ordinances imposing license taxes on occupations has been frequently upheld by this court. In the case of *City of Leavenworth v. Booth*, 15 Kan. 627, a tax of \$50 on a fire insurance company, and \$100 on a life insurance company, was upheld. In *Fretwell v. City of Troy*, 18 Kan. 272, a license

tax of \$5 per day on auction sales was sustained. See, also, *McGrath v. City of Newton*, 29 Kan. 364; *City of Cherokee v. Fox*, 34 Kan. 16, 7 Pac. 625; *City of Wyandotte v. Corrigan*, 35 Kan. 21, 10 Pac. 90; *Campbell v. City of Anthony*, 40 Kan. 652, 20 Pac. 492. In the last-mentioned case the tax was on a lumber dealer. In the case of *Stevenson v. Ewing*, (Tenn.) 9 S. W. 230, it was held by the supreme court of Tennessee that a real-estate broker who has not, pursuant to Acts Tenn. 1885, c. 1, § 46, taken out the license required of persons engaged in that business, cannot recover compensation for effecting a sale. The act under consideration declared that "the occupation of real-estate brokers shall be deemed a privilege and be taxed, and not pursued or done without license." In this case the ordinance prohibits any person from carrying on the business of a real-estate agent without having paid the tax. The prohibition in each case is the same, and the calling taxed identical. The Tennessee case seems to be well supported by authorities. *Holt v. Green*, 73 Pa. St. 198; *Dillon v. Allen*, 46 Iowa, 299; *Woods v. Armstrong*, 54 Ala. 150; *Johnson v. Hulings*, 103 Pa. St. 498. In the last-named case the jury found the following special verdict: "We find in favor of the plaintiff the sum of \$12,300, subject to the opinion of the court upon the following question, viz.: Plaintiff was in 1878, and for some years before and after, in the business of buying and selling real estate for others upon commission. In 1878 he had no license as a real-estate broker. During that year he negotiated a sale of real estate for the defendant H. L. Taylor & Company, for which he was to receive ten thousand dollars. If the court be of opinion that his failure to obtain a license as a broker is a bar to his recovery, then we find for the defendant; otherwise, for the plaintiff, as above stated." The supreme court held that the plaintiff could not recover, and directed judgment to be entered for the defendant.

Does the fact that the license tax was imposed merely by a city council change the rule? A city ordinance authorized by statute, and duly passed, becomes binding on all persons within the corporate limits, and within such limits it has the force and effect of law. *Milne v. Davidson*, 5 Mart. (N. S.) 409; *Johnson v. Simonton*, 43 Cal. 242. Licenses to sell intoxicating liquors in this state prior to the amendment of the constitution were granted in cities by the city council, and the amount of the tax was fixed by ordinance. In the case of *Alexander v. O'Donnell*, 12 Kan. 608, it was held that, "the sale of intoxicating liquors without license being prohibited by statute, no action can be maintained to recover for such liquors so sold on credit, whether the quantity sold be great or small." It is true that in that case the prohibition was by statute. The city council, however, had authority to

license. The seller obtained no license to sell, and it was held that the sale was illegal, and he could not recover. Such contracts have been repeatedly declared void by this court. *Bowman v. Phillips*, 41 Kan. 364, 21 Pac. 230; *Bank v. Gerson*, 50 Kan. 582, 32 Pac. 905; *Flersheim v. Cary*, 39 Kan. 179, 17 Pac. 825. We conclude, then, that the city council of Winfield had the right to impose a license tax as a condition precedent to the right to carry on the business of real-estate agent; that in the exercise of such right, it declared it to be unlawful for any person to engage in the business within the city, without having paid the tax; that the plaintiffs conducted their business in violation of the ordinance; and that they cannot come into court, and maintain a cause of action founded on their violation of the ordinance. The judgment will therefore be reversed. All the justices concurring.

STATE v. YATES.

(Supreme Court of Kansas. Jan. 6, 1894.)

INTOXICATING LIQUORS—CRIMINAL PROSECUTION—CHANGING PLEA—DISCRETION OF COURT.

1. The rule is that where a defendant has pleaded guilty in a criminal cause, and sentence has been passed upon him, it is within the sound discretion of the trial court to permit the plea to be withdrawn, and to allow a plea of not guilty entered. If the court abuses its discretion, error may be assigned therefor.

2. Where a defendant, being an intelligent person, and the owner of a drug store, was charged with an offense under the prohibitory liquor law, punishable by a fine of not less than \$100 or more than \$500, or by imprisonment in the county jail not less than 30 days or more than 6 months, and was represented in court by able counsel, and upon arraignment pleaded guilty, and was sentenced to pay \$300 fine and the costs, and also to be committed to the county jail until the fine and costs were paid, and the next day presented his motion to the court to retract his plea of guilty, upon the ground of the misconduct of the prosecuting attorney in inducing him to enter a plea of guilty under the belief that he would be sentenced to pay a fine of \$100 only, and upon the hearing of the motion it was shown that no definite promise was made by the county attorney to the defendant or his attorneys, or to any one for him, and that such attorney did not urge the defendant or his attorneys to enter a plea of guilty, but that, from an interview between the county attorney and one or two of the friends of the defendant, it was understood by them, and so communicated to the defendant, that if he pleaded guilty he would be sentenced to pay a fine of \$100 only. *Held*, the refusal to permit the defendant to withdraw his plea was not an abuse of sound discretion of the trial court.

(Syllabus by the Court.)

Appeal from district court, Brown county; J. F. Thompson, Judge.

L. R. Yates was adjudged guilty of selling intoxicating liquors unlawfully, and, a new trial having been denied, he appeals. Affirmed.

The other facts fully appear in the following statement by HORTON, C. J.:

On the 13th day of February, 1893, there was

filed an information against Dr. L. R. Yates, charging him, in several different counts, with having violated the prohibitory liquor law in his drug store in the city of Hiawatha. After Yates was arrested, he moved to quash the warrant. This motion was overruled at the February term, 1893, and the cause continued to the May term, Yates being required to give a recognizance in the sum of \$1,000. At the May term the county attorney filed an amended information charging Yates with keeping a place where intoxicating liquors were received and kept for the purpose of use, gift, barter, and sale, as a beverage. Yates, being required to plead to this amended information, pleaded guilty. The trial court sentenced him to pay a fine of \$300 and costs, and to be committed to the jail of Brown county until the fine and costs were paid. On the next day, Yates filed his two several motions to set aside his plea of guilty, and to grant a new trial. In the first, he alleged he was induced to do so upon the promise of the county attorney that only a fine of \$100 would be imposed, and because of misconduct on the part of the prosecuting attorney. In the second motion, he stated that the fine was excessive, and greater than punishments theretofore inflicted by the trial court, and that the plea of guilty was entered on the promise of the county attorney that a fine of \$100, with costs, only, would be imposed. The motion was overruled. Yates excepted. He appeals.

Jas. Falloon and S. F. Newlon, for appellant. John T. Little, Atty. Gen., and W. F. Means, for the State.

HORTON, C. J., (after stating the facts.) The rule is that where a defendant has pleaded guilty in a criminal cause, and sentence has been passed upon him, it is within the sound discretion of the trial court to permit the plea to be withdrawn, and to allow a plea of not guilty to be entered. If the court abuses its discretion, error may be assigned therefor. *City of Salina v. Cooper*, 45 Kan. 12, 25 Pac. 233; 4 Amer. & Eng. Enc. Law, 776, and cases cited. In this case, we do not think the trial court erred in the exercise of its discretion. Before the plea of guilty was rendered, the defendant was represented by able counsel, and had full opportunity to consult with them. Two of his friends interviewed the county attorney, for the purpose, principally, of ascertaining whether the defendant could plead guilty, and be fined only, thereby avoiding a jail sentence. One of the defendant's friends understood from the county attorney, in his interview, that if the defendant pleaded guilty he would be fined \$100 only, yet he admits that no definite promise was made. Upon cross-examination by the county attorney, this witness testified, among other things, that: "Q. I didn't urge upon you or these parties, in talking to you for them, to enter a plea of any kind, did I?"

A. No, sir; not at all. Q. If they did so, they did it with their own free will? A. Certainly, all the way through. Q. About the talk of the hundred dollar fine, I will ask you if that wasn't more specially in regard to what the fine had been on previous occasions, rather than what it might be in these cases? A. I think that was the understanding,—that the fine would be a hundred dollars, if they pleaded guilty. Q. I did not make the promise that they would receive a fine of a hundred dollars, did I? A. You made no definite promise at all, Mr. Means." The county attorney had no conversation with the defendant, personally. The defendant talked with his friends who had interviewed the county attorney, and it was his understanding from them, as well as their understanding, that if he pleaded guilty he would be fined \$100 only, and have no jail sentence. It is not claimed that the plea of guilty was entered by anything said or done by the trial judge. In order to assist the defendant to avoid a jail sentence, the county attorney nolleed the prior information, containing seven or eight counts for violation of section 386 of the crimes and punishments act, and filed a new information, under section 895, permitting the court, in its discretion, to fine the defendant, only, or imprison him in the county jail. Under the first information, upon a conviction or plea of guilty, a jail sentence was compulsory. The trial court had no discretion. Under the new information, the court had discretion, and exercised it favorably to the defendant. The real complaint is that the sentence was for \$300, instead of \$100 only, as the defendant and his friends expected. If the defendant has or will yet pay the fine and costs adjudged against him, there will be no commitment. We cannot perceive, from a careful reading of the evidence, that the county attorney acted in bad faith, in any way, towards the defendant. Nor was the trial court under any duty to inflict the minimum sentence permitted by the statute, by anything said or done by the county attorney. Under these circumstances, this court will not interfere. The judgment of the district court will be affirmed. All the justices concurring.

STATE v. PYLE.

STATE v. POTTENGER.

(Supreme Court of Kansas. Jan. 6, 1894.)

INTOXICATING LIQUORS—CRIMINAL PROSECUTION—CHANGING PLEA.

The case of State v. Yates, 35 Pac. 209. 51 Kan. —, followed.

Appeal from district court, Brown county; J. F. Thompson, Judge.

Charles V. Pyle and John W. Pottenger were separately adjudged guilty of unlawfully selling intoxicating liquors, and appealed. Affirmed.

Jas. Falloon and S. F. Newlon, for appellant. John T. Little, Atty. Gen., and W. F. Means, for the State.

HORTON, C. J. Both of the foregoing cases will be affirmed, upon the authority of State v. Yates, 35 Pac. 209, (No. 9,139; just decided,) as the facts are identical in each case. All the justices concurring.

NEWBERRY et al. v. ARKANSAS, K. & C. RY. CO.

(Supreme Court of Kansas. Jan. 6, 1894.)

APPEALABLE ORDERS—QUASHING SUMMONS—ACTION AGAINST RAILROAD COMPANY—VENUE.

1. A ruling quashing the summons, and setting aside the service made upon the defendant, is a final order, which is reviewable in the supreme court.

2. Such a ruling is not available as error where more than one year has intervened between the making of the order and the commencement of proceedings in error.

3. An action against a railroad company for injury to property upon the road or line of the company may be brought in any county through or into which the road passes; and, when rightly brought, the summons may be issued to any other county of the state, and there served upon the president of the company.

(Syllabus by the Court.)

Error from district court, Ford county; A. J. Abbott, Judge.

Action by F. R. Newberry and another against the Arkansas, Kansas & Colorado Railway Company. The service of summons having been set aside, plaintiffs bring error. Reversed.

L. K. Soper, for plaintiffs in error. J. F. Frankey, M. A. Low, and W. F. Evans, for defendant in error.

JOHNSTON, J. F. R. Newberry and Charles P. Noell filed a petition in the district court of Ford county, alleging that the defendant, the Arkansas, Kansas & Colorado Railway Company, in constructing and operating its railroad through and over their premises, threw down their fences, and left the premises unfenced, and without cattle guards, on account of which corn and fodder were destroyed, and they were required to incur extra expense in the herding of cattle and horses kept within the inclosure, and one cow was killed, whereby they sustained loss and damage in the amount of \$1,230. A summons was issued, directed to the sheriff of Ford county, which was returned by the sheriff as having been served upon D. M. Frost, the vice president of the company; and afterwards the return was so amended as to state that he was the chief officer of the company in that county, the nominal president of the company being a nonresident, and no person having been designated by the company, as the law requires, upon whom process could be served. Testimony was offered upon the motion, by which it appeared that the defendant company had

leased its entire property to another railroad company, and that it had no clerk or agent in charge of any station or other property, and had made no designation of any person upon whom to serve process. Other testimony was offered with respect to the duties of the vice president of the company, and the place where the president resided. On May 16, 1889, the court sustained the motion, and set aside the service of summons. Another summons was duly issued, directed to the sheriff of Clark county, Kan., commanding him to make service upon C. D. Perry, the president of the defendant company. The return, among other things, stated that service had been made by leaving "a true copy of the within summons, with all the indorsements thereon, with the wife of the said C. D. Perry, president of the said defendant company, at his usual place of residence." The service was made by the undersheriff of the county. A motion was made to quash the summons and set aside the service, upon the grounds that the summons must be served in the county where the action is begun, that it had not been made upon C. D. Perry personally, and that it did not appear that service could not be made in Ford county. On August 7, 1889, the court sustained the motion, and set aside the service. Afterwards another summons was issued, directed to the sheriff of Clark county, directing service to be made on C. D. Perry, who returned that he had served the summons on September 2, 1889, by delivering a copy thereof, with the indorsements thereon, duly certified, to the defendant railway company, by delivering a copy of the same personally to C. D. Perry, the president of the defendant company. A motion was made to set aside the service of this summons upon the ground that the court had no longer any jurisdiction of the case, for the reason that the plaintiff had made a case for the supreme court therein on the former rulings; and for the further reason that it did not appear that service of summons could not have been made in Ford county, nor in what place the service was made. This motion also was sustained. Exceptions were taken to each of the rulings, and each is assigned as a ground for reversal.

A ruling of the court quashing the summons and setting aside the service which had been made upon the defendant is a final order, which is reviewable in the supreme court. Civil Code, §§ 542, 543. It is difficult to see why the first service made upon the vice president of the company was insufficient; but, as this ruling was not brought up for review within one year after it was made, it is not now an available error. The ruling was made on May 16, 1889, and the proceeding for reversal was instituted in this court on July 7, 1890. More than one year having intervened between the making of the order and the commencement of proceedings in this court, it comes within the bar of section 556 of the Code, and is not reviewable.

The other rulings were based upon attempts to make service upon the president of the railroad company, who resided in Clark county. Objection is made to the sufficiency of the service first made in Clark county, it being claimed that it was made upon Perry's wife, instead of upon himself. Whatever may be said as to the sufficiency of the objection to this service, no substantial objection can be made against the last service made in Clark county. In that instance service was personally made upon the president of the company, and the record fairly shows that it was served in Clark county, Kan. As this was an action for injury to property upon the road or line of the railroad company, the plaintiffs were authorized to bring it in any county through or into which the road or line passed. Civil Code, § 50. The action having been rightly brought in Ford county, the summons was properly issued to any other county of the state at the plaintiffs' request. Civil Code, § 60. A summons against a corporation may be served upon the president, as was done in this case, wherever he may be found in the state. Civil Code, § 68. The company had failed to designate any person upon whom process could be served, and, having transferred its entire property to another company, it had no officers or agents in the county in charge of its property upon whom service could be had. The fact that the plaintiffs had made a case for the supreme court prior to the last ruling setting aside the service will not affect the case, nor deprive the plaintiffs of a review of such ruling. The judgment will be reversed, and the cause remanded for further proceedings. All the justices concurring.

ST. LOUIS & S. F. RY. CO. v. HURST et al.
(Supreme Court of Kansas. Jan. 3, 1894.)

APPEAL FROM JUSTICE'S COURT—PRACTICE IN PERFECTING TRANSCRIPT—AMENDING BOND.

1. An appeal from the judgment of a justice of the peace is complete upon the filing and approval of the appeal bond or undertaking within 10 days from the rendition of the judgment.

2. The successor of a justice of the peace has the power, under the direction of the district court, to supply omissions in a transcript of his predecessor, and for that purpose may file with the clerk of the district court a new and completed transcript from the official records in his possession.

3. Where an appeal bond, filed and approved by a justice of the peace, is insufficient in form or amount, the party appealing should be given an opportunity by the district court, where the appeal is pending, to change or renew the bond before the case is dismissed for a defect therein.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Action by Elizabeth Hurst and Alfred Hurst against the St. Louis & San Francisco Railway Company for killing animals. From

a judgment dismissing the appeal from a justice's court, defendant brings error. Reversed.

The other facts fully appear in the following statement by HORTON, C. J.:

On July 30, 1888, Alfred and Elizabeth Hurst commenced their action against the St. Louis & San Francisco Railway Company before W. D. Kreamer, a justice of the peace of Arkansas City, in Cowley county, to recover damages on account of the killing of stock by the railway company, claiming \$100, the value of the animals, and \$100 as attorney's fees. Summons was issued and served upon the agent of the railroad company. On the 4th of August, 1888, the day set for trial, the railway company did not appear. Judgment was rendered against the company for \$200; \$100 being allowed as attorney's fees. On August 9, 1888, the railway company presented a bond to the justice of the peace, and the same was approved by him on that day. On August 8, 1889, the justice of the peace filed with the clerk of the district court a transcript of certain proceedings before him, together with the papers in the case, including the bill of particulars, the summons and return thereof, and the appeal bond. This transcript did not recite or set out the appeal bond, nor by whom the appeal was taken, nor the date. On December 20, 1889, the railway company moved to dismiss the action, because—First, the court had no jurisdiction of the cause; second, because the justice did not send up the transcript in 20 days after the supposed appeal; fourth, because the party who sent up the appeal (Fouts, the successor of Kreamer) had no authority to send up a transcript. This motion was overruled. On December 26, 1889, Elizabeth and Alfred Hurst filed in the district court a motion to dismiss the appeal of the defendant upon the grounds: "First, because the appeal was not taken, as required by law; second, because no appeal bond was ever filed, as required by law; third, because the transcript of the judgment in justice's court was not filed in this court, as required by law." On January 4, 1890, the railway company filed a motion suggesting a diminution of the record, and to compel the justice of the peace to show upon his docket and in the transcript when the appeal was taken, by whom, and the bond. On January 27, 1890, a transcript was filed in the district court from the docket of Kreamer, a justice of the peace, showing what was contained on Kreamer's docket; and also that on January 10, 1890, the railway company filed a motion to have the docket show the filing and approval of the appeal bond, and when and by whom the appeal was taken. On the hearing of this motion on the 25th of January, 1889, the parties appeared by their attorneys. J. H. Eckert, the justice of the peace, who was one of the successors after Kreamer, sustained the motion. On April

19, 1890, D. Baxter, successor in office of J. H. Eckert, filed in the district court a transcript of the proceedings, findings, and rulings before the other justices of the peace. On April 28, 1890, the case came on for hearing on the motion of Elizabeth and Alfred Hurst to dismiss the railway company's appeal. The motion was sustained, the appeal dismissed, the railway company excepting. The company brings the case here.

A. A. Hurd and Robert Dunlap, for plaintiff in error. C. T. Atkinson and McDermott & Johnson, for defendants in error.

HORTON, C. J., (after stating the facts.) In this case a judgment was rendered before the justice of the peace on the 4th of August, 1888. According to the case made, "the railway company, on the 9th day of August, 1888, duly filed with said justice of the peace, in his office in Arkansas City, Cowley county, its appeal bond, which was duly approved by said justice of the peace by indorsement thereon in writing." Therefore the railway company, the party appealing, within 10 days from the rendition of the judgment, entered into an undertaking to the adverse party. Section 121 of the justices' act. Section 122 of the justices' act provides: "The appeal shall be complete upon the filing and approving of the undertaking, as provided in section 121." The omission of the justice of the peace to enter such fact upon his docket could not prejudice the rights of the appellant. Therefore the filing and approval of the appeal bond or undertaking perfected the appeal. Whether the justice filed the transcript with the clerk of the district court within the 20 days prescribed by the statute is immaterial. After the bond was filed and approved, the appeal was perfected, and there was a cause pending. *Railway Co. v. Wilder*, 17 Kan. 243; *Bond v. White*, 24 Kan. 45. It is suggested that the record does not show that any appeal bond was ever filed in the district court. The case made recites that "on the 8th day of August, 1889, the said justice of the peace duly filed a transcript of the proceedings had by and before him in said action, together with the papers in said case, the bill of particulars, summons and return thereof, and the appeal bond hereinbefore mentioned in the district court of Cowley county." It is true that one or more of the transcripts were defective, but the papers of the case before the justice were filed with the district court, including the appeal bond. Subsequently proceedings were had to correct the transcripts, and there was sufficient at the time of the hearing of the motion to dismiss the appeal before the trial court to show that the filing and approval of the appeal bond was within time. Successors in office of W. D. Kreamer, the justice of the peace, who approved and filed the ap-

peal bond, had the power, under the direction of the district court, to supply from the official records any omissions in any transcript, and for that purpose had full authority to make and file in the district court a new and complete transcript. If the justice of the peace before whom the cause was tried delayed in transmitting his certified transcript to the clerk of the district court of his county, the plaintiff below, as well as the railway company, might have applied to the district court, and hastened the filing of a correct transcript; but the mere delay of the justice or his successor to make and send up a certified transcript ought not of itself to defeat the appeal, after it had been fully completed by the company. If the appeal bond was insufficient in form or amount, and the attention of the district court had been called thereto, it had the power to order a change or renewal thereof, (section 131 of justices' act;) but no motion was made for that purpose. Where an appeal bond, filed and approved by a justice of the peace, is insufficient in form or amount, the party appealing should be given an opportunity by the district court, where the appeal is pending, to change or renew the bond before the case is dismissed for a defect therein. At one stage of the proceedings the railway company moved to dismiss the action, not the appeal. This motion was properly overruled. The presentation of that motion, however, did not estop the company from excepting to the ruling of the court upon the motion of plaintiffs below to dismiss the appeal. The trial court committed error in dismissing the appeal. Its order and judgment will be reversed, and cause remanded for further proceedings. All the justices concurring.

FIRST NAT. BANK OF COBLESKILL v. EMMITT.

(Supreme Court of Kansas. Jan. 6, 1894.)

NEGOTIABLE INSTRUMENTS — RIGHTS OF INDORSEES — BURDEN OF PROOF.

1. The plaintiff being in the possession of a negotiable note, properly indorsed, it will be presumed that he owns and acquired the note in good faith for full value in the usual course of business before maturity, without notice of any circumstance that would impeach its validity; and where the defendant, who is the maker of the note, claims that the plaintiff does not so hold it, it devolves upon him to prove his claim.

2. The evidence examined, and held to be insufficient to sustain the finding that the holder was not an innocent purchaser of the note in suit.

(Syllabus by the Court.)

Error from district court, Saline county; R. F. Thompson, Judge.

Action in replevin by the First National Bank of Cobleskill, N. Y., against David Emmitt. There was judgment for defendant, and plaintiff brings error. Reversed.

Bishop & Burch and Garver & Bond, for plaintiff in error. R. A. Lovitt and Wm. A. Norris, for defendant in error.

JOHNSTON, J. David Emmitt executed a promissory note to M. J. Wellslager for \$342, payable six months after date, at 12 per cent interest per annum from date, and to secure the same he executed a chattel mortgage upon certain personal property. The note was duly indorsed to the First National Bank of Cobleskill, N. Y., and, as payment thereof was not made at maturity, the bank demanded the delivery of the mortgaged property, which was refused. The present action for the recovery of the property was then begun. The plaintiff alleged the due execution of the note and mortgage, the indorsement and transfer of the same before maturity, the failure to pay the note when due, and the demand and refusal to deliver the mortgaged property. The answer of the defendant was a general denial, under which he contended that the plaintiff was not entitled to recover, because the note upon which the action was based was usurious, and could not be made the basis of any judgment. Upon the trial it appeared that the note represented the last of a series of transactions, commencing in 1884, and continuing until 1889, in which Wellslager had loaned money to Emmitt at a rate of interest exceeding 12 per cent. per annum, and a computation of the excess interest throughout these transactions would show that it equals in amount the note in question. While the testimony shows, without doubt, that the transactions were usurious, we are unable to find any testimony that the plaintiff had any notice or knowledge of the fact that the note in suit represented or contained interest in excess of 12 per cent. per annum. Upon its face it was legal, and it was indorsed and transferred by Wellslager to the bank in the usual form. Being in the possession of the note, properly indorsed, it will be presumed that the bank owns and acquired the note in good faith for full value in the usual course of business before maturity, and the burden rested upon the defendant to show that the bank was not a holder for value, and that it did not purchase the note in the usual course of business, for value, without notice. In all the evidence there is nothing to show that, in any of the transactions, Wellslager loaned the bank's money, or that the bank had any knowledge of the rate of interest which had been charged by him. The testimony is that he had negotiated and sold this note, as well as a number of others, to the bank; but in every transaction it is shown to have been a sale and purchase of the notes, and not that Wellslager was the agent of the bank for the purpose of loaning its money. Notwithstanding this state of the case, the jury found that the money loaned upon the note and mortgage was the bank's; that the bank

knew the rate of interest which had been charged upon the note; that it had authorized Wellslager to charge more than the legal rate; and that it received a portion of the usurious charge which Wellslager had made. The only testimony in the case which touches this subject is directly in conflict with the findings of the jury. To sustain these findings, counsel for defendant in error calls attention to the following testimony by the cashier of the bank who stated that "we have bought notes of him, [Wellslager,] and I have known him since 1876. I have known him in a business way since September 19, 1884. The reason we have dealt with Wellslager is to get an outlet for our money. In June, 1885, I went west and saw Wellslager, and told him that if he had notes, and we had money, we would buy them of him on a basis of 8 per cent. interest to plaintiff. I, as cashier, made this arrangement." It will be readily seen that this testimony furnishes no support for the findings. In connection with the testimony quoted, the same witness stated that Wellslager had never loaned any money for the bank, nor had acted as its agent in that capacity. The bank had simply purchased notes from him at their face value, and had no knowledge of the rate of interest which had been charged by Wellslager. Wellslager testified that he sold and transferred the note to the bank within three or four days from the time that he made the loan, and received \$342 for the same, which was just the face of the note. If there was any proper evidence which supported the findings and verdict of the jury, they could not be set aside, even though the great preponderance of the evidence appeared to be against them; but as in this case, where there is no material evidence to support the findings, and, in fact, where all the evidence is against them, we have no other alternative than to set them and the verdict aside. The judgment of the court will be reversed, and the cause remanded for a new trial. All the justices concurring.

KREAMER et al. v. KREAMER.

(Supreme Court of Kansas. Jan. 6, 1894.)

EXECUTOR AS RESIDUARY LEGATEE — BREACH OF BOND.

Where an executor, who is a residuary legatee, executes a bond to pay all the debts and legacies of the testator, he and the sureties become absolutely liable, to the extent of the penalty of the bond, for all debts and legacies, regardless of the amount or value of the assets of the estate; and, where a specific legacy is not paid when due, the legatee may, without obtaining an order of allowance by the probate court, and upon demand and refusal of payment, maintain an action for the recovery of such legacy against the obligors of the bond. (Syllabus by the Court.)

Error from district court, Jewell county; Cyrus Heren, Judge.

Action by Sarah Kreamer against Newton Kreamer and another on a bond. Plaintiff

had judgment, and defendants bring error. Affirmed.

C. Angevine, for plaintiffs in error. J. H. Mechem, for defendant in error.

JOHNSTON, J. On August 14, 1886, John Kreamer died, leaving a last will, by which A. W. Kreamer, a residuary legatee, was appointed executor. Among other provisions of the will was one directing the executor to pay "to my wife, Sarah, out of my estate, \$250 each year, as long as she lives." A. W. Kreamer accepted the appointment as executor, and, instead of giving the ordinary executor's bond, executed one as residuary legatee, under the provisions of Gen. St. 1889, par. 2789, with Newton Kreamer and David J. Matter as sureties, conditioned that he would pay all the debts and legacies of the testator. After his appointment and qualification, A. W. Kreamer entered upon his trust as executor, but he paid no part of the legacy devised to Sarah Kreamer. On March 18, 1888, he died intestate, and letters of administration of his estate were issued to the defendant Newton Kreamer. In 1888, Sarah Kreamer demanded of A. W. Kreamer the amount of the legacy then due to her under the terms of the will, and in August, 1889, she demanded of Newton Kreamer and David J. Matter, the sureties upon the bond, the amount then due her under the provisions of the will, but all of these demands were refused. She then brought the present action against the sureties upon the bond of A. W. Kreamer as residuary legatee, and recovered the sum of \$829, being the amount of the legacy due for the period of three years, together with interest thereon.

It appears that a claim for the payment of this legacy was never presented to nor allowed by the probate court, as a claim against the estate; and it is contended that there was no breach of the condition of the bond until the claim was allowed by the court, ordered to be paid, and payment refused. This is the only material question presented for review. In our opinion, an order by the probate court, allowing the legacy, was entirely unnecessary. It was fixed and definite, and the plaintiffs in error had made an unconditional promise to pay the same. Instead of giving the usual bond, which required him to account to the court for the assets of the estate, and use them so far as they would go in the payment of debts and legacies, Kreamer voluntarily executed the obligation of a residuary legatee, which made him and the sureties liable for all debts and legacies, regardless of the amount or value of the assets of the estate. There has been some discussion upon the much-controverted question of whether the giving of such a bond vested the property and assets of the estate in the residuary legatee, and closed the administration of the estate. Upon this question the authorities are not uniform. *Lafferty v. Bank*, 70 Mich. 210, 38 N. W. 221;

1 Woerner, Adm'r, 434. It is not material to the decision of the present case whether the creditors and legatees may look to the assets of the estate as an additional security for payment, nor to what extent the residuary legatee is under the control of the probate court. It is sufficient to know that, by the express conditions of the bond, the sureties therein are bound to pay the debts and legacies, to the extent of the penalty of such bond. The authorities strongly sustain the view that an action upon the bond is not the only remedy of creditors or legatees, and that the giving of such a bond does not close the administration, nor wholly deprive the probate court of jurisdiction over the executor and the estate. But none of the cases cited furnish authority which would relieve the obligors from the condition of the bond, by which they agreed to pay the debts and legacies unconditionally, whether there were sufficient assets or not. There may be some reason why an unliquidated claim or an indefinite and undetermined legacy should be presented to the probate court for its consideration and allowance, but there is no necessity nor any good purpose to be subserved by the presentation to and allowance by the probate court of a definite and fixed legacy, such as the one under consideration. The statute does not expressly require it, and nothing in the nature of the bond given makes it necessary. The legacy being specific, and the liability of the obligors absolute, of what avail would be the consideration or allowance of the probate court? What is there for it to determine? The court could not, if the matter was presented to it, alter the amount or terms of the legacy, nor limit the liability which the obligors of the bond have assumed. The obligation to pay this legacy at the times when it became due was absolute, and, when the executor failed to make the payments when due, the condition of the bond was broken. Default has been made in three payments of this legacy, and, as demands have been made for payment, we see no reason why an action could not be maintained upon the bond. As tending to sustain this view, we refer to the following authorities: *State v. Snowden*, 7 Gill & J. 430; *Durfee v. Abbott*, 50 Mich. 278, 15 N. W. 454; *Wheeler v. Hatheway*, (Mich.) 24 N. W. 780; *Jones v. Richardson*, 5 Metc. (Mass.) 248; *Buel v. Dickey*, (Neb.) 2 N. W. 884; *Conant v. Stratton*, 107 Mass. 482; *Lafferty v. Bank*, supra.

Complaint is made of the refusal of the court to compel the plaintiff below to separately state and number what are called "several causes of action." This motion was not made until after the demurrer was filed, and, as plaintiffs in error have chosen to stand upon their demurrer, the rulings of the court upon the subsequent motion and pleadings have become immaterial. The judgment will be affirmed. All the justices concurring.

BROOKS et al. v. BROOKS.

(Supreme Court of Kansas. Jan. 6, 1894.)

PROBATE PRACTICE—POWER OF JUDGE TO CORRECT RECORDS.

1. The claim of a creditor against an estate was duly allowed, and ordered to be paid, by the probate court, but the probate judge neglected to make a complete entry of the allowance and order of payment. After payment had been made, and another probate judge had succeeded to the office, it was discovered that no entry had been made of the order. Upon motion, a nunc pro tunc order was made, authorizing the entry of the allowance and order for payment which had been made by the former probate judge. *Held*, that there was power in the court to correct the records so that they should speak the truth.

2. The evidence examined, and found to be sufficient to sustain the findings and judgment of the court.

(Syllabus by the Court.)

Error from district court, Rooks county; Charles W. Smith, Judge.

From the order of final settlement of the account of Silas N. Brooks, administrator of the estate of Calvin K. Brooks, deceased, Martin Brooks and James Brooks, heirs of decedent, appealed to the district court. The order of settlement was there affirmed, and appellants bring error. Affirmed.

W. B. Ham, for plaintiffs in error. M. C. Reville, for defendant in error.

JOHNSTON, J. This was an appeal from an order of the probate court of Rooks county making final settlement with Silas N. Brooks, administrator of the estate of Calvin K. Brooks, deceased, and discharging him and his sureties from all liability on account of the administration bond. The case was submitted to the court without a jury, and it appeared that, at the time of the death of Calvin K. Brooks, he was indebted to various parties in about the sum of \$1,000. Included in this indebtedness was one note for \$850, dated January 4, 1881, due one year after date, drawing interest at 10 per cent. per annum from date, and payable to George W. Brooks. The only property of the estate was a quarter section of land in Rooks county, and the administrator obtained an order of the court authorizing the sale of this real estate, with which to pay the debts of the estate. The land was sold under this order for the sum of \$1,000. The claim of George W. Brooks against the estate was presented for allowance to the probate court in 1885, when D. H. Budd was probate judge, and the administrator, at the time being present in court, waived formal notice of the presentation of the claim; and upon investigation thereof it was duly allowed by the court, and the administrator was directed to use the proceeds of the sale of the real estate in the payment of the claim. At the time of the allowance the court failed to make any entry of the proceedings upon its journal or other record, except a brief entry in the Rec-

ord of the Presentation of Claims. On May 25, 1889, and while John Mullen was probate judge, Silas N. Brooks, as administrator of the estate, presented the accounts to the probate court, and asked for a final settlement of the estate; and, no record of the allowance of the claim of George W. Brooks being found, a nunc pro tunc order was made by Judge Mullen, authorizing the entry of the allowance and order for payment made by Judge Budd of the claim of George W. Brooks. This nunc pro tunc order was spread at length upon the records by the former incumbent of the office,—Judge Budd.

We think the evidence abundantly sustains the finding of the court that the claim of George W. Brooks was a just and legal charge against the estate, and that it was legally presented and allowed by the court in 1885. The failure of the probate court to make a complete entry of the allowance and order of payment will not deprive the administrator of a credit for the payment of the claim made under the order of the court. The court has a continuing power over its records, and an unquestioned authority to make them speak the truth. The failure to enter the order which the probate court had actually made was not due to the negligence of the administrator, and he should not be deprived of his legal rights by the omission of the probate judge to discharge the duties imposed on him by law. While there were some irregularities in the administration, there is nothing to indicate wrongdoing by the administrator, or the judge of the probate court. Substantial justice appears to have been done in the case, and, as we find no material error, the judgment of the district court will be affirmed. All the justices concurring.

JENKINS v. HENRY.

(Supreme Court of Kansas. Jan. 6, 1894.)

HOMESTEAD—ABANDONMENT.

J. owned a quarter section of land, which he occupied as a homestead with some of his children for a number of years. Plaintiff was his wife. After all of his children had left the land, J. alone executed a deed for it to defendant, and then abandoned his homestead. Plaintiff, who had never before been in Kansas, soon after joined her husband, and after his death took possession of the land, and brought this suit to set aside the deed. The trial court made a general finding for the defendant, and rendered judgment thereon in his favor. This judgment is upheld.

(Syllabus by the Court.)

Error from district court, Graham county; Charles W. Smith, Judge.

Action by Amanda Jenkins against James J. Henry to cancel a deed. There was judgment for defendant, and plaintiff brings error. Affirmed.

W. B. Ham and G. W. Jones, for plaintiff in error. Z. C. Tritt, for defendant in error.

ALLEN, J. The plaintiff brought this action to set aside a deed to a quarter section of land in Graham county, executed by John Jenkins, her husband, to the defendant, dated September 19, 1887. The plaintiff contends that the land was a homestead at the time of the execution of the deed, and therefore that the deed was void. On the trial, testimony was offered by both parties, and the court made a general finding in favor of the defendant. This, under the well-settled rules governing the consideration of the case here, resolves all doubtful questions of fact in favor of the defendant. Reading the testimony as the trial court must have construed it in order to reach the conclusion it did, the substantial facts appear to be as follows: The plaintiff and John Jenkins, while slaves in Kentucky lived together as man and wife, and continued so to do after they became free, for about 12 years. After that John Jenkins came to Kansas, where he took a homestead claim on the land in controversy, on which he resided until after the execution of the deed to the defendant. A son, Charley, came there one fall soon afterwards, (the exact year does not appear in the testimony,) and lived with him until the following May, when he became crazy, and was taken away to the asylum. He never returned to live there again. The next spring, a daughter, Clara, came out and lived with her father on the land until three or four years before the execution of the deed, when she married, and moved away. Another daughter came out some time in 1886. It is true that this daughter, Sarah, testifies that she continued to live with her father until after the execution of the deed, but other witnesses testify that she took a homestead claim, on which she made proof the following spring, and they also testified to her living on that claim. The court seems to have found that at the time of the conveyance all of the members of Jenkins' family had left the place. It appears that after the execution of the deed Jenkins moved to what is called the "Henry Place." The plaintiff testifies that she came to Kansas in September, 1887, though she does not state the exact date. Other witnesses place the time of her arrival in October or November. It seems clear that she did not come until after the execution of the deed. She had never been in this state before. It was held by this court in the case of Buffington v. Grosvenor, 46 Kan. 730, 27 Pac. 137, and reaffirmed in Chapman v. Chapman, 48 Kan. 636, 29 Pac. 1071, that that provision of paragraph 2599, of the original statutes of 1889, which reads: "That the wife shall not be entitled to any interest, under the provisions of this section, in any land to which the husband has made a conveyance, when the wife, at the time of the conveyance, is not or never has been a resident of this state,"—is constitutional and valid. The only ground, therefore, on which the plaintiff's claim is based

is that the land was at the time it was conveyed a homestead. Unlike the case of *Farlin v. Sook*, 26 Kan. 397, where it appeared that the land had never been impressed with the character of a homestead, because none of the family of the owner had ever resided on it with him, in this case the land was for a considerable period of time occupied by John Jenkins and some of his children, and was, therefore, during the time of such occupancy, a homestead. But a homestead may be abandoned. The plaintiff in this case had never made it her home, and all of the members of John Jenkins' family, other than himself, had left the place before the execution of the conveyance. At the time he signed the deed there is evidence tending to show that he alone dwelt upon the land. He alone might, therefore, abandon it. He did, in fact, execute a conveyance to the defendant, and move to another place, where he was living at the time of the plaintiff's arrival. The fact that the defendant knew that plaintiff was Jenkins' wife, and had sought to obtain her signature to another deed shortly prior to the execution of the one by Jenkins alone, does not change the legal rights of the parties in the case. John Jenkins, being the sole occupant of the land, might alone abandon it. There is evidence in the record tending to show that he did so abandon it. That being the case, the conveyance by him alone is valid. *Bradford v. Trust Co.*, 47 Kan. 587, 28 Pac. 702. The judgment is affirmed. All the justices concurring.

BOARD OF RAILROAD COM'RS OF
STATE OF KANSAS et al. v. SYMNS
GROCER CO. et al.

(Supreme Court of Kansas. Jan. 6, 1894.)

RESTRAINING RAILROAD COMMISSIONERS FROM REDUCING RATES—INTEREST OF PLAINTIFF.

The board of railroad commissioners made a finding and decision reducing rates of freight upon car-load lots of sugar, coffee, beans, and canned goods, making them considerably less than the rates upon the same commodities when shipped in less than car-load lots. A shipper, whose business mostly required the use of the rates fixed for less than car loads, and who claimed that the proposed rates would operate to his injury and to the benefit of other shippers who would use the car-load rates, brought an action against the board to enjoin it from promulgating and putting in force the new schedule of rates, contending, not that they were unreasonably low or unremunerative to the carrier, but that the enforcement of them, without making a reduction of the rates for the shipment of smaller quantities, was a discrimination against him which should be enjoined. *Held*, that the plaintiff had no such interest as entitled him to enjoin the board from putting in force its finding and decision, and that he was not entitled to the relief demanded.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by the Symns Grocer Company, for itself and others, against the board of rail-

road commissioners of Kansas and others, for an injunction. There was judgment for plaintiffs, and defendants bring error. Reversed.

The other facts fully appear in the following statement by JOHNSTON, J.:

This was an action of injunction to prevent the promulgation and enforcement of a revision of the freight rates made by the board of railroad commissioners, by which the rates on car-load lots of sugar, coffee, beans, and canned goods were reduced. The action was brought by the Symns Grocer Company of Atchison, on behalf of itself and others similarly situated, against the board of railroad commissioners, the Missouri Pacific Railway Company, the Atchison, Topeka & Santa Fe Railroad Company, the Chicago, Rock Island & Pacific Railroad Company, the Kansas City, Ft. Scott & Memphis Railway Company, the Missouri, Kansas & Texas Railway Company, and the Union Pacific Railway Company. The grocer company, in its petition, alleges substantially that it was engaged in jobbing sugar, coffee, beans, and canned goods throughout the state of Kansas, and that there were a number of other parties, located in Atchison, Leavenworth, Kansas City, Kan., and Ft. Scott, engaged in a like business, whose interest it is to distribute commodities throughout the state in less than car-load lots; and that they had expended large sums of money in securing permanent facilities required by their business, and all are interested in the relief sought. It is further averred that heretofore there had been established and maintained rates relatively reasonable and just between car-load and less than car-load lots of the commodities named, under which it was immaterial whether goods were shipped in car-load or less than car-load lots; and that the plaintiff had built up and established a large business in the interior of the state, relying upon their right under the law to the continuance of reasonable and non-discriminating rates, and upon the belief that the board would never make any unfair or unreasonable discrimination between car-load lots and smaller quantities of such goods. That prior to March 1, 1892, there were established at the cities of Salina, Hutchinson, Wichita, and Arkansas City firms, persons, and corporations engaged in a similar business to that of plaintiff, who were competitors of plaintiff and others engaged in the business of selling job lots of the articles named, and as such came in direct competition with the plaintiff, and were entitled to equal and just rates on the lines of railroad without discrimination in favor of or against plaintiff. That, instead of this, the board of railroad commissioners, on March 5, 1892, made and promulgated an order reducing the rates on sugar in car-load lots from Atchison and the other jobbing points in eastern Kansas to 15 cents per 100 pounds, and making the rate on canned goods, cof-

fee, and beans in car-load lots 22 cents to Salina, 25 cents to Hutchinson and Wichita, and 28 cents to Arkansas City; whereas the rate on less than car-load lots was permitted to remain at 34 cents per 100 pounds to Salina, 41 cents to Wichita and Hutchinson, and 49 cents to Arkansas City. That the reasonable difference between rates in car-load and less than car-load lots should not exceed 5 cents per 100 pounds, and that the rate established was unreasonable and discriminating, and, if made effective, would injure and destroy the business which had been built up by the plaintiff. It was further alleged that the making of the order was a covert and unlawful attack on the rights of the plaintiff under the interstate commerce laws of the United States. The Bittman-Todd Grocer Company and Rohlfing & Co., wholesale grocers of Leavenworth, were, on their own application, made parties to the action, and joined the plaintiff in asking the relief prayed for in the petition. The answer filed by the board of railroad commissioners recited the facts which led up to the making of the order complained of, and alleged that the rates established by it were reasonable, just, and nondiscriminative; and, further, that they stood ready at all times to hear, consider, and determine any matter of freight rates connected with the business done by the plaintiffs within the state of Kansas, and to adjust the same so that they might be reasonable, just, and equitable. The Chicago, Rock Island & Pacific Railroad Company answered, alleging that the rates established were unjust and unreasonable, and, further, that they would not afford the railroad company a just and reasonable compensation for carrying the commodities between the points named in the order. The answers of the Union Pacific Railway Company and the Missouri, Kansas & Texas Railway Company were substantially the same. So was that of the Missouri Pacific Railway Company, which contained the further averment that the commodities named in the order were produced outside of Kansas, and were the subject of interstate commerce, over which the board had no jurisdiction to establish the rates sought to be fixed by its order. The Atchison, Topeka & Santa Fe Railroad Company filed an answer, disclaiming any interest in the controversy except to learn what was required of it by law, and alleging that the interior jobbers at Wichita, Hutchinson, Salina, and Arkansas City, upon whose complaint the order was made, were interested, and should be made parties to the cause. The interior jobbers did intervene, and filed an answer, which, among other things, alleged that the rates established by the board of railroad commissioners upon the commodities named in its order were just and reasonable, and not discriminative. When the action was instituted, a temporary injunction was granted by the court, and afterwards a motion to dissolve this injunction

was made by the board of railroad commissioners and the interior jobbers upon the grounds: First, that the court had no jurisdiction to entertain the action or to grant the injunction; second, that the amended petition filed in the action did not state facts sufficient to constitute a cause of action; and, third, that the allegations of the petition were not true, except as admitted in the answers of the defendants. A hearing of this motion was had by the court on August 13, 1892, when it determined that the injunction should be continued, and therefore overruled the motion to dissolve the same. Of this ruling the plaintiffs in error complain.

L. Houk, Geo. R. Peck, A. A. Hurd, Robert Dunlap, T. F. Garver, and Edwin White Moore, for plaintiffs in error. Rossington, Smith & Dallas, John C. Tomlinson, and Henry Elliston, for defendants in error.

JOHNSTON, J., (after stating the facts.) For several months prior to March 5, 1892, the board of railroad commissioners had been considering the complaint of the wholesale merchants of Wichita, Hutchinson, Salina, and Arkansas City that the freight rates upon certain merchandise were excessive, unreasonable, and unjust. After considerable controversy with the railroad companies, the board finally reached the decision that the car-load rates on sugar, coffee, beans, and canned goods were too high, and upon the date named a finding and decision were announced fixing the car-load rates from the eastern cities of the state to the interior cities which have been named on sugar at 15 cents per 100 pounds, and on the other commodities which have been mentioned a rate of 22 cents to Salina, 25 cents to Wichita and Hutchinson, and 28 cents to Arkansas City. The decision was to become effective on March 16, 1892, but before that time, and upon the application of the Symms Grocer Company, a wholesale dealer at Atchison, a temporary order was obtained, enjoining the board of railroad commissioners, as well as the railroad companies, from putting in force the schedule of rates which the board had established. There was considerable testimony taken with respect to the cost of transportation of the commodities named, and what were reasonable charges for the same, and also as to the difference in the expense of transporting such merchandise in car-load lots and in less quantities, as well as the difference in charges usually made between the two methods of transportation. We have examined this testimony, but the view which we take renders an analysis of the same unnecessary. At the outset, the right of the plaintiff below, a shipper, to maintain an action enjoining the board of railroad commissioners and preventing the promulgation and enforcement of their order, is challenged. There is no contention by the plaintiff below that the rates

established are too low, nor that they are unremunerative to the carrier. None of the railroad companies have appeared here except the Atchison, Topeka & Santa Fe, and it has filed a cross petition, alleging that the court erred in granting and in sustaining the order of injunction. The rates which were fixed by the board must, therefore, be regarded as just and reasonable in themselves; and the only complaint is that other rates are too high, and therefore the board should not be permitted to put one schedule or revision in force until another schedule has been revised and reduced. The rates established are open alike to the plaintiff below and all other shippers who desire to send merchandise in car-load lots. Can a shipper who anticipates that at some time he will send goods in smaller quantities tie the hands and stay the action of the board which has entered upon a revision of rates, and has established a schedule for car-load lots, which of itself is confessedly just, because it has not yet reached and revised a rate for shipments of like merchandise under different conditions and in smaller quantities? We think not. It is well settled that is it competent for the state legislature to establish rates and classifications to be charged by railroad companies for the transportation of passengers or freight between points on their line within the state, and also that this power may be largely delegated to boards of commissioners. *Munn v. Illinois*, 94 U. S. 113; *Chicago, etc., Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702; *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468. Under the act of 1883, as since amended, a code of rules is provided for the regulation and control of railroads, and it confers upon a board of railroad commissioners the power to establish or revise rates of transportation; and the finding and adjudication of that board as to rates is to be accepted by the railway company, posted up in the depots on the line of its road, and taken as a reasonable compensation for the service for which they are provided, until the contrary is proved. The finding and adjudication of the board is *prima facie* evidence of the matters therein stated, and of what is a reasonable charge in all actions for such service. Gen. St. 1889, pars. 1334, 1337, 1339, 1341. The classification of freights and the adjustment of rates so devolved upon the board is a matter of considerable difficulty, as it involves so many elements, and is affected by so many circumstances. In determining what are reasonable and just rates much discretion is necessarily invested in the board, and, so long as it acts within the limits of that discretion, its acts cannot be enjoined or interrupted. The courts cannot trench upon its jurisdiction, nor exercise the discretion and power vested in it. Members of that tribunal are presumed to have been chosen with reference to their judgment, discretion, and special fitness; and it is presumed that

by special study and experience they will become qualified to master the details and intricacies of rates and tariffs. Much of the information respecting transportation is under the control of the railroad companies, and not accessible to the occasional patron of the roads; and hence the commissioners are created with the right to inquire, to classify, and to decide. Although not clothed with all the functions of a court, they are authorized to determine what are just and reasonable rates. In a certain sense they stand as guardians of the public for the protection of shippers and patrons. Their determination is binding and conclusive unless the railroad companies can show that their findings and decisions are unjust and unreasonable. It can hardly be that the decision of a board so constituted, which is applicable to the entire state, can be stayed or set aside at the suit of an individual for whom no service has yet been performed, and who may or may not bring himself within the operation of the decision. The schedule of rates sought to be enjoined is designed for the whole state, and for all who may desire to avail themselves of it. Every shipper, and, indeed, every purchaser, of the commodities shipped under the schedule established will be more or less affected by it. It is a matter of public concern, and a private individual cannot invoke the extraordinary remedy of injunction unless he has some personal and peculiar interest not shared by the public. As has been said: "It is not enough that his damages are greater than those sustained by the general public, thus differing only in degree; but they must be different in kind." *Commissioners v. Smith*, 48 Kan. 333, 29 Pac. 565, and cases cited. The Symns Grocer Company may, by virtue of its larger facilities, be affected in a greater degree than other shippers in the state, but the injury, if there be one, does not differ in kind from that suffered by other shippers throughout the state who may utilize the rate in the transportation of merchandise. The matter, then, being a question of public interest, decided by a public quasi judicial tribunal, it would seem that a private shipper could not maintain an action to enjoin the announcement and enforcement of the decision of the board; but if, for any cause, an action would lie, it should be brought in the name of the state on the relation of some public officer. Every time a schedule of rates applicable throughout the state is changed, the interests of a great many are necessarily affected. A change may operate beneficially as to some, while as to others it may not be as favorable as were the pre-existing rates. Can it be that some one of the thousands of individuals affected may challenge the reasonableness of the rate made, and maintain an action in his own name to prevent the board from putting into operation such a state schedule until he can have an adjudication as to

whether it injuriously affects him? It has been well said that, if one shipper may maintain the action, another shipper, liable to be affected by the rate, living in another part of the state, may likewise maintain the action; and in this way there might result a conflict in the various courts of the state. The district court in one county might find the order or rate reasonable, while the district court in another county might find it unreasonable. One court might enjoin the enforcement of the decision, and another decide that it should be put in operation. These illustrations only show the confusion that might arise if an individual or shipper who has no special interest should be allowed to enjoin the putting in effect of such a decision.

We are cited to cases where injunction was maintained by the railroad company against the enforcement of the order of such a board, but in these cases it was held to be maintainable because the rates proposed to be put in force were so unreasonable as to be confiscatory. The railroad company, being a public carrier, and obliged to transport commodities offered for shipment, and use their property in so doing, it was held that a provision requiring the carriage of persons or property without reward amounted to the taking of private property for public use without just compensation, or without due process of law, and hence a court of equity might prevent the enforcement of such a provision. *Railway Co. v. Dey*, 35 Fed. 866; *Chicago, etc., Ry. Co. v. Minnesota*, supra; *Budd v. New York*, supra. The shipper, however, who is not compelled to ship, does not stand in such a position. He may utilize the rate prescribed, or he may not; and, if an injury is inflicted, it is not one peculiar to himself. Our attention is also called to *Scofield v. Railway Co.*, 43 Ohio St. 571, 3 N. E. 907, but, as will be seen, that was not a case against a board of railroad commissioners, but was an action against a railroad company to prevent a plain discrimination against particular individuals. We are referred to no case which can be regarded as a precedent for the claim made in the one at bar. As has been said, the rates sought to be enjoined are not claimed to be unreasonably low, but the complaint is that the enforcement of the same would operate injuriously to the plaintiff below, unless a corresponding reduction was made in the rates for the shipment of less than car-load lots. It may be that the rates upon smaller quantities should be reduced, and it may be that the disparity between the two classifications is so great as to result to the detriment of some of the shippers. If that be the case, the plaintiff is not without remedy. The board of railroad commissioners is a continuous body, and presumably is open at all times for the readjustment of rates, or to correct any inequalities which the practical operation of

a rate or regulation may disclose. The construction of new roads, the building of trade centers, and the development of the country necessarily cause a disturbance of rates; and when such changes occur, and new circumstances arise, the board may be required to revise and change existing rates. It is conceded by all that a distinction may be made between the carriage of commodities in car-load lots and in less quantities. The reasons for making such classification are easily seen. It is clear that the enforcement of a reduction of rates upon one class ought not to be prevented by judicial interference because the board has failed to reduce the rate upon another class. Under various provisions of the statute, application may be made to the board to adjust the rates charged for the class which would embrace the shipment of smaller quantities of the commodities in question. The fact that there may be too great a disparity between the rates charged for the two classes can hardly be treated as a statutory discrimination within the meaning of section 10 of the act providing for the regulation and control of railroad companies. It prohibits a railroad company from charging or receiving a greater sum from one than another "for a like service from the same place, or upon like conditions and under similar circumstances." The difference in conditions and circumstances appears to afford sufficient ground for a different classification and a different charge. But, if the classification operates prejudicially to the interests of the complaining parties, they may appeal to the board to adjust the rates and correct any inequality that may exist. The same statute affords a complete remedy for any discrimination that may be made. In this respect it operates as a substitute for the remedy which existed at common law. In *Beadle v. Railroad Co.*, 51 Kan. 248, 32 Pac. 910, it was decided that by this act the legislature had not only given to the shipper all his remedy at the common law, but had given him a much better and broader one, whereby he was permitted to recover three times the excess of any overcharge exacted by the common carrier, or treble damages, with attorney's fees and costs. It was said that the legislature intended that this statute should supersede the common law concerning unreasonable prices or excessive charges, and that a shipper would not be permitted to waive the statute and avoid its limitations by an action at common law; and that, a full remedy being given, the parties are and ought to be confined to it.

There is no reason for the claim that the decision of the board is an unlawful interference with interstate commerce. By its terms it is limited to shipments from one point to another within the state, and cannot be construed to affect, or as an attempt to affect, interstate transportation. It fol-

lows from what has been said that the order and judgment of the district court must be reversed. All the justices concurring.

CITY OF HUTCHINSON v. HOLLAND.

(Supreme Court of Kansas. Jan. 6, 1894.)

SALE OF INTOXICATING LIQUORS—CRIMINAL PROSECUTION—ELECTION OF COUNTS—INSTRUCTIONS.

On the trial of a prosecution for the unlawful sale of intoxicating liquor under a general charge, where the prosecution offers testimony to prove two distinct sales, and, at the close of the plaintiff's testimony, is required to elect on which sale it will rely, it is error for the court, after the conclusion of the defendant's testimony, to set aside the election, and instruct the jury that they have only to consider the evidence as to the other sale, on which plaintiff had not elected to rely.

(Syllabus by the Court.)

Appeal from district court, Reno county; F. L. Martin, Judge.

Pat Holland was convicted of selling intoxicating liquors unlawfully, and appeals. Reversed.

Lewis Fierce and T. A. Decker, for appellant. F. F. Prigg, for appellee.

ALLEN, J. The defendant was charged in two counts with unlawful sales of intoxicating liquor. On the trial in the police court he was convicted on the first count, and acquitted on the second. He appealed to the district court, where the case was tried before a jury. The state proved two sales of beer,—one, of a bottle, to the witness Loudeback, which he testifies he and the witness Malotte drank on the premises at the time of purchase; and another bottle which Malotte bought, paid for, and took away with him. At the conclusion of the plaintiff's testimony, the court required the state to elect which sale it would rely on for conviction. Thereupon the state elected to rely on the sale of beer drank on the premises. The defendant then introduced his testimony, and, among other witnesses, called the police judge, who testified that the conviction before him was on the sale of the bottle which was produced in his court, being the bottle bought by Malotte. After the conclusion of all the testimony, on application of the plaintiff the court set aside the order requiring the state to elect, on the ground that there was no necessity for an election, and then instructed the jury that the defendant was tried and acquitted before the police judge as to the second count, and upon the sale made to Loudeback of the beer which was drank on the premises, and that the only question was as to the bottle of liquor sold to Malotte, and taken away by him; thus submitting to the jury the sale which the plaintiff had by its election abandoned, and withdrawing from their consideration the one on which it had elected to stand. This was error. State v.

Falk, 46 Kan. 498, 26 Pac. 1023. The instructions are subject to criticism, though we do not deem any special mention of them necessary. But see State v. May, (Kan.) 34 Pac. 407. Judgment is reversed, and a new trial awarded. All the justices concurring.

BOARD OF EDUCATION OF CITY OF CALDWELL v. SPENCER, County Treasurer, et al.

(Supreme Court of Kansas. Jan. 6, 1894.)

MANDAMUS—ACCOUNTING.

Where it appears from the alternative writ of mandamus that a long and complicated accounting must precede a final disposition of the case, the court will not attempt, by mandamus, to determine the rights of the parties.

(Syllabus by the Court.)

Original action in mandamus by the board of education of the city of Caldwell against Ezra Spencer, county treasurer, and others. Heard on motion to quash the provisional writ. Motion granted.

The other facts fully appear in the following statement by ALLEN, J.:

It is alleged in the alternative writ that Ezra Spencer is the county treasurer of Sumner county; that the defendant William H. Carnes is the county clerk, and the other defendants are county commissioners, of said county; that the county was organized by proclamation of the governor on February 7, 1871. The writ then states the names and terms of office of all the various persons who have held the several offices named since the organization of the county. It then states that in 1872 school district No. 20 was duly organized, including within its limits the town, now city, of Caldwell; that Caldwell became a city of the second class on the 22d of March, 1887; that the board of education is the successor in interest of said school district, and is entitled to receive all moneys due it; that during each year from 1875 to 1891 a large number of town lots were sold for delinquent taxes by the several county treasurers, and were bid in for the county; that included in the taxes for which said lots were sold were taxes levied by said school district, and afterwards by said board of education, varying in amount from 1 cent to \$122 per lot; that a large majority of said lots and tracts of land have either been redeemed, or the certificates of sale assigned to individuals, and that in this manner there has been paid into the county treasury more than \$4,600 of the original taxes levied by said school district and said board of education for school purposes; that the county treasurer did not distribute the money received on such redemptions and assignments to the several funds to which they belonged, nor include the funds belonging to the plaintiff in his quarterly statements; that the county clerk failed

to charge the county treasurer with the amount received from such redemptions and assignments, except in a few instances stated in the writ, but that the charges in fact made are not accurate or correct; "that the amounts above stated as charged by the county clerk to the county treasurer have been paid by said county treasurer, but, excepting said amounts, none of the moneys paid into the county treasury and received by the county treasurer prior to October 12, 1892, for the redemption and assignment of tax-sale certificates held by said county as and for school taxes due said school district No. 20 and said board of education, or the amount so paid and received as interest on said school tax while said county held said certificates, have ever been paid over by said county treasurer to said school district No. 20 or to said board of education, but each and all of said funds have been paid over by each county treasurer to his successor in office, and are now in the hands of the defendant Ezra Spencer, as county treasurer of said county." The writ then alleges a failure on the part of the board of county commissioners to make settlement with the county treasurer of the accounts between such treasurer and the school district, and alleges that the moneys collected for such school taxes, together with interest, have been charged by the county clerk to said county treasurer upon the county current expense fund, and in that manner more than \$5,500 of taxes and interest belonging to the plaintiff have been charged to the said county fund. The writ commands the board of county commissioners to make settlement in all these matters with the county treasurer, and the county clerk to charge to the county treasurer, on the proper account, all these moneys, and credit the county treasurer therewith upon the current expense fund, and to draw orders upon the county treasurer in favor of the plaintiff for all moneys so charged, and the county treasurer to accurately determine the amount due the plaintiff on account of such taxes, and pay them over to the plaintiff, or to show cause why the same should not be done. The defendants moved to quash the writ.

A. A. Richards and James Lawrence, for plaintiff. C. J. Garver and Schwinn & Rogers, for defendants.

ALLEN, J., (after stating the facts.) The first ground of the motion to quash is that the plaintiff has a plain and adequate remedy at law, and that the cases of *State v. McCrillus*, 4 Kan. 250; *State v. Bridgman*, 8 Kan. 458; *Byington v. Hamilton*, 37 Kan. 758; *State v. Hannon*, 38 Kan. 593,—are decisive of this case. Those cases all relate to the payment of claims of private persons out of public funds. This case is to be distinguished from those cases because here it is sought only to transfer funds raised by

taxation for a public purpose from one public depository to another,—from the county treasury to the treasury of the board of education. It is doubtful whether the case of *State v. McCrillus* is in accord with the weight of authority in other states. We are not inclined to extend the rule as there declared, and followed in subsequent cases, to a case like this, where public interests require the transfer of public moneys from one depository to another. It appears to us, however, that a more serious difficulty stands in the plaintiff's way, in this form of action. The taxes sought to be recovered extend over a period of 17 years, and it is contended by the defendants that most of them appear from the writ to be barred by the statute of limitations. The averment that they have never been paid out, but are now in the hands of Spencer, as county treasurer, is perhaps sufficient to avoid the bar of the statute; but a summing up of this immense number of separate transactions, attended by a computation of interest on each, and a determination of the portion of each separate assignment or redemption due the plaintiff, especially where the transactions extend back through the terms of office of many different officers, presents a case for the determination of which mandamus is not an appropriate remedy. It will be impossible to determine the rights of these parties without a long and complicated accounting. For that purpose the writ of mandamus is inadequate. An ordinary action in the district court will afford a more suitable and complete remedy than this. The plaintiff concedes its inability to state the sum to which it is entitled. It seeks by this remedy to compel the present incumbents of the offices of treasurer, clerk, and county commissioner to make such computations, and to determine the amount due it, and, in doing so, to go through and make up long accounts which their predecessors should have made. It is unnecessary for us to hold that this could not be done in any case, but we do hold that, in the exercise of a sound discretion, it should not be attempted in this. The motion to quash is sustained. All the justices concurring.

SCHOOL DIST. NO. 8 OF JEFFERSON COUNTY v. GIBBS, County Clerk, et al.

(Supreme Court of Kansas. Jan. 6, 1894.)

DIVISION OF SCHOOL DISTRICT—INJUNCTION.

A school district cannot, by injunction, restrain the collection of taxes on lands detached from its territory and included in a newly-formed school district, nor restrain the school-district officers of such newly-created district from acting as such, nor control the action of the county superintendent in the discharge of his official duties in relation thereto.

(Syllabus by the Court.)

Error from district court, Jefferson county; Louis A. Myers, Judge.

Action by school district No. 8, of Jefferson county, against J. M. Gibbs, county clerk, and others, for an injunction. From an order denying the relief sought, plaintiff brings error. Affirmed.

W. F. Gilluly, for plaintiff in error. H. B. Schaefer and Horace T. Phinney, for defendant in error.

ALLEN, J. It appears that the defendant W. D. Snell, as superintendent of public instruction of Jefferson county, organized a new school district, including two sections of land which had theretofore been included in district No. 8. The plaintiff now seeks to enjoin the county clerk from placing on the tax roll of the county the taxes levied by the new school district, to enjoin the school-district officers from acting, and to restrain the county superintendent from taking any further proceedings in relation to the newly-made district. Counsel for the plaintiff in error, in his brief, says: "The question, and the single question here, is, has this plaintiff a right to come into the courts of the state, and ask for protection and relief, when an encroachment on its rights which threatens its very life is committed, and threatened at the hands of those claiming to act for the public, and under color and claim of right, but whose acts therein are wholly without authority of law?" This is rather a sweeping inquiry. We answer only such question as is presented by the record. The superintendent of public instruction is charged with the duty of organizing and altering school districts. The record fails to show, and counsel fail to point out, wherein his action is illegal or unwarranted. The plaintiff now seeks by injunction to prevent the collection of taxes on property in which it has no interest, and to control the actions of public officers. It practically seeks by injunction to destroy the newly-created district. This is not a proper form of action for the trial of the validity of the action of the county superintendent, or the legal existence of the district. The plaintiff has no standing in court in this case to try the questions urged for consideration. The order of the district court refusing the injunction is affirmed. All the justices concurring.

POUNDS v. RODGERS, County Treasurer, et al.

(Supreme Court of Kansas. Jan. 6, 1894.)

REDEMPTION FROM TAX SALE—TENDER—RETROACTIVE LAWS.

1. All matters relating to the sale and conveyance of land for taxes under any prior statute shall be fully completed according to the laws under which they originated, the same as if such laws remained in force. Gen. St. 1889, par. 7010; Laws 1876, § 155, c. 34; Gen. St. 1863, § 143, c. 107.

2. The sale of land for delinquent taxes, under the statute, constitutes a contract between the purchaser and the state, the terms of which are found in the law then in force.

3. On September 1, 1893, the owner tendered to the county treasurer the amount for which the land was sold, with interest at the rate of 24 per cent. from the date of sale to the 18th day of May, 1893, the day on which chapter 110 of the laws of 1893 (reducing the interest payable on redemption to 15 per cent.) went into effect, and interest from May 18, 1893, to September 1, 1893, at the rate of 15 per cent.; also, the amount of the half tax of 1892, paid by the purchaser June 21, 1893, with interest from the latter date to the time of tender at the rate of 15 per cent. Held, that the tender was insufficient; and, further, held that, to redeem said land, the amount for which the land was bid off, and all the subsequent taxes paid by the purchaser thereon, with interest at the rate of 24 per cent. per annum on the taxes and charges from the date of sale, and the same interest on all subsequent taxes so paid by the purchaser from the date of payment, must be paid or tendered.

(Syllabus by the Court.)

Original action in mandamus by M. A. Pounds against A. K. Rodgers, county treasurer, and others. Writ denied.

James H. Troutman, for plaintiff. Morton & Clark, for defendants.

HORTON, C. J. This is an action brought to compel defendant, the county treasurer of Shawnee county, to accept a tender made by plaintiff, and execute to him a certificate of redemption of certain land sold at the tax sale of September 6, 1892, for the taxes of 1891. At the time of the tax sale, the law in force as to redemption provided that any owner might, at any time before the execution of a tax deed, redeem any land by paying to the treasurer of the county where such land is sold, for the use of the purchaser, the amount for which the land was sold, and all subsequent taxes and charges thereon, with interest at the rate of 24 per cent. per annum on the amount of the purchase money from the date of sale, and the same rate on all subsequent taxes paid thereon. Section 2, c. 110, Laws 1893, reduced the rate of interest to be paid on redemption to 15 per cent., and took effect May 18, 1893. The tender of plaintiff was based upon a computation of interest upon the amount for which the land was sold, from the sale day to May 18, 1893, at the rate of 24 per cent.; interest from that date at the rate of 15 per cent.; and interest on the subsequent taxes paid by the purchaser at the rate of 15 per cent. from the date of payment. The question is whether the redemption in this case is to be under the law of 1893, or the law in force at the time of the tax sale. The sale of land for delinquent taxes, under the statute, constitutes a contract between the purchaser and the state, the terms of which are found in the law then in force. Adams v. Beale, 19 Iowa, 61; Rambo v. Campbell, 8 Mo. App. 581; Fleming v. Roverud, 30 Minn. 273, 15 N. W. 119; McCann v. Merriam, 11 Neb. 241, 9 N. W. 96; Moody v.

Hoskins, 64 Miss. 468, 1 South. 622; State v. Foley, 30 Minn. 350, 15 N. W. 375; Boyd v. Holt, 62 Ala. 296. In this case the state, by the terms of the statute, contracted with the purchaser that he shall be entitled to interest on his own investment at the rate of 24 per cent, per annum up to the time of a redemption, and, if not redeemed within three years, to a tax deed. The transaction being a contract, there would be an equal violation of obligation in reducing the rate of interest on the tax certificate as in extending the time of redemption. As to cases of an attempted extension of time of redemption, see Robinson v. Howe, 13 Wis. 341; State v. McDonald, 26 Minn. 145, 1 N. W. 532; Merrill v. Dearing, 32 Minn. 479, 21 N. W. 721; Goenen v. Schroeder, 8 Minn. 387, (Gil. 344.) The supreme court of South Dakota has recently held that "the sale of land for delinquent taxes, under the statute, constitutes a contract between the purchaser and the state, the terms of which are found in the law then in force, and that a law extending the time of redemption, though only for sixty days, could not apply to prior sales." State v. Fylpaa, (S. D.) 54 N. W. 599. The case of Morgan v. Commissioners, 27 Kan. 89, was analogous in many respects to this. In its opinion the court distinctly recognizes the contractual relations of the purchaser and the state, and says: "Notwithstanding that in 1879 this provision of the law was materially changed, plaintiffs in error are entitled to have their money refunded under the statute existing when their rights vested. The repayment of the taxes and the charges and interest to a purchaser at a tax sale, after the conveyance thereon has been adjudged invalid, was as much a part of the contract with such purchaser as the execution of the conveyance itself." The case of Crawford v. Shaft, 35 Kan. 478, 11 Pac. 334, is also to the same effect. Section 155, c. 34, Laws 1876, provides that "all matters relative to the sale and conveyance of land for taxes under any prior statute shall be fully completed according to the laws under which they originated, the same as if such laws remained in force." Paragraph 6687, Gen. St. 1889, provides that no repeal of a statute shall affect any right which accrues, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed. We are referred to the following authorities, which it is claimed decide that the terms of the former statute relating to tax proceedings may be changed at any time by the legislature: Black, Tax Titles, § 360; Filinn v. Parsons, 60 Ind. 573; Snell v. Campbell, 24 Fed. 880. Black merely cites the other two cases. In the Indiana case, at the time of the tax sale the interest was 6 per cent. Under a subsequent statute it was provided that, if the tax deed was invalid, the tax purchaser should recover 25 per cent. interest. The tax deed

was executed after the new statute was enacted, and the court held that, as the deed was discovered invalid, that the tax purchaser was entitled to 25 per cent., under the new statute. That decision favors, to some extent, the contention of the plaintiff, and it is the only case we have been able to find of like import. But in the Snell Case it was stated by the trial judge that "what the rule would be as against some third party not interested in the tax sale, who should, at a tax sale, bid in the property for the tax and penalty, and actually pay such amount into the treasury, is not considered or determined." That case, therefore, has no application. Writ denied, and judgment for defendants for costs. All the justices concurring.

UNION TERMINAL R. CO. v. BOARD OF RAILROAD COM'RS OF STATE OF KANSAS.

(Supreme Court of Kansas. Jan. 6, 1894.)

RESTRAINING ACTION OF RAILROAD COMMISSIONERS—PARTIES DEFENDANT—INTEREST OF RAILROAD COMPANIES.

The board of railroad commissioners, in pursuance of chapter 184 of the Laws of 1887, upon the application of a railroad company granted it the right to cross the roads of two other railway companies, and prescribed the terms and manner of crossing, and also fixed the compensation to be paid by the crossing company. No appeal was taken from the order. At the end of about four months, and before the crossing was made, the companies over whose roads the crossing was allowed applied to the board of railroad commissioners for a rehearing of the case, and to set aside the order allowing the crossing to be made. The crossing company objected to the consideration of the application, claiming that the board had no power to grant a rehearing. The objection was overruled, and the board was proceeding to rehear the case, when an action for injunction was begun against the board alone, to enjoin it from further hearing the application. Held, that the railroad commissioners are only nominal parties; that the railroad companies who are invoking the action of the board, and whose rights will be seriously affected by the action which the board may take, are necessary parties; and that no injunction should be allowed until they are brought into court, and given opportunity to be heard.

(Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by the Union Terminal Railroad Company against the board of railroad commissioners of Kansas for an injunction. From an order denying a temporary writ, plaintiff brings error. Affirmed.

Trimble & Braley, G. A. Vandever, and Rossington, Smith & Dallas, for plaintiff in error. John T. Little, Atty. Gen., David Martin, Frank Doster, A. L. Williams, and N. H. Loomis, for defendant in error.

JOHNSTON, J. Upon application, and after due notice and a hearing, the board of railroad commissioners, on January 3, 1893, made an order allowing the Union Terminal Rail-

road Company to cross the tracks and rights of way of the Union Pacific Railway Company and the Missouri Pacific Railway Company at a point near the west end of the bridge across the Kansas river in Wyandotte county. The order provided that the crossing should be made at grade, and prescribed the terms and manner of crossing, as well as fixed the compensation to be paid. On May 8, 1893, and after the membership of the board had been changed, the Missouri Pacific Railway Company and the Union Pacific Railway Company filed motions before the new board for a rehearing of the crossing cases, and asked the board to set aside and vacate the orders made by the former board on January 3, 1893. The motions for rehearing were heard on May 10, 1893, when the Union Terminal Railroad Company appeared specially, and objected to the consideration of the motion, claiming that the board had no power to reopen the case or to grant any rehearing. The objection was overruled, and the board held that it had power to rehear the cases, and to vacate and set aside the orders previously made. The plaintiff then commenced the present action in the district court of Shawnee county to enjoin the board from further hearing the motions for rehearing, when a restraining order was allowed until the hearing for a temporary injunction. Subsequently, the district court heard the application, and, upon the evidence and arguments submitted, the temporary injunction was denied. Upon this ruling, error is assigned.

The proceedings to obtain the right to cross the tracks of the complainants were taken in pursuance of chapter 184 of the Laws of 1887. It is contended that this act with reference to crossings is an exercise of the power of eminent domain, in which the board of railroad commissioners simply act, *ex officio*, as condemnation commissioners. Counsel for plaintiff argue with great earnestness and plausibility that the rules of law applicable to ordinary condemnation commissioners are applicable in this case, and when the board has heard the application, visited the premises, considered the evidence, rendered its decision, and made its award of compensation, they are then, like other condemnation commissioners, *functus officio*, and can take no further action in the premises. It is urged that they have only such powers as are expressly given them by the statute itself, which makes no provision for rehearings, or for any proceedings to vacate, modify, or set aside an award made by them; that the law does provide for an appeal as to the compensation awarded, and the terms of crossing; and it is urged that, if either party feels aggrieved by the decision of the board, it should pursue the statutory remedy, and that the complainants, failing to avail themselves of that, have no other remedy. On the other hand, the defendants call our attention to the fact that they are only nominal par-

ties, and that no temporary injunction should be granted until the railroad companies whose legal rights are to be directly affected are made parties to the action. The objection is good. The railroad companies who are invoking the action of the board, and whose rights will be seriously affected by the action which it will take, were not made parties to this action. The railroad commissioners have no interest in the controversy beyond the abstract one of correctly determining their power in the premises, and the rights of the contending parties. They are not the representatives of the railroad companies, and cannot be burdened with the task of protecting their rights. As a ground of injunction it is claimed by the plaintiff that since the order of January 3, 1893, allowing the crossing to be made, it has expended about \$100,000 in the acquisition of right of way and in the construction of its road approaching the proposed crossing. It is contended that the lapse of time, and the expenditures made by the plaintiff relying upon the order allowing it to cross, gave it a vested right, and the district court held that there was great force in this contention. The fact that the money was expended upon the faith of the order of the old board, or that vested rights had accrued against the defendant companies, appears to be disputed. But why should the board of railroad commissioners assume the burden of any of the defenses of the railroad companies? The motions for rehearing were filed, and are being pressed, by the railroad companies, in which they allege numerous reasons for reopening the case and setting aside the original order. They are endeavoring to have rescinded an order which they allege inflicts serious and unnecessary injury to them and their properties. Shall their rights be determined, and their hands tied, without a hearing, or an opportunity to be heard? We are clearly of opinion that they are necessary parties to this proceeding, and that no important step should be taken, nor any injunction granted, until they are brought before the court. It has frequently been held that the court will not proceed against a mere nominal party until the real parties, and those who will be directly affected by the result of the litigation, are given an opportunity to be heard upon the question at issue. *State v. Anderson*, 5 Kan. 90; *Gilmore v. Fox*, 10 Kan. 509; *Hays v. Hill*, 17 Kan. 360; *Voss v. School Dist.*, 18 Kan. 467; *Carpenter v. Hindman*, 32 Kan. 607, 5 Pac. 165; *Railroad Co. v. Wilhelm*, 33 Kan. 206, 6 Pac. 273; *Cassatt v. Commissioners*, 39 Kan. 506, 18 Pac. 517; *McCarthy v. Marsh*, 41 Kan. 17, 20 Pac. 479; *Livingston v. McCarthy*, 41 Kan. 20, 20 Pac. 478. Under the ruling of these authorities, and in the absence of the railroad companies, the plaintiff was not entitled to an injunction, and therefore no error was committed in denying the application. Judgment affirmed. All the justices concurring.

BOOKWALTER v. CONRAD et al.

(Supreme Court of Montana. Jan. 22, 1894.)

TRANSCRIPT ON APPEAL—SUFFICIENCY.

An appeal from an order denying a motion for change of venue may be brought up without a statement or bill of exceptions. It being sufficient that the transcript contains the papers on which the motion was made, certified to by the clerk, as provided by Code Civil Proc. § 438.

Appeal from district court, Missoula county; F. H. Woody, Judge.

Action by J. Bookwalter against Charles E. Conrad and others. Defendants moved for a change of venue, and from an order denying their motion they appeal. Plaintiff moves to dismiss the appeal. Denied.

Sandford & Grubb, Bickford, Stiff & Hershey, and A. J. Shores, for appellants. Toole & Wallace, for respondent.

PER CURIAM. The respondent moves to dismiss the appeal. The appeal is from an order denying defendants' motion for a change of venue. The ground of the motion to dismiss the appeal is that it does not appear that any bill of exceptions or statement was ever signed by the judge to authorize the appeal. But this is an appeal from an order, and may be brought up without a bill of exceptions or a statement. Section 438, Code Civil Proc., provides that, "on appeal * * * from an order, the appellant shall furnish the court with a copy of the notice of appeal, undertaking or undertakings on appeal, the judgment or order appealed from, and a copy of the papers used on the hearing in the court below, such copies to be certified in like manner to be correct." The motion in the case at bar was made "on the demand and affidavit of merits, and on the pleadings and papers on file in said action." Therefore, if the papers on which the motion was made are properly certified to us, that is sufficient. *Mining Co. v. Weinstein*, 7 Mont. 346, 17 Pac. 108; *Barber v. Briscoe*, 8 Mont. 214, 19 Pac. 589; *Arnold v. Sinclair*, 12 Mont. 260, 29 Pac. 1124. The clerk certifies that the transcript, consisting of, (enumerating all the papers,) is a full, true, and correct copy of all the papers that were asked for in the praecipe for a transcript. The clerk does not say in his certificate that these were the papers used on the hearing below, but he certifies that they are correct copies of the files in his court, and that they were ordered put into the transcript by the person requesting the record for the appeal. *Arnold v. Sinclair*, 12 Mont. 248, 29 Pac. 1124, was a motion for a new trial. Some of the grounds for motion were upon affidavits. As to the affidavits portion of the motion, we said: "There might in some cases be difficulty in ascertaining what 'papers were used on the hearing in the court below,' if contention should arise concerning that point, but that matter could be made certain by a certi-

ficate of the judge who heard the motion and made the order, setting forth the papers used, (*Walsh v. Hutchings*, 60 Cal. 228;) but no such contention is involved here. It is stated in the notice of intention to move for a new trial, among other things, that said motion will be made on a statement of the case and affidavits setting forth newly-discovered evidence; and, pursuant to that notice, two distinct classes of matter were presented in support of the motion. The notice of intention accompanies the affidavit and statement on motion for new trial, and the same are certified to be correct copies of the 'files and proceedings had and done in the cause of,' etc., giving the title of the action; and, such notice being requisite to the proceeding, and among the files, we must presume that the same was one of the papers used on the hearing in the court below, in the absence of showing to the contrary." So, in the case at bar, there is no showing or claim to the contrary. Indeed, the respondent, moving to dismiss, says, in his brief: "We do not wish to be understood as claiming that the papers in the record were not used on the trial." The motion to dismiss the appeal must therefore be denied, and it is so ordered.

WALSH et al. v. MULLER et al.

(Supreme Court of Montana. Jan. 22, 1894.)

DISMISSAL OF APPEAL—WHEN LIES—MOTION FOR NEW TRIAL—STATEMENT.

1. An appeal will not be dismissed because the time for serving the statement on motion for new trial was extended, without respondent's consent, beyond the statutory period, if respondent not only made no objections to such extension, but joined in the settlement without objection.

2. The fact that notice of motion and statement on motion for new trial was not served on all the attorneys of certain of the respondents is no ground for dismissing an appeal from the order denying such new trial, where it appears that attorneys representing all the respondents were served with such notice and statement.

Appeal from district court, Meagher county; Frank Henry, Judge.

Action by P. T. Walsh and others against William Muller and others. There was judgment for defendants, and from an order denying a motion for a new trial plaintiffs appeal. On motion to dismiss the appeal. Denied.

H. G. McIntire and McConnell, Clayburg & Gunn, for appellants. Toole & Wallace, for respondents.

PER CURIAM. The respondents move to dismiss the appeal from the order of the district court denying a new trial. The first ground of the motion is that the statement on motion for new trial was not served within the time provided by statute, or within the 30 days from the period to which it might be extended. Comp. St. p. 201, § 536. We observe by the record that the time was ex-

tended very much more than 30 days, and without the consent of the opposite party; and, if this were all that appeared, the statement on motion for new trial could not be considered. *Doyle v. Gore*, (Mont.) 34 Pac. 846. But it appeared by the judge's certificate, in settling the statement, that not only no objections were made to these extensions and the lapse of time, but that the opposing party came in with amendments, and joined in the settlement without objections. The lapse of time was therefore waived. *Sweeney v. Railway Co.*, 11 Mont. 34, 27 Pac. 347; *Arnold v. Sinclair*, 12 Mont. 261, 29 Pac. 1124.

Other grounds for dismissing the appeal are urged, in that the notice of motion and statement on motion for new trial were not served on all the attorneys for certain defendants. Messrs. Waterman & Callaway were attorneys for certain defendants. Mr. T. C. Bach was attorney for certain other defendants. The objection is made of want of service upon Messrs. Waterman & Callaway and Mr. T. C. Bach; but the papers were served on Messrs. Toole & Wallace, who, we think, it sufficiently appears from the records and appearances, were attorneys for all the defendants. The motion is denied.

NELSON v. DONOVAN et al.

(Supreme Court of Montana. Jan. 22, 1894.)

APPEAL—TIME OF TAKING — APPEALABLE ORDER.

1. An appeal from an order granting a new trial must be dismissed if not taken within the time prescribed by statute. Code Civil Proc. § 421.

2. An order granting a motion for judgment on the pleading is not appealable.

Appeal from district court, Cascade county; C. H. Benton, Judge.

Action by N. P. Nelson against James Donovan and others. There was judgment for defendants, and from an order granting a new trial defendants appeal. Plaintiff moves to dismiss the appeal. Motion granted.

Donovan & Lyter, for appellants. Ed. L. Bishop, for respondent.

PER CURIAM. The respondent moves to dismiss the appeal from the order granting a new trial, for the reason that the appeal was not taken within 60 days after the order was filed with the clerk of the district court. It appears by the record that the new trial was granted in April, 1893, and that the appeal was taken August 12, 1893. The appeal must be taken "within sixty days after the order * * * is made and entered in the minutes of the court, or filed with the clerk." Code Civil Proc. § 421. The appeal from the order granting a new trial was not taken within the time prescribed, and must be dismissed, and it is so ordered. After the district court had granted plaintiff a new trial, it granted plaintiff's motion for judgment on the pleadings. From this order

defendants also appeal. Respondent also moves to dismiss the appeal from this order. This motion is also granted, as an order granting a motion for judgment on the pleadings is not appealable. But the judgment itself is appealable, and the notice also states that defendants appeal from the judgment. The case is therefore left in court, standing upon the appeal from the judgment.

DALY v. MILEN et al.

(Supreme Court of Montana. Jan. 15, 1894.)

JUDGMENT—VACATION—GROUNDS.

In an action to vacate a judgment against plaintiff, in defendant's favor, on the ground of an alleged settlement pending the suit, and agreement by defendant to dismiss, the jury found, in answer to interrogatories, that no such settlement or agreement had ever been made. *Held*, that a judgment for plaintiff should be reversed.

Appeal from district court, Custer county; George R. Milburn, Judge.

Action by Charles Daly against William Milen and another to vacate a judgment in favor of defendants, and against plaintiff, and to enjoin its enforcement. From a judgment for plaintiff, defendants appeal. Reversed.

Middleton & Light, for appellants. T. H. Porter and C. H. Loud, for respondent.

PEMBERTON, C. J. The plaintiff alleges in his complaint that on the 20th day of July, 1888, the defendant Milen began a suit in the district court of Custer county against him (plaintiff) to recover judgment on a promissory note, given by plaintiff to said defendant, in the sum of \$574, with interest at 12 per cent. from October 30, 1887; that summons was issued in said suit, and served on plaintiff; that on the 21st day of May, 1889, and while said suit was still pending in said court, the plaintiff and said defendant had a settlement of all demands and accounts existing between them, including the amount, and the note on which this said suit was brought; that thereupon, and in consideration of said settlement, said defendant Milen and his attorney agreed to dismiss said suit at the costs of said Milen, but that, instead of dismissing said suit, said defendant Milen's attorney, on the 22d day of May, 1889, caused and procured judgment to be entered in said court in said action in the sum of \$679, with interest and costs, against this plaintiff, in violation of his rights, and of the terms of said settlement; that said judgment was entered of record in said court, and still remains of record therein; that plaintiff had no knowledge of said judgment having been obtained and entered, as aforesaid, until execution issued thereon was levied on his property by the sheriff; that defendant E. J. Jones is the sheriff; that said sheriff has levied said execution upon 2,400 sheep belonging to plaintiff, and has taken them into his possession

thereunder, and threatens to remove them, etc. Plaintiff therefore brings this suit, and asks judgment that the defendants be enjoined from taking and selling said property under said execution; that said execution and judgment of the district court be vacated, and declared null and void; that his property be restored; and for costs, etc. All the material allegations of the complaint are denied by the answer of the defendants. The case was tried by the court with a jury. A number of special findings of fact were submitted to the jury. These special findings of fact were made and returned in favor of the defendants. The jury also returned a general verdict in favor of the defendants. The plaintiff thereupon filed a motion to set aside the special findings of fact and the general verdict of the jury in favor of defendants, and for judgment in favor of the plaintiff. On the hearing of this motion the court set aside the general verdict of the jury, adopted the special findings of fact, and rendered judgment in favor of the plaintiff, in accordance with the prayer of his complaint. From this judgment, defendants appeal.

The main issue in the trial of this cause was this: Was the note on which judgment was rendered in the district court on the 22d day of May, 1889, in favor of defendant Milen, and against the plaintiff in this action, included in and settled in the settlement had between the said parties on the 21st day of May, 1889, as alleged in the complaint, and was it agreed, at the time of said settlement, that said suit should be dismissed by said defendant Milen? This issue was submitted to the jury in special findings Nos. 7 and 8. They found in favor of the defendants, as will be seen by the interrogatories Nos. 7 and 8, and the answers thereto, which are as follows: "(7) Was there ever any stipulation made or signed by the parties to this action, or their attorneys, to dismiss the action which was pending in this district court on the 21st day of May, 1889, in which Milen was plaintiff, and Daly was defendant? Answer. No. Jesse Haston, Foreman. (8) Was there any oral agreement, May 21, 1889, to dismiss the case in the district court? Answer. No. Jesse Haston, Foreman." The court approved and adopted these findings, as well as others, and included them in the judgment rendered in this case. To authorize the court to render a judgment vacating and restraining the enforcement of the judgment in controversy as null and void, it was necessary that it should be shown and found as a fact that the note on which said judgment was rendered had been paid and settled in the settlement of May 21, 1889, between the parties to this suit. But the finding was the other way, both by the jury and the court. Before the court could hold the attacked judgment null and void, order it vacated, and enjoin its enforcement, it must have been shown, as a *sine qua non*, that it had been

paid, or that the claim on which it was recovered had been paid before its rendition, as is the contention in this case. The respondent moves this court to strike the evidence which accompanies the record therefrom, for the reason that it was not properly made a part of the record,—that it was not made a part of the record within the time, or in the manner, provided by law. This same motion was made in the lower court, and was overruled *pro forma*. This motion was not proper in the lower court. If the evidence was not properly made a part of the record on appeal for any cause, the respondent had the right to have the record show this, with his objections, and the lower court to properly certify thereto. Then, when the case was filed in this court, his motion to strike would have been proper, for the reasons shown in the record, and certified to by the trial court. But this is an appeal from the judgment. It is only necessary, for the determination of this case, to examine the judgment roll, which is brought here by an appeal from the judgment. The findings of fact by the jury are a part of the judgment roll, (section 306, Code Civil Proc.) and the court adopts these findings, and incorporates them into judgment appealed from. We think the findings of fact so incorporated in the judgment are inconsistent with, and antagonistical to, the judgment. In truth, the findings of fact do not authorize or support the judgment. The judgment is therefore reversed, and the cause remanded for new trial.

HARWOOD and De WITT, JJ., concur.

STATE v. NORTHRUP.

(Supreme Court of Montana. Dec. 23, 1893.)

CRIMINAL LAW—NEW TRIAL — APPEAL—INFORMATION—SUFFICIENCY.

1. Crim. Pr. Act, § 896, authorizing an appeal by the state on "a question of law reserved by the state," does not authorize an appeal from an order granting defendant a new trial. Harwood, J., dissenting.

2. An information charging murder, which describes the act done, and the killing, and alleges that such acts were done feloniously, unlawfully, premeditatedly, and with malice aforethought, is not vitiated because the conclusion simply states that defendant committed murder, and did not state the acts which he did or that he committed them with malice aforethought, since Crim. Pr. Act, § 171, provides that no indictment shall be quashed for any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged, or for any defect which does not tend to prejudice the substantial rights of defendant on the merits. *Territory v. Young*, 5 Pac. 248, 5 Mont. 244, followed.

Appeal from district court, Park county; Frank Henry, Judge.

Charles Northrup was convicted of murder in the second degree, and from an order granting him a new trial the state appeals. Affirmed.

Henri J. Haskell, Atty. Gen., H. J. Miller, and Allen R. Joy, for the State.

The state may appeal from an order granting defendant a new trial. *State v. West*, (La.) 12 South. 7; *People v. Hawes*, (Cal.) 33 Pac. 791; *Johnson v. State*, (Ark.) 23 S. W. 7; *Lovett v. State*, (Fla.) 11 South. 550; *Vaughn v. State*, (Ga.) 16 S. E. 64; *Byrd v. Com.*, (Va.) Id. 727; *Willingham v. State*, (Tex. Cr. App.) 22 S. W. 925; *Wilkins v. State*, (Ala.) 13 South. 312; *State v. Thompson*, (La.) Id. 392; *Jackson v. State*, (Ga.) 15 S. E. 677; *Norris v. State*, (Tex. Cr. App.) 22 S. W. 592; *Lewis v. State*, Id. 687; *Gibbs v. State*, (Tex. Cr. App.) 20 S. W. 919; *Territory v. Johnson*, 9 Mont. 28, 12 Pac. 346; *People v. Gonzales*, 71 Cal. 569, 12 Pac. 783; *Springfield v. State*, (Ala.) 11 South. 250; *Scales v. State*, Id. 121; *State v. Parker*, (Mo.) 17 S. W. 180; *Pugh v. State*, 2 Tex. App. 545; *Polk v. State*, (Tex. App.) 18 S. W. 466; *State v. Doyle*, (Mo.) 17 S. W. 751; *State v. Sullivan*, (Iowa,) 50 N. W. 572; *Dillard v. State*, (Tex. App.) 19 S. W. 895; *Davis v. State*, (Neb.) 47 N. W. 851; *State v. Shreves*, (Iowa,) Id. 899; *State v. O'Brien*, 81 Iowa, 88, 46 N. W. 752; *State v. Stockwell*, (Mo.) 16 S. W. 888; *State v. Morrison*, Id. 492; *Maurer v. State*, (Ind. Sup.) 29 N. E. 392; *People v. Bruggy*, 93 Cal. 476, 29 Pac. 26; *State v. Elliot*, (Ohio,) 26 Wkly. Law Bul. 116; *Johnston v. State*, (Fla.) 10 South. 686; *State v. Jackson*, (La.) Id. 600; *People v. Donguli*, 92 Cal. 607, 28 Pac. 782; *Young v. State*, (Ala.) 10 South. 913; *State v. Blunt*, (Mo.) 19 S. W. 650; *Crist v. State*, (Tex. App.) 17 S. W. 260; *Halbert v. State*, 3 Tex. App. 680; *Stitt v. State*, (Ala.) 8 South. 669; *Gibson v. State*, Id. 98; *Brown v. State*, (Ala.) 3 South. 857; *Territory v. McAndrews*, 3 Mont. 166.

Campbell & Stark, for respondent.

The defendant and respondent in the court below moved the court to have the appeal dismissed. Motion was overruled, but, upon the petition of the defendant and respondent, a rehearing was ordered upon said motion. The third subdivision of section 396 of the third division of the Compiled Statutes of Montana, which relates to appeals by the territory in criminal cases upon questions of law reserved by the state, is in contravention of the constitution of the United States and of the state of Montana, which provides that no person shall be twice placed in jeopardy for the same offense. Section 341, which carries into effect the provisions of chapter 15, would place the defendant twice in jeopardy, and is therefore unconstitutional and void, and it must all fall together. *State v. Van Horton*, 26 Iowa, 402; *City of Olathe v. Adams*, 15 Kan. 391; *State v. Anderson*, 3 Smedes & M. 751; *State v. Hand*, 6 Ark. 169; *State v. Burris*, 3 Tex. 118; *People v. Webb*, 88 Cal. 467; *People v. Swift*, 59 Mich. 529, 541, 26 N. W. 694; *State v. Crosby*, 17 Kan. 396; 1 Bish. Crim. Law, § 1026. There being

no appeal allowed by common law, the statutory provisions for appeals in criminal cases by the territory should be strictly construed, and no appeal should be allowed to the state unless the same is expressly allowed by statute. *U. S. v. Sanges*, 144 U. S. 310, 12 Sup. Ct. 609. There can be no appeal by the territory until there is a judgment. *Crim. Pr. Act*, § 395. In the case of *Territory v. Laun*, 8 Mont. 322, 20 Pac. 652, the learned judge says that no appeal can be had until there is a judgment of acquittal. This may be dictum, but it seems to us it is the only construction which can be placed upon it, as section 395 does not provide for appeals from anything but judgments, and, no appeal being allowed by common law, no appeal can be had. In New York, under the Laws of 1852, providing that writs of error should be granted to review any judgment rendered in favor of any defendant upon any indictment for any criminal offense, except where such defendant had been acquitted by a jury, it was held that the court of appeals had not the power to review, by writ of error, an order of the supreme court granting the defendant a new trial, before any judgment had been entered. *People v. Nestle*, 19 N. Y. 583. The supreme court of Indiana have passed upon a section similar to ours, and from which we believe ours to have been taken, holding that there can be no appeal until a final judgment is entered in favor of the defendant. *State v. Hamilton*, 62 Ind. 409; *State v. Spencer*, 92 Ind. 115; *Wingo v. State*, 99 Ind. 343; *State v. Evansville*, etc., R. Co., 107 Ind. 581, 583, 8 N. E. 619; *Elliot*, App. Proc. § 272. The supreme court of this state, in the cases of *U. S. v. Smith*, 2 Mont. 487, and *Territory v. Rehberg*, 6 Mont. 467, 13 Pac. 132, have decided that the defendant cannot appeal until final judgment has been entered; and the same construction must certainly apply to the state. Conceding, for the purpose of this argument, that an appeal may be taken by the territory before final judgment, it can only be taken upon questions of law reserved by the state, not a matter of discretion. If it is a matter of discretion, no bill of exceptions can be taken under section 340, *Crim. Pr. Act*; and, if no exception can be taken, no appeal can be had therefrom. The granting of the new trial by the court was a matter of discretion, and not a matter of law. The only true way to determine whether the ruling of the court is a matter of discretion or a matter of law is to see what objections were made by defendant's bill of exceptions, and, if they raise questions of fact, they then become mixed questions of law and fact, and not questions of law. In this case nearly the entire 38 specifications of error raise questions of fact, and the thirty-third specification of error, upon which the court granted the motion for new trial, raised a question of fact by alleging that the evidence was insufficient to warrant the giving of the in-

struction. This is a mixed question of law and fact, to which no exception can be taken. *Kinna v. Horn*, 1 Mont. 597; *Pomeroy's Lessee v. Bank*, 1 Wall. 597; *Territory v. Laun*, supra. A question of fact being raised by the thirty-third specification of error, if the court held that the instruction was improperly given, the reason which he gave for so holding is immaterial, and no part of the decision, and should not be reviewed by this court. *Com. v. Church*, 1 Pa. St. 106; *McMullen v. Armstrong*, 1 Mont. 486. Courts frequently sustain the holdings of the lower court, but upon entirely different reasons than those given by the trial court. *Pennoyer v. Neff*, 95 U. S. 719; *Black v. Mining Co.*, 3 C. C. A. 312, 52 Fed. 859. As we understand the case, should this court conclude that the information is sufficient, and instruction No. 10 not error, it can only order the case remanded, instructing the district court, on the retrial of the case,—which has already been granted,—to hold the information sufficient, and to give instruction No. 10 upon the retrial, simply for the purpose of determining the law for future guidance. There can be no reversal of the judgment. *State v. Bartlett*, 9 Ind. 569; *State v. Kinney*, 44 Iowa, 444; *Elliott's App. Proc.* § 298; *State v. Granville*, 45 Ohio St. 264, 12 N. E. 803. The statute does not confer upon the state a general right to appeal; on the contrary, the right is limited to the classes of cases specified. Hence, it is held that it is only the specific questions properly made and saved that can be considered on appeal. *Elliott's App. Proc.* § 278; *State v. Lusk*, 68 Ind. 264.

John T. Smith and E. C. Day, for respondent.

The state has no right to an appeal from, or writ of error to review, a decision in favor of the accused, except when clearly and expressly authorized by statute, whether that decision is upon a verdict of acquittal or question of law; and the right exists only when conferred by statute, "expressed in the most plain and unequivocal terms, such as cannot be turned by construction to any other meaning." *State v. Jones*, 7 Ga. 422; *People v. Corning*, 2 N. Y. 9; *Com. v. Cummings*, 3 Cush. 212; *State v. Reynolds*, 4 Hayw. (Tenn.) 110; *Com. v. Harrison*, 2 Va. Cas. 202; *State v. Kemp*, 17 Wis. 690; *State v. Burns*, 18 Fla. 185; *State v. Copeland*, 65 Mo. 497; *U. S. v. Sanges*, 144 U. S. 310, 12 Sup. Ct. 609; *State v. Simmons*, (Ohio,) 31 N. E. 34; *People v. Raymond*, (Colo.) 32 Pac. 429; *State v. Croteau*, 23 Vt. 14. The right did not exist at common law, and statutes conferring it must be strictly construed. There can be no appeal by the state or the defendant until final judgment, unless the statute expressly provides for such an appeal. *People v. Bork*, 78 N. Y. 346; *State v. Evansville, etc.*, R. Co., 107 Ind. 581, 8 N. E. 619. The Montana statute contemplates a final judgment, before the

appeal is taken, except where the appeal is from the order arresting judgment. Section 395, Crim. Pr. Act, provides that "an appeal from a judgment * * * may be taken," etc. Section 397: "The appeal must be taken within six months after the judgment is rendered." By section 398, notice must be served upon the clerk of the court "where the judgment was entered, stating that the appellant appeals from the judgment." By section 401, in cases of appeals by the state on reversed questions, the record need contain only "the bill of exceptions and the judgment of acquittal." This question was directly decided in favor of the contention here urged by Mr. Justice Liddell. *Territory v. Laun*, 8 Mont. 322, 20 Pac. 652. In New York, under the Laws of 1852, providing that writs of error should be granted to review any judgment rendered in favor of any defendant upon any indictment for any criminal offense, except where such defendant had been acquitted by a jury, it was held that the court of appeals had not the power to review, by writ of error, an order of the supreme court granting the defendant a new trial, before any judgment had been entered. *People v. Nestle*, 19 N. Y. 583. The only state in which an appeal lies from an order granting a new trial in criminal cases is California, and there by express statutory provision. *Pen. Code Cal.* §§ 1235, 1238. The state can only reserve such questions for appeal as she may except to. *Territory v. Laun*, supra. These are pointed out in section 340 of the criminal practice act. Under that section, the giving or refusing instructions to the jury can only be excepted to "when the case is finally submitted to them." The court has not yet refused to give instruction No. 11. When he does, the state can then except, and reserve its exception. The exceptions permitted by that section are clearly limited to rulings by the court at the trial, and not to matters occurring after the trial. The state cannot reserve the court's rulings on the information, for the reason that the court has not yet held it insufficient. If the judge's opinion is in this court for any purpose, it shows conclusively that the motion for a new trial was not granted for defects in the information. He simply expressed his doubts as to its sufficiency.

The ruling of the court excepted to by the state is the order sustaining the motion for new trial. The state can have no exception to the opinion of the court. *State v. Bartlett*, 9 Ind. 569. The court's ruling upon the motion for a new trial is a mixed one of law and fact, and involved matters resting entirely within the discretion of the court. The granting of a motion for new trial is largely in the discretion of the court, and that discretion will not be controlled by the supreme court except where it has been abused. *Kinna v. Horn*, 1 Mont. 597. The only case similar to the one at bar, that our

research has been able to disclose, is that of *State v. Ensey*, 42 Ind. 480, where the court declined to decide whether an exception to a ruling on motion for new trial is such an exception "as constitutes a reservation of a point of law." But the reasoning is against the position. The state has no general right of appeal. Only the specific questions reserved can be considered on the appeal. Only so much of the case must be brought into the record as will enable the appellate court to understand and decide the particular question reserved. *Elliott's App. Proc.* § 278 et seq.; *State v. Lusk*, 68 Ind. 264. The object of this appeal is to procure a reversal of the order granting a new trial. The motion for a new trial was based upon numerous specifications, any one of which, so far as this court can now say, might have been sufficient to sustain the ruling. But, if this appeal only brings up the reversed questions, this court is not in a position to decide whether the lower court erred or not. It is powerless to render a decision, because it has not the case before it. Surely, it was never contemplated that an appeal could be had in a case where the court could not render a judgment determining the cause. If chapter 15 of the criminal practice act be held to give the state the right to appeal in any case, it is unconstitutional, for the reason that the appellate jurisdiction of this court does not extend to criminal cases. The jurisdiction of the supreme court is defined and limited by the constitution, and the legislature can neither diminish nor increase such jurisdiction. *Ex parte Attorney General*, 1 Cal. 88; *Reilly v. Reilly*, 60 Cal. 625; *Haynes*, *New Trials & App.* § 170. "The appellate jurisdiction of the supreme court shall extend to all cases at law and in equity, subject, however, to such limitations and regulations as may be prescribed by law." *Const. Mont. art. 8, § 3.* "Cases at law" do not include criminal cases. *People v. Johnson*, 30 Cal. 99, 105; 3 *Amer. & Eng. Enc. Law*, p. 25. This court, in the case of *Lloyd v. Sullivan*, 24 Pac. 218, construed this phrase "cases at law" to include special proceedings, referring to article 8, § 11, defining the jurisdiction of district courts, for the constitutional construction of the phrase. That section negatives the idea that "cases at law" include criminal proceedings, for it expressly provides that "the district court shall have original jurisdiction in all cases at law and in equity, * * * and in all criminal cases amounting to felony." The only authority that this court has to review the orders of the district court in criminal cases is conferred by section 2, art. 8, which provides that the supreme court shall have a general supervisory control over all inferior courts. But this "supervisory control" is distinct from its "appellate jurisdiction," and cannot add to or take away from the latter. In view, then, of the apparent want of jurisdiction in this court

to entertain this appeal, and of the absence of any express statute conferring the right, and also in view of the manifest inconvenience and injustice that would result from allowing the state an appeal at any stage of the proceedings, where a ruling is made to which the county attorney sees fit to except, we think the motion to dismiss should be granted.

DE WITT, J. The defendant was convicted in the district court of murder in the second degree. He moved for a new trial, which motion was by the court granted. From the order granting defendant's motion for a new trial, the state has appealed to this court. The respondent moves to dismiss the appeal on the ground that the law does not permit the state to appeal from that order granting defendant a new trial.

The state took a bill of exceptions to the order of the district court granting the motion for a new trial, and reserved what it contends is a question of law decided (and erroneously decided) by the district court in granting the motion. Respondent says that the question so decided by the district court was not one purely of law, but one of discretion. Section 340, *Crim. Pr. Act.* But this contention of counsel will be passed. In the view that I take of this appeal, I may assume that the question decided by the district court, and reserved by the state, was one of law purely. The state bases its claim to the right of appeal upon section 396, *Crim. Pr. Act.*, which section is contained in chapter 15 of that act, and which chapter is devoted to the subject of appeals in criminal cases. That section is as follows: "Sec. 396. Appeal to the supreme court may be taken by the state in the following cases, and no other: First. Upon a judgment for the defendant in quashing or setting aside an indictment. Second. Upon an order of the court arresting the judgment. Third. Upon a question of law reserved by the state." The state takes its appeal under what it claims is the authority granted by the third subdivision of the section just quoted.

We may start with the settled proposition of law that the state has no appeal in criminal cases unless the same is expressly granted by law. This is the law of almost all the courts of this country. See cases cited by counsel on this argument. Mr. Justice Gray, of the United States supreme court, says, after reviewing the English decisions: "But whatever may have been, or may be, the law of England upon that question, it is settled by an overwhelming weight of American authority that the state has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a ques-

tion of law." *U. S. v. Sanges*, 144 U. S. 312, 12 Sup. Ct. 609. The learned justice then reviews the American authorities upon the subject. I am satisfied with the reasoning and authority of the eminent tribunal rendering that decision, and of the distinguished courts cited by Mr. Justice Gray. In the same line of thought is the following language of this court in *Territory v. Laun*, 8 Mont. 325, 20 Pac. 652: "The right of appeal by the state should be strictly construed and limited to those instances mentioned; and that such was the intention of the legislature is most evident, or it would never have used the emphatic language found in section 396 of the act referred to, where it says: 'Appel to the supreme court may be taken by the state in the following cases, and no other.'"

I will therefore direct my inquiry to a determination of whether section 396, subd. 3, (in connection with the whole of chapter 15 of our criminal practice act,) gives the state the right of appeal from an order of the district court granting defendant's motion for a new trial. That section, and subdivision 3, give an appeal "upon a question of law reserved by the state." That section does not itself provide how the question of law is to be reserved, but I think that this is made clear by sections 401, 340, *Crim. Pr. Act*. Section 401, found in chapter 15, above noted, provides as follows: "Sec. 401. In case of an appeal from a question reserved, on the part of the state, it is not necessary for the clerk of the court below to certify, in the transcript, any part of the proceeding and records, except the bill of exceptions and the judgment of acquittal. When the question reserved is defectively stated, the supreme court may direct any other part of the proceedings and record to be certified to them." This section thus has in view an appeal under the provisions of the third subdivision of section 396,—that is to say, upon the question of law reserved; and it provides for bringing the bill of exceptions to the supreme court, and, if the bill of exceptions defectively states the question of law reserved, the court may direct other portions of the record to be certified up. This seems to contemplate the reserving of the question of law by a bill of exceptions. Turning to section 340, *Crim. Pr. Act*, we find it provides that "the district attorney, or any counsel for the state, may except to any decision of the court upon a question of law, in admitting or rejecting witnesses, or testimony, or in deciding any question of law, not a matter of discretion, or in giving or refusing any instructions to the jury, when the case is finally submitted to them." Thus, we here find matters to which the state may except. They are defined specifically, and are not as extensive as the rights of exception given to a defendant, for "exceptions may be taken by the defendant to any decision of the court upon matters of law af-

fecting his substantial rights." Among the exceptions given to the state (section 340) is not one given in terms to an order granting a new trial to defendant. Of course, I understand that the language of section 340, "in deciding any question of law, not a matter of discretion," is broad enough to include an exception to an order granting defendant a new trial, if such an order decides a pure question of law, not of discretion. But I suggest these views of section 340 simply as a tendency of the intent of the criminal practice act (taken in connection with the more pointed expressions of the intent, which I will review below) to exclude the appeal by the state from an order granting a new trial to a defendant, for it is observed that section 340 descends into details in some matters; for example, it mentions a decision in admitting or rejecting witnesses or testimony, and in giving or refusing instructions. The granting of a new trial is a decision as important and vital as are those specifically mentioned in section 340. Indeed, it is a decision of such prominence in the case that I have found no court ever holding that an appeal could be taken from it, unless specially authorized by statute. California is the only state in which I find that the statute provides for such an appeal, and that state seems to have had such statute since its organization. Therefore, if our legislature had intended that an exception could be taken to such an order, as laying a foundation for appeal on a question of law reserved, it would seem, in view of the history of jurisprudence on this subject, that it would have been natural that such order be mentioned specifically in section 340. As above noted, these considerations do not at all conclude my views as to the appealability of the order; but they do indicate a tendency of expressed intent, not out of line with the direct expressions of the legislature, which I shall examine later in this opinion. I am of the opinion that if the state wishes to have reviewed a question of law reserved under the provisions of section 396, subd. 3, it must be done upon an appeal from the judgment. Such is indicated to have been the opinion of this court in *Territory v. Laun*, 8 Mont. 324, 20 Pac. 652, in which Mr. Justice Liddell, for the court, says: "This last ground [that is to say, upon a question of law reserved by the state] is evidently the law under which the present appeal is prosecuted; and, in order that the territory can have this appeal considered, it must show by the record that there is a question of law to be decided, not within the discretion of the trial judge, and that the appeal is prosecuted from a judgment." The view is thus expressed that a question of law reserved is to be considered by this court only upon an appeal from a judgment. An order granting a new trial is not a judgment. I do not consider that those remarks in *Territory v. Laun* were necessary to the decision of that case, and

are therefore not now controlling; but, as far as dictum may suggest what may be the opinion of the court, the language in that case shows the tendency of the view of this court at that time, (1889.) As noted above, the right of appeal by the state must be strictly construed, (*Territory v. Laun*), and must be granted by express statute, (*U. S. v. Sanges*, supra.) If the right is given at all by statute, it is granted by section 396, subd. 3. *Territory v. Laun*. That section and subdivision provide that the appeal may be taken by the state "upon a question of law reserved." I think that they refer to the subject-matter to be reviewed on the appeal, to wit, a question of law reserved by a bill of exceptions and do not purport to describe from what the appeal is to be taken,—whether from an order or the judgment. The appeal is upon a bill of exceptions carrying up the question of law. The bill of exceptions is a vehicle by which the alleged error is conveyed to the appellate court for consideration. I am therefore of opinion that the section and subdivision describe the subject to be reviewed, and the method of preserving it for review, and do not provide whether the subject so preserved for review shall be considered by the appellate court by an appeal from the order of the district court, which erroneously decided the question of law, or whether by an appeal from the judgment in the case.

But, examining the whole of chapter 15, in which is found section 396, we find much light as to the practice laid down for bringing up for review the question of law reserved. This chapter 15 is upon the subject of appeals in criminal cases generally, and is composed of sections 394–409, *Crim. Pr. Act*. Everything that is said in the chapter is as to appeals from a judgment. There is nothing as to an appeal from an order granting a new trial. Section 395 is, in orderly consideration, the introductory section of the chapter, although it appears as the second section. It reads as follows: "Sec. 395. An appeal from a judgment in a criminal action may be taken in the manner and in the cases prescribed in this chapter." Here we find an appeal from the judgment is provided for, and it is "in a criminal action," including, apparently, appeals by both the state and defendant. Next in proper order should be read section 394, as to appeals by defendant. That is as follows: "Sec. 394. An appeal to the supreme court may be taken by the defendant, as a matter of right, from any judgment against him, and, upon appeal, any decision of the court or intermediate order, made in the progress of the case may be reviewed." So, it appears that the defendant must appeal from the judgment, and thereupon intermediate orders may be reviewed. Then comes section 396, which is cited above in full, as to appeals by the state. Then we may consider section 397: "Sec. 397. The appeal must be taken within

six months after the judgment is rendered, and the transcript must be filed within thirty days after the appeal is taken." Here the time within which the appeal may be taken is fixed. It is within six months after the judgment. If an appeal may be taken from an order granting a new trial, when is it to be taken? The statute is silent, and it is silent, in my opinion, because it did not contemplate such an appeal. "Appeals are matters of statutory regulation. There must be a substantial compliance with the statute in order to confer jurisdiction upon the appellate court. The appellant is charged with the duty of perfecting his appeal in the manner provided by law, and error in this regard affects the jurisdiction of the appellate court. *Courtright v. Berkins*, 2 Mont. 404." *Territory v. Hanna*, 5 Mont. 247, 5 Pac. 250, cited in *State v. Gibbs*, 10 Mont. 210, 25 Pac. 288. But we find no statutory regulation for taking an appeal from an order granting a new trial in a criminal case. If chapter 15 had intended to allow an appeal from such an order, it seems that it would not have been wholly silent as to the time in which it might be taken. What practice is the state to follow? When shall it take its appeal? How is this court to determine whether it is taken in time? The legislature surely did not intend to leave all these questions open. I do not think of any other instance where the statute has given an appeal, and omitted to provide a time in which it is to be taken.

We also next observe that there is no method laid down for taking such an appeal. Section 398 provides as follows: "Sec. 398. An appeal is taken by the service of a notice upon the clerk of the court where the judgment was entered, stating that the appellant appeals from the judgment. If taken by the defendant, a similar notice must be served upon the attorney prosecuting. If taken by the state, a similar notice must be served upon the defendant, if he can be found in the county; if not found, by posting up a notice three weeks in the clerk's office." Thus it appears that the appellant appeals from the judgment. There is no provision for a notice of appeal from an order granting a new trial. The remarks above made, as to section 397, are also in point as to section 398. Section 399 is as follows: "Sec. 399. An appeal taken by the state in no case stays or affects the operation of the judgment in favor of the defendant until the judgment is reversed." Here, again, the judgment seems to be in contemplation, and not an order granting a new trial. Section 401, which I have quoted above, regulates the preparation of the record on appeal. There should be certified up a bill of exceptions and the judgment of acquittal. Here, again, we find the judgment, only, in contemplation. Section 404 provides: "The appellate court may reverse, affirm, or modify the judg-

ment appealed from." Here, again, the indication is that the judgment alone is appealed from. So, throughout the whole of this chapter 15 every expression indicates that the legislature intended that the appeal should be from the judgment. The whole chapter is in *pari materia*, and is to be construed with section 396, subd. 3, which is a part thereof. To hold that the state may appeal from an order granting a new trial, I think, would not be in accord with the expressed general intent of chapter 15, in view of all of its provisions, and the history of judicial decisions upon this subject. The question is not without difficulty. I have approached its consideration with preconceptions opposed to the view which I now feel compelled to entertain and express. It is true that this view debars this court from reviewing an order of the district court granting a defendant's motion for a new trial. I believe it would be well if such review could be had upon questions purely of law; but that is for the legislature, and to their wisdom I commend the consideration of the subject. In this particular case at bar, a review of the order of the court below would be an advantage, for I doubt that this court would be able to agree to the correctness of the ruling of the district court as to instruction No. 10, in connection with other instructions given. I do not think that the district court, even in effect, quashed or set aside the information or arrested the judgment. The motion of the defendant was for a new trial. In granting the motion, the judge expressed doubts as to the sufficiency of the information, but the order of the court did not expressly set aside the information; nor was the effect of the order to set it aside, or to arrest the judgment. *Crim. Pr. Act*, § 357. The order granted a new trial, and the effect of this order is to place "the parties in the same position as if no trial had been had." *Crim. Pr. Act*, § 353; *State v. Thompson*, 10 Mont. 562, 27 Pac. 349. Therefore, in the case at bar, the order granting the new trial left the case standing for trial upon the information as filed. The granting of a new trial materially differs, in effect and results, from arresting the judgment. The granting a new trial goes back to the information, and wipes out the proceedings subsequent to the information. It lifts up the case, and sets it back to the information, for a new start at that point. On the other hand, an arrest of judgment cuts deeper. It attacks the foundation. It destroys the information (*Crim. Pr. Act*, § 359,) on the grounds,—First, that the offense is not within the jurisdiction of the court; or, second, that the facts stated do not constitute an offense, (*Crim. Pr. Act*, § 357.) The order arresting judgment is more of the nature of a final judgment,—in fact, quite of that nature. It leaves the defendant with no charge standing against him. *Crim. Pr. Act*,

§ 359. To be sure, he may be held to answer a new information, (*Crim. Pr. Act*, § 360,) if there is reasonable ground to believe that he can be convicted of any offense. But this simply puts him about where he would be if committed by a magistrate on preliminary examination, if there was probable cause to believe that he was guilty of any criminal offense. *Crim. Pr. Act*, § 96. I add these remarks in view of a possible application of the decision in this case to a construction of subdivision 2, § 396, *Crim. Pr. Act*, which provides for an appeal by the state "upon an order of the court arresting the judgment." Regarding the substance of things, such an order is, in its nature and results, a judgment for defendant. It is a denying a judgment to the state, and a discharge and acquittal of defendant from any possible consequences that threatened to flow from the information. I am therefore of opinion that nothing said in this opinion looks to a denial of the right of the state to appeal under the provisions of subdivision 2, § 396, *Crim. Pr. Act*.

In this connection, and in consideration of the matter to which I shall now call attention, I think it is proper that we express our view as to the sufficiency of the information. The ruling of the court in granting the new trial was made in such a peculiar manner that the state's attorneys have construed it to be an attack upon the information, and there is reason to believe, from the record, that the district court would hold the information to be bad if that matter were regularly before it for a decision. The sufficiency of the information is not a matter to raise upon a motion for a new trial, (section 354, *Crim. Pr. Act*;) but it may be raised on a motion in arrest of judgment, if the defects exist which are set forth in section 357, *Crim. Pr. Act*. Insufficiency of the information was not specified by defendant as one of the grounds of the motion for a new trial, nor was that matter before the court by virtue of that motion. Section 354, *Crim. Pr. Act*. But no motion of any kind is necessary that the court may arrest the judgment. The court may do this without motion. Section 358, *Crim. Pr. Act*. Now, on the motion for a new trial of this case, we find the court going outside of that motion, and entering the domain of the motion in arrest of the judgment, which domain it may enter without being moved to do so by either party. *Crim. Pr. Act*, § 358. Having entered this field, we find, by the record, that the judge strikes nearly a direct blow at the information. It is fairly to be gathered from his ruling that he considers the information insufficient to sustain a judgment on the verdict. It is true that he makes this a ground for granting a new trial, as he ought not, and he does not make it a ground for an arrest of judgment, as he should have done if he held the infor-

uation was objectionable under section 357. The ruling was not one that was attentive to the practice, and it did not distinguish the nature of the matter which the court undertook to handle. It threw the case into some confusion, and has left the counsel for the state in uncertainty as to how they will stand as to their information, for the state's attorneys come into this court in the belief that the information was attacked, and they devote most of their argument to its defense. This case is now to go back for trial. It will stand upon an information which has been impugned, in the opinion of the district court. The state's attorneys may therefore naturally be shaken in their confidence in the sufficiency of their pleading. Therefore, although, in fact and effect, the district court did not arrest the judgment, and therefore did not destroy the information, and hence the information is not before us for review, yet as all subsequent proceedings must rest upon this information, which, in the opinion of the court which is to try the case, is, if not decided to be bad, at least much discredited, we deem it proper and fair to both court and counsel to express our views, not as a decision, but advisably, as to the sufficiency of this pleading.

The counsel for the respondent does not show in his brief wherein the information was ever claimed to be insufficient, nor does the ruling of the court enlighten us upon that point. The judge says, simply, that he believes the information is insufficient to sustain a judgment of murder in the second degree. But upon the argument of the case we were told that the information was faulty in its conclusion. If we examine the information without regard to the concluding sentence, there is no contention but it charges murder in the first degree. It describes the acts done, and the killing, and alleges that those acts were done feloniously, unlawfully, premeditatedly, and with malice aforethought. An information charging murder in the first degree is a good information to sustain a judgment on a verdict of murder in the second degree. Territory v. Stears, 2 Mont. 324. Therefore, the information is sufficient to sustain a judgment for murder in the second degree, unless the objection which counsel urged to the conclusion is good. That conclusion, which is in a sentence by itself at the end of the indictment, is as follows: "And so the county attorney aforesaid, upon his oath aforesaid, does give the court to understand and be informed that the said Charles Northrup, at the time and place aforesaid, and in the manner aforesaid, did commit the crime of deliberate, premeditated murder, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Montana. Allan R. Joy, County Attorney of Park County, State of Montana." The argument upon this matter was very brief, and about all that

was claimed was that the language of this conclusion stated simply that the defendant had committed murder, and did not state the acts which he did, or that he did them of malice aforethought. But the acts constituting the offense, and the manner of performing them, and all the allegations of premeditation and malice aforethought, had been fully and unobjectionably set forth in the preceding portion of the information; and the portion of this information which is now criticised is a mere conclusion resulting from the previous allegations. The conclusion states that "at the time and place aforesaid, and in the manner aforesaid." This point was directly decided in the case of Territory v. Young, 5 Mont. 244, 5 Pac. 248, in which Chief Justice Wade says: "These words are the mere conclusion drawn from the preceding averments. If the averments are bad, the conclusion will not aid them; if they are good, and sufficiently describe the crime as the law requires, by proper averments, the formal concluding words are immaterial. At common law, the concluding words formally charging the defendant with murder were necessary in order to distinguish an indictment for murder from an indictment for manslaughter. If the term 'murder' were omitted from the conclusion of the indictment, the defendant could only be convicted of manslaughter. 3 Chit. Crim. Law, 737; *Fonts v. State*, 8 Ohio St. 119, 120. The reasons for the technical conclusion of indictments for murder at common law all disappear under statutes defining the degrees of the crime, and providing that the jury shall designate the degree in their verdict; and so we are compelled to say that this indictment is clearly within the Stears and McAndrews decisions, and those decisions we cannot disturb. This conclusion seems irresistible when we remember our statute, which provides that no indictment shall be quashed or set aside for any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged, or for any defect or imperfection which does not tend to prejudice the substantial rights of the defendant on the merits." The statutes to which the above opinion refers are now section 171,¹ subds. 4, 6, 7, Crim. Pr. Act. The information in the case at bar clearly contains sufficient matter to indicate the crime and the person charged, and the objection which is now raised to it is not as to matter which tended to the prejudice of substantial rights of the defendant upon the merits. We are therefore of the opinion that the objection to the sufficiency of the information is not well founded.

¹ Crim. Pr. Act, § 171, provides that no indictment shall be quashed for any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime and person charged or for any defect which does not tend to prejudice the substantial rights of defendant on the merits.

The contention at the bar has been very earnest and vigorous on both sides. I have not, in this opinion, quoted or analyzed all the authorities which the zeal and learning of counsel have collected in their briefs. I have cited the general principles of the cases, and have then thought that the determination of this case depends upon an interpretation of our chapter 15, Crim. Pr. Act, in the light of the legal principles established by the decisions. See cases cited in the briefs of counsel. It is ordered that the appeal be dismissed.

PEMBERTON, C. J., concurs.

HARWOOD, J., (dissenting.) In so far as the majority of this court have entertained this appeal to review the ruling of the trial court in holding the information insufficient I am in accord with them; but how far that has been done, and why it was done, I apprehend will be a perplexing problem for reporter, annotator, practitioner, and judge, in view of the incongruity manifest in reviewing the information, and condemning the ruling of the trial court thereon as erroneous, and yet prefacing such review with the observation that "although, in fact and effect, the district court did not arrest the judgment, and therefore did not destroy the information, and hence the information is not before us for review." It seems to me bad enough for an appellate court to review and announce opinions upon matters not before it; but here must be something worse, if the court's views are tenable, for it is not only affirmed that the matter reviewed is not before this court, but that the ruling reviewed never was made at all. Yet, proceeding, the court enters upon a discussion of the virtue of the information, and appears to condemn as erroneous the ruling of the district court that the information was insufficient; but, in closing, the appeal is dismissed, thereby again affirming, in effect, that this court has no jurisdiction thereof. I cannot concur in such a treatment. The appeal presents two questions of law, on consideration of which the trial court vacated the verdict of the jury finding defendant guilty of murder in the second degree, both of which questions of law, in my opinion, are, by virtue of the provisions of the statute, brought within the jurisdiction of this court for review and determination by this appeal.

The first question of law for review is the ruling of the trial court to the effect that the information is insufficient to support the verdict; and as to that ruling it appears to me there can be no well-founded doubt that it is fully within the jurisdiction of this court to review, and ought to be authoritatively passed upon, and a determination announced. Such review and determination on that point I have urged in the councils of this court as proper, and that such determin-

nation could be made in a homogenous treatment of the case, along with the holding of the majority that the other question of law, which pertains strictly to the motion for new trial, is not subject to review on this appeal.

Let us set clearly in view the conditions which gave rise to this appeal, and the questions of law which appellant seeks to have reviewed and determined thereby. Defendant was by information charged with the commission of the crime of murder in Park county; has been twice tried thereon, and upon the second trial was, by the jury's verdict, found guilty of murder in the second degree. Thereupon motion for a new trial was made on behalf of defendant, and granted by a court order, as follows: "In this case, although many errors are assigned, there are but two which I consider of sufficient importance to notice in passing upon what I consider the merits of the motion for new trial. I am satisfied that the case was fairly presented to the jury, that the evidence was sufficient to sustain the verdict, and that there was no error in the instruction or the evidence or the argument of counsel. The two objections which I have referred to as being worthy of notice are: First, the objection to the sufficiency of the information; and, second, the objection raised to the instruction given by the court, number ten, (10.) There are grave doubts in my mind as to the sufficiency of the information to support a verdict of murder in the second degree, and although I would not feel like granting a new trial upon this objection, standing alone, still, when taken in connection with the instruction given by the court, number ten, (10,) already referred to, I am disposed to grant a new trial. Instruction numbered ten (10) takes away from the jury the consideration of whether or not the defendant acted upon what he believed to be actual danger at the time, and estops the jury from considering the question as to whether the defendant really believed himself to be in danger, although he might afterwards turn out to be mistaken in such belief; and although the court gave a further instruction, numbered twenty-three, (23,) explaining that the danger need not be real, but only apparent, still, the court is unable to say that the jury might not have been misled as to this instruction. Therefore, for these two reasons, the motion for a new trial in this case is sustained." Exceptions to this ruling of the court, both as to holding the information insufficient, and in holding instruction No. 10 erroneous, was reserved by the state. The instruction in question reads as follows: "(10) Before a person is justified in taking the life of his assailant, the slayer must not only exhaust all other reasonable means within his power, consistent with his own safety, to prevent the homicide, but it must clearly appear that the party slain not only had, at the time, the present ability, as well as the in-

tention, to kill or seriously injure the slayer at the time, and that deceased was then and there in the act of carrying out this purpose, to wit, the intention to destroy the slayer, or of inflicting upon him serious bodily injury; and even then it will not justify the slayer in the use of any more force than is actually necessary at the time to prevent the deceased from immediately carrying into effect such unlawful purpose. By this instruction the jury will understand that the right to take life is limited to the actual and present necessities then suddenly precipitated by the assailant, under such circumstances as to place the life and person of the slayer in such peril as admits of no other reasonable alternative than the killing of the assailant; and even then the slayer's right to employ force against the assailant is limited to the force necessary to repel the violence then being offered, and to place himself beyond the reach of immediate danger. The law of self-defense will not allow the slayer to go beyond this limit; and although the attack may be violent, unwarranted, and felonious, and made with the apparent intent to kill, yet, whenever this danger is removed, as by disarming the assailant, or by overpowering him by the interference of others, then the right of the person assailed to use force ceases. And for the same good reason, where the assailant retires from the conflict, or pauses in his advance, or turns away before committing any violence, a person, though violently attacked, would not be justified in killing while his assailant was hesitating or pausing in his attack, or was retreating or plainly evincing a desire on his part to discontinue all further violence; and in this case, even though you may believe from the evidence, beyond a reasonable doubt, that the deceased was advancing to attack defendant just prior to the shooting, still, if you are further satisfied from the evidence, beyond a reasonable doubt, that, before the fatal shot was fired, deceased ceased the attack, or turned away, or in any manner plainly manifested his desire to avoid any further violence, or was attempting to escape from the defendant at the time the fatal shot was fired, then defendant had no occasion to take the life of deceased, and you will bring in your verdict of guilty." Instruction No. 23, given along with No. 10, and referred to in the order of the court, is as follows: "(23) You are further instructed, as a matter of law, that if a person believes, and has reasonable cause to believe, that another has sought him out for the purpose of killing him or doing him great bodily harm, and makes demonstrations manifesting an intention to commence such attack, then the person so threatened is not required to retreat, but he has a right to stand and defend himself, and pursue his adversary, until he has secured himself from danger, and if, in so doing, it is necessary to kill his antagonist, the

killing is excusable on the grounds of self-defense."

The ruling of the court touches two questions,—the sufficiency of the information, and the sufficiency or correctness of said instruction. These are both purely questions of law. Whether the information is sufficient in law to charge defendant with the commission of said crime is a question of law. And likewise an instruction stating the circumstances or conditions under which the law will justify homicide is purely a matter of law. Indeed, the statute defines those circumstances or conditions under the pressure of which the law will justify homicide. The fact as to whether such conditions existed or not, in a particular case under inquiry, is, of course, a question of fact for the jury to find. Therefore, it is seen that the two points upon which the court made its ruling, overturning the results of the trial, and, as the prosecuting officer construed it, also overturning the information, were purely questions of law. The state, having reserved an exception to this ruling, appealed to this court, asking a review and determination of those important questions of law. Respondent interposed a motion to dismiss this appeal on the ground that there is no law authorizing an appeal on the part of the state until after final judgment of acquittal is entered in the trial court; and this motion to dismiss the appeal is the subject of the present consideration, although the whole case was argued and submitted along with the motion to dismiss. The consideration of this question may be premised with the observation that, according to a preponderance of American authority, an appeal cannot be taken on the part of the state in a criminal case without statutory provision therefor. Mr. Bishop summarizes his investigation of this question of criminal procedure in the following remarks: "Rights of State to have Proceedings Reversed. In England, writs of error, the practical object of which is generally to bring whatever appears of record under the review of a higher tribunal, seem to be allowable to the crown in criminal causes; but the courts of most of our states refuse them, and refuse the right of appeal to the state or commonwealth, except where expressly authorized by statute, as in some states they are. In Maryland, the state may have a writ of error at common law, to reverse a judgment given on demurrer in favor of a defendant; and in some other states questions of law may, without specific statutory direction, be reviewed by this proceeding, or by appeal, on prayer of the state. The question is not free from difficulty, but probably some judges have refused the writ to the state from not distinguishing sufficiently between cases in which the rehearing would violate the constitution, and cases in which the prosecuting power has the same inherent right to a rehearing as a plaintiff has in a civil suit." 1 Bish. Crim. Law, § 1021. We

therefore go directly to the statute with the question, to find whether provision has been made for such an appeal, and there find it provided that "appeals to the supreme court may be taken by the state in the following cases and no other: First. Upon a judgment for the defendant in quashing or setting aside an indictment. Second. Upon an order of the court arresting the judgment. Third. Upon a question of law reserved by the state." Crim. Pr. Act, § 396. It is seen that the statute expressly provides for an appeal by the state from the action of the trial court in quashing or setting aside an indictment. Under the present law and practice in criminal cases, as reformed by the constitution and statute, the information is equivalent to an indictment, and said provisions of statute apply thereto. The state's attorney construed said order of the court as quashing or setting aside the information as insufficient to "support a verdict of murder in the second degree," of which defendant had been convicted, and pointed to the express provision of the statute providing for an appeal from such determination of the court. The only attempt to avoid the direct force of that statute is by mere argument that the question of insufficiency of the information was not before the trial court on the motion for a new trial. It is true that question is not strictly germane to the motion for new trial, (section 354, Crim. Pr. Act,) and for that reason alone this court appears to hold that what was actually done was not done simply because "the ruling was not one that was attentive to the practice, and it did not distinguish the nature of the matter which the court undertook to handle." And so this court holds, against all authority and reason too, as it seems to me, that, when the trial court does indirectly something which would be reviewable on appeal if done directly, the appeal and jurisdiction to review is cut off. The logical result of this is that, as often as a trial occurs, the court may annul the result by holding the indictment or information insufficient, and, if this is done on motion for new trial, such ruling is not reviewable, and the appeal will be dismissed; but, if the court should hold the indictment bad on some motion which gave nice attention to the rules of practice, this court then admits that in such case the statutory provision making such ruling reviewable on appeal would have its effect. That statute could, however, be set aside at any time by indirection, or by creating a little confusion on the subject of practice. But is the learned trial court subject to the strictures thrown upon its rulings, when viewed in the light of the statute? It is clear that the trial court followed the plain path of the law. When the motion for new trial was committed to the consideration of the trial court, there was also raised the question of the sufficiency of the information to sustain the conviction. This was a question which can be raised at any time before judg-

ment, and not only raised by motion, but the court, on its own motion, may consider that question. Crim. Pr. Act, § 358. But, according to the language of the order of court above set forth, "objection" was raised "to the sufficiency of the information." The court says: "The two objections which I have referred to as being worthy of notice are: First, the objection to the sufficiency of the information," etc. The tendency of this language seems to me to indicate that "objection to the sufficiency of the information" was made. Nevertheless, whether it was raised by counsel, or considered by the court on its own motion, there is the authority of statute for the practice. Therefore, while that objection was not germane to the motion for new trial, it was before the court at the same time, and was ruled upon. The court expressed "grave doubts as to the sufficiency of the information to support a verdict of murder in the second degree," and on that ground, coupled with the criticism of an instruction, vacated the verdict, and granted a new trial. If the court groups together these matters directly placed within the province of its consideration at the time, and bases its action in vacating the verdict on the insufficiency of the information, shall it be said that the court did not do what it plainly has done, simply because all the grounds of the order were not especially pertaining to the motion for new trial, and that no appeal lies to review the ruling which the statute plainly makes reviewable on appeal, because that ruling was made in connection with other considerations? The situation is therefore peculiar, considering that this court holds that no appeal lies, and declines to authoritatively determine whether the information is good, or whether the criticisms of the court below respecting the same are well founded. Suppose that, upon another trial, the state should again convict defendant, and motion be made to vacate the verdict and grant a new trial, and the court should grant the same, observing that he had once held the information insufficient, and that ruling had not been reversed. Consistency alone might dictate such a ruling on the part of the trial court. Nor could any blame for this extraordinary result rest upon the prosecuting attorney, because he appealed, and sought review of the order which determined the information insufficient.

In refusing to entertain this appeal, and review the ruling of the trial court in so far as that ruling impugns the sufficiency of the information, it seems to me this court disregards the substance and effect of things, and proceeds upon mere verbal distinctions without substance; and I am unable to find, either in the argument of counsel in support of the motion to dismiss, or in the opinion of the majority of this court, any ground for refusing such review. As to a review of the question of law involved in the ruling of the trial court that instruction No. 10, delivered

to the jury, was erroneous, there is also provision of statute for appeal therefrom, found in the third subdivision of section 396, that the state may appeal "upon questions of law reserved by the state." This is the direct provision, and, if given force, would make such appeals available to review questions of law analogous to the method of bringing up questions of law by writ of error. But this court holds that an appeal cannot be taken to review such questions of law reserved by the state, as provided in subdivision 3 of section 396, until there has been a judgment of acquittal; and of course the mischief of the "error of law" is irremediable. So that if, on an error of law alone, an order for new trial, or any other order, however vital to the proceeding, is granted over and over again, there can be no review until it has resulted in a judgment of acquittal. But that holding on this branch of the case has an implication of statute to support it, and the majority of this court, as it appears to me, have given this implication the effect of annulling the express provision allowing appeals "upon questions of law reserved by the state" in many cases of criminal prosecution; and the effect, in all cases, of adding to that provision the words "after judgment of acquittal." Both of these effects of the ruling of this court stand directly in contradiction of the rules of construction of statutes, for instead of making the express provision of the statute yield to the mere implication, or "sacrificing the spirit to the letter," the contrary is the rule of construction; and likewise the rules of construction forbid an interpretation which in effect adds or inserts into the statute any words or provision. Code Civil Proc. § 630. Such construction of the statute is not only forbidden by sound rules of interpretation, but it seems to me a moment's reflection and consideration of those provisions of the statute, standing in *pari materia*, would lead to a different view. The holding of the majority is that no appeal lies on the part of the state until there is a judgment of acquittal; and hence there is no appeal, as provided by statute, "upon questions of law reserved by the state," if that error was given effect in an intermediate order overturning a conviction, until the result was an absolute acquittal. Such is the effect of the observations in *Territory v. Laun*, quoted in the majority opinion, but acknowledged to be obiter dictum; and on that dictum, and the implication of the provisions of the statute following section 396, the holding of this court is based.

Now, with all due respect to the obiter dictum referred to, and also being mindful of the implication found in certain sections of the statute providing the manner of taking appeals, we cannot escape the fact that the statute directly and expressly contradicts that dictum by providing for an appeal from an intermediate order where there is not, and in the very nature of the case cannot

be, a judgment of acquittal. The statute provides for an appeal by the state "upon an order of the court arresting the judgment." Crim Pr. Act, § 396, subd. 2. This is an intermediate order before there is any judgment, much less a judgment of acquittal. How, then, can this court quote and follow the dictum of *Territory v. Laun*, "that, in order that the territory can have this appeal considered, it must show that the appeal is prosecuted from a judgment?" Or how can this court hold, on the mere implication of the subsequent sections of the statute, that the appeal must always be accompanied by a judgment? Does not that holding contradict the plain intent, and not only so, the positive and express provision of the statute, so plainly declared, that there is no room for interpretation? The legislature has said, by direct provision, there shall be an appeal by the state from an order refusing to enter judgment, but this court say that the appeal must be prosecuted from a judgment in all cases. And a logical following of that construction will deny an appeal from "an order arresting the judgment;" for, if an appeal is entertained from an order arresting a judgment, such appeal will not be "from the judgment," nor by service of notice of appeal upon the clerk of the court "where the judgment is entered;" nor will it affect or stay the "operation of the judgment," because, when an appeal is taken from an order arresting judgment, no judgment will have been entered in contemplation of law. And so all the implications and dicta which the majority opinion has drawn together to support this dismissal will apply just as forcibly to dismiss an appeal from an order in arrest of judgment, and thus annul also the express provision of subdivision 2 of section 396, that the state may appeal from an order of the court arresting the judgment.

I do not find any support for the ruling of this court in denying a review of the order of the court below, in so far as it impugns the sufficiency of the information; nor do I find sufficient strength in the dicta and implications pointed out to overthrow the direct, positive provisions of the statute authorizing an appeal "upon questions of law reserved by the state." The framers of the statute undoubtedly intended that questions of law reserved by exception should be reviewed on appeal as upon writ of error, which was a well-known practice for review of errors of law. And that practice was undoubtedly in the mind of the framers of the provision that the state may appeal "upon errors of law reserved by the state," found in the third subdivision of section 396; and, viewed in the light of such analogy, it is without difficulty. The intention of the legislature in that provision is demonstrated by the history of the rulings of courts upon this point of criminal procedure. That ruling has been quite uniform in American jurisprudence that no exception, or appeal, or review

by writ of error was allowable on behalf of the state without express provision of statute therefor. Hence, the legislature provided in the criminal practice act for review of "a judgment quashing or setting aside an indictment," "an order of court arresting the judgment," and of "questions of law reserved by the state." This statute is refused effect because the legislature did not provide an appeal from an order granting a new trial. It seems to me the observation that, "if our legislature had intended that an exception could be taken to such an order, [an order for new trial,] such order would have been made appealable," manifests an entire misapprehension of the meaning and intent of the legislative provision. I think there is no doubt that, if the framers of that statute had intended to provide for an appeal from an order granting a new trial, provision would have been made to that effect. But it is manifest that the legislature did not so intend. New trials are frequently granted on discretionary considerations, and it is clear from section 340, Crim. Pr. Act, that it was not the policy of the legislature, in its wisdom, to make matters of discretion, resolved in favor of the prisoner by the trial court, reviewable on appeal by the state. Hence, the legislature did not provide that an order granting a new trial to the prisoner should be appealable, because such provision would put upon review all the grounds of the order. Of course, under the usual rules of appellate review, discretionary rulings are allowed to stand unless abuse is plainly shown. The legislature, however, left that responsibility entirely with the trial court. But to the end that the law might be administered, and administered uniformly throughout the state, the legislature provided for review of questions of law ruled upon by the trial court against the prosecution; and these ought to be reviewed and determined, even if another trial was granted on discretionary grounds, so that errors of law might not intrude their influence into the case until possibly miscarriage of justice is wrought thereby. In my humble opinion, the manifest wisdom and intention of the legislature is set aside in the holding of the majority, in refusing to review and determine the questions of law brought here for review by this appeal.

STATE ex rel. NORTHRUP v. CONROW,
Sheriff.

(Supreme Court of Montana. Dec. 23, 1893.)

CRIMINAL LAW—RIGHT TO SPEEDY TRIAL—UN-
REASONABLE DELAY.

Const. art. 3, § 16, provides that in criminal prosecutions the accused shall have the right to a speedy trial. Crim. Pr. Act, § 303, provides that if a person indicted for an offense, and committed to prison, shall not be brought to trial before the end of the second term of court after the finding of the indictment, he shall be discharged. *Held*, that where one was twice brought to trial within the pre-

scribed time, but, pending an appeal by the state from the granting of a new trial, two terms elapsed without a further trial, there was no failure to give speedy trial, though it was finally decided that the state had no right to appeal. Harwood, J., concurs in result.

Appeal from district court, Park county; John Henry, Judge.

Application for habeas corpus, on the relation of Charles Northrup, against John M. Conrow, sheriff of Park county. Writ denied. Relator appeals. Affirmed.

Statement of the case by the justice delivering the opinion:

Relator in this case is the same person who is respondent in the case of State v. Northrup, 35 Pac. 228, (just decided.) See that case for the general facts. Relator was arraigned November 14, 1892, upon an information charging murder. On November 23d he was tried, and the jury disagreed. Relator was then remanded to the custody of the sheriff, respondent herein. On January 23, 1893, he was tried the second time, and convicted of murder in the second degree. On March 24, 1893, the district court granted a motion for a new trial. Since that time he has been in the custody of the sheriff, and there have been two terms of court,—one from April 10 to April 22, 1893, and the other from June 19th to October 23d. At each term a trial jury was in attendance. There was time at each term to try relator. The state did not apply for a trial at either term. The defendant's attorneys asked to have the case set for trial. It does not appear whether this request was made at the April term or the June term, or whether it was made when the jury was in attendance, or after it was discharged. The state's attorney asserts in his brief that "the appellant made no demand whatever for a trial at the April term, nor even at the June term, until several weeks after he knew the jury had been discharged." This does not appear affirmatively in the record, nor does it appear that there was any jury in attendance when the request was made. The state, meantime, had taken, on March 29, 1893, the appeal from the order granting defendant's motion for a new trial, which appeal was considered in State v. Northrup, above referred to. At the close of the June term of the district court, on October 23, 1893, relator, showing the above facts, asked his discharge in that court upon habeas corpus, relying upon section 303, Crim. Pr. Act. The court remanded him, and, from that judgment, relator now appeals.

Campbell & Stark, for relator. Allen R. Joy, for respondent.

DE WITT, J., (after stating the facts.) The constitution of this state provides, in article III, § 16, that in all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. The statute (section 303, Crim. Pr. Act,

is as follows: "Sec. 303. If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after the indictment is found, he shall be entitled to be discharged, so far as it relates to the offense for which he was committed, unless the delay shall be granted on the application of the prisoner, or shall be occasioned by want of time to try the cause at such second term." The statute thus declares, in effect, that if a defendant committed to prison be not tried before the end of the second term after his indictment, (or information filed,) unless he himself, or the want of time, has caused the delay, this is not giving him a speedy trial. But the relator in this case does not bring himself within the provisions of section 303. It is not the fact that he was not brought to trial before the end of the second term held after the information was filed. On the contrary, he was tried twice within the period defined by section 303, and within 60 days. It is true that two terms of court elapsed without trying him, after he was granted a new trial, on March 24th. If he could show that the state unreasonably, and without cause, delayed trying him for two terms of court, after he had once been tried, we are of opinion that he might urge such delay as a denial of a speedy trial, without relying upon the statute, (section 303,) and depending simply upon the provisions of the constitution, (article 3, § 16;) for the statute (section 303) does not attempt to, even if it could, provide what shall alone be a denial of a speedy trial. We may therefore inquire whether the facts shown constitute a denial of a speedy trial. In the case of *U. S. v. Fox*, 3 Mont. 512, in this court under the territorial organization, the decision was not made in view of section 303, Crim. Pr. Act, but was rather upon the general principles of the guaranty of a speedy trial by the constitution of the United States, (article 6 of the amendments.) In that case the United States was the prosecutor. It neglected, for a whole term of court, its duty to provide funds to try the case. The providing of such funds was wholly within the power and the duty of the United States, and it wholly neglected to so provide them, and did not attempt to offer any excuse for the neglect. The court discharged the relator in that case by reason of the neglect to prosecute. But in the case at bar the state has pursued the relator, not without diligence. It tried him twice in rapid succession. It resisted his motion for a new trial. Upon that motion being granted, the state took an appeal to this court, and during the pendency of the appeal in this court the state did not try the defendant again. Pending that appeal, defendant sought to be discharged by writ of habeas corpus in the district court, and,

being remanded, he is now here on appeal from that judgment.

This court has now determined that the appeal of the state in the case of *State v. Northrup* was not permitted by law. Relator's argument now is that, as it was decided that the state had no appeal in the case of *State v. Northrup*, the state is now in the same position as if it had not attempted to appeal, and had simply willfully neglected to try relator during the time when the pretended appeal was pending. We cannot concur in that proposition. Whether or not an appeal would lie to this court from an order granting defendant a new trial seems to have been a question of great difficulty. See the opinions in *State v. Northrup*. The question had never been decided in this jurisdiction. Upon the hearing the contest was most vigorous and earnest on both sides, and the difficulties were such that, after mature deliberation, this court was not able to announce a unanimous decision. Under these circumstances, the omission by the state to try the relator a third time, pending their attempted appeal to this court, was not a willful or unreasonable neglect to prosecute. When we observe the difficulty which the question of the appeal caused this court, we may conclude that the legal advisers of the prosecution in the district court did not unreasonably delay the trial of the relator when they ventured to entertain the opinion that they were entitled to the appeal which they attempted to prosecute in *State v. Northrup*. The judgment of the district court remanding relator is affirmed.

PEMBERTON, C. J. I concur.

HARWOOD, J. I dissent from the views expressed in the foregoing opinion, but concur in the conclusion on entirely different grounds. According to the law of this case, as decided in the dismissal of the appeal on behalf of the state, by the order just made in *State v. Northrup*, defendant ought to be discharged from custody, as provided by the statute, (section 303, Crim. Pr. Act,) which statute is entirely consonant with the provisions of the constitution, (article 3, § 16,) because, as conceded, two full terms of court passed while defendant was held in jail under indictment, and was not brought to trial, nor was such failure occasioned by his application for delay. The former trial and conviction had been set aside and annulled by order of the trial court, and defendant held for another trial, and, during the period mentioned, the state was attempting to prosecute an appeal which this court has decided (erroneously, as I believe) was not sanctioned by law. The constitution provides that "in all criminal prosecutions the accused shall have the right to a speedy public trial;" and the statute gives large indulgence to the state in providing, "if any person indicted

for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense," he shall be entitled to discharge, unless the delay is granted on his application. After the former trial, conviction was swept away by order of the trial court, and defendant was remanded to jail, with the indictment resting upon him in force, as the court has held; and from that date—March 24th—to the present December the prisoner has been held in confinement, with no movement on the part of the state towards bringing him to trial on the indictment. During this time, as conceded, at least two terms of the court "having jurisdiction of the offense," and fully equipped to try said cause, have convened, progressed through the term, and adjourned, and all this period of time has been frittered away in a fruitless and illegal attempt to prosecute an appeal which the law, according to the ruling of this court, did not permit on behalf of the state. I think counsel for the prisoner are right in reasoning that, if this court held the attempted appeal was without authority of law, then the prisoner was entitled, under the statute and constitution, to discharge. Counsel for the prisoner did not find in those constitutional and statutory enactments the idea, "in effect," as the foregoing opinion put it, that if the prisoner has been tried once within the time provided by law, and the results of that proceeding be entirely annulled, then the prisoner may be kept in jail an indefinite length of time, with the indictment hanging over him, without trial, and the statute referred to has no effect. But such appears to be the interpretation placed upon the provision by the majority of this court, in saying the prisoner "does not bring himself within the provision of section 303. It is not the fact that he was not brought to trial before the end of the second term held after the information was filed." The opinion of the majority of this court, read in connection with their opinion in dismissing the state's appeal in the same case, concedes that the state, without any legal ground so to do, has held the prisoner in jail more than two full terms of the trial court without bringing him to trial; and according to the interpretation and application of section 303, as found in the foregoing opinion, the prisoner can now be kept in jail as many terms as the state, through delinquency, without any legal ground therefor, may be disposed to delay the trial. This interpretation is based upon the assumption that said section provides, "in effect," that if the prisoner is brought to trial before the end of the second term after the indictment is filed against him, and that proceeding is annulled, then the prisoner may be held in jail, without trial, as long as the state may see fit, without any legal ground to support said action, and the prisoner cannot claim the protection of the constitution and statute

against such wrongful delay. I do not concur in that interpretation of the statute. Nor do I find in the statute or the constitution any implication or proviso that the same shall have no effect in case the state delays the trial by undertaking, in a fruitless and illegal method, to test some question of law, even if "the contest was vigorous and earnest" in respect thereto. Nor should there be read into that statute a proviso that it shall not have effect if the state "did not unreasonably delay the trial" of the prisoner, as seems to be interpolated into it in the foregoing opinion. Neither the statute nor constitution has made any such proviso. The statute fixes the delay which shall give the prisoner the right to claim discharge, without inquiring whether there was a plausible, reasonable, or unreasonable excuse for the delay. The statute declares all the grounds upon which the discharge may be demanded, and in this case it is practically conceded that all those grounds exist in favor of the prisoner. But practically there is read into that statute, by the foregoing opinion, a proviso which it does not contain, to the effect that if the prosecutor conceives that he has a question of law to test on appeal, and suffers the prisoner to lie in jail under indictment three-quarters of a year, in an attempt to take an appeal which the law does not permit, then the prisoner shall suffer, without benefit of the guaranty of the constitution and statute.

The only ground upon which I can concur in the result of this decision is that the state was authorized to prosecute the appeal which it did prosecute upon the ruling of the trial court on the questions of law, whereby the conviction was annulled, and a new trial ordered. If that appeal was authorized by the statute, the order of the court granting a new trial solely on two questions of law did not take effect, if appeal was taken, until after review by the appellate court, and the prisoner's application for new trial was held in abeyance until the appellate court passed thereon. Nor was the conviction annulled until the appellate court passed upon the appeal, if the appeal was authorized. From that point of view, the prisoner was not wrongfully held in jail, but was held there as the legal effect and result of his own application, because he was not entitled to a new trial until the authority therefor had been fully adjudicated. I have no doubt the order of the learned trial court, in overruling the prisoner's application for discharge under this writ of habeas corpus, was made on the theory that the state was entitled to appeal, and have reviewed the questions of law upon which the order for new trial was granted. From that point of view, the ruling of the trial court was correct. When the trial court ruled upon this application for discharge, this court had not determined that such appeal was illegal, and should be therefore dismissed; but, when it

was found by this court that the state had no authority to attempt such an appeal, it virtually follows, as the law of the case, that the state had no authority, under the constitution and statute mentioned, to delay the trial of the prisoner, as has been done. The views of the majority of the court upon the motion to dismiss are contrary, however, to those I entertain, and, according to the views I entertain in that case, the prisoner would have no right to discharge under this proceeding. On that ground alone I can concur in the determination announced in this case.

STATE v. BLOOM.

(Supreme Court of Montana. Dec. 23, 1893.)

Appeal from district court, Park county; Frank Henry, Judge.

Charles Bloom was convicted of crime, and from an order granting a new trial the state appeals. Appeal dismissed.

H. J. Haskell, Atty. Gen., Allen R. Joy, and H. J. Miller, for the State. John T. Smith and E. C. Day, for respondent.

DE WITT, J. This is an appeal by the state from the order of the district court granting defendant's motion for a new trial. The defendant moved to dismiss the appeal on the same grounds as a similar motion was made in the case of *State v. Northrup*, 35 Pac. 228. On the authority of that case, it is ordered that the appeal herein be dismissed.

PEMBERTON, C. J., concurs.

HARWOOD, J., (dissenting.) I dissent on the grounds fully set forth in *State v. Northrup*, 35 Pac. 228.

PARROTT v. KANE et al.

(Supreme Court of Montana. Jan. 15, 1894.)

ACTION ON APPEAL BOND—DEFENSES.

1. The sureties on a stay bond on appeal cannot contend, in an action on the bond, that the judgment from which the appeal was taken had never been entered, and that consequently the bond was void, where both the bond itself and the record on the appeal recite such entry, and where the cause was heard on the appeal as if entry had been made, and for over two years the execution of the judgment was stayed by the appeal.

2. The sureties on a stay bond on appeal from a judgment providing for the restitution of certain premises are not relieved from liability by the fact that the district court stayed all proceedings under a writ of restitution that it had issued in pursuance of a remittitur from the supreme court affirming its judgment, and that such stay was still in force, where this stay was not had until after the commencement of the action on the appeal bond, and was not granted for any defect in the judgment.

Appeal from district court, Deer Lodge county; F. H. Woody, Judge.

Action by George Parrott against John Kane and others on an appeal bond. Judgment for plaintiff. Defendants appeal. Affirmed.

Cole & Whitehill, for appellants. Edward Scharnikow and Robinson & Stapleton, for respondent.

DE WITT, J. The plaintiff herein is the same person who was the plaintiff in the case of *Parrott v. Hungelburger*, reported in 9 Mont. 526, 24 Pac. 14. He brought this action against John Kane and another, who were sureties on the stay bond on the appeal of *Parrott v. Hungelburger*. See the report of that case for the facts therein. That action was in the nature of ejectment, judgment being for the plaintiff. The bond given by defendant thereon, on appeal, was that she would pay the value of the use and occupation of the premises, not exceeding \$500, pending the appeal. In this present action on that bond, plaintiff recovered judgment for \$500. The defendants appeal.

The complaint in this case sets up the fact of the judgment in the district court in *Parrott v. Hungelburger*, for the restitution and possession of the premises; also, the appeal by the defendant Hungelburger from the judgment, and the giving of the undertaking on appeal by the persons who are the defendants in the case at bar, (which undertaking is set out in full as an exhibit to the complaint.) The complaint further sets up the fact of the stay of proceedings by virtue of the undertaking, and the keeping of plaintiff out of possession of the premises; also, the fact of the affirmance of the judgment in *Parrott v. Hungelburger*, and the remittitur to the district court. The undertaking on appeal in *Parrott v. Hungelburger* recites as follows: "Whereas, the defendant in the above-entitled action is about to appeal to the supreme court of the territory of Montana from a judgment made and entered against defendant, and in favor of plaintiff, in said action, in said district court, on the 30th day of October, 1888, for the restitution of the premises described in the complaint, for damages, and for costs; and whereas, the appellant is desirous of staying the execution of said judgment so appealed from, in so far as it relates to the possession of the land and premises described in the complaint." The undertaking then goes on to bind the sureties for the value of the rents and profits. The defendants denied that in *Parrott v. Hungelburger* any judgment was ever given, rendered, or entered, in the district court, in favor of plaintiff in that case. This denial was by the district court stricken from the answer, the court holding that defendants could not be heard to make it. Defendants contend that this was error. We will examine this contention.

Hungelburger died pending the appeal of *Parrott v. Hungelburger* in this court, and Peter McDevitt, administrator, who is also a defendant in the present case, was substituted. It is not contended in argument by the appellants but the judgment in *Parrott v. Hungelburger* was rendered, nor, as it appears, could it be so contended. In the record of that case in this court, a copy of the judgment appears, formal in all respects, signed by the judge, and indorsed, "filed and

entered October 30, 1888." But appellants say that in fact the judgment was not entered, and, if not entered, the appeal was premature, and a void proceeding, and the undertaking given thereon was also void. Appellants urge that, therefore, on the trial below, they had the right to allege and prove that the judgment in *Parrott v. Hungelburger* had not been entered. A distinction has been made between "rendering" and "entering" a judgment. That distinction is pointed out by Mr. Justice Sawyer in *Gray v. Palmer*, 28 Cal. 416. Rendering judgment is the judicial act of the court. Entering it is the ministerial act of the clerk. A judgment is a judgment when it is rendered. It is the rendering which makes it a judgment. The entering makes a record of the judgment which the court has rendered. See, also, 1 Black, Judgm. § 106, and cases cited. As to the time for taking an appeal from a final judgment in an action commenced in the court in which the judgment is rendered, it is provided by our statute that it shall be taken "within one year after the entering of the judgment." Code Civil Proc. § 421. Construing the same language as is used in this section, the California supreme court has held that an appeal would, on motion, be dismissed, if taken before the entering of the judgment. *Thomas v. Anderson*, 55 Cal. 43; *McLaughlin v. Doherty*, 54 Cal. 519; *Haynes*, New Trials & App. p. 549. The appeals in these cases were held to be premature. There was no question but their subject-matter was within the jurisdiction of the court, but it was held that they had been brought into court before the time provided by law. For this reason they were dismissed upon a motion made when the case came to the supreme court. But there is a very different state of facts in the case at bar. No motion to dismiss the appeal was ever made in *Parrott v. Hungelburger*. In fact, the persons now complaining of the entertaining of the appeal in that case are the persons who gave the stay bond on that appeal, which was so entertained. The appellants in this case stand in this position: They executed and filed their undertaking in *Parrott v. Hungelburger*, in which they solemnly recited that judgment had been made and entered in that case. That judgment was brought before this court for review. The clerk certified that it was the judgment in that case, and, furthermore, certified that judgment had been entered. Counsel for both sides appeared, and argued the appeal twice in this court. Not a suggestion was made by any one that the judgment had not been entered, and it is conceded, all through the history of the case, that the judgment was in fact rendered. After the decision in this court, no motion for rehearing was made. The remittitur was sent to the district court, and filed therein. That remittitur was read in evidence on the trial of the case at bar. It was a record of this court, and became, by filing in the dis-

trict court July 22, 1890, a record of that court in that case. It appears thereby, and therefore was in evidence on the trial of this case, that the judgment in *Parrott v. Hungelburger* was entered October 30, 1888. The decision of this court, affirming the judgment, was upon May 4, 1890. The defendant in *Parrott v. Hungelburger* enjoyed the stay of proceedings from October 30, 1888, to November 28, 1890, at which time a writ of restitution was issued. The plaintiff in the case of *Parrott v. Hungelburger*, against whom the appeal was taken, never asked to have it dismissed, and the defendant, *Hungelburger*, not only did not ask to have it dismissed, but was the active agent in bringing the appeal to this court, and having it heard. The consideration for the undertaking was the stay of proceedings. That consideration was received. The stay was had. After all this history of the proceedings, and when the plaintiff, who had been kept out of the possession for over two years by virtue of the appeal and the stay bond, asks to be made good for his damages, he is met with the objection, for the first time, that the judgment had not been entered. We are of opinion that the objection, at this time, comes too late. The case of *Hill v. Burke*, 62 N. Y. 111, was an action upon an undertaking given upon appeal. The following remarks by the New York court of appeals, in deciding the case, are in point, both as to the facts and the conclusions: "The objections relate to the regularity of the appeal, and, I think, are not well founded. It appeared upon the trial, by the remittitur of the court of appeals, which was introduced in evidence, and it is stated as a fact in the case, that the remittitur showed, among other things, that an appeal was taken from the judgment of the general term of the supreme court, referred to in said undertaking, to the court of appeals, and that said judgment was duly affirmed by the court of appeals, with costs, and the proceedings duly remitted to the court below. This was, I think, conclusive evidence that an appeal had been taken by the filing of the notice with the undertaking, the service of the same, and a copy of the undertaking, as the Code requires; and it was not necessary to establish, by other and independent evidence, that these preliminary steps, which are required to perfect the appeal, had been taken. It may also be remarked that the complaint alleged that the judgment appealed from was, by the court of appeals, duly affirmed, with \$132.21 costs; and upon the trial it was admitted by the defendant's counsel that the judgments referred to in the complaint were duly recovered, as therein stated. But even if the provisions of the Code had not been complied with, in the particulars named, it was, at most, an irregularity; and the submission of the cause to the court of appeals by the respondent without any objection to the jurisdiction, must be regarded as a waiver of the

filing and service, and obviate the alleged defect." See, also, *Murdock v. Brooks*, 38 Cal. 600; *Hathaway v. Davis*, 33 Cal. 161; *Pierce v. Whiting*, 63 Cal. 533.

Another point of appellants must be noticed. They contend that plaintiff has not suffered any damages, caused by a stay by virtue of the undertaking, but that the damages occurred by reason of an order of the district court staying execution, which order is still in force. In regard to that order, and the time when it was made, we observe the following facts, as they appear in the record: The remittitur from this court in *Parrott v. Hungelburger* was filed in the district court July 22, 1890. The following November 28th, a writ of restitution was issued. A year later, December 3, 1891, the writ of restitution was, on motion of defendant, recalled and quashed, and all proceedings were stayed. This action now before us on appeal was commenced March 27, 1891,—prior, it is observed, to the quashing of the writ of restitution,—but when the case was tried the stay of December 3, 1891, was still in force. As to this, the appellants urge, and state in their brief, "So long as there is an order of the court in force, staying execution on judgment against the party who had appealed from a lower court, the sureties on his appeal bond cannot be sued." Appellants, in this connection, cite *Parnell v. Hancock*, 48 Cal. 452; *Sharon v. Sharon*, 84 Cal. 434, 23 Pac. 1102; *Bank v. Rogers*, 13 Minn. 407, (Gil. 376.) It is said in *Parnell v. Hancock*, "Before the defendants, as sureties of Porter, can be sued, Parnell, their principal, must have himself become absolutely liable to pay the judgment of the county court." But in the case at bar the defendant, when this action was commenced, was, and still is, absolutely liable on the judgment in *Parrott v. Hungelburger*. Her liability to restore possession of the premises was adjudged by the district court, and was affirmed by the supreme court, and the remittitur was sent down. The judgment is final and conclusive. It is not suggested that it can ever again be questioned. The liability of defendant in that case is settled, and nothing remains but to enforce the judgment. Such were the facts and conditions when this action was commenced. The keeping of plaintiff out of possession, and absorbing his rents and profits, and this wrongfully, were all complete facts at the commencement of this action. But pending this action, and before its trial in the district court, that court stayed the writ of restitution, but not on any grounds that affected the validity or integrity of the judgment, or the rights of plaintiff, or the liabilities of defendant thereunder. The liabilities of defendant in this case had all accrued, and were completed, before the action of the district court in recalling the writ of restitution. We are therefore of opinion that the damages to plaintiff were caused by the stay of execution worked

by the undertaking. The judgment is affirmed, with remittitur forthwith.

PEMBERTON, C. J., and HARWOOD, J., concur.

JAMESON et al. v. COLDWELL.

(Supreme Court of Oregon. Jan. 8, 1894.)

SALES TO CORPORATIONS—CONTRACTS BY OFFICERS—COMMISSIONS FOR OFFICERS—SECRET ARRANGEMENT—RATIFICATION.

1. Where the officers of a corporation, on its behalf, make a contract for the purchase of lumber, with a secret arrangement with the seller for a commission thereon for themselves, the corporation, on learning of such secret arrangement, may rescind the contract of purchase, and, having done so, the officers cannot recover the commissions.

2. The fact that the corporation, after rescinding the contract of purchase, bought the lumber at a lower figure, does not constitute a ratification of the original contract of purchase, rendering the seller liable to the officers for the commissions.

3. Nor does the fact that the seller, in an action against him by the officers on the agreement for commissions, sets up a counterclaim for damages by reason of the officers' unauthorized execution of the contract for the corporation, constitute a ratification of the contract by the seller, making him liable for the commissions.

Appeal from circuit court, Multnomah county; H. Hurley, Judge.

Action by H. M. Jameson and A. F. Johns against George L. Coldwell for commissions. Judgment for defendant. Plaintiffs appeal. Affirmed.

J. F. & E. B. Watson, for appellants. J. T. McKee and Stott, Boise & Stout, for respondent.

MOORE, J. The facts in this case are identical with those in the former appeal. (*Jameson v. Coldwell*, 23 Or. 144, 31 Pac. 279,) and therefore need not be detailed here. When the cause was remanded, the defendant, by leave of court, amended his answer by adding thereto an allegation to the effect that the plaintiffs, as president and secretary of the Western Lumber Company, were on March 1, 1888, acting as its sole agents and trustees in negotiating and consummating the purchase of lumber for it; and that they entered into a contract with the defendant whereby they were, without the knowledge or consent of the corporation, to receive a commission from the defendant for sales of lumber from him to it; and that, as soon as the corporation discovered that plaintiffs were to receive said commission, it repudiated the contract, and refused to receive any lumber under it, and never at any time consented to or ratified the said agreement. The cause was tried, by consent of the parties, without a jury, and the findings of fact and conclusions of law being for the defendant upon all the issues, except his counterclaims, judgment was rendered for

his costs and disbursements against the plaintiffs, from which they appeal.

The appellants requested the court to find and declare the facts upon the following issues: "(1) Whether any negotiations were had between the Western Lumber Company, or any person claiming or assuming to act for or to represent it, as an officer or agent thereof, in relation to the purchase of the lumber involved in this action, after its articles of incorporation were signed, on March 1, 1888, and before the written agreement for said purchase between said company and said George L. Coldwell, of the same date, was executed. (2) Were the terms of said purchase, or any of them, as they appear in said written agreement, finally adjusted and agreed upon in the course of said negotiations? (3) Did Andrew Nicholls, as general manager of said company, act for or represent said company during said negotiations? (4) Did the plaintiffs, H. M. Jameson and A. F. Johns, or either of them, act for or represent, or assume to act for or represent, said company during said negotiations, or any of them, as officers or agents of said company? (5) Did the plaintiffs, or either of them, take any part in making said purchase, or in arranging or agreeing upon its terms, as officers of said company or otherwise, except to introduce said George L. Coldwell to said Andrew Nicholls, as general manager of said company, after its articles of incorporation were signed, until said agreement had been drawn up by said Andrew Nicholls, and they requested by him to execute the same in their official capacity on behalf of said company?" This request the appellants contend the court denied, and made no findings upon these issues, which is assigned as error in the notice of appeal. Their theory is that Andrew Nicholls, the general manager of the corporation, negotiated the terms of the contract with the defendant, and the only part they took in the transaction was to introduce the defendant to him. A broker who merely brings the parties together, and has no hand in the negotiations between them, they making their own bargain without his aid or interference, can legally receive a compensation from both, though each was ignorant of his employment by the other. *Ranney v. Donovan*, 78 Mich. 318, 44 N. W. 276; *Rupp v. Sampson*, 16 Gray, 398; *Montross v. Eddy*, 94 Mich. 100, 53 N. W. 916. The pleadings present these issues, and the bill of exceptions shows that the plaintiffs testified that the general manager was directed to make this contract; that he drew it up, and they, at his request, signed it, but that they had nothing to do with the negotiations. It also shows, by the deposition of Andrew Nicholls, that the plaintiffs at that time were the only persons who represented the company. The law is well settled in this state that, in an action tried by the court without the intervention of a jury, all the material issues must be passed upon. *Drainage Dist. v.*

Crow, 20 Or. 535, 26 Pac. 845; *Pengra v. Wheeler*, (Or.) 34 Pac. 354.

The findings of the court applicable to plaintiffs' request are as follows: "(2) That pretending to act as such officers of said company and agents thereof, and for and on its behalf, they made and entered into the agreement set out in the answer filed herein, and on pages two and three of the amended complaint, with the defendant, on the 1st day of March, 1888, by which the defendant agreed to sell and deliver to said company three million six hundred thousand feet, more or less, of Oregon pine and spruce lumber, to be delivered on the lighters at the port of San Pedro, California, and for which the said company agreed to pay the said Coldwell the price as per schedule of the Pacific Pine Lumber Company, of San Francisco, California, with seven and one-half per cent. added." "(10) That the articles of incorporation of the said Western Lumber Company were drawn up and signed by the incorporators thereof on the 1st day of March, 1888, a few hours before the written agreement mentioned in the complaint. (11) That Andrew Nicholls, the general manager of said company, wrote out the contract between said company and the defendant, and had full knowledge of its terms, but neither said Nicholls nor the said company, except the plaintiffs, as president and secretary thereof, had any knowledge of the agreement between the plaintiffs and defendant for the allowance of said commission to the plaintiffs for the sale of said lumber to said company." These findings show that the contract was executed a few hours after said articles of incorporation were signed; that the plaintiffs assumed to act for and represent said corporation, as officers and agents thereof, in relation to the purchase of said lumber; and it must be presumed that the negotiations were not completed until the contract was executed, and that the terms of purchase, as they appear in said written agreement, were fully adjusted and agreed upon in the course of said negotiations, and hence it was unnecessary to find upon plaintiffs' first and second requests. The court finds that the plaintiffs, as president and secretary of said corporation, and agents thereof, and for and on its behalf, not only entered into, but made, the agreement with the defendant a few hours after the articles of incorporation were signed; and that at that time they represented the company, and it was their duty, as such agents and trustees, to promote its general welfare and protect its interests; and hence it was unnecessary to find upon plaintiffs' third and fourth requests. If the plaintiffs, as such agents, made the contract with the defendant, they necessarily must have taken part in negotiating with him for the purchase of the lumber and in agreeing upon the terms of payment, and therefore the court infer-

tially finds that the plaintiffs did more than merely introduce the defendant to the general manager, and this precludes the necessity of a finding upon the fifth request. The findings cover all the issues made by the pleadings, and show that the plaintiffs were not merely brokers who introduced the parties, but that they, as its officers and agents, took part in the negotiations, and made the contract, at the same time having a secret arrangement with the defendant for commissions. It is safe to presume that if the defendant could afford to sell the quantity of lumber he agreed to deliver, and pay the plaintiffs a commission of $2\frac{1}{2}$ per cent. of all moneys received on account thereof, he could equally have afforded to remit that amount to the corporation. It was the duty of the plaintiffs to negotiate for the purchase of lumber for the corporation upon the best possible terms, and any advantage to be obtained in consequence of their efforts should inure to its benefit; and hence it follows that these commissions were, in equity and good morals, the property of the corporation. They could doubtless have been assigned to the plaintiffs by the corporation, or if it had, at the time the contract was executed, been aware of the agreement, and assented thereto, it would have amounted to a voluntary donation to them. The amended answer alleges that, aside from the president and secretary, the corporation at that time had no knowledge of the secret agreement between the plaintiffs and defendant for commissions, and the court so finds upon this issue. The plaintiffs then could have no moral right to a sum of money that was due the corporation, and as they were its agents and trustees, whose duty it was to advance its interests, and by their endeavors make the capital stock pay a dividend, they can have no legal right to these commissions. To permit the officers of a corporation to appropriate its property without rendering a just equivalent is a fraud upon its creditors and stockholders, for whom the funds, property, and franchises are held in trust. The case of *Atlee v. Fink*, 42 Amer. Rep. 385, is very similar to the one at bar. In that case the defendant was employed upon a salary to superintend the construction of buildings for his employers, who would pay no bills for labor or lumber until certified by defendant to be correct. The defendant entered into a secret agreement by which he was to receive a commission of $2\frac{1}{2}$ per cent. on lumber sold by plaintiffs to defendant's employers upon his recommendation. In an action to recover the commission it was held that the contract was void. *Henry, J.*, said: "One employed by another to transact business for him has no right to enter into a contract with a third person which would place it in his power to wrong his principal in the transaction of the business of the latter, and which would tempt a bad man to act in bad faith toward his employer.

The interests of the defendant's employers, and those of plaintiffs, as buyers and sellers, were antagonistic, and defendant could not serve two masters in a matter in which there was such a conflict in their interests." It was also held, in the same case, that it was wholly immaterial whether the agreement with the defendant was ratified or not by the plaintiffs, and that the ratification of the contract would not have eliminated the element which rendered it invalid. It would doubtless be presumed that *Andrew Nicholls*, the general manager, who wrote the contract and was present when it was executed, represented the corporation, (*Sacalaris v. Railroad Co.*, 18 Nev. 155, 1 Pac. 835;) but this presumption is overcome by the finding of the court that the plaintiffs made and entered into the contract with the defendant. The plaintiffs, as agents and trustees of the corporation, without its consent, could not make a contract on its behalf with the defendant, in which they had a private interest. *Mor. Priv. Corp.* § 517. They could not, therefore, with respect to these commissions, act for themselves and for the corporation, nor occupy a position in conflict with its interests. *Wardell v. Railroad Co.*, 103 U. S. 651. Such a contract is not necessarily void *per se* in the sense that it is incapable of ratification, but it may be avoided by the corporation within a reasonable time. *Greenh. Pub. Pol.* 296. This it did as soon as the secret agreement between the plaintiffs and defendant became known, and refused to accept any lumber from the defendant under the contract.

The appellants contend that the modification by which the $7\frac{1}{2}$ per cent. above the said schedule price was remitted amounted to a ratification of the original contract, and made the defendant liable for their commissions. Ratification is the approval by the principal of the unauthorized act of an agent. If the agent carry out the instructions of the principal in the execution of a contract on his behalf, the minds of the principal and of the other contracting party have met and agreed upon the terms, and the contract is of binding force from the date of its execution. If, however, the agent make a contract for his principal without authority therefor, it cannot bind the latter, because it is not his act, and the minds of the parties have never met or agreed upon the terms. If the principal ratify the act of the agent, the contract becomes valid, and in all things relates back to the date of its execution. There are certain acts on the part of the principal which are construed by the courts as a ratification. Thus, if he, with full knowledge of all the terms of a contract made by his agent, accept any portion of the fruits resulting therefrom, he is held to have accepted and ratified the whole. *Whart. Ag.* § 72. The corporation did not accept any fruits of the transaction, but repudiated the whole contract within a

reasonable time, as it had a right to do under the circumstances, and then made another for itself; and the fact that it adopted some of the language of the old contract made it no less a new one. The defendant not having received or accepted any of the fruits of the old contract, and the $7\frac{1}{2}$ per cent. above the said schedule price, which was the consideration for the agreement to pay the commissions, having been remitted by the new contract, there was no ratification of the old one, nor any part thereof. The appellants also contend that the defendant ratified the contract by his counterclaim for damages. Mr. Wharton, in his work on Agency, (section 90,) states the accepted law on that subject to be that if the principal elect to sue the agent for the proceeds, and not the damages caused by the unauthorized act, he necessarily ratifies the contract. When an agent, without authority, sells the property of his principal, the latter may waive the tort, and bring an action for the proceeds, and in doing so he ratifies the act of the agent; but bringing an action against the agent for the damages caused by the unauthorized act can never amount to a ratification. The contract, at its inception, having been unlawful because of the secret agreement, and not having been ratified, it follows that the judgment must be affirmed.

KNOLL v. KIESSLING et ux.¹

(Supreme Court of Oregon. March Term, 1886.)
HUSBAND AND WIFE—MORTGAGE OF WIFE'S SEPARATE PROPERTY—EFFECT.

The wife's covenants, where she binds her property as security for her husband's debts, should not be construed to create a personal liability beyond the property mortgaged, unless she is a party to the contract of indebtedness.

Appeal from circuit court, Multnomah county.

Action by A. R. Knoll against H. H. Kiessling and Emeline W. Kiessling, his wife, to foreclose a mortgage of land executed by defendants to Hobart, Wood & Co., and assigned by them to plaintiff. There was a decree for plaintiff, and defendants appeal. Modified.

The complaint alleges the partnership of Hobart, Wood & Co., the marital relation of defendants, the execution and delivery of a promissory note by the husband, H. H. Kiessling, and the execution and delivery by both husband and wife of a mortgage on her property to secure this note. The mortgage was in the usual form, and contained this covenant: "And the said H. H. Kiessling and Emeline W. Kiessling, heirs, executors, and administrators, doth covenant and agree to pay unto the said parties of the second part, their executors, administrators, or as-

signs, the said sum of money as above mentioned." The circuit court entered a decree foreclosing the mortgage, and giving judgment against both H. H. and Emeline W. Kiessling for any deficiency remaining after applying the proceeds of the sale of the mortgaged property to the payment of the judgment.

WALDO, C. J. The objection to the admission of the note in evidence, now made for the first time, that the signatures of the maker and of the indorsers, Hobart, Wood & Co., were not proven, not having been made when the note was offered in evidence, was waived. The evidence to impeach the mortgage on the ground of fraud in obtaining it, in this, that the mortgage did not contain important clauses of the agreement which Mrs. Kiessling supposed were included in it, is insufficient for the purpose. It is testimony which contradicts the contract. A clear case must be made out to produce that result. If the evidence in this case were sufficient for that purpose, no written contract would be safe. It is impossible, with any due regard to the safety of business transactions, to act upon the testimony in this case, and relieve Mrs. Kiessling from her solemn written obligation. It is extremely doubtful if the alleged representations of Saufly amount to an estoppel, were we to take the ground that they were actually made. Bigelow, Estop. 476. But we place our decree expressly upon the ground that the testimony is insufficient to impeach the written instrument. There does not seem, however, anything to bind Mrs. Kiessling to a personal liability beyond the value of her property mortgaged, except the bare covenants in the mortgage. A wife's covenants, where she binds her property as security for her husband's debts, should not be construed to create a personal liability beyond the value of her property mortgaged, unless she be a party to the contract of indebtedness, which in this case she is not. To this extent, therefore, the decree should be modified; but, as this point was not a ground of contention below between the parties, it seems proper that the costs should follow the decree. With this exception, the decree will be affirmed.

NOBLITT v. BEEBE.¹

(Supreme Court of Oregon. Oct., 1882.)
DEEDS—CONVEYANCE TO HUSBAND AND WIFE—ESTATE BY ENTIRETY.

In Oregon, a conveyance to a husband and wife creates an estate by entirety.

Appeal from circuit court, Clackamas county.

Action by C. W. Noblitt against Charlotte

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Beebe to quiet title to land. There was a decree for plaintiff, and defendant appeals. Affirmed.

In 1866 Adams and his wife conveyed the premises to Austin S. Beebe and Susan, his wife. In 1868 Susan Beebe died intestate, leaving two children, Willis and Charlotte. In 1875 Willis died unmarried and intestate, and in 1877 Austin S. Beebe died intestate, leaving surviving him the said Charlotte. Thereafter, an administrator was appointed for the estate of Austin S. Beebe, and this administrator sold to the respondent, Noblitt, whatever right said Austin S. Beebe had in the disputed premises. Noblitt claims that Beebe and wife had an estate by entirety, that on the death of Susan Beebe her husband became the owner of the entire estate, and that plaintiff bought all this estate from the administrator, while Charlotte Beebe claims that she is the sole heir of her mother, and as such is the owner of an undivided half interest in the land, as the deed to Beebe and wife created a tenancy in common.

Johnson, McCown & Macrum and Northup & Gilbert, for appellant, Beebe. Eastham & McBride, for respondent, Noblitt.

WALDO, J. In 1866 Adams conveyed a tract of land in Clackamas county to Austin Beebe and Susan Beebe, husband and wife, in fee. Held, that A. B. and S. B. took an estate in entirety. *Fisher v. Provin*, 25 Mich. 347; *Den v. Hardenburgh*, 10 N. J. Law. 42; *Marburg v. Cole*, 49 Md. 402; *Meeker v. Wright*, 78 N. Y. 273; 1 Bish. Mar. Wom. § 615; *Goelet v. Gori*, 31 Barb. 314; *Hemingway v. Scales*, 42 Miss. 1.

HOUGH v. HOUGH.

(Supreme Court of Oregon. Jan. 8, 1894.)

ASSUMPSIT—COMPLAINT—DUPLICITY

A complaint in assumpsit which alleges that defendant has failed to keep a promise to pay a specified sum for money paid, goods furnished, and money loaned is not objectionable for duplicity, since the several transactions constitute but one cause of action.

Appeal from circuit court, Crook county; W. L. Bradshaw, Judge.

Assumpsit by A. W. Hough against A. Hough. From an order denying a motion to strike out the complaint, defendant appeals. Affirmed.

J. F. Moore, for appellant. George W. Barnes, for respondent.

LORD, C. J. This is an action to recover money. The complaint alleges, in substance, that the plaintiff, at the special instance and request of the defendant, between the dates specified, in Crook county, Or., "loaned the defendant money, furnished him goods, wares, and merchandise, paid out money at his request, etc., to the full aggregate amount of \$748.58;" that the "defendant agreed and

promised to pay the plaintiff therefor the said sum of \$748.58; that he has not paid the same, or any part thereof, except the sum of \$400; and that there remains yet wholly unpaid a balance for \$308.58; and that the same is now due," etc. The defendant interposed a motion to strike out the complaint, alleging, as the ground therefor, "that several causes of action are improperly united in one count," which motion was overruled, and, the defendant refusing to plead further, the court rendered judgment for the plaintiff for the amount claimed, from which judgment the defendant has brought this appeal. If the several facts alleged constitute but one cause of action, the complaint is not vulnerable to the objection raised by the motion; but, if they are separate transactions or demands, they should be separately stated, as distinct causes of action. A complaint which fails to keep separate the different grounds of action, but confuses and blends them in one statement, is open to the objection of duplicity. The vice of duplicity in pleading consists in the union of more than one cause of action in one count in a writ, or more than one defense in one plea, or more than a single breach in a replication, and not in the union of several facts, constituting together but one cause of action or one defense or one breach. *Jackson v. Rundlet*, 1 Woodb. & M. 381; *Harker v. Brink*, 24 N. J. Law, 333; *Patcher v. Sprague*, 2 Johns. 462. A complaint, therefore, may contain in a single statement numerous matters, provided they are covered by one contract, or constitute, when taken together, but a single cause of action. The complaint, in effect, states that the defendant, in consideration of the transactions alleged, promised to pay plaintiff the full sum specified, and that he had not paid the same, except a certain sum named, and that there is a balance now due and unpaid for which judgment is asked. The cause of action is based on the promise to pay for the goods furnished, money loaned and advanced, a specified sum, and the failure to keep such promise. The union of these several transactions is the foundation of the promise; hence they constitute together, not several, but one, cause of action. The fact that each different transaction might be the ground of a distinct cause of action does not affect the principle involved when such transactions are united under one promise. "Where there is," said Strong, J., "an account for goods sold or labor performed, where money has been lent to or paid for the use of a party at different times, or several items of claim spring in any way from contract, whether one only or separate rights of action exist, will in each case depend upon whether the case is covered by one or by separate contracts. The several items may have their origin in one contract, as on an agreement to sell and deliver goods or perform work or advance money; and usually, in the case of a running account, it may be fairly implied that it is in pursuance

of an agreement that an account may be opened and continued either for a definite period or at the pleasure of one or both of the parties." *Secor v. Sturgis*, 16 N. Y. 558. The complaint, it is admitted, is not well drawn, but we think it states a cause of action. If the defendant desired, he could have required an itemized account, or moved to have the complaint made more definite and certain, if this was essential to his defense, or necessary to more fully disclose the nature of the transactions. He did not see fit to pursue this course, but attacked it in its present form, embracing, as it does, all the items as an entire demand, or uniting the transactions under his promise and agreement to pay the sum specified as a single cause of action. Such being the case, we do not see how the ruling of the court affected any substantial right of the defendant. It results that the judgment must be affirmed.

CRAFT v. NORTHERN PAC. R. CO.

(Supreme Court of Oregon. Jan. 8, 1894.)

DEATH BY WRONGFUL ACT—ACTION BY PARENT—WHEN LIES.

Hill's Code, § 34, giving the parent or guardian a right of action for the injury or death of a child, applies only where the child is a minor. *Putman v. Pacific Co.*, 27 Pac. 1033, 21 Or. 244, followed.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by Julia Craft against the Northern Pacific Railroad Company to recover for the death of Benjamin P. Craft, plaintiff's son. There was judgment for defendant, on a general demurrer to the complaint, and plaintiff appeals. Affirmed.

The action was brought under Hill's Code, § 34, which reads as follows: "A father, or in case of the death or desertion of his family, the mother, may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward." The complaint alleged negligence on the part of defendant in the equipment and management of the switch engine which ran over and killed decedent, the father's desertion of his family, and plaintiff's dependence on decedent for her necessary support. It also alleged that decedent was unmarried, was a member of plaintiff's family, and that his age was 21 years and 8 months.

Watson, Beekman & Watson, for appellant. Joseph Simon, for respondent.

PER CURIAM. As this case involves the same question decided in *Putman v. Pacific Co.*, 21 Or. 244, 27 Pac. 1033, we are of the opinion that the right of action given by section 34, Hill's Code, to a parent or guardian for the injury or death of a child, is confined to minority, and that the view ex-

pressed on rehearing in that case should control and be decisive of the present case. Judgment affirmed.

OSMUN v. WINTERS.

(Supreme Court of Oregon. Jan. 8, 1894.)

BREACH OF MARRIAGE PROMISE—DAMAGES—Seduction—EVIDENCE OF ENGAGEMENT—REPUTATION FOR TRUTH—EVIDENCE.

1. In an action for breach of promise, plaintiff may allege and prove, as an element of damages, seduction under promise of marriage, though a statute gives a woman a right of action for her own seduction.

2. It is for the jury to say whether they will consider the fact of seduction in estimating damages in an action for breach of promise, and it is error to instruct that they must consider it.

3. Where defendant's offer of marriage is denied by him, plaintiff's declarations, made in the absence of defendant, that she was engaged to him, are not admissible.

4. Evidence to show plaintiff's reputation for truth is not admissible where such reputation has not been attacked.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by May Osmun against H. D. Winters. Judgment for plaintiff. Defendant appeals. Reversed.

Watson, Beekman & Watson, for appellant. Flegel & Stanislawsky, P. J. Bannon, and A. F. Sears, Jr., for respondent.

BEAN, J. This appeal is brought by the defendant to reverse a judgment recovered against him in an action for a breach of promise of marriage. The complaint avers a mutual promise of marriage between the plaintiff and defendant, made on or about the 17th day of January, 1892, to be performed on or about the 2d day of May, 1892, and a postponement thereof at the request of the defendant until the 2d day of August following; and "that on or about the 10th day of April, 1892, in the city of Portland, county of Multnomah, and state of Oregon, the defendant invited the plaintiff into his parlor in defendant's building, situated on the northeast corner of Fifth and Davis streets, in said city, county, and state, and while there, under promise of marriage, the defendant took improper liberties, seduced, and had carnal intercourse with said plaintiff, and thereafter, by repeated promises of marriage, induced plaintiff to continue said sexual intercourse with said defendant, and to live with him, and by reason thereof this plaintiff has suffered great mental anguish, her health was greatly impaired, and her character and reputation ruined;" and further avers a breach of the contract by the defendant on or about the 14th of August, 1892. The answer contains a specific denial of all the allegations of the complaint, and for a separate defense avers that plaintiff was an unchaste, lewd, and lascivious woman, specifying certain acts of lewdness on

her part, all of which were unknown to the defendant at the time the several alleged promises of marriage were entered into. The trial resulted in a verdict and judgment in favor of the plaintiff for the sum of \$10,500, from which defendant brings this appeal, alleging error in the admission of testimony and in the instructions to the jury.

The first question arises upon the following instruction: "This is an action for a breach of promise of marriage, and although there has been a good deal of evidence introduced here bearing upon the question of seduction, which is set up in the pleadings in the case, you must not consider seduction as the principal element in the case. All that can be claimed for or gained by the charge of seduction in these pleadings is an aggravation of damages, and you have nothing to do with that question unless you first find that there was a promise of marriage, and that the promise was broken. The defendant denies that there was any seduction. The plaintiff alleges that there was a seduction. And before you can make any use of that matter of seduction in determining the case, you must find the fact that there was a seduction substantially as alleged. And then, if you find from the whole matter—the whole case—that the promise of marriage was made, and justification for breaking off the promise has not been proven, and that there was seduction, then you must consider the seduction as well as the allegations of justification for refusing to carry out the promise of marriage, in assessing the damages." To all that portion of this instruction relating to seduction, and directing the jury to consider the same as an element of damages, the defendant excepted, and now assigns the same as error. Several objections are made to this instruction, and of these in their order.

First. It is contended that there is no sufficient allegation in the complaint of seduction under a promise of marriage; but in this contention we are unable to agree with counsel. It seems to us that by a fair construction of the complaint it is averred that the alleged seduction was under a promise of marriage.

It is next contended that seduction cannot be alleged and proved as an element of damages in an action for a breach of a promise of marriage. Upon this question there is some slight conflict in the books, but the decided current of authority, both in this country and England, is that, while damages for seduction, as a distinct ground of action, cannot be added to the damages which plaintiff is entitled to recover for a breach of the promise to marry, it may, if alleged, be shown in aggravation of damages, on the ground that compensation for the injury she has received by the breach of the contract cannot be justly estimated without taking into consideration the increased humiliation and distress to which she has been exposed by the defendant's conduct. The action is nominally for a breach of contract, but the

damages are awarded upon principles more commonly applicable to actions of tort; and, if seduction is brought about by a reliance upon the contract, it may in no very indirect way be said to be a breach of its implied conditions. "Such an engagement," says Mr. Justice Campbell, "brings the parties necessarily into very intimate and confidential relations, and the advantage taken of those relations by the seducer is as plain a breach of trust in all its essential features as any advantage gained by a trustee or guardian or confidential adviser, who cheats a confiding ward or beneficiary or client into a losing bargain. It only differs from ordinary breaches of trust in being more heinous. A subsequent refusal to marry the person whose confidence has been thus deceived cannot fail to be aggravated in fact by the seduction. The contract is twice broken. The result of an ordinary breach of promise is the loss of the alliance, and the mortification and pain consequent on the rejection. But in case of seduction there is added to this a loss of character and social position, and not only deeper shame and sorrow, but a darkened future. All of these spring directly and naturally from the broken obligation. The contract involves protection and respect, as well as affection, and is violated by the seduction as it is by the refusal to marry. A subsequent marriage condones the first wrong, but a refusal to marry makes the seduction a very grievous element of injury, that cannot be lost sight of in any view of justice." *Sheahan v. Barry*, 27 Mich. 219. The common-law practice is substantially uniform in admitting such evidence, and is, we think, based upon sound principles. 3 *Suth. Dam.* 316; *Cooley, Torts*, 510; 1 *Bish. Mar. & Div.* § 232; *Hattin v. Chapman*, 46 Conn. 607; *Sauer v. Schulenberg*, 33 Md. 288; *Kniffen v. McConnell*, 30 N. Y. 285; *Sherman v. Rawson*, 102 Mass. 395; *Kelley v. Riley*, 106 Mass. 339; note to *Weaver v. Bachert*, 44 Amer. Dec. 178; *Berry v. Da Costa*, L. R. 1 Q. B. 331; *Millington v. Loring*, 6 Q. B. Div. 190. But it is claimed that, our statute (section 36) having given a woman over 21 years of age a right of action for her own seduction, the reason of the old rule has ceased, and it ought not to prevail in this state; and this would seem to be the opinion of Mr. Parsons, for he says: "By the strict rules of the law they [damages for seduction] should, we think, be excluded where the plaintiff was in actual or constructive service, or lived in a state in which the statute law gave her an action for seduction, and not otherwise; and the weight of authority seems to be so." But he seems to think that, while the strict rules of law would exclude the evidence as irrelevant, it would be impracticable to keep the fact of seduction from the jury without excluding other evidence to which the plaintiff would be entitled; and, when once admitted, the jury would probably regard it

in estimating damages, and the courts would seldom disturb the verdict on that ground. 2 Para. Cont. 70. No authorities are cited by Mr. Parsons in support of his view, and we believe none can be found in the adjudged cases. On the contrary, where the question has arisen in states giving the woman a right to maintain an action for her own seduction, it has uniformly been held that the rule of the common law is unchanged by the statute, and that seduction may be alleged and proved in an action for breach of a promise of marriage. Thus, in *Michigan*, the statute authorizes an action for seduction to be brought by any relative of full age, who may be selected by the woman; and in *Sheahan v. Barry*, supra, Mr. Justice Campbell, answering a contention similar to the one made in this case, and assuming that the damages recovered in an action brought under the statute belong to the woman, says: "There are two considerations in the way of holding the rule changed by our statute. If it gives a remedy to the woman herself, it should, on common law principles, be regarded as a cumulative remedy,—so far as the seduction under promise of marriage is concerned,—rather than as superseding the old one. And it is better for all parties, and more consonant with public policy, that, where justice can be fully accomplished in one suit, no one should be driven to begin more than one; and where this rule is respected there can be no danger of injustice by a second prosecution. The maxim that no one shall be twice vexed for the same cause of action will always prevent any plaintiff from suing twice for the same damages. If they can be recovered in this action under the pleadings, a recovery in this will necessarily be a bar to any future action. This subject was recently considered in the case of *Leonard v. Pope*, 27 Mich. 145." So, also, in *Haymond v. Saucer*, 84 Ind. 3, it was held, under a statute like ours, that seduction could be considered as an element of damages in an action for a breach of promise, Mr. Justice Woods saying, (page 11:) "The fact that seduction accomplished under some circumstances is a crime is no reason why it may not be the subject of a civil action; and if, instead of making a separate cause of action, the injured party chooses to plead it as a cause for aggravation of damages in a suit for a breach of the promise of marriage under which it was accomplished, there is no good reason why it may not be done." Several of the other states contain similar statutory provisions, but we have not been able to find a single case in which it has been held that evidence of seduction in an action for breach of promise of marriage is not admissible on that ground. The rule allowing seduction to be alleged and proven in such an action is but a rule of damages based upon the theory that a plaintiff is entitled to compensation for mental suffering, injury to

reputation, loss of virtue, and the shame and disgrace caused by defendant's conduct, and ought not to be varied because of the possibility of another action. And from the *Michigan* and *Indiana* cases it would seem that if a plaintiff chooses to allege and prove seduction in an action for breach of promise in aggravation of damages the judgment in such action would be a bar to a further action by the woman under the statute for her own seduction.

It is also claimed that there is no evidence in this case tending to show seduction. The plaintiff testified that the defendant had illicit intercourse with her on or about April 10, 1892, and, from her statement of the circumstances under which it occurred, we think the jury would have been justified in inferring that she was not an unwilling participant, although she says it was accomplished by force, and without her consent. This was a question for the jury, and there was evidence sufficient to justify its submission to them.

It is also claimed that the court erred in instructing the jury that if they found from the evidence that the promise of marriage was made, and justification for breaking off the promise had not been proven, and that there was seduction, then they must consider the seduction in assessing the damages. In actions of this character the question of damages belongs exclusively to the jury, subject, of course, to the power of the court to set aside the verdict if against the evidence, or when excessive damages are allowed. There are no hard or fast rules by which the amount can be determined. Each case must be dealt with according to its own particular circumstances. While seduction under a promise of marriage may be alleged and proven in aggravation of damages, yet it is for the jury alone to determine what weight, if any, is to be given to such testimony, and what effect it will have in determining the amount of damages to which plaintiff is entitled. That portion of the instruction complained of deprived the jury, in case they found the facts referred to, of all discretion upon the question as to whether they should consider the seduction in assessing damages. They were told that in that event they must so consider it. Such we do not understand to be the law. In an ordinary action for a breach of contract the amount recovered is limited to the actual damages caused by the breach. To this rule there is an exception in an action for breach of promise of marriage, because, although founded on contract, it is regarded as being somewhat in the nature of an action founded upon tort; but the cases sustaining the exception go no further than to hold that it should be left to the good judgment and discretion of the jury whether or not there should be added to the damages naturally resulting from a breach of the contract anything on account of seduction accomplished

under the promise. In the case of *Jacobs v. Sire*, (Super. N. Y.) 23 N. Y. Supp. 1063, in an action for a breach of promise of marriage, the court instructed the jury that if they believed from the testimony the defendant had purposely and maliciously wronged the plaintiff, they were bound to give what are called "exemplary damages;" but the court held this instruction error, upon the ground that it deprived the jury of all discretion upon the question whether exemplary damages should or should not be given. The court said: "Sedgwick and other text writers on damages agree upon the proposition that, where there is evidence of circumstances sufficient to uphold a verdict for exemplary damages, the question whether they shall be given or not is one for the jury; and it is erroneous to instruct the jury to give exemplary damages, for the plaintiff can never recover them as a matter of law." So, in this case, we think it was error for the court to instruct the jury that if they found a promise was made, and there was no justification for the breach, and that seduction occurred, they must consider the seduction as an element in estimating the damages; and under the evidence we cannot say that it was harmless error. From plaintiff's own testimony it appears that she was not inexperienced in the ways of the world, but was of mature years, had been married, and became engaged to the defendant, who is an old man, within two weeks after her first acquaintance with him; that she left the home of her aunt and uncle, where she was living, and went to defendant's rooms, where she claims to have been seduced, and lived with him as his "promised wife" for some time before the alleged seduction took place, and continued to live with him afterwards without complaint; and that the alleged seduction was not disclosed to any person, or known by any one except the parties, until the plaintiff consulted counsel for the purpose of bringing this action. Under these circumstances it was prejudicial error to tell the jury that if they found the seduction they must consider it in estimating the damages. It should have been left to the sound judgment and discretion of the jury, under all the circumstances of the case, with the direction that they should exercise their own judgment, and consider the seduction or not, as to them might seem just and proper.

The next alleged error is in permitting Emma Dodge, Walter Dodge, and Danville Dodge, the aunt and uncles of the plaintiff, to testify in her behalf, against the objection of defendant, that she told them,—the defendant not being present,—on the day she claims the promise to have been made, that she was engaged to marry the defendant. This, we think, was incompetent, and should not have been admitted. There is a class of authorities which hold that when the offer of marriage by the defendant is shown, and the question of the acceptance of the offer

by the plaintiff becomes material, it is competent to show such acceptance by her actions and conduct not in the presence of the defendant. *Hutton v. Mansell*, 6 Mod. 172; *Peppinger v. Low*, 6 N. J. Law, 384; *Moritz v. Melhorn*, 13 Pa. St. 331; *Thurston v. Cavenor*, 8 Iowa, 153. These cases recognize that the admission of such evidence is an exception to the general rule of law based upon the peculiar nature of the contract, which is generally made in secret, and to which witnesses are not called to attest, and had its origin in the supposed necessities of the case. The foundation for this doctrine rests upon the decision of *Hutton v. Mansell*, supra, in which there was no question as to defendant's offer, and which was rendered while the parties to an action were yet ineligible as witnesses, and was probably based upon the fact that such evidence was, in the language of some of the later cases, "frequently the only, and ordinarily the best and most satisfactory, evidence of the existence of the engagement." But the reason for this rule has ceased, and under our system, which permits all parties to testify in their own behalf, it is not apparent why any different rule of evidence should now prevail in this class of cases than that which prevails in other cases. But if it be true that cases may arise—where the offer of marriage on the part of the defendant is shown, but the acceptance by the plaintiff is disputed—in which her conduct and declarations may be competent to show her assent, no such question is presented by this record. Here there was no question as to the assent of the plaintiff if an offer was made by the defendant, but the important question made by the pleadings, and vigorously contested throughout the entire trial, was the alleged promise on the part of the defendant, and concerning this the plaintiff was permitted to fully and freely testify in her own behalf; and there was no reason for allowing her to use her bare declarations, made without the knowledge or consent of the defendant, to support her case. Every reason which exists for the exclusion of such evidence in other cases forbids with equal force its use in a case of this nature. For, as was said by Morse, J., in *McPherson v. Ryan*, 59 Mich. 39, 26 N. W. 321: "The plaintiff, as courts and juries must ever be constituted, has certainly advantage enough of the defendant, without giving her the opportunity of fabricating, by her acts and declarations, without his consent or knowledge, evidence to make a case against him. It would place almost any man at the mercy of an evil-disposed and designing woman. An adventurer could come into court and swear to a promise of marriage, and then bring others of like ilk, her friends and intimates, to sustain her with testimony of the stories she had told them in furtherance of her plan to secure damages. There is no necessity of throwing open the door of courts to

such opportunities to work injustice. When the plaintiff has the equal right with the defendant to place fully before the jury the story of her wrongs, aided, as she will ever be, by the sympathy always accorded to both the weakness and the beauty of her sex,—a sympathy which the most rigid administration of justice cannot entirely prevent,—right and equity demand that she shall no longer have the aid which the law refuses in all other cases." There is another class of cases which holds that when a promise of marriage by the defendant is shown, in pursuance of which plaintiff has made preparation for the marriage, her declarations and statements accompanying and in explanation of such preparations are competent as evidence to show her acceptance of the promise, and in aggravation of damages. *Westmore v. Mell*, 1 Ohio St. 26; *Reed v. Clark*, 47 Cal. 194; *Dunlap v. Clark*, 25 Ill. App. 573. But these cases are not applicable to the question presented by this record, because the declarations of the plaintiff admitted were simply her bare, bald statements that she was engaged to the defendant, and it would be an unwarranted relaxation of the rules of evidence to sustain the admission of such testimony. The tendency of the modern decisions is to apply the same rule of evidence in cases of this nature as in other cases, and it has even been held that evidence of preparations for the marriage are inadmissible. 1 *Rice*, Ev. 862; *Russell v. Cowless*, 15 Gray, 582; *Walmsley v. Robinson*, 63 Ill. 41; *Graham v. Martin*, 64 Ind. 567; opinion of *Morse, J.*, in *McPherson v. Ryan*, 59 Mich. 33, 26 N. W. 321; *Lawrence v. Cooke*, 56 Me. 187.

As the other questions suggested in the brief will probably not arise on another trial, it is unnecessary to notice them at this time, except to say that we think the evidence of the manner in which plaintiff and defendant were received and treated in the lodge was competent as tending to show the manner in which they were received and treated by their neighbors and friends, and their conduct towards each other, (*Kelley v. Highfield*, 15 Or. 277, 14 Pac. 744;) and that the evidence tending to show plaintiff's reputation for truth and veracity to be good was not competent, unless such reputation had previously been attacked. *Sheppard v. Yocum*, 10 Or. 402; *Thomp. Trial*, § 555. The judgment is reversed, and a new trial ordered.

SAYRES v. ALLEN.

(Supreme Court of Oregon. Jan. 3, 1894.)

WITNESS—SCOPE OF CROSS-EXAMINATION.

In an action for money alleged to have been collected by defendant as plaintiff's agent, after defendant testified to having given the money to plaintiff's husband for her, the husband testified that the money received by him from defendant was not on plaintiff's account,

but was money due him on account of a partnership existing between himself and defendant, and collections made by defendant, as receiver and otherwise, on accounts due witness and one A. as partners. On cross-examination the husband was asked to state "what partnership existed between witness and defendant, and between witness and A., when it was, its nature and business, when defendant was receiver, for what this money was collected by defendant, and when." *Held*, that it was error to exclude the answer to such question.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Assumpsit by Maria Sayres against William O. Allen. From a judgment for plaintiff, defendant appeals. Reversed.

X. N. Steeves, for appellant. R. R. Giltner, for respondent.

LORD, C. J. This is an action brought by the plaintiff against the defendant to recover the sum of \$855.85, alleged to have been collected by the defendant as her agent from a number of persons named in the complaint. The answer denies such indebtedness, and sets up counterclaims which the reply puts in issue. The trial resulted in a verdict and judgment for plaintiff for the sum of \$599.35, from which this appeal is brought. The error assigned relates to the refusal of the court to permit a witness to answer on cross-examination a certain question propounded to him. The bill of exceptions discloses that, after the plaintiff rested her case, the defendant was called as a witness in his own behalf, and, among other things, gave evidence tending to prove that he paid and advanced to the plaintiff, through George Sayres, her husband and agent, \$1,201.75, that the amount claimed in her complaint should be satisfied out of this sum, and that he should have judgment for the balance. The defendant having rested his case, the plaintiff recalled George Sayres on her behalf as a witness in rebuttal, and, among other things, he gave testimony tending to prove that the said money so paid by the defendant was not paid on plaintiff's account, but that it was money due from the defendant to him on account of a partnership existing between himself and said defendant, and collections made by defendant, as receiver and otherwise, on accounts due said Sayres and one Antone as partners. Defendant, by his counsel, asked said witness, on cross-examination, to state "what partnership existed between said Sayres and defendant, and between him and one Antone, when it was, its nature and business, and when defendant was receiver, and for what this money was collected by said Allen, and when, and fully state all about this partnership and receivership, and moneys collected by Allen on account thereof;" to which question counsel for plaintiff then and there objected, whereupon the court sustained the objection, and refused to allow any testimony in regard to said partnerships by the witness on said cross-examination, or

as to the money collected as receiver, or as to the total amount of money which the said Sayres claimed the defendant had collected; to which ruling the defendant, by his counsel, then and there excepted, and said exception was allowed.

At the outset of the argument, the contention of the defendant involved the idea that the trial court, in its ruling, proceeded on the mistaken notion that the cross-examination of a witness is a matter within its discretion, and not a legal right of the defendant. We are satisfied, however, that the trial court made its ruling from no misapprehension of its duties. It may be true, as claimed for the plaintiff, that the question asked was excluded because the matter to which it was addressed had been already freely investigated, but this cannot be assumed; it should be made to appear by the record. Certainly, if such was the case, it was the duty of counsel to have called the attention of the trial court to the matter, and secured its incorporation in the bill of exceptions certified to us; otherwise, we cannot regard such matter. Judged by the record and the argument, the question asked was excluded upon the assumption that it was not proper cross-examination, or that it included matter beyond the scope of legitimate cross-examination. The extent and range of such examination is largely in the discretion of the trial court, and, as a consequence, its exercise is not subject to appellate review unless a clear case of abuse or manifest injustice is disclosed.

The question, then, in the present case, is whether the ruling of the trial court amounted to an abuse of its discretion. It will aid us in the determination of this question to keep in view the object of a cross-examination, and the limit within which the right may be exercised. The object of all cross-examinations is to break the force, or destroy the effect, of the testimony given by the witness on his direct examination, or to lay the foundation for the testimony of other witnesses which shall have that effect. As a means to this end, when a witness has been examined in chief, the adverse party has the right to cross-examine him for the purpose of showing the situation of the witness with respect to the parties and to the subject of the litigation, his interest, his motives, his inclinations and prejudices, his means of obtaining a correct knowledge of the facts to which he has borne testimony, and the manner in which he has used these means, his power of discernment, memory, and description, so that the jury may have the opportunity of observing his demeanor, and of determining the just weight and value of his testimony. 1 Greenl. Ev. § 446; Tayl. Ev. § 1285; 1 Whart. Ev. § 545; Starkie, Ev. 196. Such an examination affords one of the principal and most efficacious tests for the discovery of truth, and renders it extremely difficult for a witness subjected to

such test to impose upon the court or jury. Such being its importance, great latitude should be allowed the adverse party in conducting his cross-examination, in order to make it effective, and subserve the ends of justice. Our Code provides that "the adverse party may cross-examine the witness as to any matter stated on his direct examination, or connected therewith, and in so doing may put leading questions; but if he examine him as to other matters, such examination is to be subject to the same rule as a direct examination." Hill's Code, § 837. Under this section the adverse party has the right to cross-examine the witness as to the facts and circumstances stated in his direct examination, or connected therewith; but, if he wishes to examine him as to other matters, he must do so by making him his own witness, as such examination is to be subject to the same rules as a direct examination. Within the subject-matter of the direct examination, a free range should be allowed in conducting such examination. "It should not be limited," Bean, J., said, "to the exact facts stated in the direct examination, but may extend to other matters which tend to limit, explain, or qualify them, or to rebut or modify any inference resulting therefrom, provided they are directly connected with the matter stated in the direct examination." *Ah Doon v. Smith*, 34 Pac. 1093, (decided at this term.) A like view is expressed by Brewer, J., who says: "It may extend to other matters which limit, qualify, or explain the facts stated on the direct examination, or modify the inferences deducible therefrom, providing, only, that such matters are directly connected with the facts testified to in chief." *Blake v. Powell*, 26 Kan. 327. It is obvious, therefore, that a cross-examination is allowed a free range if kept within the subject-matter of the testimony given, especially, as the cases show, where such witness is a party or unwilling. This being so, the right of cross-examination is a substantial right, which cannot be restricted so as to prevent the adverse party from going fully into all matters connected with the direct examination. Within these limits, the defendant had a clear right to cross-examine Sayres, and require him to give a detail of the facts and circumstances within the range of the subject-matter of his direct examination, for the purpose of showing, if he could, the situation of the witness with respect to the parties, his motives, his interest, his prejudices, as well as means of obtaining correct information relative to the matters to which he had borne testimony.

The record discloses that the defendant testified that he paid the money collected for the plaintiff to George Sayres, her husband, as her agent. The witness Sayres testified that he received the money from the defendant, but that it was paid to him as money due to himself on account of the partnerships and collections in regard to which he

(Sayres) had testified in his direct examination. The material question was, how was this money paid,—was it, as the defendant testified, paid to Sayres as the agent of the plaintiff, his wife, and therefore to her, or was it, as Sayres testified, paid to him as money not due his wife, but moneys collected for himself from the sources named? As the solution of this question depended upon the effect which the jury would give the testimony, it was important, as the case stood, that the defendant should strengthen his own testimony, and weaken Sayres', by all legitimate means. For this purpose he had a right to cross-examine Sayres fully in respect to all matters connected with his direct examination; he was entitled to put to him any question calculated to test his credibility, his memory, his motives, his interests, his prejudices, and the means and extent of his knowledge, or draw out any fact or circumstance which might tend to controvert, explain, modify, or weaken his statement in respect to the partnerships and receivership as the sources from which defendant collected the money and paid it, as already indicated. Certainly, if it should have appeared on cross-examination that no such partnerships had existed at any time, and that the defendant Allen had never been receiver, then Sayres could not apply the money to his own use, as claimed by him, and the defendant's testimony as to the application of such money would be materially strengthened. It does not matter how positively Sayres may have testified to the facts in his direct examination, it does not preclude the adverse party, upon cross-examination, from requiring him to reaffirm or deny his previous statements, and to give a detail of the circumstances surrounding the facts to which he has testified, and tending to disprove their existence. *Phillips v. Elwell*, 14 Ohio St. 243. "It was incompetent for appellant's counsel," said Elliott, J., "to enter into the details of the subject-matter opened up by the examination in chief; and they were not restricted to the statements made in general terms by the witness in his answers to the questions asked on direct examination. They had a right to demand, within reasonable limits, details and particulars, and were not to be put off with more general statements. A cross-examination is important, not only as a means of getting out, in full detail, all the facts within the range of the subject-matter of the direct examination, but it is also an important means of testing the memory of the witness, as well as a potent means of ascertaining the truth of his statements. It is very clear that the trial court erred in denying the appellant the right of asking the question submitted by her counsel." *Hyland v. Milner*, 99 Ind. 310. As a general rule, it is true that the range and extent of the cross-examination is within the discretion of the trial court, subject, however, to the limitation that it

must relate to facts and circumstances connected with the matter stated in the direct examination. In such case it is only when these limitations are disregarded that there has been an abuse of discretion which authorizes the appellate court to interfere. But the rule under consideration gives the right of inquiry, on cross-examination, into all the facts and circumstances connected with the matters of the direct examination. As the defendant had the right, on cross-examination, to require that Sayres should give a detail of the circumstances surrounding the facts to which he had testified, prejudice will be presumed where this right is denied. "The right of cross-examination being a substantial and very important right," says Judge Seymour D. Thompson, "it is error to restrict it so as to prevent the cross-examining party from going fully into all matters connected with the examination in chief." 1 *Thomp. Trials*, § 408. As applied to the facts before us, we think the principle stated authorized the question objected to and excluded by the court. "Though we may not be able to see," said Christianity, J., "that the answers could have benefited the defendants, or that they were actually injured by the rejection of these questions, yet, as they related to the same subject as the direct examination, and were therefore prima facie admissible, and we cannot affirmatively say that they would not have elicited evidence material to the defense, nor, therefore, that the defendants were not injured by the rejection in such trial, we must treat the rejection of these questions as erroneous." *O'Donnell v. Segar*, 25 Mich. 374. In view of the considerations suggested, the judgment must be reversed, and a new trial ordered.

LEWIS et al. v. CITY OF PORTLAND et al.

(Supreme Court of Oregon. Dec. 26, 1893.)

HIGHWAYS—DEDICATION—EVIDENCE—RIGHTS OF RIPARIAN OWNERS ON NAVIGABLE STREAM—APPROPRIATION OF WHARF—NECESSITY OF COMPENSATION.

1. A dedication as a street of a strip of the public domain, made before the passage of the donation law, is not binding on one who subsequently acquires title under such law to a tract containing the strip so dedicated.

2. It cannot be contended that the owner of an addition to a city conveyed lots in such addition with reference to the M. plat of the addition, and was thus estopped from denying the dedication of a street as designated on such plat, where there were several plats, and there was no evidence that such owner ever recognized or saw or knew of the existence of the M. plat.

3. A dedication to public use as a street of land in an addition to a city is not shown by the fact that a plat of the addition designated such land as a street, and that such plat was the only one on which appeared certain lots in the addition, all of which were conveyed with reference to a plat, where such plat was made merely to cover an extension to the addition, and not to supersede a prior plat.

which, though it contained the land in question, made no designation of it as a street, and the only lots which were not marked on the prior plat were those in the extension.

4. Though a passageway to plaintiff's wharf was used by the public without objection for over 20 years, such fact does not show a dedication by user, where plaintiff always claimed to own the way, maintained a gate at the mouth of it part of the time, improved it, and kept it in repair.

5. As there has been no legislation in Oregon relative to the sale or disposal by the state of its proprietary interest in the submerged lands of navigable fresh-water rivers, the title to such submerged land is in the riparian owner, subject to the public's paramount right of navigation. Consequently, a riparian owner who has built a wharf out to the navigable part of a fresh-water river acquires private property therein, which cannot be taken for public use without compensation.

6. As the object of Code, § 4227, authorizing the owners of land lying upon a navigable stream to construct a wharf, and to extend it into such stream, is to encourage the building of wharves to aid navigation, a riparian owner on a navigable stream, who built a wharf on such stream before the passage of this section, acquires property in such wharf which cannot be taken from him for public use without compensation.

7. A riparian owner, who has built a wharf out to the navigable waters of a stream, in pursuance of the privilege granted by Code, § 4227, to so build, acquires a vested right in the wharf that is not affected by a subsequent act authorizing the construction of a public bridge at a point covered by the wharf. Consequently, such wharf cannot be appropriated to public use without compensation.

Appeal from circuit court, Multnomah county; H. Hurley, Judge.

Action by C. H. Lewis and others against the city of Portland and others to enjoin defendants from appropriating to public use without compensation a certain strip of land belonging to plaintiffs. From a decree for plaintiffs, defendants appeal. Affirmed.

M. L. Pipes and J. V. Beach, for appellants. George H. Williams, for respondents.

LORD, C. J. This is a suit in equity to enjoin the defendants from appropriating to public use a certain strip of land for a bridge abutment and approach thereto without compensation to its owners. The complaint, *inter alia*, alleges that the plaintiffs are the owners in fee simple and in possession of the lots therein described, having adjacent thereto several warehouses; and also of a strip of land at the foot of Burnside street, 60 feet wide, between Front street and the Willamette river, and of the wharf located thereon, extending to the navigable water of such river; that the defendants, the bridge commission, appointed and acting under the "Meusdorffer Act," propose to construct a bridge across the Willamette river from the intersection of Burnside and North Front streets, in the city of Portland, to a point opposite thereto on the east bank of said river, and have let the contract therefor to the defendant the Bullen Bridge Company, which company is about to commence the work of its construction; that the defendants propose

to place the approach to and abutment for the west end of such bridge upon said strip of land, and to appropriate the same to public use, without any compensation to its owners, and without taking any steps to acquire the title, or any right to occupy or use said land; and that, unless restrained, they will proceed with the construction of said bridge, and wholly deprive the plaintiffs of their property without compensation therefor, and also permanently obstruct the use of said wharf, and the extensions thereof north and south of the proposed site of said bridge, to their great and irreparable injury. The answer denies, on information and belief, that the plaintiffs are the owners of said property, and affirmatively alleges as a defense (1) that the strip of land in controversy is a part of Burnside street by virtue of a dedication under certain maps and plats made and filed by John H. Couch between the years 1859 and 1869, showing the extension of said street to the Willamette river; that the said John H. Couch, his wife, Caroline, and these plaintiffs, exhibited the same to intending purchasers, and sold lots and blocks with special reference to such maps and plats; that the locus in quo is a part of the wife's half of the John H. Couch donation land claim, and that his wife, Caroline Couch, after his death, and the plaintiffs, after her death, sold and conveyed to divers persons sundry lots and blocks and parts thereof with particular reference to said plats and maps, and thereby approved and ratified the act of John H. Couch in making and filing the same. And alleges (2) as a further defense that the locus in quo has been constantly used by the public as a street for more than 20 years last past, with the knowledge and consent of the plaintiffs, their ancestors, predecessors, and grantors; and that the public thereby acquired a prescriptive right to use and occupy the same as a street. The reply denies the allegations in the answer, except that the locus in quo is in that half of the donation land claim set apart to Caroline Couch, etc. From this statement it will be seen that the main questions involved and to be determined are: (1) Has there been a dedication of the locus in quo as a public street? (2) Have the plaintiffs a right to erect and maintain, at the locus in quo, a wharf extending to the navigable water of the Willamette river?

To establish the first proposition the defendants introduced two plats and maps of Couch's addition to the city of Portland. The first one is a lithographic map of Portland, dated 1859, made by S. J. McCormick. It shows that Burnside street extends to the river, and thus includes the strip of land in dispute. The second map was made by John H. Couch on the 22d day of June, 1869, and purports to be an addition to Couch's addition, already laid out. It also shows that Burnside street extends to the river. On the other hand, plaintiffs have introduced two

maps of Couch's addition to the city of Portland, one made by John H. Couch in 1865, and the other made by Caroline, his widow, Caroline E. Wilson, Clementine E. Lewis, Elizabeth R. Glisan, May H. Couch, George Flanders, and Maria L. Flanders, on the 15th day of November, 1872. Both of these maps show that Burnside street terminates at the west side of Front street, and that the strip of land in controversy is private property. It thus appears, so far as the maps and plats are concerned, that the two introduced by the defendants show Burnside street extends to the river, while the two introduced by the plaintiffs show that it terminates at the west side of Front street. As to the lithographic map of 1859, there is no evidence to show, nor is it claimed, that John H. Couch or his wife signed or acknowledged or had anything to do with making it. The point upon which the defendants mainly rely in respect to such map as showing a dedication is that it was in general use in the city, and the only public map referring to Couch's addition from 1859 to 1865, during which time John H. Couch and his wife made certain deeds in which the lots were described by reference to Couch's addition to the city of Portland. It is argued that the reference in these deeds to Couch's addition, under the circumstances, was intended to refer to such addition as platted on said map, and was therefore a recognition of it; and, in legal effect, a dedication of the streets as platted thereon. We are unable to assent to this inference. The admitted facts show that the strip of land in dispute belonged to Caroline Couch as donee of the United States, and that it was conveyed to the plaintiffs Allen & Lewis and Flanders, together with certain lots, some time in 1854, and that they are now the owners and entitled to the possession of it, unless the public has acquired an easement therein as a street. There is some evidence that there was a plat made of an addition to the city of Portland by John H. Couch in April, 1850, but there is nothing to show that the locus in quo was dedicated as a public street therein; and, even if there was, such plat having been made before the donation law was passed, it would not have the effect to constitute a dedication. Any person who should subsequently acquire the title from the government or its grantees had a right to revoke such dedication, and subject the property to his private use. Nor is there any evidence that Couch or his wife, prior to 1859,—the date of the McCormick map,—ever made any map on which the locus in quo was platted as a street. It is probable that after they acquired the title from the United States they may have continued to use such prior map, exhibiting it to intending purchasers, and selling their lots with reference to it; but there is nothing to show that Couch or his wife ever recognized the McCormick map, or that they ever saw it, or knew of its existence. In fact, it does not purport to be a

map of Couch's addition to the city of Portland.

In view of these considerations, we do not think that the reference in their deeds to Couch's addition was intended to refer to their property as platted on the McCormick map. It is not this, however, but the map of 1869, upon which the defendants mainly rely as establishing a dedication of the locus in quo as a public street. It is claimed that all of the plaintiffs except Mr. Allen made deeds conveying lots with reference to this map. All that can be said in support of this claim is that these parties made certain deeds, referring therein for description to the map of Couch's addition to the city of Portland. But, inasmuch as Couch had made a map in 1865, upon which the locus in quo was not platted as a part of Burnside street, even if we assume that the map made by him in 1869 platted it as a part of such street, there is nothing to show whether the general reference in those deeds was to the map of 1865 or 1869. Mrs. Couch, during the time that she was the owner of the land in dispute, never made any maps or plats dedicating it as a public street, nor had any of the plaintiffs. The maps and plats made by John H. Couch, after he and his wife had conveyed this land, as already stated, to the plaintiffs Allen & Lewis and Capt. Flanders, would not bind them, unless they accepted and acted upon such maps, and there is no evidence that they accepted and acted upon the map of 1869, other than the mere fact that they made certain deeds in which they described the property by reference to the map of Couch's addition to the city of Portland, which reference was as likely to be to the map of 1865, or to some prior map, of which there was some evidence, as to that of 1869. It is sought, however, to obviate this objection by showing that some of the deeds conveyed lots and blocks that were for the first time platted on the map of 1869, or, in other words, that such deeds conveyed lots and blocks that appear on no other map; and hence it is argued that the reference in them was necessarily to the map of 1869 which, it is claimed, shows that the property in dispute was a part of Burnside street. It is true that such lots and blocks did not appear on any other map, for the reason that the map of 1869 was intended as an addition or extension of prior maps; but this affords no justification for the assumption or argument that such map, made by John H. Couch, shows a dedication of the locus in quo as a public street. Before, however, it can be assumed that his wife recognized the map of 1869 by joining with her husband in such deeds, as showing a dedication of her property, so as to bind or estop her, such map itself ought to show the dedication so distinctly and positively as to make the evidence of her intention to divest herself of the title entirely clear. The map itself does not purport to be anything more than a map of the exten-

sion of Couch's addition to the city of Portland. The lots and blocks laid out on it, which constitute the new addition, are designated and marked by a coloring of yellow, and all the other property, except a tier of blocks adjoining such yellow portion, is left blank. This indicates that the map of 1869 was not intended to affect the prior maps. Its object was to plat a second addition, and to show its relative position to the first one. The numbering of the lots and blocks and the dedication of the streets outside of the extension were to remain as platted on the prior maps. This must be so, as it is impossible to convey any lots or blocks by reference to such map, outside of the extension, because they are left in blank; and hence deeds referring to lots and blocks as numbered by the map of 1869 necessarily referred to it, and did not appear on any other map, because such lots and blocks composed the new addition or extension of prior plats; but, as we have shown, the other portion of such map negatives the idea that it was intended to change the map of 1865, or prior maps, or that it undertook to represent the locus in quo as a part of Burnside street. This view is confirmed by the form of acknowledgment to this map, which reads, in its material parts, as follows: "That he recognized the accompanying diagram or plat as a true and correct description of lots and blocks laid out by him as an addition to the city of Portland." This, of course, means the lots and blocks laid out on this map as a new addition, indicating that the added blocks copied from prior maps were only intended to show their relative position to such new addition, and not to alter or affect the prior maps. We do not think, therefore, that any representations as to Burnside street upon that portion of the map left in blank—such portion constituting no part of the addition—can be construed as intending to make a dedication of the locus in quo to affect the prior maps. The map of 1872 is the only one that Caroline Couch or the plaintiffs ever signed, and it shows that the property in question is not a part of Burnside street. This map corresponds with that of 1865, and, as we construe it, is not in conflict with the map of 1869. We do not think, therefore, that such deeds as were made of lots and blocks which appear only in the map of 1869 were a dedication of the locus in quo, or that they can be reasonably construed to be a recognition of any dedication thereof. In thus holding we do not controvert the principle that where a proprietor recognizes a plat in making a sale of lots he will be estopped to deny a dedication of the streets designated upon the plat embracing his property; but we do not think, in view of the facts, that such principle can be applied to the case at bar.

The second defense is dedication by user. It is claimed by the defendants that the locus in quo has been used by the public, with the

consent of the plaintiffs, the same as other streets similarly situated have been used, for more than 20 years, and that, therefore, the public have a prescriptive right to the same. A dedication of land to the public use rests on the intention or assent of the owner. As it is purely a question of intention, the evidence of it, when resting in parol, must be clear and satisfactory, and indicate a positive and unmistakable intention to devote the property to public use. All the authorities agree that the acts and conduct of the owner, when relied upon to show the dedication of his property, must be deliberate and unequivocal, manifesting a clear intention to abandon such property to the public use. The burden of showing it rests on the defendant. The security of titles requires that the evidence of dedication, when depending on parol proof, should be of such a deliberate and decisive character as to leave no doubt of the owners' intention. Hence the rule is well settled by numerous authorities that before there can be a valid dedication there must have been an actual intention, clearly indicated, by deliberate and unequivocal words or acts, to dedicate the property to the public. *Hogue v. City of Albina*, 20 Or. 185, 25 Pac. 386. It appears from the testimony that some time in 1854, and soon after the plaintiffs Capt. Flanders and Allen & Lewis bought the property, they built a wharf in front thereof for ocean vessels and river craft; that it was one of the first wharves built in the city, and for many years was the principal landing for such vessels; that it has been maintained there continuously ever since, although it has been rebuilt several times, and extensions added. The wharf extends across the locus in quo, and out from the bank of the river about 100 feet to the navigable water of such river, and is 700 feet in length. A roadway or street was left open from the east side of Front street to the wharf, for the purpose of ingress and egress. The wharf opposite the street is two-story, and at the time it was built the plaintiffs last mentioned constructed an elevated passageway 20 feet wide on the north side of this roadway, from Front street to the upper story, and inclosed the space underneath, and used it for a stable and storehouse. This roadway or street has been used by the public and plaintiffs as a means of conducting and carrying on the business appertaining to this wharf and warehouse, and the facts indicate that it has not been used for any other purpose. The plaintiffs have at all times maintained their right to the locus in quo, consistent with its use as a passage or roadway to and from their wharf, and the use of it by the public for such purpose was not under a claim of right, but by their permission. The city authorities have not exercised any acts of ownership over or assumed any right to control it; nor has the city made any improvements or performed any work upon the same by way of repairs or other-

wise, but the evidence shows that the plaintiffs have used and occupied such property to the exclusion of the public, except so far as was necessary for the public to use it in doing business at their wharf. The evidence also shows that the plaintiffs have asserted their ownership of the land in controversy by acts and declarations which are entirely inconsistent with any intention to abandon or dedicate it to the public use. They have used it for the storage of iron, brick, and other heavy freight; they have improved and repaired it; they have kept a gate across it for 10 or 12 years; exercised the right to exclude persons or teams from it whenever they chose to do so; they have publicly and repeatedly, in connection with the use of the property, declared that it was not a public street, but a private way to their wharf and warehouse. In *Irwin v. Dixon*, 9 How. 10, in which the facts are similar to the case at bar, the court say: "From the very nature of wharf property, likewise, the access must be kept open for convenience of the owner and his customers; but no one ever supposed that the property thereby became public, instead of private. * * * No length of time during which property is so used can deprive an owner of his title. * * * While any one might be allowed to travel over this space from the warehouse to the wharf and river, when convenient, and not interfering with the owner, it would not be because it had been intended to give to the public a right of way over these premises, but because he himself intended to travel over it, and while so doing and so leaving it open, would not be captious in preventing others from traveling there." The same principle is laid down in the note to *Dovaston v. Payne*, 2 Smith, Lead. Cas. 155, wherein it is said: "If, therefore, a person opens and uses a space upon his own land as a road for his own convenience and purposes, the mere fact that the community are allowed to make use of it in common with him for even twenty or thirty years will not constitute a dedication of it to the public use, especially in the face of declarations on his part inconsistent with an assent to such dedication." So that the use of the locus in quo by the public in the manner referred to is entirely consistent with the ownership of the plaintiffs, and therefore the public have not acquired a prescriptive right by user to the land in controversy.

The next question to be determined is as to the right of the plaintiffs to erect and maintain a wharf at the locus in quo extending to the navigable water of the Willamette river. The contention for the defendants is that the title to the soil under the Willamette river is in the state by virtue of its sovereignty, and that riparian owners, without a license or grant from the state, have no authority or right to maintain a wharf beyond the ordinary high-water mark. Hence they claim that if the plain-

tiffs have erected their wharf and extended it over the submerged soil of such river to its navigable waters without any license from the state, they have erected a purpresture, which may be abated or removed as a common nuisance. The theory of their argument is that in this country the law as to navigable fresh waters is the same as to waters moved by the tide; that, in either case, the state, by virtue of its sovereignty, is the owner of the subjacent soil of its navigable rivers, including tide lands or submerged lands contiguous to deep water; that, as such owner, it has the right to regulate the use of such lands, or to dispose of them, in any way that will not impair or injuriously affect the public interests in such rivers, especially for purposes of navigation and commerce, free from any easement of the upland owners, who can only acquire the right to extend a wharf over them by its consent, obtained by legislation, or acquired by acquiescence through local usage; and that, as a consequence, unless the plaintiffs, as riparian owners, have obtained the consent of the state to extend their wharf over the submerged soil of the Willamette river to the point of its navigability, they cannot be considered as having any right in the premises which the state is bound to respect; nor can their wharf be recognized as a legal structure, the taking or condemnation of which for a public use would entitle them to compensation as for private property. By the common law, in England, the title to the shore of the sea, and the arms of the sea, and the soil under tide water, is vested in the king, who has a proprietary interest therein, which he may grant or dispose of subject to the public use for navigation and commerce. "The *jus privatum*," says Lord Hall, "that is acquired by the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers and the arms of the sea are affected to the public use." *De Jure Mar.* 22. The soil so vested in the king can only be transferred subject to the public trust. In this country the state has succeeded to the ownership and sovereignty over such lands, charged with a like public trust; and the law is now regarded as settled that the state, by virtue of its sovereignty, is regarded as the owner of lands covered by tide waters, and, as an incident of such ownership, has the right to use or dispose of them in such way as will not impair or prejudice the public interests or privileges, such as fishing, navigation, and commerce. As touching this subject, Mr. Justice Field said: "Upon the admission of California into the Union upon equal footing with the original states, absolute property in and dominion and sovereignty over all soils under the tide waters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to

the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government." *Weber v. Commissioners*, 18 Wall. 65. And in *Bowlby v. Shively*, 22 Or. 410, 30 Pac. 154, in conformity with our previous adjudications, it was held that when the state of Oregon was admitted into the Union the tide lands became its property, and subject to its jurisdiction and disposal; that, in the absence of legislation or usage, the common-law rule would govern the rights of upland proprietors, and by that law the title to such lands is in the state; that the state has the right to use or dispose of its title in such manner as it might deem best, free from any easement of such upland owners therein other than such as the state might choose to resign to them, subject only to the paramount right of navigation and the uses of commerce. The same rule has been extended to our great fresh-water lakes, which, owing to the extended commerce conducted upon them, are treated as inland seas; and also, in some of the states, to the great fresh-water rivers, which are navigable in fact, as the Mississippi, the Missouri, the Ohio, and, in the state of Pennsylvania, to, all its permanent rivers; such rule depending on the law of each state as to what waters, and to what extent, the prerogative of the state over the lands under water shall be exercised. The question, as Mr. Justice Bradley said, is one for the several states themselves to determine. "If they choose to resign to the riparian proprietor rights which properly belonged to them in their sovereign capacity, it is not for others to raise objections." *Barney v. Keokuk*, 94 U. S. 324. So it appears that the same rule as to the ownership of and the sovereignty over lands under the navigable waters of the great lakes and fresh-water rivers applies which obtains at common law as to the ownership of and sovereignty over lands under tide waters, and that such lands are held by the same right in the one case as the other, and subject to the same trusts and limitations. *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 436, 13 Sup. Ct. 110.

In respect to the tide lands, the state, as owner, has provided by legislation for their sale and disposal free from any right of the upland owners therein, except such as it saw fit to recognize in them or their grantees, 'in consideration of the fact that prior to such legislation the tide lands had often been dealt with by the adjacent owners as private property, subject, however, to the paramount right of navigation and the uses of commerce. *Bowlby v. Shively*, supra. But in respect to navigable fresh-water rivers in this state there has been no legislation for the sale or disposal of any portion of the submerged lands lying between the upland

and navigable waters. Such lands, so far as any legislative action is concerned, have not been treated by the state in the proprietary way which it has asserted and applied to the tide lands; and some of the decisions of its courts recognize certain rights in the riparian owners, arising from adjacency, which do not belong to them in common with the public. In *Minto v. Delaney*, 7 Or. 337, it was held that the river is the boundary of lands lying along the Willamette, and that accretions formed on the shore by the gradual receding of the water belong to the riparian owner; and in *Moore v. Locks Co.*, Id. 357, that rocks and shoals along the margin of the same river belong to the riparian owner. While, therefore, the state, as the owner of the submerged lands of navigable fresh-water rivers, has not treated its proprietary interest in any portion of them as subject to sale or disposal, it has recognized certain rights in the riparian owners, not common to the public, in the shoal water in front of their land. It is common knowledge that before and after the state was admitted into the Union the riparian owners along the navigable fresh-water streams within its limits acted on the assumption that the right of wharfage was incident to their land, and built wharves in front thereof. Some of these wharves, like the plaintiffs' are expensive structures, and of great advantage and benefit to commerce. Nor is this all. Upon the tidal waters, such owners, believing that the tide lands adjacent to their uplands belonged to them, built wharves over the same, and dealt with them as private property. This condition of things was recognized in the legislation referred to; and in consideration thereof, and as an act of justice, a preference was given to the riparian owners in the provisions for the sale of such lands. "Though the state was under no legal obligation to recognize the rights of either the riparian owner or those who had occupied these tide lands," as *Boise, J.*, said, "still the legislature, considering the fact that these lands had been dealt with as private property, and improved sometimes by the erection of expensive structures, which were a great advantage to commerce, made what we think wise and just provisions for the protection of those who had spent their money in purchasing and improving these lands, which improvements were in many cases absolutely necessary as aids to commerce." *Parker v. Rogers*, 8 Or. 180. All this goes to show that the custom which obtained of building wharves along the navigable rivers of the state by riparian owners was fully understood, and that there was no intention to interfere or obstruct the right to wharf across the submerged lands on nontidal or fresh-water rivers, but that the act was only designed to provide for the sale of tide lands on tidal waters, the effect of which was inconsistent with any easement or right of the upland owner therein

not granted to him in such act. This becomes all the more apparent by the proviso in the tide-land act, which provides "that the Willamette, Coquille and Coos rivers shall not be deemed rivers in which the tide ebbs and flows, within the meaning of this act, * * * and that the title of this state to any tide or overflowed lands upon said rivers is hereby granted and confirmed to such owner of the adjacent lands." This grant conveyed the title to all of such lands along these rivers, whether tide or overflowed, to the riparian owners, subject to the public trust. As the Willamette is a fresh-water river, and only slightly affected by the tides a short distance from its mouth, there is no tide land at Portland, as held in *Andrus v. Knott*, 12 Or. 501, 8 Pac. 763; and therefore it results that if the submerged or overflowed lands described in the act include such as are not affected by the tides, and lie between the upland and navigable water, they belong to such owners, subject to the paramount right of navigation and commerce. There is a marked distinction made by such legislation between the submerged lands of fresh navigable waters, and those covered by the flux and reflux of the tide, and known as tide lands. In view of these considerations, and the tendency of our adjudications to recognize rights in the riparian owners on the Willamette river that do not belong to the public, and the custom which has prevailed from the early settlement of the country in respect to the building of wharves, it is at least reasonable to infer that the state has acquiesced in the right of the riparian owners to build wharves in aid of navigation. In fact, the absence of legislation in respect to the state's proprietary interest in the shoal water of submerged lands of the Willamette river, taken in connection with the legislation providing for the sale and disposal of tide lands, and adjudications to the effect that the grant of its proprietary interest therein is free from any easement of the riparian owner, and subject only to the public right of navigation and commerce, leads to the conclusion that it is the policy of the state, as in other states, to allow riparian owners on such rivers to build wharves in aid of navigation. Mr. Gould says: "Riparian owners upon navigable fresh rivers and lakes may construct, in shoal water in front of their land, wharves, piers, landings, and booms in aid of and not obstructing navigation. This is a riparian right, being dependent upon title to the bank, and not upon title to the river bed. Its exercise may be regulated or prohibited by the state; but so long as it is not prohibited it is a private right derived from the passive or implied license by the public. As it does not depend upon title to the soil under water, it is equally valid in the states in which the river beds are held to be public property and in those in which they are held to belong to the riparian proprietors, usque

ad flum aquae." Again, he says: "The legislature may authorize the extension of such structures beyond low-water mark, but, if not sanctioned by the legislature, they are illegal, so far as to interfere with or limit the right of navigation." Gould, *Waters*, § 176. In view of these considerations, the wharf of plaintiffs, being in aid of navigation, is a legal structure, and private property, which can only be taken for public use according to established law, and with due compensation therefor.

Passing these considerations for the present, there is another phase of the case, which seems to be decisive of the assent of the state to the building of plaintiffs' wharf. The legislative assembly, at its session held in 1862, passed the following act relating to wharves in cities: "Sec. 4227. The owners of any land in this state lying upon any navigable stream or other like water, and within the corporate limits of any incorporate town therein, are hereby authorized to construct a wharf or wharves upon the same, and extend such wharf or wharves into such stream or other like water beyond low-water mark so far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other like water." Sec. 4228. The corporate authorities of the town wherein such wharf or wharves is proposed to be constructed shall have power to regulate the exercise of the privilege of franchise herein granted; and upon the application of the person entitled to and desiring to construct such wharf or wharves, such corporate authority shall, by ordinance or other like mode, prescribe the mode and extent to which the same may be exercised beyond the line of low-water mark, so that such wharf or wharves shall not be constructed any further into such stream or other water beyond such low-water line than may be necessary and convenient for the purpose expressed in section 4227, and so that the same will not unnecessarily interfere with the navigation of such stream or other like water." Hill's Code. In 1869, the city of Portland, under the authority of this statute, passed an ordinance defining the wharf limits and regulating the building of the same. Section 3 of this ordinance provides that "all wharves and piers now erected or driven beyond the lines described in section 1 of this ordinance shall be removed to conform to the above-described line, within ten years from the date of the approval of this ordinance. Provided, that if any such wharf or structure shall be at any time destroyed by the elements, or so damaged as to necessitate the rebuilding thereof, it shall be rebuilt to conform to said above-described lines." The contention for the defendants is that the plaintiffs' wharf, having been built when the statute was passed, did not come within its purview; that the statute provides for the doing of

future acts under the regulation of the corporate authorities; that it does not legalize or attempt to legalize wharves theretofore constructed; that the words "proposed to be constructed," and "desiring to construct," and "hereby authorized to construct," show beyond cavil that future, and not past, erections were what the lawmakers had in mind. The rule undoubtedly is that a statute is to be construed to operate prospectively, and not retrospectively, unless the language is so plain and direct as to preclude all question as to the intention of the legislature. The rule is founded on the principle that a construction should not be given to a statute that will take away or restrict rights, unless the intention of the legislature cannot be otherwise satisfied. A retrospective law is always subject to the limitation that it shall not be such as is termed "ex post facto," or as impair the obligations of contracts. But we do not think there is any occasion to apply the principle suggested to the statute in question. There is no claim that it affects past transactions, or relates back, and gives them validity. It is not pretended that the statute has a retroactive effect, and made wharves legal structures which were erected prior to its enactment. The statute neither commands certain acts or things to be done, nor prohibits them from being done. It is a permissive statute, which allows certain things to be done without commanding them. "Under the provision of the statute," said Boile, J., "any person within an incorporated town within this state may build and maintain a wharf from his land at high water into navigable water, so far as is necessary or convenient to accommodate shipping, if he conforms to the legal restrictions imposed on him by the authorities of the town, and does not impede navigation. Such structures are erected in all commercial towns, and have been recognized as legal structures in all the states." *Parker v. Taylor*, 7 Or. 448. The statute simply grants permission or license to any upland owner in an incorporated town whose land fronts upon a navigable stream to construct a wharf in front of his land, which permission, when acted upon, renders his wharf a legal structure. Its object is to encourage the building of wharves to aid navigation, and for the benefit of commerce. Within its purport, then, what difference would it make whether the wharf was built before or after the statute was enacted. In either case, the wharf would serve the object it sought to accomplish, and hence be a legal structure within its spirit and intent. But it is argued that the leave granted under the statute, being merely a permission or license, is revocable at the pleasure of the state; and that, as a consequence, the wharf of the plaintiff ceases to be a legal structure, or to have a legal existence, when the leave is withdrawn, or the license revoked. The statute has not

been repealed, either directly or by implication, and, so far as it is concerned, there is no revocation of the license granted. The most that has been claimed for the Meussdorffer act in that connection is that it—being for a public purpose—operates to revoke the license of the plaintiffs, and thereby to deprive their wharf of its legal foundation and existence. It will be observed, then, that the argument is based on the theory that the permission granted by the statute to build wharves is merely a license, and, as such, may be revoked at the pleasure of the state, after it has been acted upon, and the wharf erected. But this is not so. As was said in *Bowlby v. Shively*, supra, the statute does not vest any right until exercised. It is a license revocable at the pleasure of the legislature until acted upon and availed of. It is doubtless true that, if the statute should be repealed, or the adjacent tide lands disposed of, the privilege given the upland owner to build a wharf across the tide lands into deep water, unless acted upon or availed of, would be revoked. But the riparian owners who have taken advantage of the permission or privilege to build wharves—especially those on fresh navigable waters, for the reasons suggested—have acquired rights that would not be affected by the repeal of the statute. These wharves are legal structures, and as such are private property, which cannot be taken without due process of law, and due compensation therefor. Hence the contention of the defendants that the Meussdorffer act—which authorizes the location and construction of the Burnside street bridge, and under which they are proceeding to build it—is a revocation of the leave or license, cannot be maintained. Nor do we find anything in the case of *Illinois Cent. R. Co. v. Illinois*, supra, in conflict with this result. There the grant of the submerged soil of the lake was in such quantity as, in the opinion of the court, impaired the public interest in its waters, and operated, if irrevocable, as an abdication by the state of its trust over the property. The right of a riparian owner to build a wharf over the submerged soil of a river to navigable water is not inconsistent with the public interest, nor in prejudice of the public rights. Nor does the grant of such subjacent soil or tide lands subject to the paramount right of navigation and commerce authorize its use for any purpose inconsistent with the public interest. The land in front of the riparian owner, when used for a wharf, and under proper regulation, is in aid of navigation, and for the benefit of commerce. Of course, the state has the right to regulate the building of wharves, or to determine how far rights in submerged soil can be exercised consistently with the easement of navigation. Our state has made such regulations, and, as there is no claim that the wharf of the plaintiffs impedes navigation, or is not erect-

ed in conformity with its requirements, it must be regarded as a legal structure, and entitled to be protected as private property. Although the evidence shows that the original wharf was torn down and rebuilt in the year 1876, in conformity with the ordinance, we have not deemed it necessary to refer to that fact as strengthening the right of the plaintiffs in the premises. Within the principle and for the reasons suggested, it is apparent that the cases of *Rundle v. Canal Co.*, 14 How. 80; *Navigation Co. v. Coons*, 6 Watts & S. 101; *Canal Co. v. Wright*, 9 Watts & S. 9,—do not determine the questions involved in the case at bar. The right to build and maintain a wharf, being in aid of navigation, and for the benefits of commerce, rests on a different footing and principle than a license to erect mills with dams which may impede or obstruct navigation, or canals diverting the waters of a navigable river.

Without further reference, it is sufficient to say that we think the plaintiffs have a right of property in their wharf of which they cannot be deprived except in accordance with established law, and, if it should be necessary that it should be taken or destroyed for the use of the bridge, that it cannot be done without due compensation therefor. *Monongahela Nav. Co. v. U. S.*, 13 Sup. Ct. 622. The decree must be affirmed.

DAVIS v. BOWMAN.

(Supreme Court of Oregon. Jan. 8, 1894.)

CHATTEL MORTGAGES—RECORDATION—PRIORITIES.

1. Failure to file a chattel mortgage raises a presumption of fraud, in the absence of change of possession, as against subsequent mortgages, which may be rebutted by showing that the mortgage was made in good faith. *Code Civil Proc.* § 766, subd. 40, and *Hill's Code*, § 3054.

2. In the absence of fraud, the failure to file a chattel mortgage does not render it void as against a subsequent mortgagee.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by H. E. Davis against B. H. Bowman for conversion. Judgment for plaintiff. Defendant appeals. Reversed.

The other facts fully appear in the following statement by LORD, C. J.:

The plaintiff brought an action against the defendant for the sum of \$3,000, with interest thereon at the rate of 10 per cent. per annum from the 26th day of January, 1892, as damages sustained by the defendant's wrongful conversion to his own use and benefit of certain musical goods and instruments, known as the stock of the Durand Organ & Piano Company, upon which the plaintiff held a chattel mortgage, executed by the Durand Organ & Piano Company on the said 26th day of January, 1892, to secure the payment of its note, executed on the same day to the plaintiff for the sum of

\$3,000, with interest thereon at the rate of 10 per cent. per annum, and made payable upon demand. The said mortgage was duly filed for record with the recorder of conveyances of Multnomah county, Or., on the day following its execution. The defendant admits the taking and appropriating of the said mortgaged goods to his own use and benefit on the 29th day of January, 1892, but denies that he did so wrongfully. He bases his right to so take and appropriate the said mortgaged goods upon four chattel mortgages thereon, executed to him by the said Durand Organ & Piano Company, to secure the payment of the sum of \$18,938.75 and interest. Two of the said mortgages were executed and delivered to him on the 9th day of January, 1892, which were two days thereafter duly filed in Multnomah county, Or., and the other two on the 26th day of January, 1892, which were filed for record on the following day. Among the articles so taken and appropriated by the defendant were 26 Durand organs, of the value of \$1,100, which organs were not included in defendant's two mortgages of January 9, 1892, but were described in his two mortgages of January 26, 1892, and were also included in the plaintiff's mortgage of the same date, filed as above stated. After issues were joined, the case was referred to Richard H. Thornton, to take the evidence, and report the facts and law therein. The referee, in his report, made 18 findings of fact and 10 conclusions of law, and thereupon advised that judgment be given for the defendant. The plaintiff duly excepted to a portion of the report as made and filed by said referee, and moved that the same be set aside, and for judgment, alleging as reasons therefor that the findings and conclusions so excepted to are not supported by the evidence, and are contrary to the law. The defendant filed his motion, asking the court to affirm the report as made and filed by the referee, and for judgment thereon. Upon the hearing of the motions for and against the confirmation of the referee's report, the court modified certain findings of fact and law therein, and gave judgment for the plaintiff for the amount agreed upon by the parties to be the value of those instruments in defendant's mortgage of January 26, 1892, which were not included in his mortgage of January 9, 1892, to wit, \$1,100.

R. & E. B. Williams & Carey and W. W. Thayer, for appellant. Dolph, Mallory & Simon, for respondent.

LORD, C. J., (after stating the facts.) In our view, the modification by the court of one of the referee's findings does not materially affect the case, but, as it is necessary to a proper understanding of the issues herein, we copy such finding as modified, viz.: "That on the 27th day of January, 1892, before the hour of 8 A. M., the

plaintiff and defendant, by their several agents, were present at the office of recorder of conveyances for Multnomah county, and there presented for record the three mortgages executed as aforesaid on the previous day to plaintiff and defendant, and more particularly described in finding of fact No. 9. The plaintiff's mortgage was presented to and received by the recording officer for filing one or two minutes before the defendant's mortgages were so presented and received. The presenting and receiving of the mortgages for recording were completed before 8 o'clock A. M. of the said day, the hour at which the recorder is required by law to open his office." Among other conclusions of law, the referee found "that the plaintiff's mortgage of January 26, 1892, and the defendant's two mortgages of the same date, were, in contemplation of law, filed simultaneously, namely, on the 27th day of January, 1892;" that, "where two chattel mortgage are filed simultaneously, the time of their execution must determine their priority;" and that, as the defendant's "mortgages were all executed before that of plaintiff, he cannot be charged with a wrongful taking and conversion of any goods which are included in the mortgages of both parties." Hence, while the referee found that, "in case of conflicting claims between mortgages of chattels, he has the priority whose mortgage is first duly filed," as held in *Pittock v. Jordan*, 19 Or. 8, 13 Pac. 510, he considered the rule as there declared inapplicable to the case at bar, inasmuch as there was no priority in the filing of the mortgages. As a consequence of this view the referee found that the defendant "did not wrongfully take or convert to his own use and benefit any of the chattels mentioned in the complainant." After the hearing upon the motions to set aside and confirm the report of the referee, the court re-referred the case, for the purpose of obtaining a finding as to whether or not the plaintiff had notice, actual or constructive, of the existence of the mortgages of the defendant which were executed on the 26th day of January, 1892. The referee reported as an additional finding of fact that "the plaintiff had no actual or constructive notice of the actual existence of the two mortgages last named, or either of them, at the time of the execution of his mortgage." In view of this finding, taken in connection with the finding of fact as modified and above stated, the court found the law to be that "the time of the filing of said mortgages should date and be of the actual time at which they were received for recording by the recorder at his office, and should be filed as of that time," in lieu of the referee's finding that such mortgages, in legal contemplation, were filed simultaneously. Hence, the court held that the plaintiff's mortgage was filed before the defendant's two mortgages, and, within the rule laid down in *Pittock v. Jordan*,

supra, that it was entitled to priority over them without reference to the time of their execution. The court thereupon found that the defendant "did wrongfully take and convert to his own use and benefit the chattels mentioned in the complaint," and adjudged that the plaintiff recover as their value the sum specified as aforesaid.

Our inquiry, therefore, in this case is whether, upon the facts as disclosed, the time of filing or the time of execution of such mortgages should determine their priority. The solution of this inquiry depends upon our statutes. Prior to 1862, our statute, like those of several other states, declared, in substance, that every mortgage of chattels thereafter made should be absolutely void except as to the parties, unless the possession of the thing mortgaged be delivered to and be retained by the mortgagee, or unless the mortgage be filed as prescribed. St. 1855, p. 523, § 18. In the revision of the statute for the purpose of framing a code of civil procedure this section was repealed. Laws 1862, p. 126. When the mortgages in question were executed and filed our statute provided that "it shall be the duty of the county clerk, upon the presentation for that purpose of any mortgage or conveyance intended to operate as a mortgage of goods and chattels, or a copy of any such instrument, and the payment of his fees, to indorse thereon the time of receiving the same, and to deposit such instrument or copy in his office, to be kept for the inspection of all persons interested." Hill's Code, § 3054. After such mortgage has been filed, the statute also provides that it "shall cease to be valid as against the creditors of the person making the same, or subsequent purchasers or mortgagors in good faith, after the expiration of one year from the filing of the same, or a copy thereof, unless within thirty days next preceding the expiration of the year the mortgagee, his agent or attorney, shall make and annex to the instrument, or copy on file as aforesaid, an affidavit setting forth the interest which the mortgagee has, by virtue of such mortgage, in the property therein mentioned, upon which affidavit the clerk shall endorse the time when the same was filed." Hill's Code, § 3056. So far as these provisions are concerned, there is nothing in them to indicate that the failure to file or the filing of a chattel mortgage, where there is no change of possession of the property mortgaged, raises or removes any presumption of fraud, disputable or conclusive, which affects the validity of such mortgage as against creditors, subsequent purchasers, or mortgagees in good faith. But subdivision 40, § 766, Code Civil Proc., provides that "every sale of personal property, capable of immediate delivery to the purchaser, and every assignment of such property, by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed

by an actual and continued change of possession, creates a presumption of fraud as against the creditors of the seller or assignor, during his possession, or as against subsequent purchasers in good faith and for a valuable consideration, disputable only, by making it appear on the part of the person claiming under such sale or assignment, that the same was made in good faith, for a sufficient consideration, and without intent to defraud such creditors or purchasers. But the presumption herein specified, does not exist in the case of mortgage duly filed or recorded as provided by law."

As the sections which we have cited are in *pari materia*, they must be construed together. The "mortgage duly filed or recorded as provided by law" in the last clause of subdivision 40, *supra*, necessarily refers to section 3054, *supra*, as there is no other section which provides for the filing of mortgages of personal property; and, as this section is silent as to the effect of the filing or the neglect to file a chattel mortgage, where the mortgagor retains possession, we must turn to subdivision 40, *supra*, to ascertain the nature of the legal consequences which result in such cases. Under this subdivision, a mortgage of personal property, unaccompanied by delivery and possession of the chattels mortgaged, raises a presumption of fraud, disputable, but not conclusive, which may be overcome by showing that such mortgage was made in good faith, and for a valuable consideration. Under the circumstances stated, the mortgage is valid as against third parties when the bona fides of the transaction is made to appear. But the latter clause of the subdivision is to the effect that the fraud implied from the possession of the mortgagor does not exist when the mortgage is filed as provided by section 3054, *supra*. The filing of the mortgage takes the place of the change of possession, or obviates its necessity. Such filing, like the transfer of the possession to the mortgagee, gives notice to third parties of his interest in the mortgaged property. It stands for a change of possession, and thus removes the presumption of fraud which would otherwise exist. By this means a mortgagor is enabled to pledge his chattels as security, and retain the possession and use of them in a reasonable way, while the mortgagee is relieved from the burden of proving the bona fides of the transaction. The filing being a substitute for the mortgagee's possession, its object is to give notice to third parties, and to show the transaction to have been bona fide, and thus remove the presumption of fraud which would otherwise arise against it. As a consequence, if a mortgage of personal property is filed, although the mortgagor retains possession, the presumption of fraud does not exist, but, if the mortgage has not been filed, a presumption of fraud arises, as against creditors and subsequent purchasers, which may be rebutted by making

It appear that such mortgage was made in good faith. "The presumption raised by this subdivision," Boise, J., said, "is as to unrecorded mortgages." *Orton v. Orton*, 7 Or. 482. As to such mortgages—not recorded or filed—there is a presumption of fraud which, unexplained, renders them invalid, but which, when explained removes such presumption, and leaves them intact and valid. Hence a mortgage of chattels, unaccompanied by delivery and possession, although not filed, if made in good faith, and for a valuable consideration, is not invalid as against creditors and subsequent purchasers. The mortgage of the plaintiff was executed subsequently, but on the same day, as the two mortgages of the defendant, but before they were filed. As the plaintiff had no actual notice of the existence of such mortgages, and the property remained in the possession of the mortgagor, in the absence of explanation they were presumptively invalid as against the plaintiff. But if the defendant had succeeded in filing his mortgages before the execution of the plaintiff's mortgage, no such presumption would have arisen affecting their validity. The filing of the defendant's mortgages after the plaintiff filed his did not relieve them of the presumption of fraud which impugned their bona fides. Nor did the filing of the plaintiff's mortgage in any way affect their legal status in this regard. It was not the filing of the plaintiff's mortgage, but the failure of the defendant to file his before the execution of the plaintiff's mortgage, that fixed their status as presumptively fraudulent. The plaintiff filed his mortgage to protect it against the implication of fraud as against subsequent, and not prior, mortgages. Hence his mortgage obtained no priority over the defendant's mortgages on account of being first filed. If the defendant should show, or it should be admitted, that his mortgages are bona fide, they are valid instruments, and as such created liens on the property in question from the date of their execution, which, being prior to the execution of the plaintiff's mortgage, gives them priority. The case is different where the statute declares in effect that no chattel mortgage shall be valid, except as to the parties, unless possession be delivered to and retained by the mortgagee, or unless the mortgage be filed or recorded as prescribed. Under this kind of statute, an unrecorded chattel mortgage, or one not filed, is absolutely void as against a subsequent mortgagee. "The statute," said Marston, J., "declares the instrument shall be absolutely void, and nothing short of a change of possession or filing as the section requires can save it." *Cooper v. Brock*, 41 Mich. 491, 2 N. W. 660. In other words, the statute declares that a prior unrecorded mortgage "shall be absolutely void as against" subsequent mortgagees in good faith. *De Courcey v. Collins*, 21 N. J. Eq. 360. If our statute was of this sort, the mortgages of

the defendant not having been filed when the mortgage of the plaintiff was executed, they could not have priority, because they would be entirely void as against it. Such is not the legal consequence that follows want of possession or filing under our statute. Under it a chattel mortgage not filed, where the possession is retained by the mortgagor, in the absence of explanation showing the transaction to be fair and honest, would be treated as fraudulent as against subsequent mortgagees. On the other hand, if such mortgage is shown or admitted to be founded on a valuable consideration, and made in good faith, it must be regarded as a valid instrument as against creditors, subsequent purchasers, or mortgagees. Under the circumstances first stated, the mortgage of the plaintiff would be entitled to priority over the mortgages of the defendant, not because it was first filed, but because those of the defendant were not filed when his was executed, and therefore were to be regarded as presumptively fraudulent as against it; while under those last stated the mortgages of the defendant would be entitled to priority over that of the plaintiff, because, being valid instruments, they impressed a lien on the property from the date of their execution, which, being prior to the execution of the plaintiff's mortgage, conferred priority of right. As the case was brought and tried upon the theory that the priority of the mortgages in question was to be determined from the time of the filing, without regard to the time of their execution, the facts found and the argument conceded that the defendant's mortgages were bona fide or valid instruments. Considered as such, the defendant acquired a lien on the property by his mortgages which was prior to that acquired by the plaintiff's mortgage, and consequently he had a right to take the property covered by them, and in so doing did "not wrongfully take or convert to his own use the chattels mentioned in the complaint."

In view of these considerations, the case of *Pittock v. Jordan*, which holds that a chattel mortgage given in good faith is not valid as against a subsequent mortgage first filed, must be overruled. At common law the rule unquestionably was that where there was no change in the possession such a transaction was void as to creditors. The rule of *Twyne's Case* and the other English cases following it was that the retention of possession by the vendor or mortgagor rendered the transaction, as a matter of law, absolutely void; while in this country the courts are divided, some holding strictly to the English doctrine, and others holding such a transaction only presumptively fraudulent, subject to explanation, which should be considered by a jury with the other evidence in determining whether the title of the vendee or mortgagee was in fact affected by fraud. 2 Kent, Comm. 516-531; *Marks v. Miller*,

21 Or. 317, 28 Pac. 14. The doctrine of our statute is founded on the principle of these latter decisions. As the case stands, in view of the considerations suggested, the judgment must be reversed, and the cause remanded for such further proceedings as may be proper, and not inconsistent with this opinion.

CHURCH v. SMITHEA et al.

(Court of Appeals of Colorado. Dec. 11, 1893.)
MECHANICS' LIENS—MORTGAGES—PRIORITIES—ENTIRE STRUCTURES.

Under Gen. St. § 2148, providing that, for work or material for an "entire" structure, erection, or improvement, a mechanic's lien shall attach to the building, erection, or improvement, in preference to a prior mortgage, the right of lien is not limited to one who contracts for or puts up the entire structure, but is given to one who contributes to the erection of an entire building.

Appeal from district court, Arapahoe county.

Action by J. H. Smithea and Charles Arnold, doing business as Smithea & Arnold, against Frank Church, to enforce a mechanic's lien. Judgment for plaintiffs. Defendant appeals. Affirmed.

T. J. O'Donnell and W. S. Decker, for appellant. T. B. Stuart, Chas. A. Murray, and A. M. Andrews, for appellees.

BISSELL, P. J. An asserted priority in right springing, in the one case, from a trust deed on unimproved property, and, in the other, from a mechanic's lien for work done in the construction of a building after the execution of the conveyance, has given rise to this suit. While one Ermerins was the owner of four lots in a subdivision to the city of Denver, she executed, on the 22d day of January, 1890, a trust deed to secure the payment of certain promissory notes, aggregating the sum of \$17,600. On the 1st of May thereafter, a contract was made with Smithea & Arnold to put up two buildings on these premises for a specified price. The contractors continued the work until the foundation was completed, when, for some unexplained reason, it was abandoned, and the contract never carried out. No importance is attached to the noncompletion of the contract, and the record is silent as to the reason of it. The buildings were afterwards finished, under one or more contracts made by the owner of the property. What the facts may be respecting these matters does not appear. When they completed the foundation, Smithea & Arnold filed a notice of lien under the statute, and apparently took all the steps necessary to assert their rights, if they had any. The owner made default in the payment of the notes which were secured by the trust deed, and, under the authority which the conveyance contained, the trustees proceeded to advertise and sell the property,

and conveyed it by a deed of unquestioned validity to Mitchell Benedict, who transferred it to Frank Church, the present appellant. The lien of the contractors remained unsatisfied, and the present suit was begun to enforce it. Church defended, set up his conveyance, and denied the right to a lien, on the ground that, as the owner of the premises, he was entitled to what may have been put on them after the delivery of his security. This claim is substantially an assertion of a principle well settled at the common law. Under that doctrine, it was universally true that any building or improvement erected on land subsequent to the execution of a mortgage became thereby a part of the realty, and subject to the incumbrance. The mortgagee could never be deprived of the benefit of this added security, except by express legislation, clearly designed to deprive him of this benefit, and to give superior rights to a third party. Many statutes have been enacted which were intended to secure to mechanics and contractors what might be due them for betterments put upon property. The original purpose of these enactments has long since been lost sight of, and, by an imperceptible process of extension, they have been brought to include everything that may be necessary to secure to either the mechanics, material men, or contractors pay for any service rendered in the betterment of property. Whatever may be the opinion about the wisdom of this sort of class legislation, its validity and constitutionality is too well settled to admit of discussion. The courts universally uphold it, and many express a very strong conviction concerning its propriety. *Brooks v. Railway Co.*, 101 U. S. 443; *Wimberly v. Mayberry*, 94 Ala. 240, 10 South. 157; *Cement Co. v. Morrison*, 13 N. J. Eq. 133; *Turner v. Robbins*, 78 Ala. 592; *McAllister v. Clopton*, 51 Miss. 257.

The only matter, then, concerning which there can be any dispute, is as to the terms and proper construction of the statute on this subject. Section 2148 of the General Statutes of 1883 establishes the relative rights of the prior incumbrancer and the subsequent lienor in cases of this description. The only part of the statute essential to the present inquiry is the concluding clause, which is as follows: "When the lien is for work done or material furnished for an entire structure, erection, or improvement, such lien shall attach to the building, erection, or improvement for or upon which such work was done or materials furnished, in preference to any prior lien or incumbrance or mortgage upon the land upon which same is erected or put." The difficulty which attends the construction of the act comes from the somewhat loose and indefinite expression of the legislative purpose. The contention is over the words "for the entire structure," etc. The appellant argues with great force and vigor that these words are neces-

sarily to be so construed that the statute will only give the right to such a charge on the property to whomsoever may put up an entire building. Most of the support for the appellant's contention in this respect is derived from a consideration of those cases which give the mechanic a lien for improvements, or for those things which are, with respect to existing structures, commonly called "betterments." The argument seems to us decidedly technical, and not in accord with the evident purpose and object of the act. The statute does not go to the extreme lengths of the legislation in other states, as, for instance, in Illinois, where the lienor has the statutory right to compel the sale of the entire property and a proportionate division of the proceeds. Neither does it give the mechanic or contractor the right to a lien on a building for its improvement or betterment where the building was on the property, and subject to a prior incumbrance, at the time the work was done. The lawmakers seem to have determined that the only case in which the common-law rule should be interfered with was one where an entire structure should be put on the property. They evidently concluded that, under these circumstances, no injustice would be done to the prior incumbrancer, since he would then only be deprived of the right to hold property to which his lien had never attached. In such case the statute gives the contractor or the lienors, separately or conjointly, the privilege to assert their rights against the newly-erected building. The prior incumbrancer loses nothing to which his security has affixed itself, nor does the lienor get anything beyond that which he may have put on the land. It simply remains to be determined whether the word "entire" is to be so limited as to restrict the right of lien to those cases where the lienor may have contracted for or put up the whole structure. This construction is not rendered absolutely necessary by the language of the statute, nor, in our judgment, does it correspond with the legislative purpose. That purpose, as it seems to us, was to give the right of lien wherever an entire building was put up, as contradistinguished from the case where additions or betterments were put on property. This distinction was very well illustrated in an early case in Iowa. *Getchell v. Allen*, 34 Iowa, 559. In that case the court experienced a good deal of difficulty in the construction of the statute, because the word "entire" was omitted from the enactment. But the court draws a very broad distinction between the different significations to be attached to the word "improvement," and concludes that the word must be limited to cases where it is descriptive of an entire building, and not to those cases where additions may be made to a structure already on the land, which it would be inequitable to permit the lienor to remove; but that court, and all others which have been called on to

construe similar acts, adopt the principle that the right to a lien and its enforcement exists in favor of all who may do work on a building which is newly erected on previously unimproved property. This accords with our views of the legitimate and proper construction of our own statute. The legislature evidently intended to give a lien to mechanics where a new building was put on previously vacant and incumbered property, and there is no evidence of any purpose to limit the right to one who contracts to put up the whole structure. If the building be a new one, the lien may be as legitimately enforced in favor of a dozen mechanics and contractors who do work on it as in favor of one who puts up the entire building. The incumbrancer is not harmed, since, as to him, he has lost no part of the security which he held at the time the improvement was started. The judgment of the court below is in harmony with these views, and it will accordingly be affirmed.

DENVER TRAMWAY CO. v. REID.

(Court of Appeals of Colorado. Oct. 9, 1893.)

HORSE AND STREET RAILROADS—INJURIES TO PASSENGER — EVIDENCE — INSTRUCTIONS — ERROR WITHOUT PREJUDICE.

1. In an action for personal injuries resulting from an electric shock caused by contact with defendant's street car while alighting therefrom, evidence that the car was so charged with electricity as to injure a person by contact with any part establishes a prima facie case of negligence.

2. It was competent for a physician who had had plaintiff in his care from the time of the injury to give his opinion as to whether plaintiff would ever recover his physical powers.

3. It was proper to ask a witness, who testified that electricity could not be transmitted to a trail car in such quantities as to cause personal injuries, whether the metal railings around all of defendant's cars were not blistered by leakage of electricity; such question not being objectionable as not being limited to the car by which plaintiff was injured, and about the time of the accident, when the witness testified that he did not know of the injury till the day after it happened, nor what car caused the injury.

4. Defendant introduced evidence that plaintiff was drunk at the time of the accident, and also examined him as to his habits for years as regarded drinking. *Held*, that it was competent for plaintiff to show that he was not drunk at such time, and also that his character for sobriety was good.

5. A witness for plaintiff, in reply to a question concerning a burglary which occurred near the house of one of defendant's witnesses stated that such witness was arrested, but that he was immediately released. *Held* error without prejudice when such witness was recalled and allowed to prove his innocence.

6. A company operating its cars by electricity is bound to use extraordinary care, and is liable for slight negligence.

7. The jury were properly instructed that in determining whether plaintiff was guilty of contributory negligence they might consider "the natural instinct of self-preservation; that any person under ordinary conditions will take care of himself from regard to his own life."

8. A charge that plaintiff's drunkenness would not relieve defendant from liability if guilty of negligence, but that, drunk or sober, if plaintiff, by want of ordinary care, contributed to the injury, he must assume responsibility therefor, regardless of his condition, is unobjectionable.

Appeal from district court, Arapahoe county.

Action by William Reid against the Denver Tramway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The other facts fully appear in the following statement by REID, J.:

The action was brought by appellee to recover damages for personal injuries sustained by the alleged negligence of appellant in its management of its cars in his transportation from one part of the city to another. The following is the complaint: "The plaintiff complains of the defendant, and for cause of action against it alleges: That the defendant is a corporation organized and existing under and by virtue of the laws of the state of Colorado. That the plaintiff was, at the time of the grievances hereinafter complained of, and has been during the most of his life since he arrived at maturity, a blacksmith by trade, and at the time of the grievances hereinafter complained of he was working at and carrying on his said business of a blacksmith in the city of Denver, and earning thereby a good living for himself and his family; and, further, that he had no other means of earning a living for himself and his said family except by his said trade. And the plaintiff further alleges that on, to wit, the 9th day of September, A. D. 1890, the defendant was, and for a long time prior thereto had been, the owner of and operating a certain line of railway in the said city of Denver, county and state aforesaid, for the purpose of transporting passengers to and from different portions of said city, and that said railway was and is operated by means of electricity conveyed along the route of said road by means of overhead wires. That upon, to wit, the said 9th day of September, A. D. 1890, the plaintiff was upon one of the trains of the defendant company as a passenger thereon, for the purpose of being carried and transported from one part of said city of Denver to another part of said city in consideration of the sum of five cents, then and there paid by the plaintiff to the defendant, in consideration of which sum the defendant undertook to carry and transport the plaintiff from, to wit, at or near the corner of Twenty-Fourth and Humboldt streets, in said city, to, to wit, the corner of South Ninth street and Tenth avenue, in said city, and that while the plaintiff was in the act of getting off and alighting from the cars of the defendant, and with out any fault or negligence whatever on the part of the plaintiff, the said train of the defendant was so negligently and carelessly operated and handled by the said de-

fendant, and the said electricity by which said train was operated was so carelessly, negligently, and unskillfully used, that an unexpected and sudden jerk or motion was communicated to the said train, whereby the plaintiff was violently and with great force thrown down upon the track upon which said cars were running, and between the cars of said train, and through the negligent conduct of the said defendant, and by reason of the negligent, careless, and unskillful manner in which said train and said electricity was used and operated, the plaintiff received on, upon, and into his body large quantities of said electricity, and that by means of said electricity his whole system was greatly burned, shocked, and injured, so that by means of the fall occasioned by the sudden motion of said train as aforesaid, and by means of the powerful shock received from the electricity aforesaid, and the burns aforesaid, the plaintiff was greatly and severely hurt, bruised, and injured in and throughout his limbs, his body, and his whole system; and that his limbs and body have been, and still are, to a considerable extent, paralyzed, and rendered unfit for their ordinary functions and uses, and that he was otherwise severely hurt, bruised, and injured generally throughout his whole body and limbs by being so thrown down as aforesaid, and by means of said electricity aforesaid; and that said hurts, burns, bruises, and injuries aforesaid, so caused by the negligence of the defendant as aforesaid, are of a permanent and lifelong character, and have to the present time, and at all times hereafter will, prevent the plaintiff from doing or performing manual labor. That he has suffered great pain and anguish on account of the hurts and injuries so received as aforesaid, and still suffers. And so the plaintiff alleges that he has been damaged, by reason of the premises, in the sum of \$20,000. And the plaintiff further alleges that on account of the hurts, burns, bruises, and injuries aforesaid, he was compelled to employ physicians and nurses to render him assistance, and to take the necessary and proper care of him; that the charges made by said nurses and physicians amount to the sum of \$1,000; that said charges are reasonable and proper, and all of which the plaintiff is obliged to pay on account of the said negligent conduct of the said defendant. Wherefore the plaintiff demands judgment for the sum of \$21,000 and costs of suit." To which appellant answered, denying the allegations of the complaint, and for a second or further answer alleged "that neither it nor its agents, servants, or employees were guilty of the carelessness, negligence, and improper conduct in the complaint alleged, and says that the injury therein described, if any there was, was caused by the fault and negligence of the plaintiff himself." Replication of plaintiff traversing answer.

The issues so made were tried to a jury, to which, among many others, the following instructions were given, contended by appellant to have been erroneous: "(1) The court instructs the jury that the defendant company is a carrier of passengers, operating its cars by means of electricity, and is bound to use extraordinary care, and is liable for slight negligence. And, on the other hand, the plaintiff, as a passenger on such car of the defendant, was bound to use ordinary care to guard against accident or injury. And by such ordinary care is meant that care which a person of common prudence takes of his own concern, or that degree of care which men of common prudence exercise about their own matters and their own personal safety. And in determining what would be ordinary care in a particular case, reference must be had to all the circumstances and surroundings of that case. And if, all the circumstances and surroundings considered, the plaintiff in this case used such ordinary care in preparing to get off the defendant's car, and in alighting therefrom, then he is not guilty of contributory negligence in producing the injury complained of, and for which this suit is brought. And getting up from his seat and preparing to get off of the car before the car had fully come to a standstill, but was very slightly moving, was not contributory negligence on the part of the plaintiff, unless such getting up from his seat and otherwise preparing to get off the car and alighting therefrom was done in a careless or negligent manner, all the circumstances and surroundings considered; for, if such negligence—if there was any—on the part of the plaintiff was slight, or the remote cause of the injury, he may recover, notwithstanding such slight negligence or remote cause. And, although the plaintiff may have been guilty of misconduct or failure to exercise ordinary care and prudence which may have contributed remotely to his injury, yet, if the agents of the defendant company were guilty of mismanagement or negligence in the management of said car, which was the immediate cause of the injury to the plaintiff, and, with the exercise of extraordinary care by such agents said injury might have been prevented, the defendant is liable in this suit. And the jury are further instructed that in arriving at a conclusion as to whether the plaintiff was guilty of contributory negligence at the time of the happening of the accident they may take into consideration the natural instinct of self-preservation; that any person under ordinary conditions will take care of himself from regard for his own life. And, further, the jury are instructed that, if the injury complained of was done to the plaintiff by the electricity used by the defendant for motive power or in any other wise, or by any other means, on account of the failure of the defendant to use extraordinary care about the opera-

tion of its road and cars, then the defendant company is liable in this suit, unless the plaintiff had failed to use ordinary care and prudence in preparing to leave said car and alighting therefrom; and, even if he failed to use such ordinary care and prudence, the defendant company is still liable if this failure to use ordinary care and prudence on the part of the plaintiff was the remote, and the negligence of the defendant company was the immediate, cause of said injury. (2) The presumption is that the plaintiff used ordinary care and prudence at the time of the alleged injury, and it is incumbent upon the defendant to prove that the plaintiff did not use such ordinary care and prudence, and to prove that the want of such ordinary care and prudence on the part of the plaintiff was the immediate, and not the remote, cause of the injury complained of." (5) The court part of the plaintiff, if the jury believe the instructs the jury that intoxication on the plaintiff was intoxicated, is not, as a general rule, in itself, as a matter of law, such negligence, or evidence of such negligence, as will bar his recovery in this action. The law refuses to impute negligence as of course to a plaintiff from the bare fact that at the moment of suffering the injury he was intoxicated. Intoxication is one thing, and negligence sufficient to bar an accident for damages quite another thing. Intoxicated persons are not removed from all protection of law. If the plaintiff used that degree of care incumbent upon him to use, under the circumstances of this case, as explained to you in a previous instruction, then his intoxication, if you believe from the evidence he was intoxicated, had nothing to do with the accident. When contributory negligence is one of the issues, as in this case, it must appear that the plaintiff did not exercise ordinary care, and that, too, without reference to his inebriety. The question is whether or not the plaintiff's conduct came up to the standard of ordinary care, not whether or not the plaintiff was drunk." It is claimed that the last is in conflict with the tenth, which is: "(10) The court instructs the jury that plaintiff alleges that he was injured, without any fault or negligence whatever, while alighting from defendant's cars. The court instructs you that you must be satisfied from the evidence offered in the case that such was the fact; and if you find from the evidence that just before and while plaintiff was attempting to alight from defendant's train he was under the influence of liquor to such an extent as to prevent him from exercising reasonable care and caution in controlling the movements of his body, although he might not have been entirely under its influence, and that such inability of plaintiff to so control his actions caused or tended to cause his receiving the injuries he claims in attempting to alight from defendant's train, then the plaintiff was not without fault, and your verdict must be for the defendant."

Other supposed errors in receiving and rejecting evidence will be noticed in the discussion of the case. The jury found for the appellee, with damages of \$5,500.

James H. Brown and Milton Smith, for appellant. Markham & Carr, for appellee.

REED, J., (after stating the facts.) The fact that serious injuries were received by appellee, the nature, extent, and consequent effect of such injuries, and the manner in which they were received, were well established by the testimony, appear to have been practically conceded by appellant, no serious effort having been made to in any manner contradict them. The question of negligence on the part of the appellant corporation and contributory negligence upon the part of the plaintiff were the only important issues involved. Those having been found by the jury in favor of the plaintiff, unless serious legal error occurred upon the trial, either in the admission or rejection of evidence, or in the instructions to the jury as to the law of the case, such verdict cannot be disturbed. The questions of negligence upon the part of the defendant and contributory negligence of plaintiff are purely questions of fact to be determined by the jury, not of law. No principle is better settled, both in the United States and England. In *Beach, Contrib. Neg.* § 163, it is said: "In general, it cannot be doubted that the question of negligence is a question of fact, not of law. Whenever there is any doubt as to the facts, it is the province of the jury to determine the question; or, whenever there may reasonably be a difference of opinion as to the inferences and conclusions from the facts, it is likewise a question for the jury. It belongs to the jury, not only to weigh the evidence and to find upon the questions of fact, but to draw conclusions as well, alike from disputed and undisputed facts." And in a note the text is supported by almost innumerable authorities from every state in the Union. In *Railroad Co. v. Van Steinburg*, 17 Mich. 99, Judge Cooley said, at page 118: "Negligence, as I understand it, consists in a want of that reasonable care which would be exercised by a person of ordinary prudence under all the existing circumstances in view of the probable danger of injury. The injury is, therefore, one which must take into consideration all these circumstances, and it must measure the prudence of the party's conduct by a standard of behavior likely to have been adopted by other persons of common prudence. Moreover, if the danger depends at all upon the action of any other person under a given set of circumstances, the prudence of the party injured must be estimated in view of what he had a right to expect from such other persons; and he is not to be considered blamable if the injury has resulted from the action of another, which he could not reasonably have anticipated. Thus

the problem is complicated by the necessity of taking into account the two sets of circumstances affecting the conduct of different persons, and is only to be satisfactorily solved by the jury placing themselves in the position of the injured person, and examining those circumstances as they then presented themselves to him, and from that standpoint judging whether he was guilty of negligence or not. It is evident that such a problem cannot usually be one upon which the law can pronounce a definite sentence, and that it must be left to the sifting and determination of a jury." Although in all cases, both civil and criminal, the rule of law is well settled that it is the province of the jury to determine facts, it seems to be regarded as peculiarly within their province in cases of alleged negligence and contributory negligence, where, as in this case, the negligence of one, or combined negligence of both, resulted in serious injury. And the reason undoubtedly is, as stated by Judge Cooley, "that the problem is complicated by the necessity of taking into account the two sets of circumstances affecting the conduct of different persons." In *England, in Railway Co. v. Jackson*, 3 App. Cas. 193, it was said: "Whether there is reasonable evidence to be left to the jury of negligence occasioning the injury complained of, is a question for the judge. It is for the jury to say whether, and how far, the evidence is to be believed." In *Railway Co. v. Slattery*, Id. 1155: "When there is conflicting evidence on a question of fact, whatever may be the opinion of the judge who tries the cause as to the value of that evidence, he must leave the consideration of it for the decision of the jury." In *Brown v. Railway Co.*, (1885,) 52 Law T. 622, the court said: "In an action of negligence, if the plaintiff gives evidence of negligence on the part of the defendant, and also gives evidence which may or may not be considered as amounting to contributory negligence on his own part, the case ought to be left to the jury." And see *Davey v. Railway Co.*, 12 Q. B. Div. 70; *Martin v. Railway Co.*, 16 C. B. 179.

One important branch or factor in the case seems to be ignored or overlooked, or at least not treated in argument with the consideration its importance required, viz. the serious injury from electricity, caused by coming in contact with the lower part of the car after falling. The negligence in operating the cars whereby the plaintiff was thrown in such position as to come in contact with the electrical charge may, undoubtedly, be regarded as the proximate cause of the injuries. The negligent application and use of the electric current, by which the metallic portions of the trail car became charged, was the cause of the damage to the person by shock and burning,—the first, proximate and direct; the other, resulting. Both united caused the damage to the person; consequently, both must be regarded.

The car was a "trail," supposed to be entirely free from the influence of the motive power which was applied to the motor car. It was alleged in the complaint "that by reason of the negligent, careless, and unskillful manner in which said train and said electricity were used and operated, the plaintiff received on, upon, and into his body large quantities of said electricity, and that by means of said electricity his whole system was greatly burned, shocked, and injured, so that by means of the fall occasioned by the sudden motion of said train, * * * and by means of the powerful shock received from the electricity," etc. The fact being established that injuries were caused by electricity, and that the car was so charged with the fluid as to injure a person by contact with any part of it, if not establishing negligence per se, made such a prima facie case as to require defense to show that the injuries were not caused either by that agency, or through the careless use of the agent. No effort was made upon the trial to show that the injuries were not caused by electricity, as stated in the complaint, and established by the evidence; nor was the presence of the fluid explained or attempted. It is true, Mr. Ballow, an electrical engineer in the employment of the company, was called, and testified, the result of his evidence being that he knew nothing whatever about it, nor even what car it was; that it was his duty to cause every car to be examined at the station; that he had given such orders, and presumed the examination had been made in the station the night after the accident happened, etc.,—all of which was not of the least importance, the question being what the electrical condition was at the time of the injury. That certainly could not be determined by the examination, hours afterwards, of the car detached from the motor, and "housed." Mr. Ballow and a Mr. Dashiell testified, as expert electricians, that the cars were so coupled, constructed, and insulated that it, in their opinion, would be impossible for the trail car to become so charged with electricity as to cause injury to a person coming in contact with any part of it. However expert, scientific, and learned they may have been upon the subject, and however honest, what they or either of them thought in regard to it was of very little importance when confronted with the facts and results established and uncontradicted.

In *Flannery v. Railway Co.*, 11 Ir. Com. Law, 30, it was said: "When a plaintiff sustained injuries in consequence of a portion of the train in which she was traveling having left the rails, and the railway, the engine, and the carriages were under the management of the company, held, that the fact of the accident was sufficient evidence to cast upon the company the burden of showing that there was no negligence on their part; and that, as they declined to afford any explanation of the cause of the

accident, there was a case for the plaintiff, proper to be submitted to the jury." Taking up the supposed errors in admitting testimony, Dr. Hart was asked, "From your knowledge of this case, what would you say as to the probability of his ever recovering his physical power?" Counsel says, "This question was objected to as not being a proper hypothetical question; that it was not based on the facts proven or assumed to be proven." This was evidently the result of a misconception. Dr. Hart was plaintiff's family physician; had had plaintiff in his care from the time of the injury; still had him in his care. He was not called as an expert to testify upon a hypothetical case presented, but as to facts within his own knowledge; and he was asked, not to testify from facts stated by others, but what he knew. He was asked, "From your knowledge of this case," etc. Even if an expert, the objection is answered by the first authority cited by counsel in support of his contention. *Rog. Exp. Test.* § 46. "His opinion, to be admissible, must be founded either upon his own personal knowledge of the facts, upon facts testified to in court, or else upon a hypothetical question." Mr. Ballow, an electrical engineer employed by the company, attempted by his evidence in chief to establish the fact that electricity could not be transmitted to a trolley car in quantity sufficient to cause injury. On cross-examination he was asked: "I will ask you, as a matter of fact, if all the cars running on the Lawrence street line, belonging to the Denver Tramway Company, haven't blisters upon the metal railing around the ends of the cars, caused by a leakage of electricity? Are there not blisters on these the size of my thumbnail,—on the metal,—caused by this escape of electricity on the rear car?" "The questions were objected to as irrelevant and immaterial, because not limited to the particular car, and about the time of the accident." Counsel seems to have overlooked the fact that witness knew nothing about the accident until the next day, and did not know the car upon which it happened, but had, upon direct examination, testified generally that in the cars as constructed and operated no appreciable amount of electricity could be transmitted to the "trolley" car. Such being the fact, the questions asked appear to have been in the line of legitimate cross-examination. An instructive case upon evidence in this class of cases is *Simson v. Omnibus Co.*, *L. R. 8 C. P. 390*: "A passenger in an omnibus was injured by a blow from the hoof of one of the horses, which had kicked through the front panel of the vehicle. There was no evidence on the part of the passenger that the horse was a kicker, but it was proved that the panel bore marks of other kicks, and that no precaution had been taken, by the use of kicking strap or otherwise, against the possible consequence of a horse striking out, and no ex-

planation was offered on the part of the owner of the omnibus. Held, that there was evidence of negligence proper to be submitted to a jury." If evidence of other hoof marks upon the panel was admissible upon direct examination, and sufficient to convict the horse of being a "kicker," it seems that the questions, on cross-examination, under the facts and circumstances of this case, were eminently proper.

Defendant offered to prove by Holland, a passenger, that no other passengers getting on and off the car at about the same time were injured by electricity. Refusal of the court to admit the evidence is assigned for error, and urged in argument. The refusal was proper. The fact sought to be proved could have no bearing upon the questions at issue. In order to be admissible under any circumstances, it would have to be shown that some other person was in exactly the same position in regard to the car and earth as the plaintiff, immediately before or at the exact time of the injury. Probably no other person was so situated as to receive the charge by personal contact or otherwise. One person, by contact, might receive the entire charge from a dynamo or battery, while twenty others in the same room experienced no sensation whatever. If a person were known to be killed by lightning, bore unmistakable marks of the current, it would hardly be competent to attempt to rebut the fact by proof that no other person, or all persons, in the same vicinity, were not killed.

An attempt was made by the defendant to show that plaintiff was intoxicated at the time of receiving the injury, and that such condition contributed. On cross-examination of plaintiff the following occurred: "Q. Do you ever indulge in intoxicating liquor? A. Sometimes take some. Q. How long have you had that habit prior to the receipt of this injury? A. I don't know. I have always been in the habit. I never was a teetotaler. I never was intoxicated but once in my life. Q. You have been in the habit of drinking intoxicants before the receipt of this injury? A. Yes, sir. Q. About how frequently did you indulge? A. Well, maybe once in a day; maybe sometimes not for a month or two, and, sometimes not for twelve months. Q. What do you usually drink? A. Sometimes a little beer and sometimes a little whisky. Q. Have you ever been under the influence of intoxicants? A. Not since I have been out in this country, that I know of. Q. You still keep up the habit of indulging once in a while,—of indulging in beer and whisky? A. Yes, sir. Q. Do you remember whether you had been indulging in or drinking whisky or beer on the day of this accident? A. No, sir. Q. Are you quite positive that you hadn't been indulging that day? A. No, I don't think it. I might have taken one." Defendant attempted to prove by witnesses Walker, Seiffert, and Hol-

land that plaintiff was intoxicated. In rebuttal, plaintiff produced his wife, daughter, and a Mr. Cooper, to show it was not a fact; and by them his general character for sobriety was shown. This is claimed to have been error. Counsel says: "There was no evidence offered by defendant as to intoxication at any other time, nor did the defendant in any way attack the character or reputation of plaintiff, Reid, for sobriety. All of the evidence on this question was directed solely to his condition immediately before, at, and immediately after the accident." If this, as contended for, is the proper rule, defendant cannot complain of its violation, having at the very outset disregarded it in the examination of the plaintiff by inquiry regarding his habits for years. Such being the fact, the jury were entitled to all the facts, not only as to his condition at the time of the injury, but as to his general character for sobriety. It would be competent for a person charged with drunkenness to show he never drank; for a person charged with being drunk at a particular time that he had not taken liquor. Mr. Walker, considered by the defendant an important witness, testified to the intoxication and contributory negligence of plaintiff. Mr. Ustick was called by plaintiff, and examined in regard to a burglary committed near Walker's place of business, and was asked: "Now, I will ask you to state whether he (Walker) was arrested? Also state whether he (Walker) was arrested for the offense?" To which the witness answered: "Mr. Walker was taken into custody at that time, and taken to the City Hall, and was released then at the City Hall." Although perhaps technically erroneous, it carried with it its own antidote. Errors that are not shown to have been prejudicial are disregarded. The answer in regard to the arrest also shows the dismissal of the charge and release, exonerating the witness. It can hardly be presumed that this attempted attack upon the character of the witness could have prejudiced defendant, more particularly as the defendant afterwards recalled witness Walker, and he was allowed to establish his own innocence of the charge. In argument the first and second instructions are considered together. It is objected—First. "That they are general, instead of being specific. They do not advise the jury what facts, if found by the jury to be shown by the evidence, will constitute in the case negligence, proximate and remote cause, and contributory negligence, which are referred to therein. In short, they refer to the jury both matters of law as well as matters of fact." Again: "They stated mere abstract propositions of law. They were not put hypothetically, as they should have been." We do not think them amenable to such criticism. Instead of being general and abstract propositions of law unapplied, they seem to be a full and complete statement of the law of negligence as applicable

to the case, and specifically applied in every paragraph to the issues and the facts to be found by the jury. How they could have been more definitely or specifically applied is not shown, nor can we discover. Specific objection is made to the following language of the first instruction: "The court instructs the jury that the defendant company is a carrier of passengers operating its cars by means of electricity, and is bound to use extraordinary care, and is liable for slight negligence." It is contended that it is not the law. The authorities cited in support of the contention do not sustain it. The most that can be deduced from them is that the rule does not apply where the injury may have been caused by the act of a stranger, nor where the injury resulted from some voluntary act of the passenger himself, combined with some alleged deficiency in the carrier's means of transportation or accommodation. The first—"the act of a stranger"—was certainly not involved; and whether the acts of the plaintiff, concurring with the negligence of the plaintiff, combined to cause the injury, was the very question the jury were called upon to determine; and what negligence on the part of the plaintiff would relieve the defendant from the rigor of the rule was clearly and definitely stated. Applying the rule as intended and applied by the court to cars operated by electricity, and the management and use of the motive power, by which it was shown the injury was produced, it is eminently correct. The agent employed, common experience has taught, is one dangerous to life, even when the utmost skill and prudence of best-trained electricians are exercised. It is a subtle, imponderable, death-dealing element or fluid. Of its nature, or the laws governing it, very little is known, even among those few most advanced in the study of it. It may be harnessed, utilized as a motive power, and made to perform much economic service in mechanics; but as to its nature and vagaries nothing is known. It is full of surprises, and deals injury and death under what is deemed the most prudent management, and under what are supposed to be the circumstances least liable to inflict injury. In the use of such an agent extraordinary care in its management is required. Every appliance and precaution, as well as the best skill of men, should be applied in its use. How little is known of its eccentricities and possibilities, by even those most skilled and familiar with it, was shown upon the trial of this case, where the rear car was charged with it, and the plaintiff received the charge, and his wounds were the undisputed and indisputable evidence of the agency by which they were caused, instead of explaining or showing the conditions to have resulted through no negligence of those in charge. Two experts were put upon the stand, who testified to the impossibility of the rear car being charged. Aside from the deadly agent used as motive power,

the charge of the court that the defendant was bound to use extraordinary care, and would be liable for slight negligence, is warranted by the authorities. "The law requires a degree of care proportionate to the nature and risks in the given case." *Johnson v. Railroad Co.*, 20 N. Y. 65. "Passenger carriers bind themselves to carry safely those whom they take into their coaches, to the utmost care and diligence of very cautious persons." *Maverick v. Railroad Co.*, 36 N. Y. 378. "A carrier of passengers by railway is required to show that an injury to a passenger resulted from inevitable accident, or from something against which no human prudence or foresight could provide." *Sullivan v. Railroad Co.*, 30 Pa. St. 234; *Meier v. Railroad Co.*, 64 Pa. St. 225; *Railroad Co. v. Napheys*, 90 Pa. St. 135; *Warren v. Railroad Co.*, 8 Allen, 233; *Railroad Co. v. Derby*, 14 How. 486; *The New World v. King*, 16 How. 469. See *Scott v. Docks Co.*, 3 Hurl. & C. 596. In *Smith v. Railway Co.*, 32 Minn. 1, 18 N. W. 827, it is said: "The severe rule which enjoins upon the carrier such extraordinary care and diligence is intended, for reasons of public policy, to secure the safe carriage of passengers in so far as human skill and foresight can effect such result. From the application of this strict rule to carriers it naturally follows that, where an injury occurs to a passenger through a defect in the construction or working or management of the vehicle, or anything pertaining to the service, which the carrier ought to control, a presumption of negligence arises." In 50 Amer. Rep. 550, the case is supported by several pages of notes and almost numberless authorities.

It is next contended that the court erred in charging the jury "that in arriving at a conclusion as to whether the plaintiff was guilty of contributory negligence at the time of the happening of the accident they may take into consideration the natural instinct of self-preservation; that any person, under ordinary conditions will take care of himself from regard for his own life." This seems to be fully warranted by the authorities. "In arriving at a conclusion as to whether the plaintiff has been guilty of contributory negligence, the natural instinct of self-preservation, and the known disposition of men to save themselves from harm and injury, raises the presumption that the plaintiff is not guilty of negligence." *Moak, Underh. Torts*, 312, where a large number of authorities are cited in support of the text; 2 *Thomp. Neg.* 1179; *Northern Cent. R. Co. v. Gels*, 31 Md. 357; *Railroad Co. v. Slattery*, 3 App. Cas. 1155.

It is stated that the court gave all the instructions asked by both parties,—1 to 5, (both inclusive,) asked by the plaintiff; 6 to 12, (both inclusive,) on the part of the defendant. It would be strange, under the circumstances, if they did not conflict more or less. It is contended that the fifth instruction given is erroneous, and conflicts with the tenth,

given at the prayer of the defendant. Counsel says, "This instruction commences by advising the jury that intoxication in itself, as a matter of law, is not such negligence as will bar his recovery in this action," and ends by advising the jury that "it must appear that the plaintiff did not exercise ordinary care, and that, too, without reference to his inebriety. The question is whether or not the plaintiff's conduct came up to the standard of ordinary care, not whether or not the plaintiff was drunk." It requires considerable ingenuity to find fault with the language cited. It, in effect, properly states the law to be that the questions being tried were the negligence of the defendant and the contributory negligence of the plaintiff; not whether the plaintiff was at the time intoxicated. That drunkenness on the part of plaintiff would not relieve the defendant from liability, if guilty of negligence; and that, drunk or sober, if the plaintiff, by want of ordinary care, contributed to the injury, he must assume such responsibility, regardless of his condition. We cannot well see how it could have been different. If drunk, he was held responsible for his negligence; and, if drunk, it can hardly be contended that it gave the defendant, for that reason, the right to kill or maim him, but, if known, imposed greater care on the defendant. But the evidence failed to establish drunkenness, and the jury were warranted in disregarding it. The court would have been warranted in entirely withdrawing the question from the jury.

Owing to the importance of the case, the questions involved, and the great industry and ability with which it has been presented, we have examined carefully each point urged, and the authorities cited in support, and find no serious error. In fact it appears that the defense was allowed unusual latitude, and, if any criticism of the instructions were to be indulged in, it would be that those given for the defendant were fully as favorable as warranted, and, when in conflict with those given for the plaintiff, were more so. It follows that the judgment must be affirmed.

BURBANK v. ROOTS.

(Court of Appeals of Colorado. Jan. 9, 1894.)

MORTGAGES—LIABILITY OF MORTGAGEE.

A recital in a deed that the land conveyed is subject to mortgage, the consideration for which the grantee "assumes and agrees to pay," imposes on him a personal obligation to pay the mortgage debt; and the grantor may enforce the obligation without first paying the mortgage debt himself, as the payment thereof is a part of the consideration of the deed.

Appeal from district court, Arapahoe county.

Action by Willis S. Burbank against John R. Roots to enforce payment of a debt due on a mortgage of premises conveyed by plaintiff to defendant, which debt defend-

ant assumed and agreed to pay as part of the consideration of the conveyance. There was judgment for plaintiff, and defendant appeals. Reversed.

H. Q. Tanquary, for appellant.

REED, J. On April 20, 1891, appellant borrowed money from Tanquary & Gibson, making 31 promissory notes, payable on the 1st day of each succeeding month after July 1st, each for the sum of \$15, except the last, which was for \$21, all bearing interest at 8 per cent. per annum. These notes were secured by a deed of trust upon real estate. The deed provided that, in case of default of payment of any of the notes or the interest, the whole might be declared due and payable, and the property sold. On the 8th day of July following, appellant sold to appellee the realty covered by the trust deed, and conveyed it by warranty deed, the covenants of warranty containing the following exception: "Free and clear * * * of all incumbrances, * * * except \$1,070 on lot 2, and \$300 on lots 15, 16, 17, and 18, which party of the second part assumes and agrees to pay." Default having been made in the payments, the holders of the promissory notes declared them all due, and proceeded by attachment to collect the money from appellant. It is not claimed that appellant paid the notes, but he gave other security to release the attachment, and commenced this suit to collect the money from appellee. A trial was had in the district court, resulting in a judgment for the defendant (appellee) for costs. This appeal was prosecuted from such judgment. Appellee is not represented in this court.

The law of the case appears to be well settled. A recital in a deed that the property conveyed is subject to a mortgage, which forms a part of the consideration, and stops there, creates no personal liability on the part of the grantee, and the grantor and mortgagee can only look to the property. 1 Jones, Mortg. § 748; Machine Co. v. Emerson, 115 Mass. 554; Woodbury v. Swan, 58 N. H. 380; Dunn v. Rodgers, 43 Ill. 260. But when the recital or exception is, "which mortgage the grantee assumes, or assumes and agrees to pay," or the conveyance is made "subject to the payment of an outstanding mortgage," the case is different. The assumption of the mortgage makes such sum a part of the purchase money. So much of the consideration as is necessary to pay the mortgage is taken from the consideration, and appropriated to the payment of the mortgage. It was not the taking of the property subject to the mortgage, but an agreement to pay the debt as contracted by the grantor. As said in *Heid v. Vreeland*, 30 N. J. Eq. 591, "His retention of the vendor's money for the payment of the mortgage imposes upon him the duty of protecting the vendor against the mortgage debt." It becomes a personal obligation that may be

enforced, by the vendor upon default of the vendee to pay in accordance with the contract made by his grantor. 1 Jones, Mortg. § 749; Stebbins v. Hall, 29 Barb. 524; Carley v. Fox, 38 Mich. 387; Sparkman v. Gove, 44 N. J. Law, 253; Locke v. Homer, 131 Mass. 93. The acceptance of a deed imposing upon the grantee the obligation of discharging the mortgage is sufficient. It is not necessary that he should sign the deed, or any obligation whatever. Spaulding v. Hallenbeck, 35 N. Y. 204; Belmont v. Coman, 22 N. Y. 438; Taylor v. Whitmore, 35 Mich. 97; Unger v. Smith, 44 Mich. 22, 5 N. W. 1069; Bishop v. Douglass, 25 Wis. 696; Dickason v. Williams, 129 Mass. 182; Urquhart v. Brayton, 12 R. I. 169; State v. Davis, 96 Ind. 539. And see *Dock Co. v. Leavitt*, 54 N. Y. 35, and cases cited. In such cases the promise implied by law is to pay the mortgage debt when due. If due, to pay it forthwith, or within a reasonable time. *Braman v. Dowse*, 12 Cush. 227; *Smith v. Truslow*, 84 N. Y. 660. The court below, apparently, and very naturally, fell into the error that, appellant not having paid the debt, no cause of action accrued; but the courts, in these cases, distinguish between the agreement to pay and one to indemnify. The distinction is based upon the fact that the debt was a part of the consideration for the property, and had been paid by the vendor. In the language of *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650, "As between him and his grantor, he becomes the principal debtor, and the vendor a surety." See *Sparkman v. Gove*, supra; *Braman v. Dowse*, supra; *Lethbridge v. Mytton*, 2 Barn. & Adol. 772; *Furnas v. Durgin*, 119 Mass. 500. In *Cutler v. Southern*, 1 Saund. 118, and note, it is said "that, where the condition of an obligation was merely to indemnify and save harmless, the defendant might plead non damnificatus; but where the condition was to discharge and acquit the plaintiff from such and such a bond, or other particular thing, the plea must aver performance, and a plea of non damnificatus was bad." Under the authorities, it was only necessary, in order to recover (1) to show the identity of the demand sued upon with the exception in the deed; (2) that the money was due; (3) that the vendee had made default in the payment. All of which facts appear to have been fully established upon the trial. It follows that the judgment of the district court must be reversed, and cause remanded.

QUINBY v. TEDFORD.

(Court of Appeals of Colorado. Jan. 9, 1894.)

REAL-ESTATE BROKERS—COMMISSIONS—EVIDENCE.

A real-estate broker, in an action for commissions, conceded that defendant made the sale, but claimed that he found the purchaser, and brought the parties together, while defendant's evidence tended to show that he

was negotiating a sale to the purchaser through his son, who was a real-estate broker, before the intervention of plaintiff. *Held*, that the evidence warranted a finding that the sale did not result from plaintiff's services.

Error to district court, Arapahoe county.

Action by Lewis H. Quinby against James H. Tedford. Judgment for defendant. Plaintiff appeals. Affirmed.

Milton Smith and W. T. Rogers, for plaintiff in error. Bartels & Blood, for defendant in error.

REED, J. Suit was brought by plaintiff in error to recover commissions alleged to have been earned in the sale of a property by the defendant to one Rose. The commission claimed was \$600. The suit was originally brought in the county court, a trial had to the judge,—a jury being waived,—resulting in a judgment for the plaintiff for \$200. An appeal was taken to the district court, where the trial was also had to the judge, resulting in a judgment for the defendant, from which this appeal is prosecuted.

Aside from the general assignment of error that the court erred in finding for the defendant, several special errors are assigned upon questions asked and the rulings of the court, and the admission and rejection of evidence. These supposed errors appear more technical than substantial, and of a character that could in no way materially affect the result or the parties. While it is well at all times in the trial of a cause to adhere in the examination of witnesses to well-established rules, a slight departure and trivial error is not ground for reversal, particularly when the case is tried to the court.

The other assignments are, in effect, that the court erred in its finding of facts. The trial appears to have been quite lengthy. Much contradictory and irreconcilable evidence was taken, from which the court apparently deduced the fact that within the law as laid down by the supreme court and this court the plaintiff failed to show that he had earned the fee for which he was prosecuting. It was not claimed that plaintiff made the sale, was conceded that defendant himself made it, but it was claimed that plaintiff brought the parties together, found a purchaser able and willing to buy, who did buy the property. On the part of the defendant there was evidence tending to show that, prior to the intervention of plaintiff, defendant was negotiating a sale, or attempting to, to the purchaser, through his son, who was also engaged in the business of a real-estate broker. It is evident that the court concluded that the sale did not result from the services of the plaintiff, and such finding has evidence in its support. This class of cases have been so numerous that they have become rather monotonous. The law has been so well defined and so often stated that a repetition is unnecessary.

District courts can hardly err in its application. The judgment of the district court will be affirmed.

BUCKEY et al. v. PHENICIE.

(Court of Appeals of Colorado. Jan. 9, 1894.)

APPEAL—REVIEW—HARMLESS ERROR.

In attachment proceedings before a justice, one summoned as garnishee denied any indebtedness to defendant, and, from a judgment against him, appealed to the county court. The court, after instructing the jury that the only issue was whether the garnishee had answered truthfully, required them to find whether plaintiff's judgment against defendant was valid or void, and, if found void, the jury were instructed to find that the garnishee answered truthfully. *Held*, that as the jury were compelled to find, regardless of instructions, that garnishee owed defendant nothing, the giving of such instruction was without prejudice.

Appeal from Otero county court.

Proceedings in attachment originally begun in a justice's court by George R. Buckey and others against Wilson & Wayne. J. W. Phenicie was summoned as garnishee, and from a judgment against him he appealed to the county court, which reversed the judgment, and plaintiffs appeal. Affirmed.

A. F. Thompson, for appellants.

REED, J. Appellants instituted proceedings by attachment against Wilson & Wayne before a justice of the peace. Appellee was summoned as garnishee, and made answer, denying his liability. His answer was traversed, a trial had, resulting in a judgment against the garnishee for seventy-odd dollars and costs. An appeal was taken to the county court, trial had to a jury, resulting in favor of appellee, from which appeal was taken to this court.

The only question involved was the truth of the answer made by appellee. There is no abstract of the record, as required by rule of the court. The paper filed is abstract, brief, and argumentative, so mixed as to be quite confusing. The appeal might very properly be dismissed, but, as that might subject the litigants to some hardship, we will proceed to make some disposition of the case, hoping that in future attorneys will bring themselves within the rule. There is no appearance for the appellee. Wilson & Wayne being indebted to appellee to the amount of \$90 and interest, in discharge of it, they, or rather Wayne, sold and delivered to him six head of horses, a miscellaneous lot of agricultural implements, and some other chattels of small value, also some hay in stack and some grain, which were subject to two chattel mortgages, one for \$213.53 and interest, the other for \$60 and interest. It appears from the evidence that appellee was to pay off the mortgages, and pay his own debt from the proceeds of the property, and, if any balance remained, pay it to the attorney

of Wilson & Wayne. He sold a part of the property, paid the chattel mortgages, and paid Wayne's attorney \$25. As near as can be gathered from the desultory evidence, the property sold brought in the neighborhood of \$250. The remainder he offered to sell at \$110, but could find no purchasers; making entire value of property received \$360. His disbursements and his own judgment amounted to about \$472.65, being over \$100 more than the value of the property. Testimony at great length was taken, some of it applicable to the issue, and much that was not. Several issues seem to have been tried, while there was only one involved. The instructions given by the court were very voluminous, rather incompatible and contradictory, and all but the first, which was: "Gentlemen of the jury, the only issue you are to decide in this case is whether or not the defendant, John W. Phenicle, answered the garnishee summons truthfully and correctly,"—were more or less faulty and erroneous. In one the jury were required to find as a matter of fact whether the judgment of appellants against Wilson & Wayne was valid or void, and, if found void, the jury were instructed to find that the garnishee answered truthfully. At first I regarded this error of sufficient importance to warrant a reversal, but, after a careful examination of the evidence, it was found that the jury, regardless of instructions, were compelled to find that there was no balance due from garnishee to Wilson & Wayne, or to any one else; consequently, that his answer was truthful. Hence it was of no importance to either party what the jury thought of the validity of the judgment. The instructions given at the request of the respective parties were so inharmonious that the jury may have regarded one set as neutralizing the other. The only question of fact involved seems to have been properly found, and the finding fully warranted by the evidence. Substantial justice having been done, the judgment should be affirmed.

KITZINGER et al. v. BECK.

(Court of Appeals of Colorado. Jan. 9, 1894.)

PAYMENT—ASSIGNMENT OF DEBT—GARNISHMENT.

A debtor cannot discharge a debt, of whose assignment by his creditor he has had notice, by answering as garnishee of such creditor that he is indebted, and paying the judgment rendered against him.

Appeal from Arapahoe county court.

Action by Kitzinger & Co., for the use of B. Hysinger, against Simson Beck, on account for goods sold and delivered. Judgment for defendant. Plaintiffs appeal. Reversed.

Willis B. Herr, for appellants. James S. McGinnis, for appellee.

THOMSON, J. The only ruling, of the court complained of here is the final ruling

in giving defendant judgment. Appellant claims that upon the evidence the judgment should have been in his favor. Beck, the appellee, was indebted to Kitzinger & Co., merchants at St. Louis, Mo., in the sum of \$355.85, on account of merchandise purchased by him. Kitzinger & Co. owed B. Hysinger, of the same city, something over \$6,000, for money borrowed on different occasions, for which they had given their notes, which had been renewed from time to time; and finally, on October 10, 1890, to secure the payment of these notes, Kitzinger & Co. assigned to Hysinger accounts due them to the amount of about \$6,900, and among them this indebtedness of Beck. A payment was afterwards made by Beck to Hysinger upon the debt, reducing its amount. On October 18, 1890, one I. Leon brought suit against Kitzinger & Co., and garnished Beck, who answered that he owed Kitzinger & Co. about \$250. The garnishee summons was served upon Beck October 20, 1890. Judgment was rendered in favor of Leon against Kitzinger & Co. and against the garnishee, Beck, upon his answer, for that sum. This action is brought for the use of Hysinger, assignee, to recover from Beck the balance due on his account. Beck's defense is the judgment against him in the garnishment proceedings, which he claims he has paid. At the trial the depositions of Hysinger and Max Tuholske, salesman and assistant manager of Kitzinger & Co., were read, and Beck testified in his own behalf. The testimony of Hysinger was that immediately upon the assignment of the account to him he notified Beck of the fact by a letter addressed and mailed to him, and Tuholske testified that Kitzinger & Co. also notified him of the assignment in the same way on the day it was made. Beck testified that he never had any notice of the assignment. If the evidence stopped here, we would make short work of the case; but it does not, and the rest of it changes the aspect of the controversy, as will appear from a recital of portions of it. The following is from the examination of Beck: "Q. I will ask you if you had any notice, prior to the service of the garnishment upon you, of any assignment of the claim of Kitzinger & Co. to Hysinger? A. None whatever. Q. Do you know the amount of the assignment? A. No, sir; I don't know a thing about it. I never received any letter, as it is stated here, with the exception of a statement from the firm. A statement is something a business man never files; therefore I have not anything to show for it. Q. In this letter you say: 'Dear Sir: Yours of the 14th to hand. In reply I will say that I was this day served with a writ of garnishment summons,' etc. Say whether you ever received any previous letter. A. Just merely a statement. Q. That statement was from Mr. Hysinger? A. Yes, sir. Q. Did he say the account had been assigned to him? A.

Yes, sir. * * * Q. Did he not say anything further than— A. I never received any notice from any of them." Beck also further testified that Leon and himself were on a footing of friendship, and that at the time of the garnishment Leon owed him money. The following letter was introduced, and is evidently the one alluded to by counsel in one of the foregoing questions: "Denver, Colo., Oct. 17, 1890. Mr. B. Hysinger, St. Louis—Dear Sir: Yours of the 14th to hand. In reply will say that I was this day served with a writ of garnishee summons by Mr. I. Leon, and under the circumstances I cannot remit the amount due you until the matter is disposed of in the court here. If you can arrange with Mr. Leon to release the writ, I am ready to send the amount due. Yours, truly, Sim. Beck." Notwithstanding Beck's denial that he ever had notice of the transfer of the account against him to Hysinger, it is very clear that he did have such notice, and that he had it before the garnishment process was served. He says that the statement sent him by Hysinger, and which it is apparent was received before the garnishment, informed him of the assignment. But, if there was no evidence on the subject except the letter, the fact of notice would be quite conclusively established. That letter is in answer to one of October 14th, received by him from Hysinger; and, although it is not before us, it is clear from Beck's reply that it must have contained a *dun* for the money due on this account. Beck, in stating his excuse for not sending it, refers to it as "the amount due you." He therefore knew at that time that Hysinger was the owner of the account, and that the money was due to him, and not to Kitzinger & Co. There is a peculiarity about the letter of which the evidence does not afford any direct explanation. He says, "I was this day served with a writ of garnishee summons by Mr. I. Leon." This was not true. He had not been garnished at that time. The action in which garnishment issued had not even been commenced. The action was commenced on the 18th, and the garnishment process was served on the 20th. The query is, why did he say he was garnished when he was not, and how did it happen that he was able to announce a garnishment in advance of the fact? Appellant's counsel thinks he has solved the mystery. He says: "The truth of the matter is that Beck and Leon were standing in together, in order to get ahead of the St. Louis firm; and in utter disregard of the rights of the assignee, Hysinger;" and it must be confessed that the evidence gives some color to the suspicion. But, be that as it may, the evidence establishes the fact of Beck's indebtedness to Kitzinger & Co., the fact of the transfer from Kitzinger & Co. to Hysinger and its consideration, and the fact that Beck had notice of the assignment before summons in garnishment was served upon

him. The assignment vested in Hysinger the ownership of the indebtedness, and, after notice of the assignment, Beck was the debtor of the assignee, and not of the assignors. Chamberlin v. Gilman, 10 Colo. 95, 14 Pac. 107. Beck, in his answer, should have stated the facts as he had been advised of them, leaving the good faith or validity of the assignment, and all other questions connected with it, which affected his liability in the proceeding, for the determination of the court; and in making answer, with the notice which he had, that he was indebted to Kitzinger & Co., he did so at his peril. The judgment which, in virtue of that answer, Leon obtained against him, is no defense to this action. The judgment is reversed.

CHARLES v. BALLIN et al.

(Court of Appeals of Colorado. Jan. 9, 1894.)

EVIDENCE—BOOKS OF ACCOUNT—ADMISSIBILITY.

In an action on an account, it was error to admit plaintiff's books to prove it, where the only person who testified to them was plaintiff's general bookkeeper, who supervised such books, but did not make the entries himself, and where it was not shown that the person who made the entries was dead, or out of the country, as required by Gen. St. 1883, § 3642.

Appeal from district court, Arapahoe county.

Action by Charles Ballin and another against John Q. Charles for goods sold and delivered defendant. There was judgment for plaintiffs, and defendant appeals. Reversed.

The other facts fully appear in the following statement by BISSELL, P. J.:

Ballin & Ransohoff are merchants in Denver, who have been engaged in the dry-goods trade in the city for a good many years. John Q. Charles, appellant, has been keeping house in the city during this time, and, with his wife, maintained an establishment in the city until she died, in the summer of 1890. During the most of these years, Miss Maud Charles was a member of their family, and apparently bore to them the relation of an adopted daughter. During the year 1890, goods were bought at the store of the appellees, and charged to the account of J. Q. Charles. He paid for the purchases, with the exception of a bill amounting to about \$375, which he declined to pay. According to the account, as declared on, it amounted to a little upwards of \$516, on which the merchants claimed that two amounts, of \$91.36 and \$50.75,—making a total of \$142.11,—had been antecedently paid. The case discloses the fact to be that the bill was not run as an entirety. One bill, amounting to \$91.36, was rendered in June, and paid on July 7th. This bill appears to have been contracted during the lifetime of Mrs. Charles. The other one, of \$50.75, was contracted after her decease, and was paid early in September. The items of this latter bill

were made up of charges for mourning goods furnished at the date of Mrs. Charles' death. The balance of the bill, amounting to about \$375, was contracted by Maud Charles during October and November, and was made up of articles which were purchased by her for a wedding trousseau. This was understood by Ballin & Ransohoff at the time of the sale. The goods were sold to Miss Maud, and delivered to her, and it is conceded that she had no direct authority from Mr. Charles to buy them on his credit. At the time of this purchase, Maud was a member of Mr. Charles' family, over the age of 18 years. There was no proof to show that she had any direct authority from Mr. Charles to buy any goods at any time from that firm. Some testimony was offered by the plaintiffs tending to prove that, during a long period of years, Miss Maud was sent to the store to buy goods, which were subsequently delivered to the house, and paid for either by Mr. or Mrs. Charles. The evidence plainly shows that, during Mrs. Charles' lifetime, she settled all the household accounts herself. There is nothing in the testimony to show that Miss Maud ever bought any considerable quantity of goods at any time, either for herself or the family's use, during Mrs. Charles' lifetime, nor is there anything to prove any purchases by her, other than possibly single and slight articles at odd times. In other words, the case does not establish any course of dealing between the firm and the Charles family through the agency of Miss Maud. The accounts of the purchases made in June, July, and August were run together with the account of the subsequent purchases by direction of counsel, evidently with the purpose of furnishing a basis for the deduction that, by the payments, Mr. Charles had admitted his daughter's authority to buy the goods. The case shows that Mr. Charles was in the habit of furnishing to his family what money they might require, commensurate with his means, either for the purchase of general supplies or their apparel. There was no proof that these goods bought in October and November were necessary for the daughter's use, or commensurate with her station, or that Mr. Charles had failed to provide her with whatever was requisite and necessary. No proof was made in the case concerning the value of the articles sold, other than that which might be derived from the prices which appeared on the books of the firm and the bill of particulars, both of which were offered in evidence. In introducing the books, the only person who testified to them was Charles Hard, who was the general bookkeeper of the firm, and who had general oversight over the books, which were kept by other clerks employed for that purpose. Hard himself did not keep the books, nor make the charges on them. The clerks who made them were not produced, nor were they shown to be dead or out of the country. No member of

the firm testified that the books were true and just, nor that they were correctly kept. The statute governing the introduction of books in this state is section 3642, Gen. St. 1883, and is as follows: "When in any civil action, suit or proceeding, the claim or defense is founded on a book account, any party or interested person may testify to his account book, and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself, and are true and just, or that the same were made by a deceased person, or by a disinterested person, a non-resident of the state at the time of the trial, and were made by such deceased or non-resident person in the usual course of trade, and of his duty or employment to the party so testifying; and thereupon the said account book and entries shall be admitted as evidence in the case." On this proof, judgment for the value of the goods was rendered against Charles, who prosecutes this appeal.

John R. Smith, for appellant. V. D. Markham and Harry Carr, for appellees.

BISSELL, P. J., (after stating the facts.) According to our view of the law, it is a matter of no moment to determine whether, at the time of the alleged purchase, Miss Charles was an adult, because she was over the age of 18 years, or whether at that time she was still a minor, and therefore sub potestate patris. In either event, her authority to purchase goods on the credit of her father must still be shown by plaintiffs. In the one case that burden might be well sustained by proof of a course of dealing which would warrant the implication of a grant of power, or by proof of actual authority conferred by the father. In the other, if the latter proof were not satisfactorily made, the plaintiffs would not only be compelled to show a course of dealing between the parties which would warrant the deduction, but probably they would likewise be compelled to show that the things purchased were what are always classed by the law as necessities, and a failure on the part of the father to properly supply the child. While we do not regard the evidence as at all satisfactory, in either view of the case, and are not persuaded that there was any such authority given by Mr. Charles as would render him liable for the bill, we might not, were this the only available error, reverse the judgment. There is some evidence to support the finding of the court with respect to the existence of the authority, although, to our minds, it is not proof which thoroughly supports the judgment. The issue in respect to the majority of the daughter was not presented by the pleadings, nor did they plainly raise the questions which might be presented if the suit had been brought as upon an account for goods sold and delivered to one upon the author-

ity of another. We are consequently disinclined to authoritatively express our views on these matters.

Counsel for appellant insists that in no event could the plaintiffs recover on their complaint, since it is an ordinary plea of goods sold and delivered to the defendant, which will not permit proof of the sale and delivery of goods to one, and the recovery of the price from another, who is named as defendant. Some of the early authorities are cited, which seem to hold that this would result in a variance. We would not regard this as a necessarily fatal departure of the proof from the pleadings, if the proof had satisfactorily established the defendant's liability. It must be conceded, however, that under our system, which is one requiring a statement of the facts out of which the cause of action grows, it is far better to allege whatever may be the truth in respect to this matter, rather than to put the cause of action into the form of an allegation showing simply goods sold and delivered to the defendant. What has already been said concerning the objections urged on our consideration has more reference to the course of any subsequent proceedings that may be taken in this case than to the discussion of questions which are regarded as determinative of what we must do with the judgment.

The fatal error committed by the trial court was in admitting the books and the bill of particulars in support of the plaintiffs' claim, without the foundation rendered necessary by the statute. The proper construction of the statute, and the determination of what must be done to render books admissible in actions brought for goods sold and delivered by an individual or by a firm are made very plain by the decision of the supreme court in *Farrington v. Tucker*, 6 Colo. 557. There are some slight differences between the common-law rule, which permitted the introduction of mercantile books, and that provided by the statute. These differences are of no moment, so long as the statute exists. In order to enable the merchant to establish the sale and delivery of his merchandise, and the value of the goods sold, by the production of his accounts, it is necessary that he show the books to be true and just, and that he made them, or that, by reason of facts which he establishes, he is relieved of this burden. In this case, neither was done. The accuracy of the books was not established by the evidence of the parties or of any person interested, nor were the clerks who kept them shown to be either dead or out of the country. Under these circumstances, manifestly, the books ought not to have been admitted. If there was other evidence in the record which clearly showed the sale and delivery of the goods, and what the price and value of the merchandise was, the error would not be one so prejudicial to the rights of appellant as to compel us to disturb the judgment. Since,

however, the books were inadmissible, and there is no other proof in the record showing the price and value, and nothing really showing the sale and delivery of the goods, we are compelled to send the case back for another trial. For the error committed by the court, as stated in this opinion, this judgment is reversed, and the cause remanded for a new trial.

STEARNS et al. v. SOPRIS.

(Court of Appeals of Colorado. Jan. 9, 1894.)

CORPORATIONS—LIABILITIES OF SUBSCRIBERS FOR STOCK—CONSTRUCTION OF CONTRACT.

Defendant signed a paper agreeing to take \$1,000 worth of stock in a corporation to be organized with a capital stock of \$200,000. The corporation was organized when \$60,000 had been subscribed, but defendant paid no part of his subscription, did not sign the stock subscription book, nor vote for directors. *Held*, that defendant is not liable on his subscription to creditors of the corporation.

Appeal from district court, Pueblo county. Action by Thomas B. Stearns and John Roger, partners as Stearns, Roger & Co., against the Trinidad Rolling Mills & Iron Company, defendant, and E. B. Sopris and others, garnishees. From a judgment for garnishee Sopris, plaintiffs appeal. Affirmed.

The other facts fully appear in the following statement by BISSELL, P. J.:

This controversy grows out of an attempt by a creditor of the Trinidad Rolling Mills & Iron Company to collect his debt by proceeding against a subscriber to the stock of the company to compel him to pay his subscription. Early in 1888 divers people devised the scheme of raising a company to build and operate a rolling mill near the city of Trinidad, in Colorado. The promoters did not subscribe for any very large proportion of the stock, but it was evidently their plan to obtain subscriptions from the citizens of that city sufficient to insure the success of the enterprise on the basis of the public benefits which would result from the establishment of that manufactory. A subscription paper was prepared and circulated. It is as follows: "Whereas, the undersigned citizens of Trinidad are desirous of organizing a corporation to be known as the Trinidad Rolling Mills and Iron Company, for the purpose of building a rolling mill in or near the city of Trinidad; and whereas, it has been decided to organize said corporation with a capital stock of \$200,000; wherefore it is agreed by us, the undersigned subscribers, to take stock in said Trinidad Rolling Mill and Iron Company, in the sum set opposite our names, and to pay twenty-five per cent. of our subscription on or before the 10th day of April, A. D. 1888, and the remainder in three equal installments, payable respectively, on the 10th day of June, 1888, the 10th day of August, 1888, and the 10th day of October, 1888." The paper was circulated, and subscriptions secured amount-

ing to a little upwards of \$80,000. Without waiting to obtain subscriptions for the entire capital, or failing in the attempt, which is not settled by the record, the promoters on the 10th of April, 1888, held a meeting to organize the company. The articles of corporation would seem to have been then executed by some of the parties interested, and presumably filed for record according to the statute. Some of the interested parties who were present at the meeting participated in the proceedings, signed the stock book in furtherance of their subscriptions, named the persons who were to be directors for the first year, and in general did what was necessary to perfect a corporate organization. There is considerable dispute in the record as to the part which the garnishee, Sopris, took at this meeting. Some witnesses say that he was present and took part in the meeting to the extent of voting for the people who were to serve as directors the first year. This he denies, and states that he declined to vote, and did not sign the stock subscription book. The latter fact is conceded. He seems, however, to have done nothing further with reference to the matter, took no further interest in the enterprise, declined to pay the sum that was due on the 10th of April, and paid nothing afterwards. After the company was organized as stated, it proceeded to do business, erected the mills so far as might be with the capital at their command, and attempted to carry out the purposes of their organization. The company subsequently mortgaged its property to secure some debt which was not paid at maturity, and the mortgagee closed out the concern. The present plaintiffs in error had sold the company some machinery, for which they had not been paid. They obtained judgment against the corporation. Their execution was returned unsatisfied, and thereupon they issued a process of garnishment, and had it served on sundry of the subscribers, among whom was the defendant in error, Sopris, and by these means sought to compel payment of the unpaid subscriptions. It is conceded that Sopris signed the above subscription list, and placed the sum of \$1,000 opposite his name. In answering the process, Sopris denied that he was indebted to the company by the general statement of "No" in response to the question, and the garnishing creditors took issue, set up the major portion of the foregoing facts, and the case came to trial thereon. At the trial, the facts were all proven by an agreed statement which contained substantially the foregoing narration. Judgment passed in favor of the garnishee, and Stearns, Roger & Co. prosecuted the appeal.

Hartman & Glenn, for appellants. Bo Sweeney and John A. Gordon, for appellee.

BISSELL, P. J., (after stating the facts.)
The most troublesome of the many questions

which this record presents will be left unsolved, for the decision can be safely rested on the application of a well-established principle. To prevent any possible misconstruction, and to rebut any possible inference on this matter, the court desires expressly to state that it has not considered, and does not determine the sufficiency and legality of the present proceedings to enforce the supposed liability of a stockholder upon his unpaid subscription. As is well understood by the profession, the remedy in these cases has been a matter of much discussion among the courts. The law on this subject is in a very unsettled condition, and it cannot be said to be at present clear, where no statute regulates the remedy, whether the proceedings should be at law or in equity, or by whom the suit should be brought, or whether one or all of the subscribers should be before the court. But since we conclude that in no event could Sopris be held liable, it is better to rest the opinion upon that irrefragable basis than to enter this disputed territory, and attempt by reason and on precedent to settle it. As a general proposition, it may be safely stated that every subscription to the stock of a corporation not yet organized is subject to whatever expressed conditions may be contained in the contract, and to the implied condition that all of the stock shall be subscribed before any particular subscription becomes operative, wherever the total amount of stock and the number of shares are stated in the subscription contract. The whole amount of the capital stock provided for must be secured by a bona fide subscription, enforceable as against the individual subscribers, unless there is some clear provision in the contract which will except it from the operation of this general doctrine. The basis of this implied condition has been variously stated, but never more strongly or more satisfactorily than in the Mill Dam Case below cited. In that case the Chief Justice said: "This question goes deep into the interests of those who embark in projects of improvement with the right to calculate upon a certain capital, and on their own liability to contribute towards raising it. If, with the expectation of five hundred associates or shares in that proportion, those who represent two hundred can assemble, and agree to carry on the whole work by a major vote of that number, and assess themselves and the rest, and these doings are binding on the minority, the effect will be to discourage such enterprises, and subscriptions to objects which from their nature must be of doubtful success will cease. A man may be willing, from public motives alone, to take his chance upon a limited proportion of five thousand shares of a capital stock, and altogether unwilling to adventure upon half that number; and if he secure himself by the terms of his subscription he cannot be bound beyond it by a

major vote of those who may choose to persist in the adventure under discouraging circumstances." This argument that all subscriptions are on the implied understanding, which is both just and reasonable, that the subscriber is to be aided by the other subscriptions to the full extent of the capital stock, underlies all the decisions. The subject has undergone exhaustive discussion in many cases, and the various reasons which have been assigned in support of the doctrine need not be stated. This doctrine commends itself to the common judgment of people who are engaged in such enterprises, and is adequately supported by what has already been suggested. The authorities supporting it are both numerous and conclusive. *Salem Mill Dam Corp. v. Ropes*, 6 Pick. 23; *Railroad Co. v. Preston*, 35 Iowa, 115; *Bray v. Farwell*, 81 N. Y. 600; *Temple v. Lemon*, 112 Ill. 51; *Steamboat Co. v. Sewall*, 80 Me. 400, 14 Atl. 939; *Railroad Co. v. Reynolds*, 46 Conn. 375; *Cook, Stock & S. § 176 et seq.*; *Livesey v. Hotel Co.*, 5 Neb. 50. It must be conceded that some exceptions have been ingrafted upon the rule. These exceptions, however, always rest upon the terms of the contract to which the subscriber has affixed his name; as in the case of *Railroad Co. v. Kinsman*, 77 Me. 370, where there was an express promise to pay to which no condition was affixed, and the contract itself contained no statement of the number of shares or the amount of the capital from which the implied condition could be derived. It will be found that wherever there has been a departure from this well-settled rule the reason therefor is to be easily deduced from the terms of the contract into which the subscriber has entered. Wherever, as in this case, there is no express promise to pay which is separable from the contract as an entirety, and the paper states the amount of the capital stock and the number of shares into which it is to be divided, the plaintiff, before he can recover, must prove a bona fide subscription to the total amount of the capital named in the agreement. Like all conditions contained in contracts between parties, it, of course, may be the subject of a waiver. A party may expressly agree not to take advantage of what he may have the legal right to assert, or he may do those things by which he will be estopped to insist on the condition, and in either event be legitimately adjudged to have waived it. No proof was made in this case rendering this principle applicable. No express waiver was proven, nor can one be implied from what Sopris did in the meeting whereat the company was organized. He did not subscribe to the stock at that meeting, as did the others, nor was his action of that description essential to create an estoppel. It is doubtful if he participated in the organization, voted for the election of the directors, or did anything which would indi-

cate a purpose on his part to assent to the carrying on of the enterprise otherwise than according to the terms of the original agreement. It has been held in *Hotel Co. v. Mullins*, (Mich.) 53 N. W. 360, that a waiver cannot be predicated upon what is done by a party at a time antedating the actual organization of the corporation. This principle need not be invoked to relieve the defendant Sopris. What the plaintiffs proved would not be sufficient to warrant the application of the principle of waiver. The conclusion and judgment of the trial court that Sopris was not liable accord with the law, and they will accordingly be affirmed.

FUGATE v. SMITH.

(Court of Appeals of Colorado. Jan. 9, 1894.)

TRESPASS—BREAKING FENCE—BOUNDARIES—APPEAL—RECORD—REVIEW—HARMLESS ERROR.

1. A verdict for plaintiff in trespass for breaking down a fence which defendant alleged was on his land will not be reversed, where all witnesses testified from plats made by surveyors for the respective parties; the surveyor for each party testified that his plat was correct; the plats were before the jury, but not in the record; and the testimony in the record was unintelligible, because the witnesses referred to various parts of the plats as "here," "there," "this line," "the next line," and "the red line."

2. The surveyor on each side testified that he made his survey in accordance with field notes of the original United States surveys, but it did not appear whether either was made in the usual and proper manner. *Held*, that defendant was not entitled to an instruction that the boundary line must be re-established by reference to the field notes of the original United States surveys, and by surveys made in the usual and proper manner in accordance therewith.

3. In trespass against a person who willfully broke down a fence, and allowed his cattle to enter plaintiff's land, error in charging that a lawful fence was of the kind which the statute prescribes that plaintiff must maintain to recover damages from the owner of cattle which break through it was not prejudicial to defendant.

Appeal from district court, Custer county.

Action by Robert S. Smith against J. H. Fugate for trespass to real estate. From a judgment for plaintiff, defendant appeals. Affirmed.

John H. Voorhees and Wallace Schoolfield, for appellant. J. T. McNeely, for appellee.

THOMSON, J. Robert S. Smith brought his action against J. H. Fugate for trespass to real estate. The complaint alleges that the plaintiff was the owner in fee of certain lands, describing them by their legal divisions and subdivisions, and that the defendant forcibly broke down a fence standing upon these lands, so that horses and cattle entered upon the premises, and ate up plaintiff's grass and hay, and trod down and injured his crop of growing potatoes, by reason of all of which he suffered damage. The answer was a general denial. The

plaintiff had verdict and judgment. We are asked to say that the verdict is not sustained by the evidence. The principal controversy at the trial was over the location of the fence which was broken down, the plaintiff and defendant each claiming that it was on his own land. This was an important question to be determined, because the plaintiff, having charged trespass upon certain specified real estate, could not recover, except upon proof of trespass to that land. The witnesses all testified from certain maps or plats made by the surveyors of the respective parties. The surveyor on each side testified to the correctness of his own plat. These plats were before the jury, and the witnesses designated, by pointing to the plats, the several lines, points, and locations, concerning which they testified. Neither of these plats is in the record, and as to what they contained, or looked like, we are in total darkness. The witnesses, in their testimony, refer to the various portions of the plats as "here," "there," "this line," "the red line," "the black line," "the next line," "the other line," etc. As the maps were before the jury, and all this occurred in their presence and hearing, they probably clearly understood the testimony, but it is absolutely unintelligible to us. It is true that the defendant's surveyor testified that the fence was not on the plaintiff's land; but as his statement was a conclusion from his plat, upon the contents and structure of which his testimony casts no light whatever, we have nothing by which to test the correctness of his conclusion. As it is impossible for us to understand the evidence, in the shape in which it is presented to us, manifestly, we cannot say that it did not warrant the verdict.

Defendant assigns error upon the refusal of the court to instruct the jury that the proper position of the monuments marking the boundary line between the lands of plaintiff and defendant must be determined, and the line re-established, by reference to the field notes of the original United States surveys, and by surveys made in the usual and proper manner in accordance therewith. It is unnecessary to decide whether the proposition embraced in the refused instruction is correct or not, in the abstract. The nature of the evidence must determine the character of the instructions given. The surveyor on each side testified that he made the survey in accordance with the field notes of the original United States surveys, and this is about the only intelligible portion of the testimony of either. Whether the surveys, or either of them, were made in the usual or proper manner, or otherwise, or what was shown by the testimony in respect to that, on account of the condition of the evidence in the record, we have no means of ascertaining. The court heard the testimony and saw the plats, and, presumptively, the refusal complained of was right.

Fault is also found with the instructions given. The first declares the long-established law of trespass to real estate as applicable to the pending case, and is unobjectionable. The second defines a "lawful fence," under the statute. This instruction should not have been given. The statute prescribes the character of fence which must be maintained to enable a party to recover damages from the owner of animals breaking through it, but it has no applicability where the fence is willfully broken down by the defendant himself. In such case he is a trespasser, and liable for the consequent injury, no matter what the character of the fence. But we are unable to see what harm could come to the defendant from the giving of the instruction. It required the finding of a better fence than the plaintiff was obliged to maintain for the purposes of his case, and in so far was against him. The only party who could possibly have been injured by the instruction was the plaintiff. We see no reason for reversing the judgment, and shall therefore affirm it. Affirmed.

BARTON v. LAWS.

(Court of Appeals of Colorado. Jan. 9, 1894.)

PLEADING — AMENDMENT — EVIDENCE — WRIT IN ATTACHMENT — ANSWER WITHDRAWN — NEWLY-DISCOVERED EVIDENCE.

1. In an action for conversion, where defendant verifies an answer alleging that, as sheriff, he took the property, and holds it by virtue of a writ of attachment, an amendment stating that the property was returned to plaintiff is properly denied, where the only affidavit therefor is that of the attorney, that he drew the answer in the usual form, under the impression that the property was still in defendant's possession, and was not differently informed till the deputy having the matter in charge informed him that he returned the property to the person in whose possession it was levied on.

2. In an action against a sheriff for conversion, there cannot be error in rejecting defendant's offer of a writ in an attachment suit, and the return on it, the return reciting a levy on real property only.

3. Though defendant has withdrawn part of his verified answer, plaintiff may introduce it in evidence, the same as any other writing signed by defendant, containing an admission.

4. An affidavit for new trial on newly-discovered evidence must show that failure to produce it before the trial was not due to want of diligence.

Error to district court, Arapahoe county.

Action by L. J. Laws against E. R. Barton for conversion. Judgment for plaintiff. Defendant brings error. Affirmed.

Pence & Pence and Rogers, Outhbert & Ellis, for plaintiff in error. N. M. Laws, for defendant in error.

THOMSON, J. L. J. Laws, plaintiff below, alleges in his complaint that on June 3, 1891, he owned and possessed certain buggies and vehicles, of the value of \$1,330, which were on that day taken, carried away,

and converted to his own use, by the defendant, Barton. The answer was—First, a denial; and, second, that the defendant was at that time sheriff of Arapahoe county, and that he took the property by virtue of a writ of attachment issued out of the county court against one Fannie C. McCauley, and held it, and was still holding it, as her property, it having been found in her possession. The answer then concludes thus: "And that this defendant holds said property by virtue of said attachment writ, as he was therein commanded, and not otherwise, and that he holds the same subject to the further order of the county court of Arapahoe county, out of which court said writ of attachment was so issued." The answer was verified by the defendant in person. The cause was set for trial on the 12th, and was tried on the 15th, of February, 1892. On the day of the trial the defendant moved the court to amend his answer by striking out the clause which has been quoted, and inserting in lieu thereof the following: "And that this defendant held said property by virtue of said writ of attachment, as he was therein commanded, and not otherwise, and that he did hold and safely keep the same for about the space of forty-eight hours after demand was made upon him by Lewis J. Laws for the same, and that at the end of said forty-eight hours, or about that time, he returned said property to this plaintiff, in the same condition, at the same place, and of the same value, as when levied upon by him, and did surrender possession of said property to this plaintiff in compliance with the demand of the plaintiff." In support of the motion the following affidavit was filed: "D. B. Ellis, being first duly sworn, on oath, states that he is one of the attorneys for the above-named defendant; that he filed the answer now standing in this court in the form usually followed in his office, and without giving special attention or specially looking up the status of this case when said answer was filed, and under the impression that the sheriff, defendant, still held said property under and by virtue of said writ, and was not differently informed until the 12th day of February, 1892, when he called upon the deputy sheriff, who had charge of this matter under the said defendant, and was then informed for the first time that the levy was made under and by virtue of said writ of attachment then in his hands as such sheriff was by him released, and the property returned to the same person, and in the same condition as when he, the said deputy, levied upon it under and by virtue of the writ of attachment set out in said answer." The motion was denied.

The amendment asked was one which the court was authorized to allow, upon affidavit showing good cause. Civil Code, § 75. It can hardly be said that the affidavit filed showed good cause, or any cause, for permitting the amendment. There is no affidavit of the defendant himself, explaining why he

swore to the statements of the answer on file, if they were not true, nor is there any affidavit of the deputy in charge of the attachment, showing what he did with the property. The attorney seems to have prepared the answer in some form usually followed in his office, without consulting his client, the defendant, under the impression that it was true, and left it in that condition until the day on which the cause was set for trial, when he was informed otherwise by the deputy. Even the information derived from the deputy, as set out in the affidavit, was not that he returned the property to the plaintiff. If the defendant verified the answer under a misapprehension of the facts, his own affidavit should have been procured, showing how the misapprehension arose, and in what particulars the facts were misstated, and it should have been accompanied by the affidavit of the deputy to the actual occurrences. But, even if all this had been done, an objection would still remain,—that the proposed amendment directly contradicts other portions of the answer. We do not think that the court was guilty of any abuse of discretion in refusing to allow the motion.

The cause came on for trial, and the plaintiff testified as to the ownership and value of the several articles in question. He had been engaged in the business of manufacturing buggies, had manufactured those in dispute,—except one, which had been made by Studebaker Bros., and was secondhand,—and knew their value, which he fixed. Prior to the attachment he sold his business to one Daniel W. Lesh. The sale embraced the unfinished buggies on hand, but did not include the ones in controversy. For the privilege of leaving these upon the premises while he was selling them out, he agreed to give Mr. Lesh a commission of 10 per cent. upon any of them sold by Lesh to persons who were not customers of plaintiff. Lesh afterwards sold the business to Frank Moore, and plaintiff made the same arrangement with him. Neither Lesh nor Moore was his agent for any purpose, or had possession of the property. The possession remained in plaintiff. Upon learning that the goods had been seized, he notified the defendant sheriff and his deputy that his property had been taken, and also applied to Mr. Ellis, the defendant's attorney, to have it released; and finally, some three weeks or more after the levy, he made a written demand upon the defendant for the goods, who informed him that he had levied upon them, had been indemnified by the attachment plaintiff, and had been instructed by the attorneys in the case not to deliver them up, whereupon defendant commenced this suit. He also stated that the property had never been returned to him. There was some other evidence as to value, which will be noticed hereafter. Plaintiff then rested.

The defendant offered in evidence the writ issued in the attachment suit, and the re-

turn upon it of the defendant sheriff. The plaintiff objected to its introduction, and the objection was sustained. Defendant contends that this ruling was error. He has not specified it in his assignment of errors, so as to entitle him to have it considered. But the return recites a levy upon real estate only, and does not include this property; so that we are at a loss to comprehend its pertinency to any issue in the case, or to understand what error was committed in rejecting it.

The defendant, then, with the permission of the court, withdrew all of his answer, except the denials, and introduced evidence tending to show that, some time after the property was taken, it was turned over to Mr. Moore. The defendant was a witness for himself, and upon cross-examination was asked to identify his signature to the verification of his answer. The question was objected to because a portion of the answer had been stricken out or withdrawn. The objection was overruled. The defendant then identified the signature. After the defense had closed, the plaintiff, in rebuttal, offered in evidence that portion of the defendant's answer which had been withdrawn. The defendant objected, in these words: "We make an objection as a matter of form." The objection was overruled, and error is assigned upon the ruling. A ruling upon an objection like this is hardly the subject of review. Where the grounds of objection to evidence are not stated, so as to enable the trial court to judge whether the objection is well taken, it cannot be insisted upon in the appellate tribunal. It is possible, although counsel does not say so, that it was intended that the objection to the question asked defendant on his cross-examination, as to his signature, should apply to this offer; but to permit such relaxation of the rules of practice would tend to introduce confusion into trials, and render justice uncertain. If, however, we should transfer the objection from the place where it was made to the place where it is urged, and consider it as if it had been so made at the trial, we are still unable to discover error in the ruling. It was not objected that the evidence was improper in rebuttal, or that the defendant was not given an opportunity to explain the statements of his answer. The sole objection urged is that the answer, having been withdrawn, was incompetent as evidence for any purpose. When the answer was withdrawn, it was no longer a pleading in the cause. It was thereafter not the defendant's answer. He was not bound by any of its statements. It was out of the record, and did not conclude him. But, although not a part of the record, and so not conclusive upon him, it was still a paper containing statements signed and sworn to by him. If his affidavit, or even an unsworn writing, signed by him, containing the same statements, had been in existence,

outside of the case, it will not be contended that it could not have been used, for what it was worth, to show an admission by him. He might have explained it so as to obviate its effect, but still it would have been competent in the first instance. The answer, although it was withdrawn from the case, was at least as good as the supposed outside affidavit or writing, and therefore equally competent as evidence. *Dowzelot v. Rawlings*, 58 Mo. 75; *Anderson v. McPike*, 86 Mo. 293; *Schad v. Sharp*, 95 Mo. 573, 8 S. W. 549; *Stone v. Cook*, 79 Ill. 424; *Johnson v. Powers*, 65 Cal. 179, 3 Pac. 625; 1 Greenl. Ev. § 195.

In addition to plaintiff's testimony as to the value of the property, the court admitted, against defendant's objection, that of two witnesses, who had a general acquaintance with the articles manufactured in plaintiff's shop, and testified as to the value of vehicles of the same class and quality with the ones in question, but were unacquainted with these specific articles. It is argued that this was error, but it is not assigned as such; and as the error, if there be any, is not palpable, we are not disposed to notice it, especially as the record does not disclose that it resulted in any injury to the defendant.

The court found for the plaintiff, and the defendant moved for a new trial upon the ground, among others, of newly-discovered evidence. The motion was accompanied by the affidavit of Charles J. Pence, stating that he was one of the regularly employed attorneys of the defendant, and that, although he did not take part in the trial of the cause, he, immediately, after judgment rendered, proceeded to look up evidence for the defendant, and, in the course of his search, found that R. B. Halligan, residing in Kansas City, Mo., knew something about the case, to whom he telegraphed, and received a reply as follows: "Casey turned over goods to Moore. He offered to sell buggies in my presence. Rogers & Ellis said, 'Let it drop,' and left stuff in Moore's possession." By the affidavit of E. E. Schlosser, to the effect that, since the trial, he, as the agent of the defendant, had been employed in finding the property in question, and had found the most of it at the bonded storage warehouse of the Denver Transit & Warehouse Company, whose books showed that it had been deposited there by Moore, who had taken the company's receipt for it, and by the affidavit of A. W. Snyder, that he was the warehouseman of the Denver Transit & Warehouse Company, and that Moore had stored the property with the company, taking its receipt. A counter affidavit was filed, to the effect that the property had been left with Moore as the custodian of the defendant. It is argued, with apparent sincerity, that a new trial should have been granted on that presentation. A showing sufficient to authorize a new trial upon such ground must possess several requisites, not one of which

existed in this case. Newly-discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial, is one of the grounds for a new trial enumerated in the Code. The application of the party desiring a second trial must show what diligence he used in preparing for the first, how the new evidence was discovered, why it was not discovered before the trial, and such facts as make it clear that the failure to produce the evidence was not through any fault or want of diligence of the applicant. *Hill New Trials*, 495; 1 *Grah. & W. New Trials*, 473; *Baker v. Joseph*, 16 Cal. 180; *Arnold v. Skaggs*, 35 Cal. 684; *Levitsky v. Johnson*, Id. 43. In the matter of diligence, this application shows absolutely nothing. Indeed, it may be fairly inferred from the affidavit of Pence that the first search for evidence was made after the cause was tried. The new evidence must be relevant and material; it must be such as would, probably, on a second trial, change the result; and it must not be cumulative. *Spencer v. Doane*, 23 Cal. 420; *Aldrich v. Palmer*, 24 Cal. 515; *Stoakes v. Monroe*, 36 Cal. 388; *Armstrong v. Davis*, 41 Cal. 499; *Hill New Trials*, 491, 490, 500; *Parker v. Hardy*, 24 Pick. 246. The evidence proposed is not relevant or material. It is to the effect that the property was turned over to Moore by the defendant; but unless Moore was plaintiff's agent for the purpose of receiving it, which the undisputed evidence in the case shows he was not, that would be no defense. For the same reason, it could not possibly change the result. And it is cumulative, because evidence to the same effect was introduced at the trial.

There is no error apparent in the record; and, upon a review of the whole case, we are of the opinion that the judgment was for the right party, and should stand. Affirmed.

IN RE LEWIS.

(Supreme Court of Kansas. Jan. 6, 1894.)

CORPORATIONS—APPOINTMENT OF RECEIVER—APPLICATION BY STOCKHOLDERS.

1. Under the fifth subdivision of section 254 of the Civil Code, a receiver may be appointed at the suit of a stockholder, where the business and affairs of a corporation have been so mismanaged that it has become insolvent, and where it is made to appear that all the officers and directors of the same have conspired together to divert its business to another company, dissipate its funds, and fraudulently absorb and apply its assets to the individual benefit of such officers.

2. In such a case the property and assets of the corporation may be placed in the hands of a receiver, to be preserved and rightfully applied under the supervision of the court, and they may be restored to the officers when there has been a change of management, or when it is deemed by the court to be prudent and safe to restore the property and affairs of the corporation to its duly-constituted officers.

(Syllabus by the Court.)

Original petition in habeas corpus by H. W. Lewis for release from custody on a commitment for contempt. Petition denied.

Campbell & Dyer, for petitioner. Holmes & Haymaker, for respondent.

JOHNSTON, J. H. W. Lewis asks to be discharged from the custody of an officer who holds him in pursuance to an order of the district court of Sedgwick county, committing him for contempt. By this proceeding in habeas corpus the petitioner challenges the power of the district court, which was exercised in the appointment of a receiver in the case of *Price v. The International Loan & Trust Company et al.*, pending in the same court. If the district court had jurisdiction of the subject-matter of the action, and of the parties thereto, and power to make the appointment, any error committed in the exercise of such power cannot be reviewed or revised in this proceeding. The action in which the receiver was appointed was brought by the stockholders against the International Loan & Trust Company its officers and directors, as well as the Equity Trust Company of Wichita. It was alleged that the International Loan & Trust Company had been engaged for a number of years in making loans in the name of the company, securing the same by mortgages, which were negotiated and sold to eastern purchasers, charging a commission for the making of such loans, which commissions were represented by notes and mortgages, and that the chief profit resulting to the company was from the sale or proceeds of the second, or commission, mortgages. It is alleged that an extensive business had been done by the company, and that it had assumed vast obligations by the guaranty of loans. It is alleged that the business of the company has been grossly mismanaged, by reason of which it has become insolvent, and that the petitioner, H. W. Lewis, who was the president of the company, as well as the secretary and treasurer, have had the principal charge of the business; that these three men were directors, while the other directors were relatives and creatures of, and subservient to, these three directors, and in fact that the company was being managed for the individual and personal benefit of the president, secretary, and treasurer of the corporation, who were rapidly absorbing all of the assets of the company, to the detriment and injury of its stockholders and creditors. It was alleged that the president was using the company's money to pay off and discharge his individual and personal liabilities, with the knowledge and consent of the other directors, all of whom were under his influence and control. It was also charged that the president, secretary, and treasurer, together with two other of the directors of the company, had formed a new corporation, called the Equity Trust Com-

pany of Wichita, and that they had fraudulently, and against the interests of the stockholders of the International Company, conveyed to the Equity Company all the real property belonging to the International Company, as well as a portion of its personal property; and, further, that they are endeavoring to divert the business which legitimately belongs to the International to the Equity Company. The plaintiffs ask that the Equity Trust Company should be adjudged and decreed to hold in trust for the International Loan & Trust Company all the tax certificates, commission mortgages, or real property which the petitioner and other officers have caused to be transferred to the Equity Company. They also ask to enjoin the defendants from transferring any mortgages, tax certificates, choses in action, or other property belonging to the International Loan & Trust Company, or in which it had any interest, and, finally, that a receiver be appointed to take charge of the property and affairs of the International Loan & Trust Company during the pendency of the action and the hearing of the cause, and that such receiver may be empowered to do all that is necessary in winding up the affairs of the corporation, as well as for all other and proper relief as might be just and equitable in the premises. After the receiver was appointed, he sought to take possession of the property confided to him, when the petitioner resisted all demands of the receiver, and refused to surrender the property belonging to the company. For this refusal he was held to be in contempt of court, and was committed until he should purge himself of such contempt.

Whatever may be the actual facts in the case, those alleged were certainly sufficient to give jurisdiction for the appointment that was made. At this time we cannot consider whether the power was wisely and correctly exercised, nor whether the testimony justified the finding and order made. When the power is shown to exist, the inquiry on habeas corpus is at an end. While the authority to appoint a receiver should be strictly construed, and the power to wrest the property of a corporation from the management of the directors and officers should never be doubtfully exercised, we have no doubt, in this case, that the court was at least vested with jurisdiction to make the appointment. The facts alleged, if sustained, would seem to justify a court of equity, aside from any statutory provision, in appointing a receiver to protect the interests of stockholders against the malfeasance of the officers in charge of the corporate business, and their fraudulent misapplication of its property and funds. Our statute upon this subject, while recognizing and preserving the general jurisdiction of courts of equity over corporations, and in the appointment of receivers, enlarges and extends the power of courts in that respect. It not only provides that the ap-

pointment may be made in a proceeding ancillary to a pending cause, but confers authority to appoint a receiver for the preservation of rights and property, when such appointment is the principal object of the action. Civil Code, § 254, subd. 5. It will be observed that it authorizes an appointment: "First, in an action to vacate a fraudulent purchase of property, or to subject any property or fund to the claim, of a creditor, or between partners or others jointly owning or interested in any property or fund, on the application of one who has a right to or interest in the property or fund, or proceeds thereof, is probable, and where it appears that the property or fund is in danger of being removed or injured. Second, an appointment may also be made in a foreclosure action. Third, it is provided that a receiver may be appointed after judgment, to carry the judgment into effect. Fourth, after judgment, to dispose of property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution. Fifth, in the cases provided in this Code, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights." And, finally, it is provided that such an appointment may be made in all other cases where receivers have heretofore been appointed by the usages of courts of equity. If we were to treat the appointment of a receiver as only an auxiliary remedy, it must be held that there was power to make the appointment in the present case, as the plaintiffs not only asked for an injunction to prevent alleged wrongs, which appears to have been denied, but they also asked that the company to which the property of the corporation had been wrongfully transferred be adjudged to hold the same in trust for its owners, and in effect it is required to restore the same. This relief would bring the case within the first and sixth subdivisions of the statute. Under the fifth subdivision, however, it appears that a receiver may be appointed in the cases provided in this Code, and by special statutes, where the corporation has been dissolved; and then there is the distinct ground, providing for an appointment where the corporation is insolvent, or in imminent danger of insolvency. This provision has been held to authorize the appointment of a receiver at the suit of a stockholder, where it appears that the corporation has become insolvent through the mismanagement of its officers, and that the continuance of their administration will necessarily result in the dissipation and absorption of the assets of the corporation by the officers themselves. *Elwood v. Bank*, 41 Kan. 475, 121 Pac. 673; *Fluker v. Railway Co.*, 48 Kan. 577, 30 Pac. 18; *Watkins v. Bank*, 51 Kan. 254, 32 Pac. 914. By the averments of the petition, it would appear that all the officers of the corporation have conspired to-

gether to divert its business to another company, and to absorb its earnings and assets, and appropriate the same to their own uses. Under those circumstances, it would be useless to apply to the officers to bring an action against themselves, and in such cases the law permits the appointment of a receiver at the instance of a stockholder. In most cases of this character, no other adequate remedy exists. The appointment of a receiver is not necessarily a proceeding to dissolve a corporation, nor will it necessarily result in its extinction. The property and assets of the corporation, which are being dissipated and fraudulently absorbed, will be preserved and rightfully applied under the supervision of the court, and may be restored to the officers of the corporation, when there has been a change of officers, or when it is deemed prudent and safe to restore the property and affairs of the corporation to its duly-constituted officers. See *Bank v. U. S.*, etc., *The Co.*, 105 Ind. 227, 4 N. E. 846; *Pike Co. v. Hammons*, 129 Ind. 308, 27 N. E. 487; *Order of Iron Hall v. Baker*, (Ind. Sup.) 33 N. E. 1128; *Haywood v. Lumber Co.*, 64 Wis. 639, 26 N. W. 184; *Consolidated Tank-Line Co. v. Kansas City Varnish Co.*, 43 Fed. 204; *Mor. Priv. Corp.* § 281; *Pom. Eq. Jur.* § 1334; *Hlgh. Rec.* § 313; *Spel. Priv. Corp.* § 1001; 20 *Amer. & Eng. Enc. Law*, 272.

The principal authority cited in opposition to the decisions of this court in respect to the appointment of a receiver is the *French Bank Case*, 53 Cal. 495. While we are unable to agree with some of the views expressed in that decision, it can hardly be regarded as an authority in the present case. The statute of California differs from ours in two respects, and one is that it seems to provide that a receiver can only be appointed in a pending cause; and the court therefore holds that the remedy was merely auxiliary, or in aid of the action already brought. In the present case, however, whatever view might have been taken of the character of the remedy, there was undoubted jurisdiction in the court, and hence the petitioner must be remanded. All the justices concurring.

COFFELT v. FIRST NAT. BANK OF HOLTON.

(Supreme Court of Kansas. Jan. 6, 1894.)

ESTOPPEL—WHAT CONSTITUTES.

If the acts or statements of a person are not done or made for the purpose of influencing the conduct of a third party, and such third party has not relied upon the same, or been induced thereby to enter upon a course of action resulting to his injury, no estoppel arises in his behalf.

(Syllabus by the Court.)

Error from district court, Jackson county; Robert Crozier, Judge.

Action by the First National Bank of Holton, Kan., against Abram Coffelt. There

was judgment for plaintiff, and defendant brings error. Reversed.

The other facts fully appear in the following statement by HORTON, C. J.:

The First National Bank of Holton, before a justice of the peace, sought to recover against Abram Coffelt primarily upon a promissory note dated August 26, 1880, for \$192. The defendant pleaded non est factum, and verified his plea. Thereupon plaintiff, by amendment, declared first upon the note, and upon a series of 12 notes, all being renewals but the first note,—the note sued on being the last of the series or renewals. There was no sworn denial to the bill of particulars as amended. The renewals were all consecutive, and prima facie made a chain of obligations, each distinct in itself; but neither the original note, nor any of the renewals except that of the twelfth, or last, were copied or attached to the pleadings. The case before the justice resulted in a judgment for the bank upon the last note. Upon an appeal to the district court the parties, during the trial, treated the case as if the execution of the note sued on was denied under oath. The trial resulted in a judgment against defendant below upon an alleged balance of \$160, upon some intermediate note or renewal. Coffelt excepted, and brings the case here.

I. T. Price and Rafter & Robinson, for plaintiff in error. James H. Lowell, for defendant in error.

HORTON, C. J., (after stating the facts.) It is difficult, from an examination of the record, to determine upon what note or renewal the trial court rendered judgment. It is alleged that there were 12 renewals. The last note, dated August 26, 1889, for \$193, is alleged to have been given for the final renewal, and is copied in the bill of particulars; but it is admitted that, in view of the conflicting testimony as to the signature of Coffelt upon that note being a forgery, the jury returned a verdict in favor of the bank upon some prior renewal or obligation. It would seem that the second count or part of the bill of particulars intended merely to recite the steps which led up to the execution of, and the consideration for, the note of August 26, 1889,—the twelfth renewal,—but upon the trial it was considered by the parties as stating a balance due upon the original note of April 19, 1887, for \$298.75, evidenced, however, by various renewals; but the original note is not copied in the pleadings, nor are any of the renewals copied, excepting the last one. As no motion was made to make the bill of particulars more definite or certain, or to compel copies of the renewal notes to be attached or set forth, we suppose we may regard it as sufficient to state an indebtedness other than for the last renewal. If the note really sued upon is a forgery, then the judgment should have been rendered upon the balance due

upon the note given for the eleventh renewal, and dated May 29, 1889, for \$188.75, if that renewal was not a forgery; but, if that renewal was also a forgery, then the recovery, if any, should have been the renewal prior to that one. We refer to this because of the uncertainty of determining upon what note the judgment was rendered. It is insisted that the trial court erred in admitting in evidence the note purporting to have been the last renewal, because its execution was denied under oath; but this note was only presented for the purpose of proving to the jury its execution by competent testimony. It is next insisted that the trial court erred in admitting in evidence two chattel mortgages. But there was some evidence showing that Coffelt recognized or ratified these mortgages; and therefore, if we consider the second count or part of the bill of particulars as stating an existing indebtedness apart from the note of August 28, 1889, or as supporting a consideration for that note, then the chattel mortgages were properly before the jury. They tended to show at least that Coffelt had signed or acknowledged, as genuine, certain notes given to the bank, and that these mortgages were executed to secure him from loss, if he were called upon to pay the same, or any part thereof. But the instruction of the court that, if Coffelt made any claim under these mortgages, he was estopped to deny his liability to the bank, was erroneous. It does not appear that any declarations, acts, or admissions of Coffelt under these mortgages, or either of them, expressed or implied, were made for the purpose of influencing the conduct of the bank, or that the bank loaned any money, or gave any renewals, on account of these mortgages, or either of them. If the bank had relied upon these chattel mortgages, or had been induced thereby to enter upon a course of action resulting to its injury, then an estoppel might apply. It is urged that Coffelt is estopped by record; but such an estoppel applies only to the parties and their privies. The bank does not claim any property under chattel mortgages, or under the mortgagor therein named. No property described in either mortgage is in dispute. *Insurance Co. v. Curran*, 8 Kan. 9; *Palmer v. Meiners*, 17 Kan. 478; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Adler v. Pin*, 80 Ala. 351. The judgment will be reversed, and cause remanded. All the justices concurring.

THOMPSON et al. v. NIGGLEY et al.

(Supreme Court of Kansas. Jan. 6, 1894.)

DURESS—NOTE OBTAINED BY THREAT OF CRIMINAL PROSECUTION—RIGHTS OF ASSIGNEE.

Written securities extorted by means of threats of prosecution for criminal offenses of which the party threatened was guilty in fact, but which were in no manner connected with the demand for which compensation was sought, may be avoided by the parties ex-

cuting them, not only in the hands of the original payee, but of his assignees, having no knowledge of the circumstances under which such securities were taken.

(Syllabus by the Court.)

Error from district court, Marshall county; R. B. Spillman, Judge.

Action by N. B. Thompson and another against Michael Niggley and another to foreclose a mortgage. There was judgment for defendants, and plaintiffs bring error. affirmed.

J. A. Broughton, for plaintiffs in error.
Ed. A. Berry and Mann & Redmond, for defendants in error.

ALLEN, J. N. B. Thompson and H. Talbot, as partners, brought suit on a note executed by Michael Niggley and Fannie Niggley, his wife, for \$1,250, payable to Adolph Summers, and to foreclose mortgage given to secure the same. The plaintiff claimed to be purchasers of the note and mortgage from Summers. The defendants, in their answer, admit the execution of the note and mortgages, but allege that they were without consideration, and were obtained by fraud and duress. It appears that Michael Niggley kept a billiard saloon in Versailles; that late one evening, as he was taking his cash from his money drawer preparatory to closing up for the night, he had a revolver out, which accidentally went off, hitting Summers. Summers, though seriously hurt, recovered, so as to be able to get about. Some friends of his soon afterwards talked to Niggley about a settlement of Summers' claim for damages growing out of the injury. On the day on which the note and mortgages were executed, friends of Summers again approached Niggley with reference to a settlement, telling him that charges were preferred against him for selling whisky, they would have to swear against him. They induced Niggley to go with them to the office of one Griffiths, who acted as attorney for Summers. When there, there was further talk about a settlement of Summers' claim. Summers and several of his friends were present. They met Niggley there, and sent for his wife, who left a very sick child, and went to Griffiths' room. Griffiths threatened to prosecute Niggley for selling whisky if he did not accede to his demands and execute the note and mortgage sued on. The case was submitted to a jury, who rendered a general verdict in favor of the defendants, and also, in answer to special questions, found that the natures both of Niggley and his wife were obtained by duress, and through fear of criminal prosecution. Niggley himself testified on the witness stand that he had been selling liquor in violation of law.

The principal question discussed in briefs is whether a charge of duress can be maintained by showing threats to prosecute a person for an offense of which he is in-

guilty. It does not appear that any complaint had been filed against Niggley, nor was there any pretense that process had been issued for his arrest. Long lists of authorities are cited by counsel on both sides for the purpose of showing the rules that have been declared by the various courts as to what constitutes duress. It is impossible to extract from the cases any complete definition which has been uniformly adhered to. There are cases holding that mere threats of criminal prosecution, when no warrant has been issued, do not constitute duress. *Higgins v. Brown*, 78 Me. 473, 5 Atl. 269; *Harmon v. Harmon*, 61 Me. 227; *Buchanan v. Sahlein*, 9 Mo. App. 552. This court, however, held, in the case of *Bank v. Oroco*, 48 Kan. 620, 26 Pac. 939, that "if the creditor operated upon the fears of the husband by threats of arrest and imprisonment, believed by him to be imminent, and thus overcame his will, and through fear and undue influence compelled him to sign the mortgage, the signature is not binding; and if the wife was induced to execute the mortgage from fear, excited by threats made to her by the creditor of an illegal criminal prosecution against her husband, the instrument thus obtained will not be binding upon her." This case settles the question as to the necessity that a prosecution should have been actually commenced in order to establish duress, but does not touch the point presented here as to whether duress can be predicated on threats of a lawful arrest and prosecution. It appears from the testimony of Niggley himself that he was guilty of the offenses for which he was threatened with prosecution, and the duress consisted mainly, if not entirely, in the fears excited in the mind of the defendant by threats of such prosecution. There are many cases holding that the threat of a lawful arrest does not constitute duress in such sense as to discharge the person threatened from liability on a contract which he has been induced to sign by means of such threats. *Nealley v. Greenough*, 25 N. H. 325; *Compton v. Bank*, 96 Ill. 301; *Eddy v. Herin*, 17 Me. 339; *Clark v. Turnbull*, 47 N. J. Law, 265; *Mundy v. Whittemore*, 15 Neb. 647, 19 N. W. 604; *Sanford v. Sornborger*, 26 Neb. 295, 41 N. W. 1102. For other cases, see 6 Amer. & Eng. Enc. Law, p. 64 et seq. We have examined a great number of cases declaring this doctrine, in all of which it appeared that the threat made was of a prosecution for the particular matter for which payment or settlement was sought. In many of the older cases, as well as in some of the later ones, the arrest threatened was on process issued, or to be issued, in a civil action, for the collection of the plaintiff's demand. In this case the threats made were of a prosecution for offenses in no wise connected with Summer's claim. The facts that Niggley was guilty of violations of the law of the state, and that Summers, his attorney, and friends knew of the facts showing his

guilt themselves, and were witnesses to the unlawful sales of liquor, were used as a menace to drive Niggley into a settlement of Summer's claim. The court of appeals of New York expressly denies the doctrine that the threat must be of an unlawful arrest. In *Adams v. Bank*, (N. Y. App.) 23 N. E. 7, it was held "that money paid by a wife in settlement of her husband's debt upon the threat by the creditor to arrest the husband if the debt was not paid, may be recovered back, though there was lawful ground for arresting the husband." The case of *Schoener v. Lessauer*, (N. Y. App.) 18 N. E. 741, also holds that duress may be exercised through threats of prosecution for an offense of which the party is actually guilty. See, also, *Johnson v. Zuschlag*, 84 Tex. 371; *Taylor v. Jaques*, 106 Mass. 291; *Davis v. Luster*, 64 Mo. 43. In *Seiber v. Price*, 26 Mich. 522, it was said: "An arrest by legal warrant, on a criminal charge, to compel the satisfaction of a mere private civil demand, is a misuse of process, a fraud upon the law, and an illegal arrest as respects the party who knowingly and purposely perverts the machinery of the law in that way. And papers obtained under the pressure of such a proceeding by the party promoting it are at least voidable as against him, at the election of the party thus constrained to make them." Summers clearly had no right to make use of his knowledge of the guilt of Niggley to force him to settle his demand. The jury have found that it was the threats and fear of their being carried into execution that caused Niggley and his wife to yield to Summers' demand, and execute the note and mortgages in question, thus incumbering their homestead to the amount of \$1,250. If, in this case, the only threats used were those of prosecution for the shooting, the cases cited by plaintiffs would be more strictly in point.

We are not inclined to encourage a resort to such pressure as was used in this instance to compel the settlement of private demands. Neither Summers nor his friends had any right whatever to agree to abstain from prosecuting Niggley for any offense he had in fact committed, and while, in this case, there is no showing of an agreement on their part to abstain from such prosecutions, or to withhold evidence within their knowledge, they impliedly held out the hope that, if Niggley yielded to Summers' demand, he would not be troubled with the criminal charges. Under the facts disclosed by the testimony, it would appear that Summers had a valid claim against Niggley for damages, which he had a right to prosecute in court if he failed to obtain settlement otherwise; but he had no claim to security on Niggley's homestead, nor could he, by any legal proceeding, have compelled Mrs. Niggley to have relinquished her rights thereto. This action, being founded wholly on the instruments obtained by duress, could not be maintained if brought by Summers. The acknowledgments of the

mortgages were taken by Thompson, one of the plaintiffs in the case, who claims as assignee of Summers; and it appears from the testimony that he came into the room where the instruments were executed, and was informed of sufficient facts to, at least, put him on inquiry, if not to fully apprise him of what had been done. It is not seriously contended that the plaintiffs were innocent purchasers of the note.

As the charge of the court was substantially in accord with the views hereinbefore expressed, and as the jury found explicitly in favor of the defendants upon the question of duress, we think no error appears in the instructions. We have also examined all the rulings of the court as to the admissibility of evidence to which attention is called in the brief, but find no material error there. Under the issue presented, the exclusion of the evidence of Dr. Humphreyville, as to the extent and character of the injury sustained by Summers, was immaterial. If this were an action between Summers and Michael Niggley to recover damages for the injury, the evidence might be material, but this is a case to which Summers is not a party, and which is founded solely on written instruments. The plaintiffs must stand or fall by them alone. We perceive no substantial error in the record, and the judgment is affirmed. All the justices concurring.

KANSAS CITY & P. R. CO. v. RYAN.

(Supreme Court of Kansas. Jan. 6, 1894.)

INJURIES TO EMPLOYE—DEFECTIVE APPLIANCES—LATENT DEFECTS—SUFFICIENCY OF EVIDENCE.

1. Between the railroad company and its employees, the railroad company is required to exercise reasonable and ordinary care and diligence, and only such, in furnishing to its employees reasonably safe machinery and instrumentalities for the operation of its road. *Railroad Co. v. Wagner*, 33 Kan. 680, 7 Pac. 204.

2. It does not necessarily follow that the special inspection given by a manufacturer, or, in a repair shop, by the expert iron workers therein employed, to discover any latent or concealed defect in a tool or instrument for use, like a lifting jack, before the same is sent out for sale or use, is demanded by railroad companies, bridge builders, house raisers, or other persons using such a tool in their work; but, of course, a railroad company, and every other person, is liable for injuries to their employees from a defect in their tools and other appliances used in their work, when such defect is visible or known, or might have been known by the exercise of reasonable and ordinary care and diligence.

3. If a railroad company purchases an ordinary tool or implement, like a lifting jack, of a well-known and reliable dealer in such tools, and at the time of the purchase there is a latent or concealed defect therein, consisting of a defective weld of the foot attached to the jack, which is not visible, yet if, after use thereof by the railroad company, such jack, on account of its cogs being worn or broken, is sent in for repairs to the railroad shops of the company, and if, in repairing the jack, it was, or ought to have been, the practice at the shops, before the jack is sent out again for use, to examine and inspect all its parts to ascertain if

any other defects exist, necessary to be repaired, and any reasonable examination or inspection by the iron workers at the shops would have disclosed the defective weld of the foot of the jack, then the railroad company is negligent in sending out from its own repair shops the jack for use in a defective condition, even if the defect is not visible.

4. Where an important special finding of the jury, which would of itself be sufficient to sustain a verdict and judgment, is wholly unsupported by any evidence, and such special finding is the probable support for other important and material findings, and the verdict is against the great preponderance of the evidence, it is clear that the case was unfairly tried, and that a new trial should be granted.

Allen, J., dissenting.

(Syllabus by the Court.)

Error from district court, Miami county; John T. Burris, Judge.

Action for personal injuries by William Ryan against the Kansas City & Pacific Railroad Company. There was verdict for plaintiff, and a new trial denied. Defendant brings error. Reversed.

The other facts fully appear in the following statement by HORTON, C. J.:

This was an action for damages for personal injuries received by William Ryan while working for the Kansas City & Pacific Railroad Company, as a section hand, 5½ miles south of Paola, Miami county. The petition asked \$7,000 judgment because of the negligence and carelessness of the defendant (1) in not selecting a fit, sufficient, and sound jack for raising railroad track; (2) and in not properly examining and inspecting said jack so sent and received for said work; (3) and in permitting said unfit, unsound, and insufficient jack to remain provided and ready for use in said work,—on account of which negligence a claw bar, thrown by the track's falling on account of said jack breaking, was forced through the flesh and bones of plaintiff's cheek, rendering him unconscious, and causing him serious, painful, and permanent injuries. The petition, by amendment, admitted that the doctor's and dentist's bills, and \$30 in cash received of Mr. Beagle, claim agent of the railroad company, for nursing and medicines, had been paid or assumed by the company. The defendant, on August 12, 1889, filed its answer, in which it admitted (1) that it was a corporation, and that the plaintiff, while in its employ, working under its section foreman, was struck and injured by the claw bar, as stated in the petition, quoting the language of that part of same; (2) denied all other allegations in the petition; (3) charged that in May, 1889, it settled with him by agreeing to keep him on the pay roll, on full time, till he was able to work, and pay his physician's bill, and \$20 on his other expenses, and that it paid said \$20, and fully complied with said agreement. August 20, 1889, Ryan filed his reply, consisting of a general denial. February 4, 1890, the railroad company filed an amendment to its answer, in which it alleged, *inter alia*, that the defect was unknown to the

company, and by reasonable diligence could not have been discovered, and further alleged disobedience by the plaintiff of the foreman's orders, but for which the injury would not have occurred. The amendment also denied all allegations of the petition it had not admitted. On the same day, Ryan filed a reply, consisting of a general denial, to this amendment. Upon the trial, which was begun February 17, 1889, it was shown that the injuries to Ryan were occasioned by the breaking of a track or lifting jack, whereby a bar of iron was thrown against his face, breaking his upper jaw and cheek bone on the left side, bruising and lacerating the flesh, and injuring him so that he was confined to his bed, and unable to work, from the time of his injury, April 22, 1889, until the latter part of July following, when he again obtained work as a section hand, and continued in that employment to the time of the trial, having been in the mean time promoted to section foreman. There is no dispute that the section men, under the direction of the foreman, John Ratliff, were raising a frog with the jack and track bars. When they had raised it high enough, they stopped, to enable the foreman to see if it was in line; letting go of their bars, and thus throwing all the weight on the jack. The jack broke, letting the track drop suddenly, throwing one of the bars across the track, where it struck Ryan, injuring him as stated. This action was begun on May 21, 1889. The trial occupied four days, and resulted in a verdict of \$5,000 for Ryan. The railroad company below moved for a new trial, which was overruled, to which exceptions were taken. It prepared, and on June 24, 1890, filed, its petition in error and made case in this court.

C. H. Kimball, for plaintiff in error. John O. Sheridan, for defendant in error.

HORTON, C. J., (after stating the facts.) It is insisted that many of the special findings of the jury are unsupported by any evidence, and contrary thereto; also, that the damages, allowed at \$5,000, are so excessive as to indicate passion and prejudice. The jury specially found that no officer, agent, or employe of the railroad company knew of the existence of the defect which caused the jack to break, prior to the time it broke; that there was no evidence to show whether the foot broken from the jack at the time Ryan was injured was the same foot upon the jack when the company purchased it; and that it was customary on railroads, generally, to leave the inspection of tools used in track work to the section foreman. But they further found that the defect in the jack was visible before it broke, if it had been properly inspected.

It has been frequently ruled by this court, in accordance with the authorities generally, that an employe of a railroad company, by virtue of his employment, assumes all the

ordinary and usual risks and hazards incident to his employment; that, as between a railroad company and its employes, the railroad company is not an insurer of the perfection of any of its machinery, appliances, or instrumentalities for the operation of its railroad; that, as between a railroad company and its employes, the railroad company is required to exercise reasonable and ordinary care and diligence, and only such, in furnishing to its employes reasonably safe machinery and instrumentalities for the operation of its railroad; that it will be presumed, in the absence of anything to the contrary, that the railroad company performs its duty in such cases, and the burden of proving otherwise will rest upon the party asserting that the railroad company has not performed its duty; that, where an employe seeks to recover damages for injuries resulting from insufficiency of any of the machinery or instrumentalities furnished by the railroad company, it will not only devolve upon such employe to prove such insufficiency, but it will also devolve upon him to show, either that the railroad company had notice of the defects, imperfections, or insufficiencies complained of, or that, by the exercise of reasonable and ordinary care and diligence, it might have obtained such notice; that proof of a single defective or imperfect operation of any of such machinery or instrumentalities, resulting in injury, will not of itself be sufficient evidence, nor any evidence, that the company had previous knowledge or notice of any supposed or alleged defect, imperfection, or insufficiency in such machinery or instrumentalities. *Kelly v. Bridge Works*, 17 Kan. 558; *Railroad Co. v. Holt*, 29 Kan. 149; *Jackson v. Railway Co.*, 31 Kan. 761, 3 Pac. 501; *Railroad Co. v. Wagner*, 33 Kan. 660, 7 Pac. 204; *Railroad Co. v. Ledbetter*, 34 Kan. 334, 8 Pac. 411; *Railway Co. v. Weaver*, 35 Kan. 434, 11 Pac. 408; *Railway Co. v. Dwyer*, 36 Kan. 69, 12 Pac. 352; *Railroad Co. v. McKee*, 37 Kan. 592, 15 Pac. 484.

A critical examination of all of the evidence in the case, including that offered upon the part of Ryan, fails to show that there was any evidence introduced to support the finding that "the defect or flaw in the jack was visible before it broke, if it had been properly inspected." Involved with this finding are also the following findings: "That the railroad company was guilty of negligence in receiving the jack for use on its road, if it was received in the condition it was when it broke," and "that a man of ordinary skill and diligence, by the usual and ordinary inspection of the jack before it broke, would have been likely to have discovered the flaw or defect therein." It would necessarily follow that if the defect in the jack was visible before it broke, and if it existed from the time it was made, or from the time that the foot was attached or welded, that "the railroad company was guilty of

negligence in receiving the jack," and, also, that "a man of ordinary skill and diligence, by the usual and ordinary inspection or examination of the jack before it broke, would have been likely to have discovered the defect." It appears from all of the evidence that the broken foot was iron, and was fastened or welded to the steel bar of the jack by having the steel split, and the iron inserted. The evidence was conflicting, whether the foot piece and bar were originally a single piece of steel, or whether a new foot piece had been put on the jack subsequent to its original completion. All of the witnesses, however, testifying upon the trial about this matter, stated that the foot was defectively and insufficiently fastened or welded to the steel bar. The pivotal question in the case, to charge the railroad company with negligence, was whether the company, by the exercise of reasonable and ordinary care and diligence, could have discovered the defect in the jack before it broke. The definition of "visible" is "perceptible by the eye; that may be seen; apparent; open; obvious." Of course, if the defect in the jack was visible before it broke, the railroad company was clearly guilty of negligence in furnishing it to its employes for use. In the absence of evidence to sustain the finding that the defect in the jack was visible, the other findings referred to, and connected therewith, may also be treated as of doubtful support to the verdict. As to whether such defect was visible before the jack broke, we refer to the following excerpts of the evidence, being all that was offered upon that point.

Ryan, the plaintiff below, testified: "Q. You had some experience on railroads before you worked on the Kansas City & Pacific? A. Yes, sir; I had worked some on the section. Q. And you had worked on the Kansas City & Pacific about three weeks before this happened? A. Somewhere about a month, I guess. Q. You commenced the 1st of April, didn't you? A. I don't know exactly when I did commence. Q. And this happened on the 22d of April? A. Yes, sir. Q. This jack had been in use right along, on track work, during the time you were working on the railroad? A. Yes, sir. Q. Used every day, and every hour in the day, almost, in raising track? A. Yes sir; there was a jack there all the time. Q. That was what you were principally engaged in doing,—surfacing road, and getting the track up in shape? A. Yes, sir. Q. So that it was necessary to use the jack about all the time? A. Yes, sir; the jack was used all the time. Q. This was the only time it ever broke, to your knowledge? A. Yes, sir; I never saw the jack break before."

John Tomaine, called as a witness by Ryan, testified: "Q. How long had Mr. Ratliff had that jack with his gang? A. I think he had had the jack ever since I commenced to work there for him. Q. That was how long before? A. I commenced to work for

him, probably, in February,—about the 1st,—1889. Q. Then it was February, March, and April, up to the time it was broken? A. Yes, sir. Q. You never noticed any signs of any defect about the jack? A. I never paid any attention to it. Q. I say you never noticed any? A. No, sir. Q. What work were you engaged in, most of the time, when you were working for them on this section, during the month of April? A. We were raising track. Q. And surfacing? A. Yes, sir. Q. This jack was the tool that was in use during that time, was it? A. It seems to me he had another jack there awhile. Sent it away along in the spring. Q. Do you know whether this jack was on the work all the time? A. Yes, sir; the jack we had was there all the time until Mr. Ryan got hurt. Q. Do you know whether it was this jack, or some other jack? A. I couldn't say whether it was that jack, for sure, or not. It was something like that jack. I guess that is the same one. I couldn't say, for sure, whether that is the one or not. Q. Was there more than one jack there at any time? A. It seems to me like he had two there in the spring, and he sent one of them in."

J. S. Edwards, called as a witness by Ryan, testified: "Q. Did you notice this flaw in the metal at the time of the injury to Mr. Ryan? A. I did, after the injury was done. Q. How long had the jack been in use there by your section men prior to that time? A. Ever since I had been there. I went on the 1st day of February. Q. And it had been used ever since? A. There was one jack. It was sent in for repairs. One of these cogs had been broken, and the piece was sent in for repairs, and it came back. Q. What had you been doing that day, with it, before this accident happened? A. We had been raising track south of the switch. Q. Been using it, and making a good many lifts with it? A. Yes, sir; we used it right along. We had no other jack. Q. And you had been using it right along ever since you had it there? A. Yes, sir; what time it was there. Q. Did you ever notice that flaw in it before it broke? A. I never did. No, sir. Q. It is mostly on the interior of the metal, isn't it? A. Yes, sir. Q. Do you remember how often this jack was sent back for repairs? A. I don't. Q. Do you remember any other repairs that it needed at any time? A. No; I do not. Q. Did you ever notice any flaw in the jack? A. I didn't. Q. Did you ever make any inspection of it, or see any one making an inspection? A. No; I never did."

Ed Nelson, a section man on the railroad with Ryan, and called by him as a witness, testified: "Q. Now, you say you have looked at this jack, generally, a good many times before it was broken. Did you ever see any signs of any defect about it? A. No, sir. Q. I will ask you if the defect that is there isn't almost entirely on the interior surface of the metal? A. I don't think it could be

seen from outside. Q. Before it was torn apart,—broken? A. Yes, sir. Q. That is, you don't think it could be seen before it was broken or torn apart? A. No, sir; I don't think it could. Q. You never made any minute examination of the foot piece, to determine whether there was any flaws on it? A. I never put it on the car, and it wasn't my business to use it, and I seldom handled it at all."

W. M. Kuykendall, called as a witness by Ryan, testified: "Q. How long had you been on the work at that time? A. I commenced about the 1st of January,—somewhere along there. Q. Had this jack been there while you were at work? A. I don't think this same jack had been there; but, then, one something like it had been there. Q. Had any jack been sent back at any time? A. Yes; if I remember right, the jack that was on the work when I went on the work was broken. These little cogs here were broken out, and Ratliff kept it here, and sent for another one, and when this one came he sent that one to Parsons, if I remember right. Q. You had been using the jack that day, had you? A. Yes, sir. Q. And for a number of weeks previous to that time? A. I don't know just exactly how long we had been using it, but I used the jack about all it was used. Q. I say, this jack had been in use a number of weeks previous to that time? A. Yes, sir. Q. It was right under your eye when you used it? A. Yes, sir. Q. You lifted it up, and had it in your hands, and handled it? A. I carried it all the time. Q. And in handling it, using it, and lifting it up, your eye must have fallen on every part of it, at various times? A. I won't say that it did. Q. What part of it do you think you never saw, or that your eye never fell upon? A. I never examined the jack. Q. I will ask you if it is possible for a man to use a tool, and handle it, day after day, without seeing it? A. It don't look hardly like he could. Q. Do you think that you handled that tool and used it there,—handled it,—day after day, without seeing it? A. I wouldn't say that I saw this part, down in here, at all, every day. Q. What? A. I wouldn't say that I saw this, down here, every day. Q. The parts that are hidden, of course, you didn't see. I don't mean that. But the parts that are in sight you saw every day, didn't you? A. I guess I did. Q. Of course, you didn't see in back here [indicating] every day, because you didn't get down to look at it? A. No, sir. Q. Did you ever see any signs or suspicions of a flaw in the jack, anywhere? A. No, sir; I didn't that I remember of, until after it was broke. I noticed it the next morning after it was broke. Q. Do you know anything about this tool being looked over by anybody else before its being used? A. Mr. Ratliff always unlocks the tool box, and I suppose he— Q. I don't want any supposition. If you ever saw Mr. Ratliff look them over, as if he was inspecting them, you

can say so, if you remember. A. I have seen him pick up his tools, and look at them. Q. Did you ever see him inspect this jack? A. I have seen him pick it up, and look over it. Q. Look over it, for what purpose? A. I suppose, to see if there was any flaw or any break about it,—cracks, or anything of that kind. Q. When did you see him do that? A. I don't know as I can tell you just when I saw him do it. I saw him look over his tools a number of times. Q. Was it his custom to do that, of mornings, when he took his tools out? Not every morning, perhaps, but occasionally? A. I think he did. Q. You have seen him do it? A. I have seen him looking over his tools. Q. You have seen him look over that jack before this accident? A. Yes, sir."

H. Lienk, called by Ryan as a witness, testified that he was a blacksmith; that he had been engaged in that business for 20 years, at St. Louis and Paola; and that he had had experience, generally, in ironwork. Upon his direct examination, he testified, also: "Q. You may state now whether a weld of that kind could have been discovered by looking at it. A. I don't suppose it could, after it was finished off. Q. Would there be anything on the surface that would indicate that that was a bad piece of workmanship,—a bad job, as you have designated it? A. I don't know. I don't think you could by looking at it after it was finished off, probably, the way that has been ground off. Q. Could you tell from the appearance of it now as to whether or not it could have been detected by looking at it? A. No; I don't think it could have been detected by looking at it. I don't think it could." Upon cross-examination, he further testified: "Q. The defect in this piece here is a defective weld, isn't it? A. Yes, sir. Q. And most of the defect is interior,—out of sight? A. Yes, sir. Q. By the way, how does that surface there appear to have been finished? A. With an emery wheel, I suppose. Q. Where the surfaces are finished off on the outside with an emery wheel, it would simply make it all bright surface of the metal? A. Yes, sir. Q. Without showing anything? A. Yes, sir. Q. That is the reason you say to the jury you wouldn't think this could have been discovered by the eye after it was once finished off, is it? A. Yes, sir. Q. Your judgment is, from the appearance of this, you couldn't have detected it with your eye? By the way this is finished down, and so forth, you couldn't have detected this with your eye? A. No, sir."

Charles Moran, called as a witness by Ryan, testified that he was a blacksmith; that he learned his trade in 1855; that he had worked at such shops for about 23 years in St. Louis, Armstrong, Kan., and in Kansas City, St. Charles, and St. Louis, Mo.; that he had had experience in the repair of railroad tools, and worked in that business in Armstrong for five years, making claw bars, spike mauls, lining bars, and lever bars, for rais-

ing track, etc. He further testified, in his direct examination: "Q. Would you have been able to know, by looking at that before it had been broken, whether or not that foot piece had been put on in the way you have stated? A. Yes, sir; you could see the scarfs, right here. You can detect that, or a man with a young eye, or with spectacles. You can see that scarf. There is a scarf loose, that never was welded. I can see it without spectacles. Q. You may just explain to the jury in what ways a reasonable examination would have disclosed that that was defective, or would have disclosed that defect or flaw. A. I myself would have told it by seeing the scarfs on it, here. I could have told it that way. It was never solidly welded. But the men that test it would do it with a hammer." Upon cross-examination, he further testified: "Q. Now, I will ask you if it isn't a fact that where two surfaces are put together,—welded together, like that,—and two-thirds or three-fourths of the weld holds, and the iron is hammered or formed, by the application of some force, into shape, and then polished,—not polished, but finished down with a file or emery wheel,—I will ask you if you would always be able to see, by your eye, a flaw? A. Yes, sir; you see that scarf? Q. I see it now, because you can't get it together tight with your fingers. A. It could be seen, anyhow, when the iron was red. Q. I know it could be seen when the iron was red, that is, in the hands of the blacksmith. A. Yes, sir; in the hands of the blacksmith. Q. I don't want to misunderstand you, Mr. Moran. What I am getting at is, after it has passed from the hands of the blacksmith, and after it has been finished down with an emery wheel or a file, whatever it might be, then wouldn't that make that all a bright surface of metal, without showing any scarf? A. No; that scarf could have always been seen. Q. You think it could have always been seen there? A. Yes, sir; specially after it was either put on the grindstone or rubbed with a file. Q. You are not positive about that, are you? A. Well, by the mechanic, it could be seen. I don't say it could be seen by everybody. Q. It could be seen by a skilled worker in iron? A. Yes; I think it could. Q. He could detect that there was a joint there? A. That there was a scarf there."

On the part of the railroad company, James Turner testified that he was a blacksmith by trade, and had been so engaged for 28 years, 22 years of which were at Paola, where he lived at the time of the trial; that he had frequently welded bars of iron together, and also bars of iron and steel: "Q. State to the jury whether, in your judgment, there would be any way, after that weld was put together, and the iron finished down as it appears to have been finished, by which a man could detect the flaw that was in there, by inspection or

observation. A. With the eye? Q. Yes. A. There is only one way known to me. Q. How would that be? A. That would be to heat it. Q. Describe to the jury how you might detect it in that way. A. You might heat this little part, for instance, altogether, and then, as the heat traveled, if the surfaces wasn't united here, you could see it. This would be dark, whereas there it would be red. Consequently, the heat wouldn't have traveled the same in that as it did in the other. Q. You would have to take it out of the jack, and put it in the fire, to do that? A. Yes, sir. Q. And would that, in your opinion, be the ordinary way of inspecting a tool that you had no suspicion of? A. No, sir; it wouldn't. Q. Do you think, then, that when this was in the jack, in the first place, there would be any indication, before it was broken or torn apart, by which any one could discover that defect? A. I don't think there would be, sir."

J. T. Fisher, called by the railroad company, testified that he was the road master of the Kansas City & Pacific Railroad at the time Ryan was injured. "Q. Did you see this jack after it was delivered to Mr. Ratliff, and before the time that William Ryan was hurt? And, if so, what was its condition? A. It appeared to be perfectly sound, and in good order. Q. Was this flaw visible, or could it have been discovered by a careful examination of the jack, before it was broken? A. It was not visible, and could not have been discovered by any examination of the tool, before it was broken. Q. Why was it not visible? A. In making a weld, the two surfaces of metal are put together hot. If the metal welds over the greater part of the surface, as in this case, the part that is not welded may, by hammering or pressure, be fitted together so perfectly that no eye can see the defect, or distinguish it from those streaks or veins caused by the grain of the metal, or by filing or finishing it. Most of the defect in this weld was in the inside of the metal, where it could not be seen, and most of the weld is behind the frame of the jack, so that no one could see much of the sides of the weld; and, for all of these reasons, nothing indicating a defect could be seen there until the surfaces were torn, or broken apart, when the defect could at once be seen."

John Ratliff, the section foreman on the road when Ryan was injured, testified: "Q. What did you do at any time in the way of inspecting this jack, to see if it was sound or not? A. Well, I inspected my tools every morning. Q. What inspection, so far as the jack is concerned, did you give it? A. I always took the jack out of the tool box, of a morning, and loaded it on the car,—examined it. Always examined the foot piece of the jack every morning. That was my habit. Q. Examined the working parts of the jack? A. Yes, sir; very often. Q. And, when you found it was in working order, what would

you do? A. State that question again, please. Q. After you examined it, and found it in working order or proper order, then what would you do? A. Well, I put it on the hand car. Q. Was that flaw visible before the metal was broken and torn apart? A. No, sir; not with the eye. You couldn't see it. Q. Was there any way, you know of, whereby it could be detected before it was broken and torn apart? A. No, sir; I think not. Q. Just show the jury how you would inspect this jack when you went to take out the tools. A. [Witness shows jury.] By working the jack, and picking it up, and looking at it. Q. Hold it in your hands this way, and look at it? A. Yes, sir. Q. State whether you could, by that examination, tell whether the jack was in good order or not. A. Well, I would think that, if there was any flaw in it, I would see it. Q. If there was any flaw in it that was visible? Yes, sir. Q. And that, you say, you did every morning? A. Yes, sir. Q. Did you do it the morning before this accident happened? A. Yes, sir."

P. Rockwell, called by the railroad company, testified that he was the general road master of the Missouri, Kansas & Texas Railway; that he had been engaged continuously in the road department of railroad work for about 30 years; that the road department has charge of the roadbed, track, and the managing and choosing of tools that were kept for that business. He also testified: "Q. I will call your attention to this fracture here, where the foot or shoe of the bar is broken off, and ask you to state if, in your judgment, that fracture could have been discovered before it was broken or torn apart, by any usual or ordinary inspection of this tool? A. No, sir; I should say not. I don't see how anybody could have detected the defect that actually existed inside that iron, previous to its use. That shows as though it had been in use quite a long time, —I don't know how long,—because that is all done by continued raising up against the bottom rail, and must have continued in use for some length of time. I don't think any ordinary inspection could possibly have discovered that, because it was entirely covered up, and on the inside. I don't see that any one could have peered into that, and discovered the defect in it. I don't think it is possible. * * * It couldn't have been done with the eye, as I could see. Q. Now, a portion of the flaw, there, you see, seems to come to the surface. Where a portion of iron or metal is welded together as this seems to have been, over, perhaps, two-thirds of the surface,—where a portion of it is welded together, and the rest of it is entirely closed up, and then finished off with an emery wheel,—would it be possible to detect the flaw in there? A. That is the reason I say it couldn't be detected, because the defects in there were entirely covered over before that fracture was made. The whole thing

seemed to be one perfect piece, but at the same time there was a defect in it, inside; and you see those edges down there are a feather edge, and would have covered everything up. That is the same kind of defect that occurs in a thousand and one pieces of machinery, where iron or steel is used for the make-up of the same."

The only witness, of all those referred to, who in any way intimated that the defect in the jack was visible before it broke, is Moran. He admits that such defect could not have been seen by everybody, but stated that it could have been seen by a mechanic or by a skilled worker in iron. The jury specially found that it was not usual or customary for railroad companies to employ expert workers in iron or steel to inspect the tools in use on the road; and therefore, from the evidence of Moran, it does not appear that the defect in the jack, before it broke, was visible, even if it had been properly inspected by a man of ordinary skill, prudence, and diligence. An experienced expert worker in iron, like Moran, might be able to detect with his trained eye a defect in a tool, when a road master or a section foreman, fully competent, and possessing ordinary skill, prudence, and diligence, for the performance of all of his duties, might not be able to do so. The jury found that the jack was not manufactured by the railroad company. There was evidence tending to show it was purchased of M. M. Buck & Co., of St. Louis, Mo. If the company purchased the jack of a well-known and reliable house, with an established reputation as a dealer in railroad tools and supplies, and the defect was latent or concealed, so that no one but a mechanic or a skilled worker in iron could have discovered it by careful examination, the railroad company would not be guilty of negligence in furnishing the jack for use to its employees. Railroad companies are not compelled to make a more careful or closer inspection of a lifting jack than bridge builders, house raisers, or other persons engaged in equally heavy work, furnishing such a tool for their employees. This tool is not a complicated one, but in general use; and no higher degree of care or prudence in the examination or inspection of the tool is required by a railroad company than of any other master or employer in like work. The same rule applies to all. Moran, contrary to all of the other witnesses, of both the plaintiff and defendant, inquired of upon the subject, testified that the defect in the jack could have been discovered before it broke "by sounding it with a hammer." He also stated that, at railroad and other shops where such tools are kept or repaired, "a man who is used to it takes a hammer, and goes around, and by tapping such a tool, can tell whether it is solid or not." This evidence was not followed up by showing, or offering to show, that with railroad com-

panies, bridge builders, house raisers, or other employers, that method of inspection is usual or customary. An expert iron worker, with his trained ear as to the sound of iron or steel or other metals, might be able to discover defects or flaws in a tool or instrument manufactured or repaired by him that could not be discovered in the same way by other parties, not having like experience. Two blacksmiths—one, who testified on behalf of the plaintiff below, and the other, who was called by the company, and both of whom are experienced iron workers—testified that the only way the defect in the jack could have been discovered before it broke was by “cutting off or unriveting the cap or top, and taking the bar out of the frame, and then striking it with a hammer or piece of steel, or other metal.” This shows that, among the iron workers who were witnesses, there was great contention whether the defect in the jack, before it broke, could have been discovered by tapping with a hammer or other instrument. But we need not pursue “the sounding of the bar by tapping” further, because, upon another hearing, other facts may be developed to show whether originally the bar and foot piece of the jack were one piece, forged out of laminated steel, as claimed by Moran, or whether, after the jack was completed, it had, after its purchase, been subsequently repaired by having a new foot piece welded on. Then, again, the plaintiff may be able to show how such jacks are properly inspected after leaving the manufacturer, and while in the hands of a master or employer for use.

The necessary inspection by the manufacturer of a tool before it is sent out to be sold may not be the same inspection which is required or demanded by the master or employer in its use, if due care is used in its purchase. There is some evidence in the record that the jack, on account of its cogs being worn or broken, was sent in for repairs to the railroad shops of the company at Parsons. Now, if, in repairing the worn or broken cogs of the jack, it was, or ought to have been, the practice at the shops, before the jack was sent out again for use, to examine and inspect all parts, to ascertain if any other defects existed therein, and any reasonable examination or inspection at the shops would have disclosed the defective weld of the foot, then the company would be negligent in furnishing from its own shops a defective jack for use, even if the defect in the jack was not visible, or even if, after such repairs, a man of ordinary skill, prudence, and diligence would not, by any usual and ordinary inspection, have discovered the defect before the jack broke. If the findings of fact were not contrary to the evidence, and if a finding had been made by the jury that the jack, before it broke, had been sent in for repairs to

the railroad shops of the company, at Parsons, on account of worn or broken cogs, or for any other reason, and that proper inspection had not been made in the shops before it was sent out again for use, such a finding would have permitted a recovery. But the case was not tried upon that theory. No instructions were given by the court, or any questions submitted to the jury, concerning a proper inspection of this jack at the railroad shops at Parsons, if sent in for repairs. Again, the evidence was conflicting whether the jack was sent in for repairs at all. See *Railway Co. v. Dwyer*, 36 Kan. 58, 12 Pac. 352, where the car to which the brake staff was attached had been repaired with a new body and new trucks, but the old brake staff, which subsequently broke, was permitted to remain. The further fact, however, appeared in that case, that the defect in the brake staff was visible before it broke, if any examination had been made underneath the ratchet wheel. There are other findings of the jury, not referred to, which deserve criticism; but the findings discussed are the most important, and therefore it is not necessary, at this time, to comment upon the others. In *Railroad Co. v. Jones*, 30 Kan. 601, 2 Pac. 657, there was a collision between hand cars, violent enough to shatter the lifting handles of the car complained of. There was a crack in one of its wheels, and the wheels also wobbled. After the collision there was no sufficient examination or inspection of the injured car. This court properly held “that the patent injury from the collision was so great that common prudence required the most careful examination for latent injuries before further use of the car, and, none having been made, the company was guilty of negligence.” That case was rightly decided, and we affirm all therein stated.

In addition to the other matters discussed, the verdict of the jury, in our opinion, is large, as it is admitted that the doctor's and dentist's bills of Ryan, on account of his injuries, were all paid by the railroad company, and as it was shown that he went to work again, as a section hand on another railroad, about three months after he was injured, and was working at the time of the trial, as section foreman, with increased pay.

It is unnecessary to comment upon the evidence or findings about the alleged settlement between Ryan and the railroad company. The evidence upon this matter is conflicting, and the jury were the sole judges of the weight and credibility of the witnesses. For the reasons given, we believe it is necessary that a new trial should be awarded; and therefore the judgment of the district court will be reversed, and the cause remanded for further proceedings.

JOHNSTON, J., concurring. ALLEN, J., dissenting.

BOARD OF COM'RS OF GRAHAM COUNTY v. VAN SLYCK et al.

(Supreme Court of Kansas. Jan. 6, 1894.)

COMPENSATION OF COUNTY CLERK—ACTION ON BOND—STATUTE OF LIMITATIONS.

1. Under the general statute relating to fees and salaries, county clerks are entitled to no more compensation than the salaries fixed by law; and all fees received by them for official services should be accounted for, and deducted from each quarterly allowance of salary.

2. A cause of action for fees not accounted for and wrongfully retained by such officer accrues at the end of each quarter, when the allowance of salary is made.

3. An action upon the official bond of a county clerk to recover for fees received, and not accounted for, was commenced more than four years after the last allowance of salary was made to him by the board of county commissioners. *Held*, that the action was barred by the three-year statute of limitations. Civil Code, § 18, subd. 2; *Ryus v. Grubbe*, 3 Pac, 518, 31 Kan. 767.

(Syllabus by the Court.)

Error from district court, Graham county; Chas. W. Smith, Judge.

Action on an official bond by the board of county commissioners of Graham county against B. Van Slyck and others. There was judgment for defendants on demurrer to the petition, and plaintiff brings error. Affirmed.

R. S. Emmons, for plaintiff in error. Harwi & Prewitt, for defendants in error.

JOHNSTON, J. This was an action by the board of county commissioners of Graham county, in which it seeks to recover upon the official bond executed by B. Van Slyck, as county clerk, and Jerome Shoup and William Wells, as sureties thereon. In the petition it is alleged that Van Slyck was duly elected county clerk in November, 1885, and that he duly qualified and entered upon the duties of the office on January 11, 1886. It is then averred that he has received various amounts as fees for official services, of which he failed and neglected to keep an account, or present a statement of the same to the board of county commissioners, as the law requires, and that these fees have never at any time been deducted from the salary allowed the county clerk, nor from any quarterly installment of his salary, as the statute requires. It is alleged that on four different occasions he received different sums of money as statutory fees for services in and about the sale and transfer of school lands, namely: \$37.75 on April 2, 1887; \$63.70 on July 2, 1887; \$25.50 on January 3, 1888; and \$27.90 on October 1, 1888. It is then alleged that at various times from January 11, 1886, to January 9, 1888, he collected, as transfer fees for entering various conveyances of lands and town lots, the aggregate sum of \$91.80. These several amounts are set forth in separate counts of the petition, and it is averred that on December 19, 1892, the county attorney made a demand in writing for the return and payment of the same, which was re-

fused; and in each count there is a demand that the court in rendering judgment shall add 100 per cent. as a penalty to the amount of recovery, and also a fee of \$25 to the county attorney for the prosecution of the action. Defendants demurred to the petition of the plaintiff, and, among other grounds, alleged that it did not state facts sufficient to constitute a cause of action. This demurrer was sustained by the court, and, the plaintiff electing to stand upon its petition, it was adjudged that the action be dismissed, and that the defendants recover their costs. Upon this ruling two questions are raised for consideration: First. Whether the county clerk is required to account for the fees collected, in order that the amount of the same may be deducted from each quarterly installment of salary; and, second, if he must, whether the action to recover these amounts is barred by the lapse of time.

Upon the first question, there is little room for discussion or interpretation. The county clerk is allowed a fixed salary, graduated according to the population of the county, and the statute prescribes that such salary is allowed as full compensation for all services by law required to be performed by him. Originally, the compensation of county clerks was derived from fees alone, which they were authorized to collect for their services, and they were permitted to retain all fees earned and collected; but in 1875, the policy of the state was changed in this respect, as far as practicable, when it was enacted that the county clerk should be allowed a fixed salary, to be paid by the county. Laws 1875, c. 98. To carry out this policy and statutory provision, the county clerk was required to keep an account of the fees collected, in a book to be provided for that purpose, showing the amount charged, the amount received, from whom, for what purpose, and the date thereof. Another requirement was that he should present to the board of county commissioners a quarterly statement, under oath, of the amount thus received by him during the preceding quarter, together with the amount of fees charged, and which were due and unpaid, and that the same should be filed with the register of deeds. Another section fixes the salary of the county clerk in accordance with the population of the county, and provides that such salary should be paid "as full compensation," and that the same should "be in full for all the services by law required to be performed in their respective offices whatsoever." It was further provided that the salaries should be paid in quarterly installments upon the order of the county commissioners, but it was provided "that the amount charged by each county clerk as fees herein provided for the preceding quarter shall be first deducted from said quarterly installment." Penalties are provided for the failure to make the quarterly report as the law requires, and the statute prohibits an allowance of salary by the county board

until the required report is made by the clerk. The policy of the state in this respect has remained unchanged since the enactment of the law of 1875, and, while there have been amendments as to details, the substantial provisions of the statute, as then enacted, still remain in force. Gen. St. 1889, pars. 3011-3019. The language of the statute clearly and conclusively shows that the compensation of the clerk is not affected by the fees which he may collect. It was deemed best by the legislature to give these officers a fixed salary upon which they could rely, rather than to leave them to the fees derived from the varying and uncertain demands of the public for their services. The statute is prospective in its terms and operation, and therefore the fact that subsequent legislatures have changed the schedule of fees, or provided other fees for added official duties, cannot affect the compensation of these officers. It is the manifest policy of the legislature that all fees charged must be accounted for, and all received deducted from the quarterly allowance of salary which the law prescribes.

The other objection to the petition is more serious, and, indeed, it is said that it was the only one considered by the district court, and upon which it rested its judgment. About five years elapsed from the time the board of county commissioners made its last settlement with Van Slyck, when he surrendered his office, before the commencement of this action. The cause of action alleged, as we think, is one upon a liability created by statute, and should have been brought within three years after it accrued. Civil Code, § 18, subd. 2. It is argued that, the action being upon an official bond, the five-year statute provided in the fifth subdivision of section 18 of the Civil Code should be applied. This contention cannot be sustained. An action accrued against the defendant for the fees collected and unaccounted for at the quarterly settlement following the receipt of such fees. The public records disclosed the performance of the official services by the clerk, and what fees should have been charged and collected. The statutory limitation could not be extended by the failure to demand the payment of the fees collected, and in fact no demand is necessary for fees so illegally retained. The cause of action was barred on all the claims included in the petition in January, 1891, although an action on the bond for some purposes might have been brought within a later date. The statute providing for the five-year limitation is not that a cause of action on a bond shall not be barred until five years have elapsed, but it is that the action "can only be brought within five years after the cause of action shall have accrued." An interpretation of this provision was before the court in *Ryus v. Gruble*, 31 Kan. 767, 3 Pac. 518, where it was held that the wrongs committed by the defendant were the real and sub-

stantial foundation for the cause of action, and that the bond was virtually only a collateral security for the enforcement of such cause of action. "The bond does not give the cause of action; the wrongs or delicts do; and the bond simply furnishes security to indemnify the persons who suffer by reason of such wrongs or delicts. And while the statute cited by plaintiff operates to bar every action brought upon the bond to enforce a cause of action which accrued more than five years prior to the commencement of the action, yet such statute does not operate to suspend the operation of the other statutes of limitation, or to continue in force or revive a cause of action which had already been barred by some one of the other statutes of limitation. Whenever a cause of action is barred by any statute of limitations, the right to maintain an action therefor upon a bond which simply operates as a security for the same thing must necessarily cease to exist." See, also, *State v. Conway*, 18 Ohio, 235; *State v. Blake*, 2 Ohio St. 147; *State v. Newman*, Id. 567; *Mount v. Lakeman*, 21 Ohio St. 643; *State v. Kelly*, 32 Ohio St. 430; *Dawes v. Shed*, 15 Mass. 6. Even if a demand had been necessary, it should have been made within a reasonable time; and, there being no good reason for delay, the cause of action must have accrued more than three years before its commencement. *Atchison, T. & S. F. R. Co. v. Burlingame Tp.*, 36 Kan. 629, 14 Pac. 271; *Bauserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051; *Id.*, 50 Kan. 794; *Rork v. Commissioners*, 46 Kan. 175, 26 Pac. 391. In any view of the case, the action is barred, and hence the ruling and judgment of the court must be affirmed. All the justices concurring.

**STATE ex rel. HUMBOLDT COUNTY v.
BOARD OF COM'RS OF LANDER
COUNTY. (No. 1,391.)**

(Supreme Court of Nevada. Jan. 20, 1894.)

MANDAMUS—TO COUNTY BOARD—REQUIRING PAYMENT OF JUDGMENT FOR COSTS—COLLATERAL ATTACK—RES JUDICATA.

1. Where a board of commissioners of a county, without a legal justification, refuse to allow a claim based upon a judgment regularly obtained against the county, mandamus is the proper remedy.

2. The rendition of a judgment against a county is an auditing of the claim, within the meaning of the statute; and it becomes the duty of the commissioners to allow it as an audited claim, unless some sufficient defense exists to the judgment. It makes no difference in this rule whether, in the action in which the judgment was obtained, the county was plaintiff or defendant.

3. When regularly entered up in a judgment, the costs of the action become a part of the judgment, and their amount and justice are not subject to collateral attack.

4. The rule that mandamus does not lie to control the judgment and discretion of an officer, only applies to the act to be commanded, and not to preliminary matters. *State v. Murphy*, 6 Pac. 840, 19 Nev. 89, followed.

5. All the questions arising in this case, such as whether there is a judgment, and whether any defense by the county exists thereto, are merely preliminary questions, concerning which the court will review the decision of the board. Suggested, also, that the true criterion in such cases is whether it was intended that the action of the officer should be final, and, if not, whether there is any other plain, speedy, and adequate remedy.

6. Where a party has treated a judgment as final by appealing from it to the supreme court, which appeal has been entertained and decided upon its merits, he cannot afterwards claim that no final judgment has been entered in the case.

7. The fact that a motion to retax costs has never been decided does not stay the execution of the judgment, nor destroy its conclusiveness as to the amount and legality of the costs.

(Syllabus by Bigelow, J.)

Original application, at the relation of Humboldt county, for writ of mandate to the board of county commissioners of Lander county. Granted.

M. S. Bonnifield, for relator. D. S. Truman, for respondent.

BIGELOW, J. In an action brought by Lander county against Humboldt county in the district court of Elko county, judgment was entered in favor of the defendant for costs. Upon appeal to this court by Lander county, this judgment was affirmed. 32 Pac. 849. Humboldt county then presented to the defendants, as the board of commissioners of Lander county, a claim for the costs as entered up in the judgment in the former action, which they rejected. This proceeding is brought to compel them to approve the same as a legal claim against Lander county.

No execution can issue in this state against the property of a county; and it follows that, if the relator is not entitled to the writ of mandamus to compel the defendants to allow the claim, there is no way by which it can enforce its judgment. Under such circumstances, mandamus is the remedy usually resorted to and allowed. Merrill, Mand. § 30; 2 DILL. MUN. CORP. § 860. Counsel for defendants contends that the writ should not issue in this case, for the reason that the claim has never been audited by the board of commissioners, or rejected by them, and a judgment thereafter obtained upon it; that it is only after a claim has been presented to the commissioners, and rejected by them, and then a judgment obtained upon it, as contemplated by Gen. St. § 1964, that a peremptory writ of mandamus can issue to compel the board to allow the claim. Before this can be done, as he contends, this judgment must be presented as an ordinary claim against the county, and, upon being rejected, another action brought upon it, in which the county will be defendant, and another judgment obtained thereon. We are, however, of the opinion that the ascertainment by the judgment of a court having jurisdiction of the case that a certain sum is due from the county is an auditing of it, within the mean-

ing of the statute, and that when so audited it becomes the duty of the commissioners of the county to allow it as such, (Alden v. Alameda Co., 43 Cal. 270; Merrill, Mand. § 130,) unless some sufficient defense exists thereto, such as fraud in obtaining it, the statute of limitations, a set-off, etc. When regularly entered up in a judgment, the costs become as much a part of the judgment as anything else contained therein, and their amount and justice are no more subject to collateral attack. It follows that if a second action were permissible, and were brought, upon this judgment, the plaintiff would certainly be entitled to a second judgment, unless some defense, such as those suggested, existed thereto. The claim was not rejected upon such ground, nor does it appear that any sufficient defense to the judgment exists; and consequently a ruling that another action is necessary would simply subject Lander county to the additional costs thereby entailed. Such a proceeding would be worse than useless, and, in our judgment, is entirely unnecessary. It is the fact that the county's liability has become fixed and settled, and is no longer open to controversy, that makes it the absolute duty of the defendants to allow the claim; and it is equally as fixed where the claim is made upon a judgment in which the county was plaintiff as it would be were it a defendant therein. A judgment so obtained would be open to the same defenses that this one is, and no more nor less. The duty to allow such a claim as this exists independently of Gen. St. § 1964, and consequently is not confined to the circumstances therein mentioned.

2. It is said, however, that the determination of whether any defense to the judgment exists involves the exercise of judgment and discretion upon the part of the board, that it consequently becomes a judicial question, and that the writ of mandamus will not issue to control the judgment and discretion of the board. In a certain sense, this is true, and it is doubtless difficult to draw a line between ministerial duties, the exercise of which will be controlled by the writ, and those involving the exercise of judgment and discretion, which will not. Considerable loose language has been used in the decisions, and they are, perhaps, to some degree in conflict; but it is nevertheless very clear that the fact that the act involves to some extent the determination of disputed questions of either law or fact, and consequently the exercise of judgment and discretion, does not prevent the court from taking jurisdiction, nor from compelling the officer to act in a particular way, for otherwise there would be very few cases indeed in which the writ could ever issue. This point as it arises here has, however, been so well considered in the recent case of State v. Murphy, 19 Nev. 89, 6 Pac. 840, that it is unnecessary to more than briefly refer to that decision. It was there held that while the writ will not issue to

control discretion, or to revise judicial action, this rule applies only to the act to be commanded by the writ, and not to the determination of purely preliminary questions. That principle is decisive here. All the questions concerning which the board could possibly exercise any judgment or discretion, such as whether the claim is based upon a valid judgment, and whether any defense exists thereto, are merely preliminary ones to the main question of whether it is their duty to allow the claim. If no such question exists, or if it is determined against the board, then we see at once that it becomes their mere ministerial duty to approve the claim; and, if such were alleged, it would, under that decision, devolve upon us to pass upon it, and, if we concluded it untenable, the writ should issue, no matter what the conclusion of the board may have been. What seems also another sufficient answer to this contention is stated in the case of *Wood v. Strother*, 76 Cal. 545, 18 Pac. 766, where it is held, in one of Mr. Commissioner Haynes' most luminous opinions, that the true criterion is not whether the act sought to be controlled by the writ calls for the exercise of judgment and discretion in the officer, but whether it was intended that this decision should be final, and, if not, whether there is any other plain, speedy, and adequate remedy. Here no one will contend that it was intended that the rejection of the relator's claim should finally conclude its right to recover thereon, nor is there any other speedy and adequate remedy. Having obtained a judgment which finally determines in the affirmative the relator's right to recover its costs, the only adequate remedy is one that will give it the fruit of that successful litigation, which only the writ of mandamus will do.

3. Gen. St. § 1965, requiring claims against the county to be presented within six months of the time they become due or payable, by its terms only applies to unaudited claims; and, if we are right in the conclusion to which we have come,—that a claim upon a judgment duly rendered is an audited claim,—then this section has no application.

4. It was next argued that it was not the duty of the board to allow this claim, for the reason that no sufficient judgment has ever been entered in the case in which the claim is made, in that the judgment is simply for costs, and in no wise determines the questions that were at issue in the action, and consequently is not a final judgment. We regard this as one of the preliminary questions that the board had the right to pass upon in the first instance, but in which the correctness of their conclusion is subject to review by this court. It would seem that, under the decisions, the judgment is insufficient, (1 *Freem. Judgm.* § 16; 1 *Black, Judgm.* § 31;) but we are of the opinion that the defendants are not in a position to take advantage of the defect. Lander county

treated it as a final judgment when it appealed from it to this court, and we entertained this appeal, and decided the case upon its merits. Having treated the entry as a judgment decisive of the merits of the case, and having taken and received the benefit of a remedy which it was otherwise not entitled to, we think that Lander county—and consequently the defendants, as its representatives—should now be estopped to claim that no final judgment has been entered in the action. In *Bigelow on Estoppel* (page 601) the author says: "It may accordingly be laid down as a broad proposition that one who has taken a particular position in the course of a litigation must, while that position remains unretracted, act consistently with it." The cases of *People v. Albany & S. R. Co.*, 39 How. Pr. 51, and *Irwin v. Nuckolls*, 3 Neb. 441, read in connection with *Nuckolls v. Irwin*, 2 Neb. 60, are quite in point. See, also, 1 *Herm. Estop.* § 285. In *Clark v. Dunnam*, 48 Cal. 204, the court said: "The only point to be decided under the agreed statement is whether the decree of August 20, 1869, is a final money judgment, in the sense of the statute, and therefore bore interest. The plaintiff in this action treated the decree as final when he prosecuted an appeal from it. If it was not final, his appeal should have been dismissed on that ground. But we entertained the appeal and decided the cause, and in justice the plaintiff should now be estopped to deny the finality of the decree."

5. After the filing of the cost bill, the plaintiff, Lander county, made a motion to retax the costs. This motion has never been heard or disposed of, and it is urged that for this reason the judgment is not conclusive of the amount and correctness of the costs therein entered. Any error in the cost bill should have been corrected in that action. We regard the judgment as conclusive. In this proceeding, that the costs therein entered were properly charged. A simple motion to retax would not stay the execution or enforcement of the judgment, nor destroy its conclusiveness, and therefore, whether now pending or not, it is immaterial in this proceeding. Let the writ issue.

MURPHY, C. J., and BELKNAP, J., concur.

PEOPLE ex rel. SCEAROE et al. v. GLENN COUNTY. (No. 18,193.)

(Supreme Court of California. Dec. 15, 1893.)

LEGISLATION—DISPENSING WITH READING OF BILL—URGENCY—COUNTIES—CREATION—SPECIAL LEGISLATION.

1. Under Const. art. 4, § 15, providing that a bill shall be read on three several days in each house before its passage, unless, in a case of exigency, two-thirds of the house, where the bill is pending, shall vote to dispense therewith, the reading of a bill may be dispensed

with by a resolution expressly naming the bill, though including other bills.

2. The motive of a legislator in voting for a resolution declaring a bill a case of urgency, and dispensing with readings thereof, cannot be inquired into.

3. An act creating and providing for the original organization of a county is not special or local legislation.

4. It is no objection to a bill creating and providing for the original organization of a county that it does not divide the county into supervisor districts, but allows supervisors to be in the first instance elected at large, who, under the general law, have power to divide the county into districts.

Department 2. Appeal from superior court, Sacramento county; Matt. F. Johnson, Judge.

Action by the people, on the relation of Seearce and others, against the county of Glenn, to have it declared not legally organized. Judgment for defendant. Plaintiffs appeal. Affirmed.

Atty. Gen. Hart, Stanley & Hayes, and H. M. Albery, for appellants. Aylett R. Cotton and J. C. Campbell, for respondent.

McFARLAND, J. On March 11, 1891, an act of the legislature was approved entitled "An act to create the county of Glenn, to establish the boundaries thereof, and to provide for its organization," (St. 1891, p. 98;) and defendant claims that, in pursuance of the provisions of that act, the county of Glenn became duly organized. For some time past defendant has been exercising the ordinary functions of a county government, and has been recognized as such by the political and executive departments of the state government. This present proceeding was brought in the superior court, in the name of the people, to have it judicially decreed that said county of Glenn "is not legally organized, and is not a separate county government;" that it has usurped the franchise of a public corporation; and that it be precluded from exercising the same, etc. To the complaint defendant interposed a demurrer, upon general as well as upon many special grounds. The demurrer was sustained, and, plaintiffs declining to further amend, judgment was rendered for defendant. Plaintiffs appeal.

The only point presented by appellants at the oral argument, and the main one made in their brief, is that said act providing for the creation of Glenn county was not, before its passage by the state senate, "read on three several days" in that branch of the legislature, in accordance with the provision of section 15 of article 4 of the state constitution; that such provision was not dispensed with by a two-thirds vote of the senate, as may be done under that section; and that, therefore, said act is unconstitutional and void. The complaint avers that said act, which had been regularly passed in the assembly, and was designated as "Assembly Bill No. 185," was not read on three several days before its passage in that body. But the complaint also shows that, before

its passage in the senate, a resolution was there adopted by a two-thirds vote, by which it was resolved that said act, (Assembly Bill No. 185,) and also a number of other bills, "present 'cases of urgency,' as that term is used in section fifteen of article four of the constitution, and the provision of that section requiring that the bills shall be read on three several days in each house is hereby dispensed with, and it is ordered," etc. The only objection to the dispensing resolution is that it included other bills as well as the one now in question. But the constitution does not undertake to provide the form, or to set limitations to the manner, in which the dispensing power shall be exercised. The words are simply: "Unless, in a case of urgency, two-thirds of the house where such bill may be pending shall, by a vote of yeas or nays, dispense with this provision." It merely provides that a bill shall be read on three different days in each house, unless such house, by a two-thirds vote, shall, in some appropriate form, dispense with that necessity. This was done in the case at bar with respect to the bill in question, the bill being expressly named in the resolution. The main virtue of the provision is evidently the requirement of a two-thirds vote. The constitution does not, either expressly or by necessary implication, prohibit the senate from exercising its dispensing power with respect to two or more bills by one declaration of its purpose; and the unquestioned rule with respect to American states is that the legislature may exercise all legislative power not prohibited to it by the constitution. The judiciary, when called upon to determine what the law is that applies to an action regularly pending in a court, is sometimes forced to say that a particular act of the legislature invoked by one of the parties to the action is not law, because in conflict with the higher law,—the constitution; but it will exercise that delicate power only in cases where the legislature, in passing the act in question, did clearly violate some prohibitory clause of the constitution. To otherwise exercise it would be to confound the distinction between the co-ordinate departments of the government. And, in the case at bar, to hold here that the Glenn county act is unconstitutional, for the reason assigned, would simply be to substitute our judgment of the propriety of certain legislative action for that of the legislators themselves, whose judgment in the premises was, under the constitution, supreme and final.

It is averred in the complaint that several of the senators who voted to declare the Glenn county bill a case of urgency afterwards voted against the bill on its final passage. This averment is clearly of no value. It was made to indicate that such senators may have voted in the first instance through improper motives. In the first place, if motives could be at all inquired into here, we would not hunt after bad motives for an act

when worthy motives were apparent. For instance, a legislator, although opposed to a certain bill, might well vote to dispense with the readings on different days, because he thought that the public interest required speedy action on the subject; or it might well be that between the first and second vote he had changed his views as to the policy of the bill. Other creditable motives could easily be suggested. But the motives which induced legislative action are not a subject to judicial inquiry; and a legislative act cannot be declared unconstitutional because, in the opinion of a court, it was or might have been the result of improper considerations. A court is neither the director of the discretion of a legislator, nor the keeper of his conscience. The case of *Bloom v. Xenia*, 32 Ohio St. 461, cited and relied on by appellants, is not authority for them, but is authority against them. The case involved the validity of an ordinance of a municipal corporation, and the facts were that the rules were suspended generally, without special mention of the ordinance in question, and then, after a certain other ordinance had been passed, the ordinance in question was passed, without any further suspension of the rules. But the court elaborately shows the distinction between a municipal corporation, with granted and limited powers, and the legislature of a state, with powers unlimited, except by prohibitions of the constitution. The court says: "The efforts of courts are to sustain acts of the legislature. They will not be declared unconstitutional unless clearly so. * * * By the terms of the organic law the legislative power of the state is declared to be vested in the general assembly. The grant of power is general, not special. It embraces all such legislative power as the people of the state could, under the federal constitution, confer,—the whole legislative power of the state. The limitations upon the exercise of this power thus broadly confined are special, and are to be found in other parts of the instrument. When, therefore, the power of the legislature to enact a general law is disputed, the proper question is whether such exercise of legislative power is clearly prohibited by the constitution."

There are other points made by appellants in their brief, which we do not deem necessary to be largely discussed. They are in great part answered by the decision of this court in *People v. McFadden*, 81 Cal. 489, 22 Pac. 851, which involved the validity of the act creating the county of Orange. It must be remembered that, as held in the case just cited, an act creating and providing for the original organization of a new county is not within the prohibitions of the constitution against special and local legislation; and this consideration parries most of the additional thrusts made in the brief at the validity of the Glenn county act. Many of the provisions of an act creating a new county

are intended to be only preliminary and temporary, and are necessary to put the new political subdivision on its feet; so that, at the expiration of time limited for the existence of the temporary expedients, the county may, in due course, take its place under the general law for the government of organized counties. And, as there is no limitation upon the means which may be employed for this preliminary organization of a county, it is not fatal to the Glenn county bill that it does not itself provide for the division of the proposed county into supervisor districts, but allows five supervisors to be, in the first instance, elected at large, who have power under the general law to divide the county into districts.

Neither do we see anything in the objection to the manner in which the election, at which the voters of proposed new county expressed their will, was held. It was held in accordance with the provisions of the act itself; and by subdivision 11, § 25, art. 4, of the constitution, there may be a special law for holding and conducting an election "on the organization of new counties." There are in the complaint some attempted allegations of fraud at the election; but if the determination of the commissioners, appointed by the act to superintend the election and declare the result, is not conclusive of that point, in the absence of any law for contesting such an election, still the said allegations are only of conclusions of law, and state no facts sufficient to constitute such fraud. There were special demurrers on that point, and they were properly sustained. There are no other points necessary to be specially mentioned. The judgment appealed from is affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

HAMILTON v. BATES et al. (No. 19,211.)
(Supreme Court of California. Dec. 21, 1903.)

CORPORATIONS—CONTRACTS.

Where a president of a corporation agrees that the corporation shall assume the debts of a person it cannot be held liable by a creditor of such person, no corporation action with relation to the contract being shown, but it being claimed simply that money paid on the contract came into possession of the corporation.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. L. Pierce, Judge.

Action by Charles S. Hamilton against F. E. Bates and others and the Coronado Beach Company. Judgment for defendants. Plaintiff appeals. Affirmed.

J. J. Henderson and Luce & McDonald, for appellant. Works & Works, for respondents.

TEMPLE, C. This appeal is from a judgment of nonsuit, rendered in favor of the de-

defendant the Coronado Beach Company, and was taken within 60 days after the rendition of the judgment. The action was brought to recover \$2,152 for goods sold and delivered to Ben S. and Josie A. Miller. The respondent was sued upon the supposition that for a valuable consideration, paid to it by one F. E. Bates, it had promised to pay all the indebtedness of the Millers. Plaintiff claims that the contract is one made expressly for his benefit, upon which he may therefore sue, as provided in section 1559, Civil Code. Ben S. Miller and Josie A. Miller, his wife, had purchased a large amount of land from the Coronado Beach Company, for which they held contracts; the purchase money not having been paid. They had built upon the land purchased an hotel called the "Hotel Josephine." About January 27, 1888, being unable to pay their indebtedness, they entered into a verbal arrangement with Bates, who had become liable for a large amount of their indebtedness, by which Bates was to take their property and sell it, and from the proceeds pay their debts. It is a matter of dispute as to whether Bates then undertook and promised to pay all the indebtedness of the Millers. The purchase money due the respondent, for which they held the land as security, was \$40,785.41. Bates had previously become responsible for about \$1,900 of the Millers' debts, and they owed about \$8,000 more, which are called "floating debts." The debts sued upon are a part of this floating indebtedness, for which Bates was certainly not liable prior to the arrangement with the Millers, above alluded to; and I think there is no evidence in the case upon which the court could have found that Bates then assumed such debts. Subsequently to the verbal arrangement it was agreed that respondent should convey the title to the land to Bates, who should secure the purchase money by a mortgage to the respondent. Accordingly the deed and mortgage were executed, and at the same time an instrument in writing by all the parties, reciting the change in the relation of the corporation to the property, and wherein Bates agreed to save the respondent harmless from loss through certain claims against the property, and particularly against the attachment of the Chadbourne Furniture Company and the floating indebtedness of the Millers. Afterwards, March 10, 1888, the Millers executed a release in favor of Bates, whereby they released Bates from all claims on account of the conveyance to him of said property, provided Bates should pay all their indebtedness in the county of San Diego, not exceeding in the aggregate \$70,000. This was not signed by Bates, and was probably intended to release him from that part of the first verbal arrangement in which it was agreed that, in case of a surplus after payment of the debts, such surplus should be equally divided between Bates and the Millers. Before this last instrument was exe-

cuted, however, to wit, February 23, 1888, Bates had become convinced that he would be unable to manage the debts of the Millers, or prevent the property from being sold under the attachments. He therefore informed Babcock, who was president and manager of respondent, of his inability. Babcock then asked what he could do to induce the corporation to assume the indebtedness of the Millers. It was then finally arranged between Bates and Babcock, acting as president and manager of respondent, that Bates would pay to respondent \$15,000, and hold the property for the Beach Company, or convey it to any one at request of that company; that, in case the debts were paid, the corporation should have and retain one-half of any surplus that might remain, and Bates should have the other half; in consideration of which Babcock agreed for the corporation that it would pay all the indebtedness of the Millers. Bates paid to Story, who was acting with Babcock, for the corporation, of which he was vice president, the \$15,000. This was charged to the corporation, and most of it, it is shown, was afterwards paid out in the name of the corporation upon the debts of the Millers in discharge of attachments upon the property.

Respondent's counsel contend that the evidence only shows that Babcock and Story undertook and agreed to pay certain debts which were then threatening to throw the Millers into insolvency, and did not assume to pay all the debts; but, as the judgment is by nonsuit, we must assume as against it that every fact was proven in favor of plaintiff which there was any substantial evidence tending to prove. It will be presumed that the trial court considered all such facts as established, and held as matter of law that, conceding that they were proven, they did not entitle the plaintiff to judgment. Bates testified very clearly that Babcock agreed for respondent that it should assume all the debts of the Millers in San Diego county. The motion for a nonsuit was based upon seven alleged defects in the evidence. The one sustained by the court was that it was not shown that the corporation ever assumed the indebtedness. As I think this point must be sustained, it is not necessary to consider the others. The only showing in regard to the corporation in the record consists in the allegation that it is a corporation; the proof that it had sold land to the Millers; that it conveyed the title to Bates, and received a mortgage for the purchase money; that Babcock assumed to act for it as president and manager; that Story signed a receipt as its vice president; that a payment was made in its name, and a note so indorsed; that Story was heard to say that he had paid the \$15,000 to it, and the testimony of Bates that some of the Miller land had been sold, and the proceeds divided between himself and the corporation. There was no proof as to the character or

purpose of the corporation, or the nature of the business in which it was engaged. There was no proof as to who were its directors or stockholders, or that Babcock or Story owned any stock except by such presumption as would arise from the fact that they assumed to act as president and vice president. No corporate action of any kind is shown. There was, so far as the proof shows, no meeting of the board of directors or of the stockholders. There was no proof tending to show the nature or extent of the authority of the president or vice president, or that they had been accustomed to transact business of any kind for the corporation. It is not a case where an agent had ostensible authority, as there is no evidence whatever as to what Babcock's authority was, and no facts tending to show that any one had a right to assume anything whatever as to the extent and scope of his authority. There is no proof that any one was or could have been deceived upon the subject. It is not shown that the directors took any action whatever upon the matter. Perhaps, had they done so, it might be assumed that a resolution authorizing it had been passed. It is not shown in proof that there were any directors. It was not shown that the articles of incorporation—in other words, its charter—would justify such a transaction. One dealing with a corporation is bound to take notice of the limitations of its charter. *Mor. Priv. Corp.* § 591.

It is not claimed that there is any proof of an actual ratification of the agreement made by Babcock and Story, but it is contended that the corporation has received the benefit of the contract, and cannot now repudiate its obligations. The benefits alleged to have been received are the \$15,000 paid by Bates in cash; the agreement that the land should be sold, and the corporation should have one-half of the surplus; and the statement of Bates that some land had been sold, and the proceeds divided between himself and the Beach Company. So far as the first is concerned, it seems to have been a mere matter of bookkeeping by Babcock and Story. They charged the money to the corporation, and when it was paid out in discharge of the Miller debts the checks were drawn in the name of the corporation. It is not shown that any stockholder or director ever knew of the transaction, or that the treasurer of the corporation—if there be one—ever had the money. It is presumable that more than that sum was paid to discharge pressing Miller debts, for Bates testified that he made the arrangement with Babcock because he only had \$15,000, which was not enough for that purpose. The evidence only shows that Babcock and Story paid the Chadbourne claim, which was a little more than \$13,000. It was shown that the property was not sold for enough to pay the Miller debts. It was in fact sold to pay the purchase money. As to the statement

of Bates that he had sold some land and divided the proceeds, it does not appear when he sold the land. It may have been before the arrangement with Babcock, and the money part of the \$15,000. But Bates does not specify how the money was paid, or to what agent of respondent he gave it. We are justified in supposing it was simply given to Babcock or Story. But there is nothing in all this which tends to prove a ratification of the contract made by Babcock and Story. At the most, it would only tend to show that the corporation had received a benefit which it could not retain when it repudiated the contract made on its behalf. In *Foulke v. Railroad Co.*, 51 Cal. 385, it was held that in such case the express contract is not ratified, but the corporation is liable upon an implied contract to pay for the benefit received, and the recovery must be limited to the extent of the benefit. Section 1559, Civil Code, only authorizes a person not a party to a contract to sue when it is expressly made for his benefit. He cannot sue upon an implied contract, and, if he could, in no sense would this be one made for his benefit. And then there is a total absence of proof showing that the respondent has retained any benefit from the arrangement. As the property did not sell for more than its own debt, for which it had a preferred lien, the presumption is it has nothing.

It is not necessary here to hold that a corporation may not so deal with an unauthorized contract as to be held to have become bound by its terms. We are dealing with a case in which no corporate action with reference to the contract is shown, but where it is claimed simply that money paid upon the contract has come into its possession. There is no evidence tending to show that any creditor has been induced to change his position to his injury by reason of supposed assumption of the Miller debts. Indeed, they would hardly have been justified in doing so, in view of the fact that in the Code the right of the parties to the contract to rescind it at any time, at least before it has been acted upon, is expressly recognized. I think the judgment should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

DAVIS v. LAMB et al. (No. 15,293.)
(Supreme Court of California. Dec. 21, 1893.)
JUDGMENT—CORRECTION—NEW TRIAL—SUFFICIENCY OF MOTION—ACTION ON NOTE—DEFENSE OF ALTERATIONS—OPENING CASE.

1. A judgment in an action against an administrator that is entered against him personally will be corrected on appeal therefrom, as

the error is one that is apparent on the judgment roll.

2. A judgment in an action against an administrator that is made immediately enforceable will be corrected on appeal therefrom so as to make it payable "in due course of administration," as required by Code Civil Proc. § 1504, as the error is one that is apparent on the judgment roll.

3. A judgment in an action on a note for a sum larger than the principal and interest due on the note will be corrected on appeal therefrom, as the error is one that is apparent on the judgment roll.

4. The denial of a motion for a new trial on the ground of insufficiency of evidence will not be reviewed where the bill of exceptions on which the motion was made contains no exception on that ground, and no specification of any particular in which it is claimed the evidence was insufficient.

5. In an action, tried before the court, on a note guaranteed by defendant's intestate, error cannot be predicated on the consideration of the note as evidence, on the ground that it had been altered after intestate's death, where no objection was offered to its admission on such ground, and the court found the note in the form in which it was made.

6. In an action, tried before the court, against an administrator on a note guaranteed by his intestate, the court's refusal to open the case after taking it under advisement, to permit the administrator to show that he demanded the production of the original note when the claim was presented to him, is a proper exercise of discretion when it does not appear that the claim was rejected because of the nonproduction of the original.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by Joseph Davis against George W. Lamb, administrator of the estate of William H. Lamb, deceased, and another, on a promissory note. Judgment for plaintiff. Defendant Lamb appeals. Modified.

Welles Whitmore, for appellant. Marcus Rosenthal, for respondent.

VANCLIEF, C. Action on a promissory note made by the defendant Larabee to A. Davis & Son, and indorsed by the decedent as guarantor. The plaintiff is a member of the firm of A. Davis & Son, and sues as assignee of the note. The defendant Larabee was not served with summons. The court found in favor of plaintiff on all the issues of fact, and, among other things, found the note to have been made and indorsed in the following form: "\$400.00. San Francisco, Oct. 19, 1889. Two months after date — promise to pay to the order of A. Davis & Son four hundred dollars, for value received, with interest at — per cent. per — from — until paid, both principal and interest payable only in United States gold coin; and in case suit is instituted to collect this note, or any portion thereof, — promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit. C. E. Larabee." As conclusions of law the court found as follows: "(1) That by the terms of said promissory note the defendant Larabee promised to pay to the order of said A. Davis & Son, two months after

its date, the sum of four hundred dollars, with interest thereon from its date at the rate of seven per cent. per annum, and, in case suit should be instituted to collect said note or any part thereof, such additional sum as the court should judge reasonable as attorney's fees in such suit. (2) That the said note was a nonnegotiable instrument, and the said William H. Lamb, by such indorsement, became a guarantor of such note, and guaranteed the payment by said Larabee of the amount of said note. (3) That by reason thereof the plaintiff is entitled to judgment against the defendant George W. Lamb, as administrator of the estate of William H. Lamb, deceased, for the sum of four hundred dollars, with interest thereon at the rate of seven per cent. per annum from the 19th day of October, 1889, and costs of suit, such judgment to be payable in the course of administration of the estate of the said William H. Lamb, deceased; and it is ordered that judgment be entered accordingly. Done in open court this 14th day of May, 1892. F. W. Henshaw, Judge." Thereafter, on June 13, 1892, the clerk entered judgment on the findings as follows: "Wherefore, by reason of the law and by the finding aforesaid, it is by the court here ordered, adjudged, and decreed that plaintiff do have and recover of and from the defendant George W. Lamb the sum of five hundred and twenty-six and 40-100 dollars, and costs taxed at \$72.00. Judgment entered June 13, 1892. James E. Crane, County Clerk. By Robert Edgar, Deputy Clerk." The defendant Lamb appeals from the judgment, and from an order denying his motion for a new trial.

Unquestionably, the judgment is erroneous in the following respects: First, it is against George W. Lamb personally, whereas it should have been against him as administrator of the estate of William H. Lamb, deceased, in which character he is sued; second, it is enforceable immediately, instead of being payable "in due course of administration," as required by section 1504 of the Code of Civil Procedure; third, it is for a sum (\$526.40) exceeding the amount of the principal and interest of the note at the time it was rendered by about \$53. All these errors are plainly apparent on the judgment roll, and may be corrected on the appeal from the judgment. On the appeal from the order denying the motion for a new trial, however, no error is made to appear. The motion was made on a bill of exceptions, proposed and settled after judgment, which contains no exception on the ground of insufficiency of the evidence, and no specification of any particular in which it is claimed the evidence is insufficient. Nor does the bill of exceptions show on what ground the new trial was asked. A paper purporting to be a notice of motion for a new trial is printed in the transcript, but it is not in, nor referred to by, the bill of exceptions, nor does it purport to have been served; and, since it is no

part of the judgment roll, it forms no part of the authenticated record. It must be presumed, therefore, that the evidence justified the findings of fact. *Jones v. Shay*, 50 Cal. 509; *Watson v. Railroad Co.*, Id. 523; *Bonner v. Quackenbush*, 51 Cal. 180; *Perham v. Kuper*, 61 Cal. 331; *Coglan v. Beard*, 67 Cal. 304, 7 Pac. 738. The bill of exceptions sufficiently specifies several alleged errors in law.

1. It is claimed that the note sued on should have been rejected and held void, for the reason that it had been altered after the death of William H. Lamb. In the note, as set out in the complaint, all the blanks appearing in it, as found by the court, are filled in so that instead of reading, "with interest at — per cent. per — from — until paid," as found by the court, it reads as follows: "With interest at four per cent. per month from date until paid." In this form, with the blanks so filled, the note was offered in evidence by plaintiff, and admitted by the court without objection, on the ground that it had been altered by filling these blanks, though it was objected to on other grounds not tenable. After it had been admitted in evidence, it appeared by other evidence on the part of the plaintiff, including the testimony of the plaintiff himself, that these blanks had been filled after the death of William H. Lamb; and one of the plaintiff's witnesses testified that all the alterations were in the handwriting of the plaintiff. Thereupon plaintiff testified that he did not make nor authorize the alterations, and made an explanation of how they might have been made without his fault or knowledge, which explanation, it must be admitted, seems lame and unsatisfactory. Yet the defendant did not move to strike out the note, nor make any objection to it, on the ground that it had been altered by filling the blanks. As we have seen, the court found the note in the form in which it was made, disregarding the alterations; and, in the absence of any specification of insufficiency of evidence, it must be presumed that the evidence justified this finding; and, since there was no objection to the note as evidence on the ground that it had been altered by the filling of the blanks, the court did not err in considering it as evidence.

2. The case was submitted to the court on briefs to be filed by both parties within 20 days. After the briefs had been filed, and while the court held the case under advisement, the defendant's attorney moved to open the case for the admission of additional evidence on the issue as to whether the defendant had demanded the production of the original note at the time a copy of it was presented to him, as administrator, for allowance; and it is contended that the court erred in denying this motion, but I think otherwise. The proposed additional evidence was merely cumulative. Besides, it does not appear that the claim was rejected by the adminis-

trator on the ground that the original note was not presented. Under the circumstances, I think the refusal of the court to open the case was clearly within the bounds of its discretionary power, and not an abuse of such power.

The other points made by appellant are not sufficiently plausible to require special consideration. I think the cause should be remanded, with instructions to the court below to modify the judgment as indicated in this opinion; and, although this relief might have been obtained by motion in the trial court, I think, upon consideration of all the circumstances, the costs of the appeal should be taxed to respondent.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the cause is remanded, with instructions to the court below to modify its judgment as above indicated, and, as so modified, the judgment and order are affirmed. The costs of the appeal are to be taxed to respondent.

HOUSE et al. v. MEYER. (No. 19,283.)
(Supreme Court of California. Dec. 29, 1893.)
NEGLECTANCE — ACTION FOR PERSONAL INJURIES — COMPLAINT — SUFFICIENCY — CONTRIBUTORY NEGLIGENCE.

1. In an action for injuries caused by defendant's alleged negligence, it is sufficient that the complaint allege generally negligence on defendant's part.

2. Nor was it necessary that plaintiffs should allege that they were free from contributory negligence.

Department 2. Appeal from superior court, Los Angeles county.

Action by House and others against Meyer. A demurrer to the complaint was overruled, and from a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

Reymert & Orfila, for appellant. C. C. Stephens, for respondents.

DE HAVEN, J. The demurrer to the complaint was properly overruled. In an action like this, to recover damages resulting from the alleged negligence of a defendant, a general allegation of negligence upon the part of the defendant is sufficient. "The negligence is the ultimate fact, to be pleaded, and is not a legal conclusion." Bliss, Code Pl. § 211. Nor was it incumbent on the plaintiffs to allege that they were not guilty of contributory negligence. *Robinson v. Railroad Co.*, 48 Cal. 409. The appeal in this case is without merit. Judgment and order affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

In re DE LEON'S ESTATE. (No. 15,367.)
(Supreme Court of California. Dec. 27, 1893.)

APPEAL—DISMISSAL.

Where the transcript on appeal does not show that the findings of fact and conclusions of law set out in it were signed by the trial judge and filed with the clerk, and that judgment was entered upon such findings and conclusions, as required by Code Civil Proc. §§ 632, 633, the appeal will be dismissed.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Proceedings by Virginia Durstein to have allotted to her a share in the estate of Jose Francisco De Leon, deceased. Decree for plaintiff. The assignee of one of the distributees of said estate appeals. Dismissed.

T. M. Osmont, for appellant. Lloyd & Wood and L. D. McKisick, for respondent.

FITZGERALD, J. The appeal in this case purports to be from a judgment upon the judgment roll with a bill of exceptions. There are so-called "findings and conclusions of law" set out in the transcript, but they do not appear to have been signed by the judge or filed with the clerk; nor was there any judgment entered thereon, as required by sections 632, 633, of the Code of Civil Procedure. With the exception of a statement in the bill of exceptions that a "decree was rendered in favor of the petitioner as in said decree set forth," there is nothing in the record showing that any judgment was ever rendered by the court. This point was not made by counsel, either in their arguments or briefs, for the reason, perhaps, that they supposed that the judgment had been regularly entered upon the decision, and that, as the appeal had been taken upon the judgment roll, it was necessarily contained therein. If, however, it should be made to appear within the time allowed to file a petition for rehearing that the judgment was in fact entered upon the decision, but was inadvertently omitted from the transcript, then the judgment herein will be set aside, and counsel permitted, upon a suggestion of diminution of the record, to supply the omission. Appeal dismissed.

We concur: DE HAVEN, J.; McFARLAND, J.

(Jan. 26, 1894.)

BY THE COURT. Ordered that the judgment heretofore rendered in this cause on December 27, 1893, be and the same is hereby vacated and set aside, and, upon stipulation of the parties filed herein, further ordered that the case stand submitted upon the amended record, and upon the briefs now on file.

KAHN v. BRILLIANT et al. (No. 15,170.)
(Supreme Court of California. Dec. 30, 1893.)

TRIAL—INSTRUCTIONS.

It is not error to refuse an instruction which has been already substantially given.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Henry Kahn against Abraham I. Brilliant and William H. Byington. From

a judgment in favor of defendant Byington, plaintiff appeals. Affirmed.

Naphtaly, Friedenrich & Ackerman, for appellant. C. L. Weller and McCreery & Byington, for respondent.

BELCHER, C. The plaintiff brought this action to recover the value of certain goods, wares, and merchandise alleged to have been sold and delivered to the defendants, who were copartners doing business under the firm name of A. I. Brilliant & Co. The defendant Byington only appeared, and by his answer he denied that he was a partner with the other defendants. The case was tried by a jury, and the verdict and judgment were in his favor. From this judgment, and an order denying his motion for a new trial, the plaintiff appeals.

The only point made for a reversal is that the court erred in refusing to give to the jury a certain instruction asked by the plaintiff. In charging the jury, the court, among other things, said: "Now, there are two essential points in dispute here, and it is around these two points that your deliberations must crystallize. Those points are substantially these: Was or was not Mr. Byington a partner in this firm of A. I. Brilliant & Company on or after December 17, 1889? Or, if he was not a partner, did he (Mr. Byington) permit himself to be held out or represented as a partner in such firm at any time to third persons, who gave credit to such firm on the strength or faith of such representations?" The court then, after stating the law very fully as to general and special partnerships, and as to the liability of every general partner, read to the jury sections 2444 and 2445 of the Civil Code, which are as follows: "Sec. 2444. Any one permitting himself to be represented as a partner, general or special, is liable as such to third persons to whom such representation is communicated, and who on the faith thereof give credit to the partnership. Sec. 2445. No one is liable as a partner who is not such in fact, except as provided in the last section." Following this, the court said: "If you should find, from the evidence, that Mr. Byington was in fact a partner (as I have explained that term to you) in the firm of A. I. Brilliant & Company on and after December 17, 1889, then I charge you your verdict must be in favor of the plaintiff for such amount as may have been proven here, which you will get later on. Again, if you find from the evidence that Mr. Byington was not in fact a partner in such firm on or after December 17, 1889, but should find that Mr. Byington permitted himself to be held out or represented as a partner in such firm at any time to third persons, and such third persons gave credit, on the faith of such representations, to such firm, then Mr. Byington would be liable to such persons, and your verdict should then be in favor of the plaintiff; but only, of course, for such amounts of credits as may

have been given to those third persons who gave credit on such representations, if any you find to have been so given." The instruction asked by plaintiff, and refused, was in these words: "When an individual permits others to hold him out as a partner, or by his acts and declarations creates in the mind of another a reasonable belief that he is a member of a partnership, he is liable to the person so believing, on a bona fide contract made by the latter with a member of such firm in the regular course of business, although in fact no such partnership existed." It is admitted that the instruction was refused upon the ground that it had already been given in substance and effect, and we think the refusal was justified. The charge as given stated the law upon the subject referred to in the refused instruction fully and fairly; and, as has been many times held by this court, a trial court is not bound to repeat itself at the request of counsel. After it has already given an instruction which substantially covers a question involved in the case, all other instructions on the same subject may well be refused. The authorities to this effect are numerous, and need not be cited. The judgment and order should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

ESREY v. SOUTHERN PAC. CO. (No. 15-440.)

(Supreme Court of California. Dec. 29, 1893)

APPEAL—TIME OF TAKING—DISMISSAL.

An appeal from an order denying a new trial, not taken within 60 days after the order is entered on the minutes of the court, (Code Civil Proc. § 939,) will be dismissed.

Department 1. Appeal from superior court, Tulare county; W. W. Cross, Judge.

Action by Nannie Esrey against the Southern Pacific Company, in which defendant appealed from the judgment in favor of plaintiff, and from an order denying its motion for a new trial. Plaintiff moves to dismiss both appeals. Motion to dismiss appeal from such order granted. Motion to dismiss appeal from the judgment denied.

Foshay Walker, for appellant. Justin Jacobs, for respondent.

PER CURIAM. Motion to dismiss the appeals. Judgment was rendered in this case in favor of the plaintiff February 8, 1892, and an order denying the defendant's motion for new trial was made and entered May 24, 1893. The defendant appealed from the judgment February 1, 1893, and from the order denying a new trial August 14, 1893. The plaintiff now moves to dismiss the appeal from the order denying a new trial, upon

the ground that it was not taken within 60 days after the entry of the order.

The right of a litigant to have the action of the lower court reviewed by this court upon an appeal therefrom depends upon a compliance by him with the statutory requirements for taking an appeal. Section 939, Code Civil Proc., limits the time for taking an appeal from an order granting or refusing a new trial to 60 days after the order is made and entered in the minutes of the court, and, unless taken within that time, this court has no jurisdiction to hear the appeal. The appeal from the order denying a new trial, not having been taken within 60 days after the entry of the order, must therefore be dismissed.

The plaintiff has also moved to dismiss the appeal from the judgment upon the ground that the transcript was not filed within the time limited by rule 2 of this court, or within the time limited by any order of the court or stipulation of the parties. The time for filing the transcript was extended by stipulation until 40 days after the decision of the lower court upon the motion for a new trial, in order that, if the motion should be denied, a single transcript might serve for both appeals. If the motion should be granted, the defendant would have no occasion to appeal. We are of the opinion, however, that the facts and circumstances presented in the affidavit on behalf of the appellant in opposition to this motion are such as to excuse its failure to file the transcript prior to receiving the plaintiff's notice of motion to dismiss the appeal. See *Carter v. Paige*, 77 Cal. 64, 19 Pac. 2.

The motion to dismiss the appeal from the order denying a new trial is granted, and the motion to dismiss the appeal from the judgment is denied.

OULLAHAN et al. v. BALDWIN et al. (No. 14,622.)

(Supreme Court of California. Dec. 30, 1893.)

REAL-ESTATE AGENTS—CONTRACT—WAIVER—COMMISSIONS—WHEN EARNED—EVIDENCE—ESTOPPEL.

1. To a request by landowners to be released from a contract made with brokers to find a purchaser of their land, the brokers replied that unless they could convince the principals by Thursday morning, at 8 o'clock, that they could make a sale, they would "then" waive all claims under it. *Held*, that it did not constitute a waiver of the original contract on the failure to perform the condition named in such reply, but was a conditional promise to waive in futuro, and did not affect the original contract.

2. Where the acts and statements of such brokers and the intended purchaser at the time specified were sufficient to convince a fair man of ordinary understanding that such brokers would make the sale, it must be held that such owners were convinced.

3. Where such reply by the brokers was purely voluntary, and written in a spirit of accommodation only, it had no binding effect.

4. In an action to recover commissions for

finding a purchaser, it appeared that the contract provided that the terms of payment should "be \$10,000 within the five days, \$5,000 additional on confirmation of title," that at 8 o'clock in the morning of the last day for making a sale, as provided by the contract, plaintiffs and one B. met defendants, and B. offered himself as a purchaser, and tendered a check for \$10,000 as the first payment; that the check was declined by defendants, as not equivalent to money, whereupon they were informed that the money would be produced on the opening of the bank; that defendants said they would allow until 9:30 o'clock to produce the money; that plaintiffs and B. drew the money at 10 o'clock, and endeavored to tender it to defendants, but were eluded all day by the latter; and that at 10 o'clock defendants sold the land to other persons. B. had made no written contract for the purchase of the land. *Held*, that defendants were liable. Harrison and Paterson, JJ., dissenting.

5. It appeared that when defendants declined B.'s check, and said they would wait until 9:30 o'clock for the money, they also said, if plaintiffs and B. did not return at that time, they would "go down below, and take up the other offer," and that plaintiffs replied, "Very well." *Held*, that such reply by plaintiffs, and their failure to return by the time stated, did not constitute either a waiver or an estoppel.

In bank. Appeal from superior court, San Joaquin county; J. G. Swinnerton, Judge.

Action by Robert B. Oullahan and others against Frank T. Baldwin and others to recover brokerage commissions under a written contract executed by defendants to Gaman & Lyon, and by the latter assigned to plaintiffs. From a judgment for defendants, and from an order denying a motion for a new trial, plaintiffs appeal. Reversed.

Louttit, Woods & Levinsky, Carter & Smith, and Mich. Mullany, for appellants. J. C. Campbell, for respondents.

GAROUTTE, J. This is an action by real-estate brokers to recover commissions for negotiating a sale of a tract of land situated near the city of Stockton. The owners thereof gave Gaman & Lyon, real-estate brokers of San Francisco, the following writing: "Stockton, September 17, 1887. We, F. T. Baldwin, B. F. Langford, and John D. McDougald, do hereby constitute and appoint Gaman & Lyon, of 339 Kearny street, of San Francisco, our sole agents for a period of five days from date hereof, to negotiate a sale of our Stockton lands, consisting of thirteen hundred and fourteen (1,314.35) and thirty-five hundredths acres, and known as 'Stockton Gardens.' Our price for said land is one hundred and sixteen thousand six hundred and sixty-six (116,666.65) and sixty-five hundredths dollars, net to us, * * * and any amount over and above said sum, for which our said agents may sell said land, we agree to give them for commissions for their services. Terms of payment shall be \$10,000 within the five days, \$5,000 additional on confirmation of title. * * * Complete abstract of title to be furnished, and ten days allowed for examination." The brokers had in view one C. D. Barrows as prospective purchaser, and were expecting him to appear up-

on the scene at any moment for the purpose of viewing the land. After the owners had placed the property in the hands of Gaman & Lyon under the aforesaid agreement, they ascertained that certain parties residing in San Jose were desirous of purchasing, whereupon they stated to the brokers their fears that the prospective buyer Barrows would fail to purchase, and that prior to the expiration of the life of the contract the San Jose parties would undergo a change of mind, and thus no sale be consummated to any one; and they thereupon requested said brokers to release them from the contract. In answer to such request, Gaman & Lyon sent them the following letter: "Stockton, Cal., September 20, 1887. Messrs. Baldwin, Langford, and McDougald—Sirs: You have requested us to release you from the contract which we hold on your tract of land near Stockton, known as the 'Stockton Gardens.' Replying, we beg to say that under the circumstances, and in view of the amount of labor we have performed, we cannot, in justice to ourselves, release you from said contract, but we will concede that, unless we can convince you by Thursday morning, at eight o'clock, that we will make a sale, we will then waive all claims under said contract. Respectfully yours, Gaman & Lyon." Baldwin gave his power of attorney to Langford and McDougald to act for him in the premises, and was not in the city on Thursday, the 22d. Langford was not in Stockton upon that day, and hence McDougald alone, aside from their attorney, represented the owners in the transaction. Thursday morning, September 22d, at 7 o'clock, Lyon informed McDougald that Barrows was present, and ready to take the land upon the terms stated in the contract, whereupon McDougald requested them to meet him at Judge Budd's law office at 8 o'clock, for the purpose of completing the trade. The parties met at that time, and Barrows offered himself as a purchaser, and tendered his personal check for \$10,000 as the first payment under the contract. This check was declined, as not the equivalent for the money, whereupon McDougald was informed that the money would be produced for him upon the opening of the bank, and McDougald then stated that he would allow them until 9:30 o'clock of that morning to produce the money, and, if not present with it at that time, he would close the trade with other parties. Thereupon Lyon and Barrows withdrew, and McDougald sold the land to the San Jose parties at 10 o'clock at a largely increased price. Lyon drew the money from the bank at 10 o'clock, and passed the remainder of the day in an effort to tender it to McDougald as the first payment upon the purchase price; but McDougald was elusive, and Lyon's efforts in that direction were not crowned with success.

Viewing the case from any standpoint, the

letter written by the brokers to the defendants, and which was entirely voluntary upon their part, and written purely through a spirit of accommodation, in no way changes the status of this litigation. In speaking as to the effect of this letter, respondents' counsel says: "While we do not contend that they [owners] would or should demand of appellants anything unreasonable or impossible, they had the right to demand and receive evidence sufficient to satisfy them, as reasonable men, that the premises would be sold according to the terms of the power or authority given appellants." After a review of the evidence upon this point, we can say it fills the measure furnished by respondents' counsel. If the letter bound the brokers to convince the owners by 8 o'clock upon Thursday morning, the 22d, that a sale would be made upon that day, or that all their rights under the contract would lapse by reason of a failure so to do, then the brokers fulfilled the self-imposed conditions, for at the agreed time ample evidence was produced to convince McDougald of the certainty of the sale. At least, the evidence was sufficient to convince a fair man of ordinary understanding,—a man who was honestly willing to be convinced, and consequently it must be held that McDougald was convinced. But, aside from the foregoing considerations, we think the letter a false quantity in the case. It neither strengthens nor weakens the cause of either party. The contract of defendants was simply an employment of Gaman & Lyon as brokers to negotiate a sale of the realty. They were made sole agents for that purpose for the period of five days from September 17th, which would include the entire day of September 22d. It is insisted that the letter modified the terms of the contract; but the letter itself, in express words, says: "We cannot, in justice to ourselves, release you." As already suggested, the letter was entirely voluntary, no consideration passed to the brokers for its issuance, and there were no mutual covenants. It did not possess a single element necessary to create a binding, valid contract upon the part of the brokers. Again, conceding the letter to have a binding force upon the writers of it, it, in substance, says: "We cannot now release you from the contract, but, if we do not convince you by Thursday morning, at 8 o'clock, that we will make a sale, we will then waive all claims under the contract." This amounts simply to a conditional promise to waive something at a specified time in futuro. It is not a waiver, but an agreement to waive at a particular future time. There can be no waiver until the time arrives, and the condition fails; and when the time does arrive, if the party declines to waive, the only result is a violated promise and a breach of the agreement. The waiver does not take place, *ipso facto*, upon the failure of the condition and the arrival of the appointed time.

Positive action upon the part of the party holding out the promise is demanded. This letter, conceding the failure of the condition, does not constitute a waiver of rights under the contract, any more than a promise by an attorney to his brother attorney, that upon the morrow he will extend his time 10 days to file a brief, constitutes in itself such extension.

No question of estoppel arising from the letter is suggested by counsel; neither does it appear to be present in the case. But it is insisted by some of respondents' counsel that a waiver took place, or an estoppel against plaintiffs was created, at the 8 o'clock meeting in the lawyer's office; and the basis of this contention is found in the following testimony of defendants' attorney: "He went away when Mr. McDougald told him he would wait until half past 9 o'clock for the money, and, if he came back with the money in that time, they would complete this trade; if not, he would go down below, and take up the other offer; and Mr. Lyon left, saying, 'Very well.' That is the last I saw of him." Conceding the broker to have used the words charged to him, still it is a very small thing out of which to build either a waiver or an estoppel. The pecuniary interests here involved are too weighty to depend upon such a slender thread. The phrase "Very well" may mean assent, and, again, it may mean the strongest dissent. Tone, inflection, gesture, and manner are the only indicators by which the phrase may be properly interpreted. The history of the various doings of these parties upon this day destroys the claim of either waiver or estoppel upon the part of plaintiffs.

The brokers were simply authorized to negotiate a sale. Their contract was completed, and their commissions earned, when they produced a purchaser, within the five days, ready, willing, and able to purchase upon the terms stated in the contract of employment. They had all of the 22d day of September in which to produce such purchaser, and upon that day they did produce a purchaser in the person of C. D. Barrows. That he was ready, able, and willing to purchase is entirely apparent from the record. It can scarcely be said to be denied by opposing counsel. The fact that his check was not a legal tender amounts to nothing. He was not required to produce, at that 8 o'clock meeting, either check or money. He was not required to attend any meeting whatever at that time. He was entitled to the last hour of the fifth day in which to pay the \$10,000. The contract so expressly provided. At this meeting he offered himself as the purchaser upon the terms presented by the contract, and stated he would pay the \$10,000 in cash as soon as the bank opened,—an event which was near at hand. He attempted to pay the \$10,000 through his broker, during the entire day of the 22d, but was prevented by his failure to secure a personal

audience with McDougald. He was not only willing, but using his best efforts, to pay this money, free of all limitations and conditions not found in the contract; and his efforts to make the first payment upon the purchase price is the highest evidence that Barrows was a purchaser ready, able, and willing to take the property. Aside from these considerations, the property was sold to third parties at 10 A. M. upon the 22d; and, if a tender of the first payment ever was required in order to establish Barrows' ability and good faith in the transaction, the conduct of the owners in making this sale waived it.

Conceding that no liability for commissions was created against respondents by the occurrences taking place at the meeting in the lawyer's office, appellants still make a showing by subsequent events that entitles them to recover. From 10 o'clock until Dr. Barrows left the city of Stockton, some time during the afternoon of that day, he was there, ready and willing to buy the land upon the terms fixed by the owners. He had the \$10,000 in hand, and was anxious to make the first payment. This period of time was during the life of the contract, and, when those conditions existed, defendants' liability attached. The fact that one of the owners was in Sacramento, another in Arizona, and the third was suddenly called from the city to look after important matters upon his farm during the expiring hours of the contract, is entirely immaterial. It is apparent that the broker was acting in good faith, and his rights cannot be sacrificed or injuriously affected by the absence of all the owners from the city of Stockton at this important period of time. For the foregoing reasons it is ordered that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; DE HAVEN, J.; FITZGERALD, J.; McFARLAND, J.

HARRISON, J., (dissenting.) A broker's contract for the sale of real estate is to be construed under the same principles as is any other contract. It is a contract of employment wherein the right to compensation is established when the broker has performed the contract according to the terms of his employment, and, until he has rendered the services for which he was employed, he has no right to compensation. "The general rule of law as to commissions undoubtedly is that the whole service or duty must be performed before the right to any commissions attaches, either ordinary or extraordinary; for an agent must complete the thing required of him before he is entitled to charge for it." Story, Ag. § 329. The rendering of such services being in the nature of a condition precedent to his right of recovery, the burden of proving the performance of the con-

dition is upon him, and its performance must be satisfactorily established in the mode, and to the extent, stipulated by the contract of employment. Whart. Cont. § 601; Hinds v. Henry, 36 N. J. Law, 328. For the purpose of showing, therefore, whether he has performed his contract, it is first necessary to ascertain the terms of the contract. The ordinary contract between a broker and the owner is that he will find a purchaser upon certain specified terms who will be acceptable to the owner. Sometimes other terms are included in the contract, such as that a sale shall be effected, (Walker v. Tirrell, 101 Mass. 257,) or that his commission shall be payable out of the purchase money, (McPhail v. Buell, 87 Cal. 115, 25 Pac. 266,) or that he shall have a fixed compensation for his services, irrespective of the result; but, in the absence of some terms qualifying his employment, his contract is performed only when he finds a purchaser who is able, ready, and willing to make the purchase according to the terms upon which he was employed to make the sale. To find a purchaser, however, means more than to procure some one who will offer to negotiate for the purchase. It implies the production of one who is not only ready and willing to comply with the terms of the purchase, but who has also the present ability to consummate it, and to comply with all of its terms, and who is also willing and ready to do all the acts that may be required to make an actual purchase of the land. To produce one who makes an offer to purchase, and who is without means, or who is not in condition to comply with the terms of the sale, and against whom a claim for damages resulting from a failure to perform the contract of purchase could not be enforced, does not constitute the finding of a purchaser, within the terms of the agreement, (Iselin v. Griffith, 62 Iowa, 671, 18 N. W. 302;) and the mere statement by one who is produced that he is ready and willing to make the purchase, even if he has the ability to do so, does not render him a purchaser, if at the same time he refuses to do the acts which are requisite to consummate the purchase. Upon the production of such purchaser, if the transaction is not to be consummated by an immediate delivery of the deed and payment of the purchase money, the owner has the right to demand that a valid, enforceable contract for the purchase of the land shall be executed by him; and the services of the broker have not been fully performed until such agreement is executed. The owner may, however, waive the execution of such contract; as, if, after the broker has introduced the purchaser to him, he himself assumes to prepare a contract which afterwards proves defective, or to deal with the purchaser upon other terms, or accepts a parol obligation from him. The broker is, however, entitled to

his commissions whenever the purchaser who is produced by him is accepted by the owner, even though the owner fail to make a binding contract, or to enforce the execution thereof, or though, either by reason of defect of title, or a refusal of the vendor or vendee to perform such contract, the sale be not afterwards consummated. So, too, the owner may by his own conduct prevent the execution of the contract, or its fulfillment on the part of the purchaser, by insisting on other terms, or by a refusal to sell, or from a defect in his title. In such case the broker is entitled to his commissions upon the principle that he has fully complied with all the terms of his employment, except those which have been waived, or from which he has been released by the acts of the owner.

It is not essential, however, that the owner and the purchaser should be brought face to face. The broker sufficiently performs his agreement if he tenders to the owner a valid, written contract, containing the terms of sale agreed upon, executed by a party able to comply therewith, or to answer in damages if he should fail to perform. *Hayden v. Grillo*, 35 Mo. App. 647. The contract must, however, be one which the owner can enforce against the vendee, and must be delivered to the owner. The owner is not bound to accept the statement of the broker that he has a contract, or that a deposit has been made with him on account of the purchase. He is entitled to the contract itself, and also to the deposit made thereunder, and to know whether the purchaser is able to carry it out. The person proposed by the broker may be insolvent, and thus, during the pendency of the transaction, the owner might lose the opportunity of making a valid sale. Much less is the owner required to accept a verbal contract made on his behalf by the broker, even though a deposit has been made with the broker upon such verbal contract. A verbal contract made by the purchaser with the broker is insufficient. A sale of real estate can be made only by an instrument in writing, and is "negotiated" only when such instrument has been executed. A binding contract for a sale constitutes a sale, within the meaning of such agreement, (*Rice v. Mayo*, 107 Mass. 550;) and an employment to negotiate a sale has been held to be satisfied by finding a purchaser, (*Phelps v. Prusch*, 83 Cal. 626, 23 Pac. 1111.) It is not, however, a part of the broker's employment to prepare a contract of purchase to be executed by the purchaser. *Cook v. Kroemeke*, 4 Daly, 268. He has done all that he was employed to do when he has produced a purchaser who is acceptable to the owner. The preparation of such agreement, and any further negotiations regarding the terms of purchase, are to be made between the owner and the purchaser. In the absence of special authority therefor, the broker has no authority to enter into any contract on behalf

of the owner, (*Duffy v. Hobson*, 40 Cal. 240,) or to make any contract on behalf of the purchaser; a broker being "one who makes a bargain for another, and receives a commission for so doing," (*Pott v. Turner*, 6 Bing. 706.) "The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made; and, until that is done, his rights to commissions do not accrue;" (*Sibbald v. Iron Co.*, 83 N. Y. 378;) but the agreement for the purchase must be one that is valid, and can be enforced.

The foregoing principles have been established in various decisions, and may be regarded as settled rules for construing the contract between brokers and their principals. *Masten v. Griffing*, 33 Cal. 111; *Phelan v. Gardner*, 43 Cal. 306; *Gonzales v. Broad*, 57 Cal. 224; *Hyams v. Miller*, 71 Ga. 606; *Veazle v. Parker*, 72 Me. 443; *Buckingham v. Harris*, 10 Colo. 460, 15 Pac. 817; *Moses v. Bierling*, 31 N. Y. 462; *Mooney v. Elder*, 56 N. Y. 240; *Barnard v. Monnot*, *42 N. Y. 203; *Love v. Owens*, 31 Mo. App. 510; *Hayden v. Grillo*, 35 Mo. App. 654; *McGavock v. Woodlief*, 20 How. 221; *Coleman v. Meade*, 13 Bush, (Ky.) 363; *Watson v. Brooks*, 11 Or. 271, 3 Pac. 679; *Hinds v. Henry*, 36 N. J. Law, 328; *Love v. Miller*, 53 Ind. 294; *Glentworth v. Luther*, 21 Barb. 145; *Leete v. Norton*, 43 Conn. 219. There are expressions in the opinions in some cases to the effect that a written contract of purchase is not necessary in order to entitle the broker to his commissions but an examination of those cases will show that in each one of them the written contract was waived by the owner, or that the owner himself refused, or was unable, to consummate the sale. We know of no authority in which it has been held, or even stated, that if the owner insists upon the execution of a valid contract of purchase, and the purchaser produced by the broker falls or declines to enter into such contract, or to comply with the other terms of purchase, the broker is nevertheless entitled to his commissions. The owner does not lose his right to make a sale of the property by reason of his having employed a broker. (*Dolan v. Scanlan*, 57 Cal. 264; *Hungerford v. Hicks*, 39 Conn. 269; *McClave v. Paine*, 49 N. Y. 561; *Wylie v. Bank*, 61 N. Y. 415,) or to employ other brokers for the same purpose; and the mere fact that he has made a sale within the time allowed the broker by his employment does not entitle the broker to his commission unless the broker has, within the terms of his employment, found a purchaser, (*Waterman v. Boltinghouse*, 82 Cal. 659, 23 Pac. 195; *Stewart v. Murray*, 92 Ind. 543;) and, however much he may have labored for the purpose of securing the purchaser, he is not entitled to commissions unless he produces one. "A broker is never entitled to commissions for unsuccessful efforts. The risk of failure is wholly his. The

reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor, and expend his money, with ever so much of devotion to the interests of his employer, and yet, if he fails; if, without effecting an agreement or accomplishing a bargain, he abandons the effort; or his authority is fairly and in good faith terminated,—he gains no right to commissions. He loses the labor and effort which was staked upon success, and in such event it matters not that, after his failure and the termination of his agency, what he has done proves of use and benefit to the principal." *Sibbald v. Iron Co.*, 83 N. Y. 383.

Under the foregoing principles it must be held that the plaintiffs did not negotiate a sale or find a purchaser for the land, and consequently did not become entitled to compensation for their services. No agreement in writing for the purchase of the land was ever made by Barrows, and, when he was introduced to the owners as the purchaser, he not only did not comply with their demand that such contract be executed, but he also failed to comply with their terms of sale. It was specified in the instrument of September 17th that \$10,000 of the purchase price should be paid "within the five days." This can only be construed as meaning that this amount of money should be deposited with the owners within that time as a payment on account of the purchase price, without any condition, and as an earnest of good faith on behalf of the purchaser that he would complete the purchase, subject, of course, to the implied agreement on behalf of the owners that it would be repaid if, through any fault on their part, the sale should not be completed. The succeeding clause in the agreement, that \$5,000 additional should be paid "on confirmation of the title," shows that this \$10,000 was to be paid irrespective of and before any examination of title. At the first interview between the plaintiff Lyon and the owners on the morning of the 22d, he had neither a contract on behalf of Barrows, nor did he produce Barrows as the purchaser, nor did he offer to pay or deposit with the owners the \$10,000, but insisted that as broker he had the right to retain this amount of money until after the examination of the title and completion of the sale. The function of a broker, however, as we have seen, is merely to make bargains, and not to execute contracts, and he was neither authorized to retain the money which his customer had given him with which to make a deposit or part payment on account of the purchase, nor to receive or hold the money for the account of the owners. Budd, on behalf of the owners, refused to accept the check as a compliance with the terms of the sale, on the ground that it was not money, and so stated to the plaintiff Lyon, and also stated to him that, if Barrows would come with the money or

what they knew to be money, he would then close the matter up, and put the agreement in writing, so that it would be binding on all parties. Lyon then went away, and after a few minutes returned with Barrows, who stated that he was willing to purchase the land according to the terms of agreement, if the title was good, and again tendered the check as a performance of the condition to pay the \$10,000. The owners, however, again declined to accept the check, upon the express ground that it was not a legal tender, or the equivalent of money, and Budd said to him that he was ready to draw up the contract and accept the money, but would not accept the check. This interview took place before the hour for the opening of the bank in Stockton. The check was drawn upon a bank in San Francisco, and was made payable to the order of the plaintiffs, Gaman & Lyon; and McDougald, on behalf of the owners, thereupon stated to Lyon and Barrows that he would wait at Budd's office until half past 9 o'clock, and that, if they then had the money there, the trade would be made, otherwise he would close with the other parties. To this Lyon assented, and thereupon Barrows and Lyon left the office without saying whether or not they would return; but neither of them did in fact return, and a little after noon of that day Barrows left Stockton, and about the same time Lyon obtained the money on the check, and took from the bank a certificate of deposit payable to his own order. McDougald and Budd waited at the office of the latter until about 10 o'clock, and afterwards, on the same day, closed the contract for the sale with the other parties. When it was thus shown to the court below that no contract for the purchase of the land was ever made by or on behalf of Barrows, and that when he was introduced to the owners he did not comply with the terms of the sale, and that when he was informed by them that they would require a contract of purchase to be made by him, and that the \$10,000 should be paid to them in money at the same time, instead of complying therewith, or saying that he was willing to do so, he went away, and soon after left town, and did not thereafter, in any form, offer to make such payment, or to enter into such contract, the court was justified in finding and adjudging that the plaintiffs had not performed their contract of employment, and that they were not entitled to a recovery from the defendants.

PATERSON, J.: I concur in the views of Mr. Justice HARRISON.

WHEELOCK v. GODFREY et al. (No. 15,236.)

(Supreme Court of California. Dec. 28, 1893.)

JUDGMENT—PAYMENT—INTERPLEADER.

1. Where judgment is rendered against a savings bank for a deposit with accrued div-

idents, the creditor having leave to apply for any relief needed to fix the amount and enforce payment, and later a decree is entered fixing the amount due to date at a certain sum, for which judgment is rendered against the bank, the first judgment is interlocutory, and payment of the second discharges both.

2. Where a defendant has disclaimed interest except as stakeholder, and prayed interpleader, and judgment is given against it in accordance with its own prayer, with costs against the defeated claimant, it may safely pay the judgment, in spite of irregularities in the interpleader suit which are uncomplained of by said claimant.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by Almon Wheelock, executor of Albert G. Wheelock, deceased, against Arabella Godfrey and the San Francisco Savings Union, for certain money deposited in defendant bank by deceased. From a judgment for defendant Godfrey against the bank, the bank appeals. Affirmed.

H. C. Campbell and Clunie & Clunie, for appellant. Wm. Barber, for respondents.

SEARLS, C. Almon Wheelock, executor of the last will of Albert G. Wheelock, brought an action to set aside and declare null and void an assignment made by Albert G. Wheelock, deceased, to defendant Arabella Godfrey, upon the ground of the mental incapacity of said Wheelock to execute the same, and fraud on the part of said Godfrey in procuring the execution of such assignment, and also to recover from both the defendants the sum of money assigned. Albert G. Wheelock, plaintiff's testator, according to the complaint, had on deposit with the San Francisco Savings Union, an incorporated bank of savings, one of the defendants and the appellant herein, the sum of \$7,045.89, for which he had a bank book. On the 1st day of October, 1888, said Wheelock assigned his said demand and bank book to the other defendant, Arabella D. Godfrey, the respondent herein, who thereupon procured the amount aforesaid to be transferred by the bank to her credit, and in evidence thereof the issue of a bank book showing such credit to her. The bank defendant answered the complaint, and also filed a cross complaint, in both of which it admitted the deposit by Wheelock of the \$7,045.89, the issue of a bank or deposit book to him, wherein he was credited therefor, and avers the due assignment thereof to defendant Godfrey, and the issuance to her of a bank or deposit book, and a credit to her of the amount thereof on its books, etc. And in its further answer or cross complaint it avers that the plaintiff and defendant Godfrey each claim said sum of money; that one of them is entitled thereto, with the dividends thereon, and that it has no means of knowing or ascertaining which of them is entitled thereto, except by the determination of the court in the premises;

that it is willing to pay the same when the ownership is determined, and has no interest in the question except to hold the money according to the terms of the deposit, and to pay it to the party entitled thereto. Defendant prays that plaintiff and defendant Godfrey be required to interplead, and that the court, by its judgment, determine which of them is the owner and entitled to said money deposit and dividends thereon. No answer was filed to this so-called "cross complaint" by either plaintiff or defendant Godfrey. The cause was tried by the court, written findings filed, and judgment entered as follows: (1) In favor of both of the defendants, as against the plaintiff; (2) that, as between the defendants, the sum of \$7,045.89, which by the answer of the bank defendant is admitted to be held by it on deposit in the name and to the credit of defendant Godfrey, belongs to her, together with any and all dividends that have accrued thereon; and it was further decreed that she recover the same, and that she be at liberty to apply to the court for any further relief that may be necessary to ascertain the amount due her by the terms of this decree, and to enforce payment thereof. This decree was entered September 18, 1891. On the 30th day of October, 1891, a further decree was entered, as between the defendants, which recited that, in pursuance of the permission granted in the former judgment entered, testimony had been introduced, from which it appears that the amount due to date (October 30, 1891) on the deposit referred to in said judgment is \$8,302.16. Judgment is rendered in favor of defendant Godfrey, and against the bank defendant, for said amount.

The bank defendant has taken an appeal from each of said judgments, and in each case the cause comes up on the judgment roll; this appeal being from the last or final judgment. As they are submitted together, it may be said here the first judgment or decree was, as between the defendants, an interlocutory judgment, which simply established the right to the deposit, but left the amount of the recovery thereon to be adjudicated and crystallized in the final judgment rendered October 30, 1891. *Freem. Judgm. §§ 29-33.* We do not doubt that a satisfaction of the last judgment will extinguish the first, and all the rights of defendant Godfrey acquired thereunder. It must be admitted that there are serious defects in the record, some of which are inexplicable, growing out of the filing of an amended complaint pending the trial. These do not, however, affect this appellant, which occupies the position of a stakeholder as between the other parties. No judgment was rendered against it either on the original or amended complaint, but, on the contrary, it had judgment for costs against the plaintiff. The judgment rendered against it was in consonance with the

prayer of its answer and cross complaint. It stands indifferent, as between the other parties to the action; and the controversy having been settled as between them, and the deposit awarded to defendant Godfrey, it was in order for it to pay the demand, as it expressed a willingness to do. There were, however, good reasons apparent why appellant here should exercise due caution in the premises by not paying the demand until a final adjudication between plaintiff and its codefendant; and it may fairly be presumed this consideration was an important inducement to this appeal. The judgment appealed from should be affirmed; each party to pay his own costs on appeal.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed; each party to pay his own costs on appeal.

WHEELOCK v. GODFREY et al. (No. 15,235.)

(Supreme Court of California. Dec. 28, 1893.)

Department 1. Appeal from superior court of San Francisco county; W. H. Levy, Judge.

Action by Almon Wheelock, executor of Albert G. Wheelock, deceased, against Arabella Godfrey and the San Francisco Savings Union, for certain money deposited in defendant bank by deceased. From an interlocutory judgment for defendant Godfrey against the bank, the bank appeals. Appeal dismissed.

Clunie & Clunie and H. C. Campbell, for appellant. Wm. Barber, for respondents.

PER CURIAM. The appeal of the San Francisco Savings Union in the above-entitled cause is hereby dismissed, upon the authority of the opinion in No. 15,236, between the same parties, this day filed. 35 Pac. 315.

WHEELOCK v. GODFREY et al. (No. 15,398.)

(Supreme Court of California. Dec. 28, 1893.)

MENTAL STATUS—OPINION EVIDENCE — INTIMATE ACQUAINTANCE—JURY TRIAL — COMPETENCY OF WITNESS—EXPERT—OBJECTION WAIVED—LEADING QUESTION.

1. There is no abuse of discretion in holding a witness competent as an "intimate acquaintance," within Code Civil Proc. § 1870, subd. 10, allowing expression of opinion of an intimate acquaintance respecting the mental sanity of a person; it appearing that witness had known him for 18 years, had until the last 6 years lived next door to him, and seen him every day, and had since then visited the family, where he lived, twice a week or more, and had often had conversations with him.

2. Plaintiff is not entitled to a jury in an action to recover money, it being asked that the assignment thereof be set aside for fraud and undue influence, the case being one of equitable cognizance.

3. Where a party offers a witness, who is not objected to, he cannot, after discovering that his testimony militates against him, have

it stricken out on the ground of incompetency of the witness.

4. Where a witness has testified that he, as a physician, attended deceased from January to the time of his death, in October, describing his ailments, physical condition, and conversations with him, etc., a question as to the state of his mind on October 1st, based on his appearance, actions, condition, and conversation, will not be held leading or suggestive.

5. Where witness has testified as an expert for plaintiff, it cannot be objected, when he is called for defendant, that he is not an expert.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by Almon Wheelock, executor of Albert G. Wheelock, deceased, against Arabella Godfrey and the San Francisco Savings Union, for certain money deposited in defendant bank by deceased. There was judgment for defendants, and from an order denying a new trial plaintiff appeals. Affirmed.

Clunie & Clunie and H. C. Campbell, for appellant. Wm. Barber, for respondents.

SEARLS, C. This action was brought to recover, by Almon Wheelock, as the executor of the last will of Albert G. Wheelock, the sum of \$7,045.89, moneys received on deposit by the defendant the San Francisco Savings Union from Albert G. Wheelock in his lifetime. Defendants had judgment. Plaintiff thereupon moved for a new trial, which motion was denied, and from the order of denial this appeal is taken. Albert G. Wheelock was a bachelor of the age of, say, 65 years; had been a bank clerk in San Francisco, and possessed a fortune worth, say, \$50,000. Arabella D. Godfrey was a widow, and Wheelock had lodged at her house for some 15 years, was a friend of her deceased husband in his lifetime, and had, according to some of the testimony, at intervals from the time of the death of the husband of said Arabella D. Godfrey, evinced a determination to make some provision for the support and maintenance of the latter. On or about September 25, 1888, said Albert G. Wheelock made a last will, whereby he bequeathed and devised all his estate, real, personal, and mixed, to his nephews, a niece, and sister residing at Chicago, Ill., and Toledo, Ohio. On or about October 1, 1888, Wheelock had on deposit with defendant the San Francisco Savings Union, an incorporated bank of savings, which we will hereafter denominate the "Bank," the sum of \$7,045.89, in evidence of which he held a bank book. At the date last mentioned, he duly assigned his said bank book to the defendant Arabella D. Godfrey, who took it to the bank with the assignment; had the amount thereof transferred to her credit, and received a bank book therefor in her own name. On the 20th day of October, 1888, Albert G. Wheelock died at the house of said Arabella D. Godfrey, in the city and county of San Francisco.

The last will aforesaid was admitted to probate, and Almon Wheelock, named therein as an executor, was duly appointed and qualified as such executor. The gravamen of the complaint is that at the date of the said assignment, if the same was ever in fact executed, Albert G. Wheelock had been stricken with paralysis, was weak in body and mind, and mentally unsound, and incompetent to attend to any business whatever; that he lodged and boarded at the house of defendant Godfrey, was subject to and under her influence, direction, and control; and that the latter fraudulently, and by duress and menace, and by undue influence, induced and procured said Wheelock, in his enfeebled condition, to execute the assignment to her, etc. Plaintiff demanded judgment (1) that the assignment be declared null and void, and set aside; (2) that the assignment was not made by Albert G. Wheelock; (3) that said moneys be declared the property of the estate of Albert G. Wheelock, and that plaintiff have judgment against the defendants therefor,—and for general relief. The complaint was not verified. The defendants answered separately, each denying the material allegations of the complaint, except as expressly admitted. The bank admitted that it held the money on deposit, set up the transfer of the deposit to defendant Godfrey, etc., and, by way of answer and cross complaint, set out that both plaintiff and defendant Godfrey claimed the money, that it was willing to pay it over to the one entitled thereto, etc., that it has no interest in the dispute, and asks that the parties be required to interplead, and that the court determine which of them is entitled to the fund, etc. Defendant Godfrey also filed a cross complaint, which was, on motion, stricken out.

At the trial the principal question in controversy related to the mental status of Wheelock at the date of the assignment. A number of witnesses on the part of defendants were called upon to express an opinion as to the mental sanity of said Wheelock. To the expression of an opinion on this subject, counsel for appellant objected, and the action of the court in overruling the objection is assigned as error. The first of these alleged errors is in relation to the testimony of Mary S. Mugan, and is based upon an alleged failure to establish a predicate for the expression of an opinion by showing that the witness was such an "intimate acquaintance" of said Wheelock as is required by subdivision 10 of section 1870 of the Code of Civil Procedure. That section, after providing for other cases in which witnesses may give an opinion, adds, in subdivision 10, as follows: "And the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given." The witness stated, in substance, that she was 23 years of age, and had known Wheelock since she was 5 years old, lived in his vicinity,

first across the street, and then next door, and saw him every day until within the last 6 years, "when we moved away. We were good friends with Mrs. Godfrey, (where Wheelock lived,) and I have been since in the habit of going there maybe twice a week, and sometimes oftener, and saw Mr. Wheelock many times and conversed with him; very often had little conversations with him; conversed with him in 1898; was in his room in 1888, and had a talk with him as to the changes in the furniture of his room. When Mrs. Godfrey was out at times, he would come to the door for me. There were many times that we had conversations, so that I haven't them placed." The witness was then permitted to express an opinion that "he was of sound mind," and gave as reasons therefor that there was no evidence of any illness; that there was no evidence of any unsoundness; that Mrs. Godfrey used to go out, and leave him in charge of her house, and would not have done so with a man of unsound mind,—and added: "The expression of his countenance was always just as I had seen it from a child. It was perfectly sound and bright. There was no change in Mr. Wheelock's expression from the time I knew him first until his death."

From necessity, much must be left to the discretion of the trial court in determining whether or not a given witness is an "intimate acquaintance," within the purview of the statute. As an abstract proposition, the question would seem to be one easily solved. In practice, however, a serious difficulty is met in the incapacity to detail specifically all the minor incidents from which the ultimate fact of an intimate acquaintance is deduced. Many persons cannot describe particulars in detail. A witness, as the result of observation, will determine with great accuracy that a given person is intoxicated; but confine him to a detail of the minute appearances that have led him unerringly up to the fact, and he will often fail most signally. The details of conduct, attitude, tones, gestures, words, expression of eye and face, and abnormal movements have either escaped him, or he is unable to draw what may be termed a "living picture" of what he has seen, and what is in reality photographed upon his mind. It is much the same in regard to the lesser details which go to make up the status of an intimate acquaintance; and the court, having the witness before it, is better able to determine the relation of the parties from the evidence given than can be done from a cold record of the words spoken. It is for this and similar reasons that this court has said that the question was addressed to the discretion of the court below, and that, there being no abuse of the discretion, the appellate court would not interfere. *Estate of Carpenter*, 79 Cal. 382, 21 Pac. 835; *Id.*, 94 Cal. 407, 29 Pac. 1101; *People v. Levy*, 71 Cal. 623, 12 Pac. 791; *People v. Fine*, 77 Cal. 147, 19 Pac. 269; *Peo-*

ple v. Pico, 62 Cal. 53. The difficulty in this class of cases which has been met and will continually meet the courts in determining what is an intimate acquaintance, within the meaning of the statute, is aptly epitomized by Temple, C., in *Estate of Carpenter*, supra, where, in speaking of the statute, he says: "Since it requires the drawing of a definite line between things which are separated only by degrees of difference, the rule is, and must remain, more or less indefinite;" and he adds: "A very large discretion must be conceded to the trial court. If the conclusion reached is one which can be reasonably entertained, consistently with the above idea of intimacy, [thereinbefore set out,] this court cannot review the ruling." Within the purview of the above reasoning and the cases cited, there was no abuse of discretion by the court below in holding the witness competent, as an intimate acquaintance, to express an opinion as to the mental sanity of Albert G. Wheelock.

The other alleged errors, founded upon rulings in the cases of other witnesses upon the same point, involve the same question, and do not vary in their facts sufficiently to alter the conclusion reached in the case considered, and need not therefore be elaborated.

The next error assigned is founded upon the denial by the court of an application by plaintiff for a jury trial. It appears from the record that the cause was set down for trial by the court, January 26, 1891, and notice thereof served upon the attorneys of plaintiff. Prior to the commencement of the trial, and prior to January 26, 1891, but at what precise date does not appear, the plaintiff in open court demanded a jury trial, which was refused by the court. The facts stated in the complaint, and the prayer for relief, indicate the case to be one of equitable cognizance, and therefore one in which plaintiff was not entitled to a jury. *Fish v. Benson*, 71 Cal., at pages 434, 435, 12 Pac. 454; *Cassidy v. Sullivan*, 64 Cal. 266, 28 Pac. 234. The statement of appellant's counsel that the amended complaint contains matter which might have been omitted, and that he demanded unnecessary relief, is, in effect, but a statement that a different cause of action, sufficient for a recovery at law, with a demand for only such relief as a court of law could grant, might have been prosecuted. The answer must be that the phraseology of the complaint was adapted to the relief sought, viz. setting aside, and declaring null and void, the assignment by plaintiff's testator to defendant Godfrey; that the money be declared the property of plaintiff; and that he have a judgment therefor against the defendants. The court committed no error in the premises. It is true, the amended complaint stated "that the said pretended assignment and transfer was never signed, made, executed, or delivered by," etc., and then proceeds to set out at length the incompetency and weakness of the testator, the

fraudulent practices of defendant Godfrey to induce him to sign the transfer, and avers that, "if he ever signed said pretended assignment or transfer, [he] was induced to sign the same by and through fraud and undue influence," etc. This allegation is iterated and reiterated in various forms. That the complaint was ambiguous is apparent, but it is not apparent that the plaintiff should be permitted to take advantage of that fact by now saying he did not mean what he said in his pleading, and by repudiating the whole theory upon which he tried the cause. He proved by his own witnesses the execution of the assignment, and then sought to show the invalidity of the act by proving the incompetency of his testator.

The next error assigned relates to the action of the court in denying a motion on behalf of plaintiff to strike out the testimony of John Montgomery, M. D., the attending physician of deceased, and in overruling the objections of plaintiff to questions put to said Montgomery by defendant as to the mental condition of said deceased. John Montgomery was called as a witness on behalf of plaintiff, and stated that he was a physician; had been in practice as such for 17 years; testified as to attending Wheelock as a physician from January, 1888, to October of the same year, when he died; gave his opinion as to his ailments; and described his death as being due to progressive paralysis, etc. On cross-examination he testified as to the mental status of his patient; said he was thoroughly rational in conversation, and deemed him a competent gentleman; that his physical condition did not affect his brain, etc. Upon the close of the testimony on behalf of the plaintiff, his counsel moved the court to strike out substantially all the testimony of Dr. John Montgomery upon the ground that he was a licensed physician, in attendance as such upon Wheelock, who was his patient, and that the information possessed by him was acquired while attending his patient, and was necessary to enable him to prescribe for Wheelock, and hence was incompetent, under subdivision 4 of section 1881 of the Code of Civil Procedure of this state. The motion was denied by the court, and the ruling excepted to by plaintiff. At a later stage of the case, Dr. Montgomery was called as a witness on behalf of the defendants, and gave important testimony, including his opinion that Wheelock was mentally sane, etc., to which objections and rulings were had, and exceptions noted. Conceding, without deciding, that Dr. Montgomery was an incompetent witness for the reasons indicated by the plaintiff, appellant is not in a situation to urge such incompetency. His testimony was received without objection from the defendants. The question, then, presents this proposition: Can a party to an action introduce testimony which, in the face of an objection, would be incompetent, and, upon discovering that it

millitates against him, strike it out without the consent of the opposite party? The question must be answered in the negative. By offering the witness, and eliciting testimony from him, he in effect declared the witness was competent and the testimony proper. In the absence of objections by defendants, it was the equivalent of consent, and was as binding upon them as a written stipulation agreeing to the competency of the witness to testify to the given facts would have been. The motion came too late. *People v. Long*, 43 Cal. 446; *People v. Samario*, 84 Cal. 484, 485, 24 Pac. 283. *Rogers on Expert Testimony*, at page 111, says: "When it is proposed to introduce in evidence the testimony of witnesses who are disqualified by these statutes, the party who desires to claim the benefit of the statutes must seasonably exercise the privilege by objecting to the evidence at the time it is offered. It is too late after the examination has been insisted on, and the evidence has been received without objection, to raise the question of competency by a motion to strike it out;" citing *Hoyt v. Hoyt*, 112 N. Y. 514, 20 N. E. 402, the doctrine of which fully sustains the text. The objections to questions put to Dr. Montgomery when a witness for defendants were not as to his competency by reason of having been the physician of Wheelock, and are regarded as of little importance. The first was to a question as to the state of Wheelock's mind on October 1, 1888, based upon his appearance, actions, condition, and conversation. It was objected that the "question was leading and suggestive, and not the proper question, and, further, that he has testified that he did not form an opinion." The witness answered: "Well, the man, to my mind, was perfectly sane." The witness then said he formed an opinion, and answered as before. Again, to a question as to his opinion whether he was of sound or unsound mind, the witness answered: "I believe he was of sound mind." Counsel objected that the witness was "not an expert, and not proven to be." Another question was as to the state of mind of Wheelock, in the opinion of the witness, from January, 1888, down to and including the time when he was stricken with this paralysis, which had been shown to have occurred some three days before his death. This was objected to as "irrelevant, immaterial, and incompetent, and as covering periods of time and occasions when the witness did not see him, and could not express an opinion." The witness answered that he never had the slightest doubt as to his sanity; "It would have been an impossibility for me to do such a thing as that." A motion to strike out the answer as not responsive was denied. The first question was not leading or suggestive, in view of the preceding testimony, in which the witness had stated at length that he had attended the deceased from January 8th to the time

of his death, in October; had described his ailments, physical condition; had conversed with him, etc. The witness had been shown to be, as before stated, a physician of 17 years' experience, and had testified as an expert for the plaintiff, and was entitled to be questioned as such. As his physician during 1888, and being in the habit of visiting him as such, and at times as often as two or three times a day, he was competent to speak of his condition during the entire period from January to October, except as thus stated. The questions, answers, and rulings of the court thereon were correct, and their propriety is sufficiently apparent to obviate the necessity of discussion.

We have examined most of the other errors assigned in the record, and find them either without merit or not of sufficient importance to warrant a reversal; and as appellant has contented himself with saying he does not waive them, and asking us to examine them, as set forth in the specification of errors, without any direction as to where they are to be found in a record of 373 printed pages, we are justified in the conclusion that they are not important. *Webber v. Clarke*, 74 Cal. 11, 15 Pac. 431; *West v. Crawford*, 80 Cal. 33, 21 Pac. 1123. The order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

WHEELOCK v. GODFREY et al. (No. 15,234.)

(Supreme Court of California. Dec. 23, 1893.)

FINDINGS—DEFINITENESS—ULTIMATE FACTS—JUDGMENT.

1. A finding that all the averments of a complaint, down to and including a certain averment, are true, is sufficiently explicit.

2. Where an attempt is made to avoid a gift on the ground of mental incompetency and undue influence, a finding that there was no incompetency or undue influence is sufficient, without finding as to the donor's physical condition or other facts stated as inducement to the ultimate facts.

3. Where one brings an action against two parties for a fund, the judgment being against him as to both, he cannot complain that it is in favor of one defendant as against the other.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by Almon Wheelock, executor of Albert G. Wheelock, deceased, against Arabella Godfrey and the San Francisco Savings Union, for certain money deposited in defendant bank by deceased. Judgment for defendants. Plaintiff appeals. Affirmed.

Clunie & Clunie and H. C. Campbell, for appellant. William Barber, for respondents.

SEARLS, C. This is an appeal by plaintiff from a final judgment in favor of defendants. The cause comes up on the judgment roll, and, as the appeal was not taken within 60 days after the entry of judgment, the appeal must be determined upon the questions presented by the pleadings, findings, and judgment. An appeal from an order denying a new trial in the same case, (No. 15,398,) this day decided, (35 Pac. 317,) contains a sufficient reference to the facts in the case, and they will not be repeated here.

The first finding is to the effect that all the allegations of plaintiff's complaint, from the commencement thereof down to and including the averment that the moneys referred to in the complaint, viz. \$7,045.89, were still in charge of the defendant bank, are true. It is objected to this finding that it is impossible to determine from it the averments found true, and those not sustained. It is as comprehensive and explicit as the complaint to which it refers, and, as it finds all the averments of the complaint true down to and including a given averment, we fail to see any difficulty in determining precisely what the court means. The averments thus found true may be epitomized as follows: Defendant Arabella D. Godfrey is a widow; the other defendant is an incorporated savings bank. On the 1st of October, 1888, Albert G. Wheelock (plaintiff's testator) had deposited \$7,045.89 in the bank for loaning and safe-keeping, and had received in evidence thereof a bank book, in which he was credited for the amount as a deposit. On or about October 1, 1888, defendant Godfrey presented to the bank this deposit book, with an assignment thereof in writing, purporting to be executed by Wheelock, assigning the said money and account, and demanded a transfer and delivery to her of said moneys. The bank, in pursuance of said demand, transferred to her credit on its books the amount, and gave her a deposit book, crediting her therein for the amount. The money has not been drawn from the bank, and it is still in its charge and custody. The court then proceeds to find at length, what need only be referred to briefly, that on October 1, 1888, the said instrument of transfer was signed, executed, and delivered by Wheelock to defendant Godfrey, and that, when so executed and delivered, he was not of weak or unsound mind, or mentally incompetent to make the transfer, but was of sound mind, and competent to make such transfer; that the assignment was not procured by or through undue influence or control by Godfrey over Wheelock, nor by any unfair advantage, nor by any advantage taken of the mental or physical weakness or unsoundness of mind of Wheelock; that he was not induced to sign the assignment or transfer by any fraud or undue influence of defendant Godfrey or any one else; that the assignment and delivery were not procured by duress, fraud, or undue influence, etc., by

Godfrey or any one else; that Wheelock was free from fraud, duress, menace, or undue influence at the time and in the matter of the making, signing, and delivery of said assignment. The court then finds the allegations of the complaint in reference to the death of Wheelock, his last will, and proceedings had thereunder as true.

These findings cover all the material issues in the case. It was not necessary to find whether or not Wheelock had been ill or paralyzed, or as to his physical condition, or any other fact stated in the complaint, merely as inducement to the ultimate facts, which were that he was mentally incompetent, and that defendant Godfrey knowingly and fraudulently took advantage of his weakness, and, by undue influence, by duress, and by obtaining control over him, induced and procured him to sign, execute, and deliver to her an assignment of his bank book and of the money in bank. The findings are full and complete on the material issues. The objection to that portion of the judgment which awarded the money in bank to defendant Godfrey, as against the bank, is not open to attack by this appellant, who was plaintiff in the court below. The judgment is against plaintiff, and in favor of both the defendants as to him. If he was not entitled to it, manifestly he is not, and cannot be, injured by any judgment in the premises awarding it, as between the defendants. That is not his affair, but theirs. The judgment appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

MIETZSCH v. BERKHOUT et al., Superintendent of Public Streets. (No. 15,011.)

(Supreme Court of California. Dec. 30, 1893.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—ILLEGAL ASSESSMENT—REMEDY—INJUNCTION—WHEN MAINTAINED.

1. St. 1889, p. 70, §§ 10-15, regulating the procedure for widening streets, provide that the commissioners must file with the clerk of the board of supervisors a report specifying each lot, etc., assessed for the improvement, with the name of the owner and a plat of the assessment district; that the clerk must give notice requiring persons interested to show cause, at a time named, why such report should not be confirmed, etc. *Held*, that a lot owner who failed to object to an assessment, and to proceed as provided by such statute, could not maintain an action to declare the assessment void, and enjoin the execution of a deed pursuant to a sale of the assessed property to pay the assessment.

2. Where a city lot is assessed only \$2.50 for a street improvement, and sold for nonpayment, and the owner could redeem from the sale by paying \$3.00, the maxim, "De minimis non curat lex," applies, and a court of equity will not restrain the execution of a deed pursuant to such sale, if invalid.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by E. Mietzsch against Amelia Berkhout and James Gilleran, as superintendent of public streets of the city of San Francisco, Cal., for an injunction. From a judgment for defendants, plaintiff appeals. Affirmed.

Henry E. Highton, for appellant. A. W. Linforth, for respondents.

BELCHER, C. Proceedings were regularly instituted for the widening of Mission street, in the city and county of San Francisco, and for the condemnation for that purpose of a strip of land 16½ feet wide, along the southeasterly side of said street. The proceedings resulted in a judgment of condemnation and in assessments upon certain lots of land owned by the plaintiff, to help pay the expenses of the improvement. The assessments not being paid, the said lots were sold thereunder to one William Kreling, who received certificates of purchase therefor, and assigned the same to the defendant Amelia Berkhout. There was no redemption of any of the property so sold, and at the proper time the said assignee served on the plaintiff the usual and required notice, that she would apply for deeds of the lots pursuant to the said sales. The defendant James Gilleran, the then superintendent of streets in and for the said city and county, was about to execute and deliver the deeds so applied for, and thereupon the plaintiff commenced this action to obtain a decree restraining the execution and delivery thereof. A summons was duly issued, and served on each of the defendants, but they failed to appear, and their defaults were entered. Thereafter, the case was submitted to the court below for decision, and after consideration the court made and filed its findings of facts and conclusions of law, to the effect that all the allegations of the complaint were true, but that the plaintiff was not entitled to the relief demanded, and that judgment should be entered in favor of defendants. Judgment was accordingly so entered, from which the plaintiff appeals.

In the proceedings for condemnation above referred to, the appellant here was a party defendant; and from the judgment entered in the case, and an order denying a new trial, an appeal was taken by the defendants to this court, where the judgment and order were affirmed. City and County of San Francisco v. Kiernan, 33 Pac. 720. Most of the questions involved in this case were involved in that, and were decided against the contention of appellant. They must therefore, upon this appeal, be treated as settled, and need not be further considered.

It is claimed, however, that one of appellant's lots was assessed for a larger portion of the costs, damages, and expenses resulting from the proceedings to effect the widening

than it should have been, and hence that the entire proceedings, as to him, were invalidated. The order of the board of supervisors, under which the proceedings were initiated and carried on, defined the district to be benefited by the widening, and upon which the costs, damages, and expenses thereof should be assessed, as the land extending along each side of Mission street, as widened, from Twenty-Sixth street to the San Mateo county line, and having a uniform width of 1,000 feet on each side of the street; and it declared that after deducting from the total costs, damages, and expenses of the widening the amount assessed to the railroad company occupying the street, the remainder should be assessed as follows: One-fourth upon the lands and improvements thereon lying within a uniform distance of 100 feet easterly from the southeasterly line of the street, as widened; one-fourth upon the lands and improvements lying between 100 feet and 1,000 feet easterly from the southeasterly line of the street; and the other two-fourths upon the lands and improvements similarly described on the northwesterly side of the street: "provided, that all lots or parcels of land within 100 feet of the southeasterly or northwesterly lines of Mission street, * * * not fronting directly on the line of said street, shall, for the purposes of this assessment, be assessed as though the same were outside the line of said 100 feet, as hereinbefore provided, and be assessed as herein provided for the assessment of land and property distant more than 100 feet from the southeasterly and northwesterly lines of said street." The appellant owned six lots subject to assessment under the said order. Three of these lots the complaint describes as lots 51, 52, and 53, "as designated upon a certain map of the Bernal Homestead Association," on file in the office of the recorder of the city and county, and as "forming a complex of lots or parcels of land designated as, and subdivided into, lots 2, 4, and 5 of block 166 in the report, and on the map, plans, and diagrams of the Mission street widening commissioners." The complaint further describes lots 51 and 52 as commencing at the corner of Mission street and Allison avenue, and extending thence along Mission street 104 feet 4 inches, and along Allison avenue 42 feet 9 inches, with a width or length at the other end or side of 96 feet 2 inches; and it describes lot 53 as located in the rear of the other two lots, and fronting on Allison avenue, with a uniform width of 50 feet and a length of 120 feet. It is alleged that the larger part of lot 53 was within the 100-foot limits, as above defined, and was assessed as within those limits, when the whole lot should have been assessed as within the 900-foot limits; and it is claimed that the assessment so made "presented an incontestable violation of the order under which it was sought to levy the

assessment." The statute regulating the mode of procedure provided, in substance, that the commissioners appointed for the purpose must make and file with the clerk of the board of supervisors their report, specifying each lot, subdivision, or piece of property assessed, with the name of the owner thereof, if known, and a plat of the assessment district, showing each block and lot, or portion of lot, assessed, and its dimensions, designated and described by an appropriate number; that upon the filing of the report and plat the clerk must give notice thereof by publication for at least 10 days, requiring all persons interested to show cause before the board on or before a day named, why such report should not be confirmed; that all objections must be in writing, and filed with the clerk, and by him laid before the board; that the board must fix a day for hearing the objections, and the clerk must notify the objectors thereof; that at the time fixed the board must "proceed to pass upon the report, and may confirm, correct or modify the same, or may order the commissioners to make a new assessment, report and plat;" that the clerk must forward to the street superintendent a certified copy of the report, assessment, and plat, as finally confirmed and adopted, and that such certified copy shall thereupon be the assessment roll; and that, immediately upon receipt thereof by the street superintendent, the assessment therein contained shall become due and payable, and shall be a lien upon all the property contained and described therein. St. 1889, p. 70, §§ 10-15. It appears from the complaint that the above-mentioned provisions of the statute were complied with; that written objections were filed by a number of persons interested, and were considered and acted upon by the board; and that, after modifying the report in a few details, the board "undertook and attempted to confirm and adopt, and in form confirmed and adopted, the said report, assessment, and plat." It does not, however, appear that any objection was made by appellant to the assessment upon any of his lots. He apparently thought he could safely rest upon his oars till after the sale, and then invoke the power of a court of equity to declare the sale null and void. But we do not think he was at liberty to do that. If the objection now urged had any merit, it should have been presented to and acted upon by the board; and it cannot, in our opinion, be raised for the first time in the courts. See *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71. Besides, no diagram or definite description of lot 5, as assessed, is presented, and from the general description we infer that it is the same as lot 53. But it appears from the complaint that lot 5 was sold for \$250, the full amount of the assessment against it, and could have been redeemed by paying \$3.90. This being so, the maxim, "*De minimis non curat lex*," may well be held applicable to the case.

The other points do not require special notice. The judgment, in our opinion, should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

PRIEST v. BROWN et al. (No. 13,886.)

(Supreme Court of California. Dec. 30, 1893.)

FRAUDULENT CONVEYANCES—RIGHTS OF PURCHASER—REVIEW ON APPEAL—SUFFICIENCY OF EVIDENCE.

1. Where the debtor testified that it was his intention, in making a transfer of his property, to prefer certain creditors, and the grantee testified that the debtor said to him at the time that his object was to prefer creditors out of the proceeds, a finding to that effect will not be disturbed.

2. An insolvent debtor, who has the right to prefer certain creditors, is not required, in the exercise of that right, to convey his property directly to such creditors, but he may transfer it to a third person, and pay the proceeds to the creditors.

3. A conveyance by an insolvent debtor with the intention of using the proceeds thereof in discharge of the claims of certain of his creditors, need not be made for cash in hand.

4. The title of a purchaser in good faith of the land of an insolvent debtor is not affected by the fact that the debtor in making the conveyance intended to defraud his creditors.

5. The fact that an insolvent debtor, who conveyed his land with the avowed intention of using the proceeds in payment of the claims of certain of his creditors, did not pay such creditors, will not affect the title of the purchaser, if the purchase was made in good faith.

6. Findings of the trial court upon conflicting evidence will not be disturbed on appeal on the ground that they are against the weight of the evidence.

In bank. Appeal from superior court, city and county of San Francisco; T. K. Willson, Judge.

Action by one Priest against Joseph Brown and others. Judgment for defendants. Plaintiff appeals. Affirmed.

T. Z. Blakeman, for appellant. James A. Waymire, H. C. Campbell, and W. T. Baggett, for appellees.

DE HAVEN, J. This action was brought by the plaintiff to subject certain real property in the city of San Francisco to the payment of a judgment obtained by him against the defendant Joseph Brown on April 5, 1887, for the sum of \$8,334.06 and costs of suit. It is alleged in the complaint that this real property was on October 3, 1883, conveyed by the judgment debtor to one A. M. Brown, with intent to delay and defraud the creditors of such debtor. The land was afterwards conveyed to other defendants named, in trust to secure an indebtedness owing from the said A. M. Brown to the San Francisco Savings Union. The superior court found that the deed from Jo-

seph Brown to the defendant A. M. Brown was not made with intent to defraud the creditors of Joseph Brown, and upon this finding, and others not necessary to be stated, gave judgment for the defendants. It is manifest that if the finding of the court to the effect that the original conveyance to the defendant A. M. Brown was not fraudulent and void as to the creditors of Joseph Brown is sustained by the evidence, the judgment and order appealed from must be affirmed without reference to other questions argued by counsel. It is earnestly urged in behalf of appellant that this finding is contrary to the evidence. It appears from the record that at the date of the transfer Joseph Brown was insolvent, and he testified to the effect that his object in making it was to prefer certain of his creditors. The purchaser, A. M. Brown, was his nephew. He was a captain in the United States army, with a salary of \$2,000 per year, but without other property. The property transferred was substantially all the debtor, Joseph Brown, had. It had a rental value of about \$1,000 per year, and the purchase price agreed to be paid therefor was \$9,000, \$500 of which was paid in cash, and the balance in the negotiable notes of the purchaser, maturing at different periods from 6 to 24 months from date. None of the creditors to be preferred knew anything of the transfer, and, of course, did not give their assent to it at the time, but Joseph Brown testified that he afterwards sent the notes to the persons for whom he intended them when he made the sale. The notes sent to his sister were returned to him by his direction, and one or more of the other notes again came into possession of the debtor, and these seem to be the only ones that have been paid, and they were paid to Joseph Brown out of money, the greater portion of which was obtained from the rents, and from a mortgage placed upon the property by the purchaser. The purchaser, A. M. Brown, testified, in substance, that at the time of the transfer he was informed by his uncle that his object was to prefer certain of his creditors out of the proceeds of the sale, and that he was willing to assist him in the matter by purchasing the property. In view of the direct testimony of the grantor and grantee to that effect, we cannot say that there was no evidence to justify the trial court in finding that the real intention of the debtor in making the transfer was to prefer a portion of his creditors, and that the conveyance was accepted by the defendant A. M. Brown with knowledge of this intention of his grantor. A transfer made by an insolvent debtor for such a purpose is not fraudulent in the absence of a statute making it so, and while it is true that in this state, under section 55 of the insolvent act of 1880, a conveyance made and accepted with such intent may be set aside by an assignee in insolvency, if made within one month before the commencement of insolvent

proceedings by or against the grantor, still, subject to the right thus given the assignee in insolvency to defeat it, such a conveyance is unassailable. This general rule that an insolvent debtor may, when there is no bankrupt or insolvent law making a different disposition of his property, lawfully devote it to the payment of any creditor, or a part of his creditors to the exclusion of others, is thoroughly settled by numerous well-considered decisions. *Dana v. Stanfords*, 10 Cal. 269; *Low v. Wortman*, 44 N. J. Eq. 202, 7 Atl. 654, and 14 Atl. 586; *Shelley v. Boothe*, 73 Mo. 74; *Brashear v. West*, 7 Pet. 614; *Giddings v. Sears*, 115 Mass. 505. The same rule is embodied in section 3432 of the Civil Code, which declares: "A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another." It is argued, however, that the facts of this case do not bring it within this rule, because the conveyance here was not made directly to the creditor, and the sale was not made for money in hand, but upon a long credit, represented by the notes of the purchaser; but we do not think these facts make any difference in the application of the rule. It is perhaps true that in most of the cases in which the question of the right of a debtor to give a preference has arisen, the transfer assailed as fraudulent was made directly to the creditor, but, in our opinion, it is not essential to its validity that a transfer for such a purpose should be made to the creditor directly. The insolvent debtor, so long as he retains control of his property, is clothed with the right to dispose of it for the bona fide purpose of providing means for the payment of any of his debts; and he necessarily has the right to determine whether the sale shall be for cash in hand or upon a reasonable credit. Nor can it make any difference whether the transfer is made directly to the creditor by way of preference, or whether the property for which it is exchanged be money or notes, to be used by him for the same purpose. This view is sustained by the following cases: *Gregory v. Harrington*, 33 Vt. 241; *Avery v. Eastes*, 18 Kan. 507; *Bedell v. Chase*, 34 N. Y. 387; *Loeschigk v. Bridge*, 42 N. Y. 421; *Ruhl v. Phillips*, 48 N. Y. 125. In *Gregory v. Harrington* the debtor sold his store and merchandise, taking the notes of the purchaser in payment therefor, and these notes he afterwards turned over to some of his creditors by way of preference; and the court held that the sale was as valid as if it had been made directly to the preferred creditors. The court said: "In this case, if the principal debtor had transferred the property itself to the same persons to whom he transferred the notes he took for it, and for the same purpose, no person would claim that he had not a perfect legal right to do so; or, if he had sold the property and taken the money for it, and had applied the money in the same

manner, it would not have been fraudulent. The purpose was not to keep his property away from his creditors, but to pay it to his creditors, he exercising his legal right to prefer such as he chose. Fraud does not consist in transferring property with a view to prefer one creditor to another, but in transferring property with the intent to prefer oneself to all his creditors." It is true that in the case just cited the notes received were actually transferred to the creditors of the vendor; but the failure of the debtor to thus apply the proceeds of a sale would not defeat the title of a purchaser in good faith, who had given his negotiable notes in payment, without any knowledge that the real object of the debtor in making the sale was not to pay his debts, but simply to convert the property into something which might more effectually be placed beyond the reach of his creditors, and for his own benefit. The case is authority for the proposition that a transfer made for the purpose of preferring a creditor is valid, although the transfer is not made directly to the creditor intended to be preferred. In *Bedell v. Chase*, 34 N. Y. 387, the sale was made upon credit, the vendors taking the purchaser's notes, the last one due in 12 months from date, and the sale was made for the purpose of preferring creditors of the vendors. The sale was upheld. So, also, in *Ruhl v. Phillips*, 48 N. Y. 125, the sale was of an entire stock of an insolvent copartnership upon credit, the vendee having knowledge of the insolvency, and also of the fact that the sale was made for the purpose of preferring certain creditors of the copartnership out of the proceeds of the sale. The court in that case held that the sale was not necessarily fraudulent because the notes of the purchasers were taken in payment, or because of the intended preference which was known to the purchasers. In discussing the question of preference the court said: "The amount of the notes was not sufficient to pay all the debts of the firm, and it was the object of Many, the member thereof who made the sale, to prefer certain of their creditors, including a copartnership, [of Many, Baldwin & Many,] in the payment of debts due to them, and to indemnify them against liability on indorsements made for their accommodation. This object, although known to Phillips at the time of his purchase, did not render it fraudulent as against the plaintiff or any of the creditors who were not to be so preferred. A debtor, notwithstanding his insolvency, is allowed to make such preference if bona fide; and a sale for that purpose is not invalid." The foregoing cases all proceed upon the principle—which we deem a sound and reasonable one—that a debtor has the lawful right to prefer a creditor; and, this object or purpose being lawful, the manner in which it is to be done, whether by a direct conveyance to the creditor or by a sale to another, either for money or notes, with the intention of applying the proceeds

of such sale by way of preference, is immaterial.

It is lastly urged that it was incumbent upon the vendee to see that his notes were applied in payment of the creditors to be preferred, and that, as they were not in fact so applied, or at least some of them were not, the transfer was fraudulent. We think, however, that there was evidence from which the court might have found that all of the notes were transferred to those creditors of Joseph Brown whom he desired to prefer. It is true, some of them got back into his hands in a manner which does not clearly appear; but, whatever the fact may be, whether these notes were or were not given to the creditors of Joseph Brown, the court had evidence before it upon which to base a finding that the defendant A. M. Brown believed at the time of the sale that his notes were to be used in preferring certain creditors of his uncle; and, if he so believed, he was not guilty of any fraud, whatever may have been the real intention of his grantor, and the conveyance cannot be set aside for the fraud of the grantor, in which the grantee did not participate. *Bank v. Northrup*, 22 N. J. Eq. 58; *Foster v. Hall*, 12 Pick. 89; *Cohen v. Knox*, 90 Cal. 273, 27 Pac. 215. Thus, in the case last cited, we said: "Where one party conveys land to another for a valuable and adequate consideration, the conveyance will be good, against the creditors of the grantor, although the latter intended thereby to defraud his creditors, if the grantee had no knowledge of such intent, and was in no way a participant in the fraudulent purpose." And of course, if, in such a case, the conveyance is valid when made, it is not rendered invalid by what the grantor may do or fail to do afterwards; if the present fraudulent intention of the grantor alone cannot defeat the conveyance, his subsequent action in furtherance of his own fraudulent design ought not to affect the rights of the grantee. The negotiable notes given by the grantee in this case constituted a valuable and adequate consideration for the transfer, and bring the transaction within the protection of the rule which upholds the conveyance, when the grantee is himself acting in good faith, and without any intention of assisting his grantor in defrauding his creditors.

We have not deemed it necessary to enter into any discussion relating to the weight which ought to be given to what the plaintiff terms "badges of fraud," and other facts appearing in this case, which he claims really outweigh the direct evidence of the defendants Joseph and A. M. Brown upon the issue as to the fraudulent character of the conveyance made by the former to the latter. At most, the matters referred to only make a conflict of evidence upon the main question involved. When this is so, it is the well-settled rule here that the find-

ing of the trial court thereon will not be disturbed by us; and the fact that the evidence bearing in this case upon the matter embraced in the finding consists of depositions does not take the case out of the general rule thus stated. *Reay v. Butler*, 95 Cal. 214, 30 Pac. 208. Judgment and order affirmed.

We concur: *McFARLAND, J.; HARRISON, J.; GAROUTTE, J.; FITZGERALD, J.*

PEOPLE v. MUNROE. (No. 20,973.)

(Supreme Court of California. Dec. 30, 1893.)

FORGERY — INSTRUMENTS SUBJECTS OF — CONTRACT AGAINST PUBLIC POLICY.

A contract which, if genuine, would be void as against public policy, may be the subject of forgery.

In bank. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

George Munroe was convicted of forgery, and appealed. After the judgment was affirmed in department, (33 Pac. 776,) a rehearing was ordered. Affirmed.

W. E. Cox, W. T. Williams, and Edgerton & Adams, for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. This case was decided in department, but, a rehearing having been ordered, it is now before the court in bank. The appellant was convicted of the crime of forgery, and prosecutes this appeal from the judgment and order denying his motion for a new trial. It is insisted that the facts charged in the information do not constitute the offense of forgery; and that is the only matter relied upon for a reversal of the judgment which demands our attention. We will not enter into a detailed analysis of the various parts of the writing which is the subject of the forgery here charged, but will view it from the standpoint of appellant's claims, and, for the purposes of this investigation, will concede the writing to be an assignment or sale of the unearned salary of a public school teacher for the next ensuing month, together with an order upon the city auditor of Los Angeles for the warrant representing such salary. That being the fact, it is further claimed that Helen Henry, the purported author of the writing, being a public school teacher, is a public officer, and that the sale or assignment of an unearned salary by a public officer is void, being against public policy, and, the writing being void, it cannot be the basis of a charge of forgery. The information charged that this writing was forged and passed by the defendant with intent to defraud one J. W. Jackson; the evidence disclosing that the writing was assigned to Jackson for a valuable consideration, and that subsequently the warrant was delivered to him by the auditor, and the money paid thereon by the treas-

urer. Section 470 of the Penal Code provides that "every person who, with intent to defraud another, falsely makes, alters, forges or counterfeits any charter, [then follows a list by name of almost every conceivable kind and character of writing,] is guilty of forgery." Upon a strict construction, it might in good reason be held that the foregoing definition of forgery curtails the elements necessary to be present in order to constitute the offense, as contradistinguished from forgery recognized by various writers upon criminal law. Under our statute we hold burglary to be an entry into a building with intent to commit larceny; and, upon the same lines, it might be held that forging a writing with intent to defraud another is forgery; and, indeed, it is apparent that the character of the writing is quite insignificant, when placed in the balances opposite the other element,—the intent to defraud. But we will take broader ground, and concede the essential ingredients of the crime of forgery to be (1) a false making of some instrument; (2) a fraudulent intent; (3) if genuine, the writing might injure another. The third element stated is expressly recognized by this court to be the true test as to the nature of the writing. *People v. Frank*, 28 Cal. 514; *People v. Tomlinson*, 35 Cal. 506; *Ex parte Finley*, 66 Cal. 263, 5 Pac. 222. There is some general language in the *Tomlinson* Case, taken very probably from *People v. Shall*, 9 Cow. 784, to the effect that the writing, if genuine, must be sufficient to form the basis of a legal liability; but such is not the true test, in our opinion. The requirements of the statute demand no such construction, and its adoption would result in the escape from justice of many criminals.

Appellant's counsel has cited many cases to the effect that a contract against public policy is illegal and void, and has no standing in courts. He has also cited cases to the effect that a void contract cannot be the subject of forgery. But he has cited no case to the effect that a contract against public policy is not the subject of forgery, and, after diligent examination of authorities, we have failed to find a case to that point, and this court is not willing to be the first judicial body to declare such a doctrine. It would serve no useful purpose to review in detail the cases cited by counsel holding that void contracts are not the subject of forgery. Many of them are cases of *nudum pactum*, and others follow the very extreme doctrine laid down in *People v. Shall*, *supra*, where the learned judge said: "I agree that a man ignorant of the technical requirements of a special agreement might be imposed upon by the paper in question. This remark probably embraces a majority of the community in which we live, and most likely the very parties named in the false instrument. In this view, no doubt, the deed of which the defendant stands convicted involves all the moral guilt of forgery. He believed that he

had succeeded in fabricating what purported to be a valid promissory. But legal forgery cannot be made out without imputing a possible, or even actual, ignorance of the law to the person intended to be defrauded. However dark may be the moral hue of a transaction, courts of justice can only act upon legal crime,—upon criminal breaches of professional obligation." It is sufficient to say that this language carries the principle to limits which we cannot follow. The more liberal doctrine, and the doctrine which, in the interests of good government, should be sustained, is declared in *People v. Krummer*, 4 Parker, 219, where the court says: "We are never called upon to determine whether, in legal construction, the false instrument or writing is an instrument of a particular name or character. It is a matter of perfect indifference whether it possesses or not the legal requisites of a bill of exchange, or an order for the payment of money or the delivery of property. The question is whether, upon its face, it will have the effect to defraud those who may act upon it as genuine, or the person in whose name it is forged. It is not essential that the person in whose name it purports to be made should have the legal capacity to make it, nor that the person to whom it is directed should be bound to act upon it, if genuine, or have a remedy over." There is no question but that a writing which is a nudum pactum is not the subject of forgery; but a contract which a court will not enforce, or even recognize, because it is against the policy of the law, cannot be termed a "nudum pactum." A forged contract, even though it covers a subject-matter which makes it void as against public policy, upon its face may present such an appearance that, if genuine, it might injure another, and thus it satisfies the test which we have laid down. The contract may be such that there would not only be a possibility of its injuring another, but a very strong probability of such injury; for there are many contracts against public policy which, upon their face, present a most innocent and most inviting appearance. Even though a contract presented to a court of justice would be declared void as against public policy, yet aside from that fact it may have a pecuniary value to its owner. It could have such a value as that the theft of it would be the subject of larceny; and it would be anomalous to hold an instrument the subject of larceny, and yet its counterfeit not of sufficient value to form the basis of a charge of forgery. If the stealing of the genuine instrument would be larceny, surely the false making of such an instrument would be forgery. To declare the law to be that all contracts which are not enforceable, because against the policy of the law, are not the subject of forgery, would be offering a carte blanche to the professional forger, of which he would not be slow to take advantage; and here-

after he would confine himself to the manufacture of spurious paper in the nature of contracts against public policy, for he would thereby be enabled to make a very respectable living,—respectable as to the size of his income, and respectable in that such acts would be no crime.

Contracts against public policy cover a multitude of subjects, and in many cases the determination of their character in this regard calls for the exercise of the nicest discrimination from the most learned judges. From the face of the contract itself, courts will disagree as to its validity or invalidity. All things which are opposed to moral precepts may be said to be against public policy, and thus we have a great and uncertain field opened up before us. Contracts pertaining to restraint of trade and competition in business have been entered into by parties in the utmost good faith, believing that they were making valid contracts, and upon considerations of the gravest character; and still those contracts subsequently have been declared to be invalid as against public policy. It cannot be contended for a moment that such contracts could not be forged. Suppose a contract contained a covenant upon the part of a competing dealer that he would not again engage in business within the state of California. Thus we have a covenant clearly void under our Code, as being in restraint of trade; yet we think such a contract is the subject of forgery. Certainly, that character of instrument might be well calculated to defraud the tradesman still remaining in business. He might be willing to pay large sums of money for that agreement, well knowing at the time that he could not enforce it in law, but knowing his man, and believing the covenants would be considered binding by the party making them, and that no attempt would ever be made to evade them. Such an agreement is of full value until denied. It answers every purpose of its creation until that time, and perchance it may never be denied. The foregoing principle is fully illustrated in *Com. v. Pease*, 16 Mass. 91. The defendant was charged with theftbote, defined by Blackstone as where a party robbed not only knows the felon, but also takes his goods again, or "other amends," upon agreement not to prosecute. The offense is here recognized as compounding a felony. The question in that case was, would a promissory note of the defendant satisfy the term "other amends?" Parker, C. J., said: "It is argued that it will not, because such a note will be void in law, and in fact nothing may ever be received; but there seems to be no reason for this nice and critical construction of the words. The note, although voidable, is in fact of value to the holder until it is avoided. It may never be disputed."

Obligations ultra vires stand upon the same level with contracts against public policy as

to the offense of forgery. If one is not the subject of forgery, neither is the other. In England, corporations are created by special acts of parliament. Within those acts are found the measures of their powers. In this country, the general statutes, in connection with the articles of incorporation, which are public records, form the limitation of their powers. Thus the world deals with corporations with a knowledge of the extent of their powers, and ignorance of the law forms no defense to the plea of *ultra vires*. If this appellant's position be sound, all contracts of corporations which are *ultra vires* are not the subject of forgery. Neither would bonds of municipal corporations which are *ultra vires* form the foundation for a prosecution for forgery. The determination of the powers of corporations, both private and municipal, is a question often involving the most complex principles of legal jurisprudence, and, if *ultra vires* contracts may not be forged, a rich field for the successful practice of fraud is presented to the forger. In *State v. Eades*, 68 Mo. 160, it is said that the fraudulent making of a false municipal certificate of indebtedness is forgery, though the municipality had no power to issue such certificate; and this principle is in line with sound reason, and fully commends itself to our views. It is held that contracts made under an unconstitutional law are void. Every man is presumed to know the law, and appellant's contention would free the criminal forging such a contract. *Vilhac v. Railroad Co.*, 53 Cal. 208. In other words, it would be a good defense to a prosecution for forgery that the law under which a genuine contract similar to the forged one might be made is unconstitutional. Such a plea is too remote from the crime of which the accused stands charged, and his liberty must be regained upon more substantial grounds. As to what contracts are against public policy, or *ultra vires*, or void as creations under unconstitutional statutes, we think matters entirely foreign to a prosecution for forgery. In the examination of such grave and abstruse questions, the criminal element of the case would soon be lost to view. For the purposes of the case, we conceded at the outset that this instrument would be declared void by a court as against public policy; but, if that question were a live issue in the case, this contract might be declared valid upon the ground that a teacher in the public schools is not a public officer. Certainly, the law as to that point is not so plain but that an ordinary layman, in the exercise of the greatest care, might not be defrauded in taking an assignment of a public school teacher's unearned salary.

There is a further view to be taken of this question, which is also fatal to appellant's claims, and which was incidentally touched upon in noticing the *Pease Case*. Aside from the nonenforceable character of this contract in a court of justice, it has an in-

herent, substantial value. It is said in *Morton's Case*, 2 East, P. C. 955, "That, though a compulsory payment by course of law could not have been enforced for want of the proper stamp, yet a man might equally be defrauded by a voluntary payment being lost to him." It cannot be said that a contract has no value because you have no standing in court to enforce it. Who can say in advance that the money will not be voluntarily paid, as agreed upon by its terms? Who can say that Helen Henry would not have lived up to the very letter of this instrument, if it had been her genuine contract? If her word is as good as it should be; if her conduct of the affairs of life is actuated by those principles of truth and justice which surely should be found in the breast of every teacher in our public schools,—then her act and deed, as evidenced by a writing such as is present in this case, would be a valuable instrument to the holder thereof; just as valuable as though it were enforceable in the courts of the land. If a genuine instrument signed by Helen Henry similar to the forged one found in this case possessed such value, the conclusion is irresistible that the forged paper was such as might defraud another. Again, if the paper had been the genuine act of Helen Henry, and upon the strength of her signature the proper officer had paid the amount it called for to Jackson, the legal holder thereof, however invalid the writing may have been as against public policy, the money would have been beyond the reach of Helen Henry forever. She could not have recovered it from the officer paying it out, or from Jackson who received it. Her mouth would be closed to assert ownership in herself. The writing would serve as a perpetual barrier to the recognition by courts of any claim upon her part; and, for this reason also, the instrument was of such value as to make it the foundation of a charge of forgery. It is ordered that the judgment and order be affirmed.

We concur: MCFARLAND, J; PATERSON, J.; HARRISON, J.

De HAVEN, J. I concur in the judgment. The writing alleged to have been forged is one which, if genuine, would be void, because against public policy; but nevertheless such a writing is, in my opinion, the subject of forgery.

DOLBEER v. LIVINGSTON et al. (No. 19,246.)

(Supreme Court of California. Dec. 30, 1893.)

ESTOPPEL—SIGNING BLANK BOND.

G. signed and delivered a bond to L., knowing that L. expected to obtain the charter of a steamer, and give the same as security therefor. At the time he signed, the date and name of the steamer and name of the payee were left blank, and the blanks were afterwards filled in by L., and the bond delivered.

to plaintiff, who received it in good faith. *Held*, that G. was estopped from denying the validity of the bond.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by John Dolbeer against J. B. Livingston and W. M. Ginty. From a judgment for plaintiff, defendant Ginty appeals. Affirmed.

C. H. Rippey, for appellant. McNealy, Trippet & Neale, Oscar Trippet, and Trippet, Boone & Neale, for respondent.

BELCHER, C. On July 3, 1890, the plaintiff entered into a written agreement with the defendants, J. B. Livingston and W. H. Clarke, under the firm name of Livingston, Clarke & Co., whereby he leased to them the steamer Farallon for a certain time, commencing July 8, 1890, and upon certain terms and conditions, and, to secure performance of the terms of the agreement on their part, the said defendants delivered to the plaintiff a bond signed by themselves as principals, and by W. M. Ginty and W. H. Clarke as sureties. The plaintiff commenced this action on the said bond, alleging that Livingston, Clarke & Co. had failed to pay the full amount of money due under the charter party for the use of the steamer, and demanding judgment against all of the defendants for the amount so due and unpaid, with interest thereon. The defendant Ginty answered the complaint, and denied that he, as a surety or otherwise, executed to the plaintiff, or at all, the bond sued upon. Upon the issue thus raised the case was tried by the court, without a jury, and judgment given for the plaintiff, as prayed for. From this judgment, Ginty appeals on the judgment roll, and the only point made for a reversal is that the judgment against him is not supported or warranted by the findings.

The court found, among other things, as follows: "That the defendant W. M. Ginty signed and executed the bond set out in said complaint, and marked 'Exhibit B,' and delivered the same to the defendant Clarke, to be delivered as security for any charter party which he or the said Livingston, Clarke & Co. might desire to make; it being then expected that the said Livingston, Clarke & Co. would procure a charter party for one or two steamers,—the Farallon being preferred,—it being known to said parties that the plaintiff was the managing owner thereof. That at the time said bond was signed by the said Ginty the names 'John Dolbeer' and 'Farallon' and the date, 'July 8, 1890,' were not inserted therein, but places therefor were left in blank, and the same was delivered to said Clarke with said blanks; and said blanks were filled in, respectively, with the names 'John Dolbeer,' 'Farallon,' and 'July 8, 1890,' by the said Clarke, before said bond was delivered to the said John Dolbeer. That upon execution of the charter party said

bond was delivered to said plaintiff by said Clarke, with said blanks filled in, and said bond appeared to be all right, and all appeared executed in regular form, and, there being nothing upon the face of said bond to excite the suspicion of said plaintiff or any reasonable person, said bond was accepted by the said plaintiff, in good faith, as security for the performance of said charter party as in said bond provided; and thereupon, upon the faith of said bond and said charter party, said steamer Farallon was delivered to the said Livingston, Clarke & Co., as hereinbefore found. That said defendant W. M. Ginty never gave the said Clarke, or any other person, any written authority to fill in said blanks, other than might be implied from his signing said bond, which was regular in all other respects, except said blanks; it being expected and understood by him at the time that the said Livingston, Clarke & Co. would procure a charter party, and that the bond signed by him should be given as security for the same, and it being particularly expected and understood that the steamer Farallon would be chartered of the plaintiff; and with such understanding and expectation the said bond was signed by the said Ginty, and delivered to the said Clarke." Appellant contends that, when the paper in question was signed and delivered by him to Clarke, it was not a bond or instrument imposing any obligation upon him, because of the blanks left in it, and could never become such unless express authority was given to fill the blanks, and that, as no such authority is found to have been given, his plea of non est factum should have been sustained; and in support of this contention he cites, and chiefly relies upon, the cases of *Upton v. Archer*, 41 Cal. 85, and *Arguello v. Bours*, 67 Cal. 447, 8 Pac. 49. Respondent, on the other hand, contends that, under the facts found, appellant is estopped to deny that the bond, as delivered to Livingston, Clarke & Co., was a valid instrument, duly executed, and binding upon him, as a surety thereon.

In our opinion, all the elements necessary to create an estoppel are shown here, and respondent's contention should therefore be sustained. It is clear that, when appellant signed the bond, he knew Livingston, Clarke & Co. were seeking to obtain a charter party of a steamer and expected to charter the Farallon from respondent, and give the bond as security therefor; and it was with the expectation and understanding that all this would be done and accomplished that he signed and delivered the bond to Clarke, who was a member of the firm. Now, if he did not intend that Clarke should fill in the blanks, and deliver the bond to respondent, when the trade was completed, then he was guilty of negligence and bad conduct, in putting it in the power of Clarke to mislead and deceive respondent. That respondent received the bond in good faith, having

no means of knowing, or reason to suspect, that it was not properly executed, is clear; and, if appellant can now escape liability thereon, it must be in disregard of the maxim of law that, "When one of two innocent persons must suffer by the acts of a third, he by whose negligence it happened must be the sufferer." Civil Code, § 3543. The general rule is that "where a person, by word or conduct, induces another to act on a belief in the existence of a certain state of facts, he will be estopped, as against him, to allege a different state of facts." 7 Amer. & Eng. Enc. Law, p. 19. "Estoppel in pais may be defined to be a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." Bigelow, Estop. (4th Ed.) 445. "Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position so that he will be peculiarly prejudiced by such adversary claim." Scott v. Jackson, 89 Cal. 258, 26 Pac. 898. Under these authorities—and many more might be cited to the same effect—the appellant must be held estopped from questioning the due execution by him of the bond in suit.

The cases cited by appellant are not in point. In *Upton v. Archer* the plaintiff executed a deed of certain real property, leaving a blank for the insertion of the names of the grantees. An agent, with whom the deed was left, sold the property to the defendant, inserted his name in the blank, and delivered it to defendant as the plaintiff's deed. Plaintiff refused to recognize the sale, or receive the purchase money; and it was held that, under the statute of frauds, the agent had no power to fill the blank without authority in writing to do so. This was upon the ground that the deed was a sealed instrument, but all distinctions between sealed and unsealed instruments are now abolished in this state. Civil Code, § 1629. In *Arguello v. Bours* the plaintiff executed a deed with a blank for the name of the grantee. The deed came into the hands of Bours, and by his direction, in the absence of Arguello, and without any authority from him, one Ingalls wrote Bours' name in the blank, and thereupon Bours took the deed, and filed it for record. In neither of these cases was there any claim that the plaintiff was estopped, and in the last-named case, certainly, no such claim could have been set up. We advise that the judgment be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment appealed from be affirmed.

PEOPLE v. SANDS. (No. 15,369).¹

(Supreme Court of California. Jan. 3, 1894.)

JUSTICES OF THE PEACE—FILLING VACANCIES.

1. City justices of the peace are not township or county officers, and the board of supervisors has no authority to fill vacancies therein.

2. Although inferior courts in incorporated cities can only be established by the constitution, (article 6, § 1,) and their jurisdiction, powers, and duties must be fixed by the legislature, (Const. art. 6, § 13,) still a valid provision for filling vacancies may be made by charter.

3. Under a charter providing that the mayor shall appoint suitable persons to fill vacancies in office, he is empowered to fill vacancies in the offices of city justices of the peace.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action in the nature of quo warranto by the people, on the relation of Fred V. Wood, against John A. Sands. From a judgment for plaintiff, defendant appeals. Reversed.

Davis & Hill, for appellant. W. H. H. Hart, Atty. Gen., Jas. O. Martin, and A. A. Moore, for the People.

HAYNES, C. This is an action in the nature of quo warranto, brought by the people on relation of Fred V. Wood against John A. Sands to try the title of the relator and the defendant, respectively, to the office of city justice of the peace of the city of Oakland. The office became vacant by the resignation of the prior incumbent, and the mayor of the city, acting under the "freeholders' charter," appointed the defendant to fill the vacancy. Sands thereupon qualified, and entered upon the duties of said office. The board of supervisors of Alameda county, assuming that the power of appointment to said office was vested in them, appointed the relator to fill the same vacancy, and he also qualified, and demanded possession of the office. The cause was submitted in the court below upon an agreed statement of facts, which was adopted as a finding, in which it is conceded that each of these persons possesses all the qualifications required by law, and that the sole question is as to where the power of appointment to fill said vacancy is vested. The superior court held that said power was vested in the board of supervisors, and gave judgment in favor of the relator, Wood, and defendant, Sands, appeals therefrom.

Appellant contends that a city justice of the peace is a city officer, and that under the charter of the city the mayor is empowered to fill all vacancies in city offices. If a city justice of the peace is a city officer, the provision of the charter is sufficient in its terms to authorize an appointment by the mayor to fill the vacancy. Its language is as follows: "The mayor shall have the power to appoint suitable persons

¹ Rehearing granted.

to fill vacancies in any office, except as in this charter provided." St. 1889, p. 570, § 202. The exception does not affect this case. The contention of respondent, briefly stated, is that city justices are not city officers, but are officers designated by the constitution, and exercising a part of the judicial power therein provided for; that, even if the power of appointment to a vacancy is not enumerated in the general permanent powers of the board of supervisors, a general provision gives them such other power, and charges them with such other duties, as are or may be imposed upon them by law; and among these is the power and duty imposed by section 111 of the Code of Civil Procedure, which reads as follows: "If a vacancy occurs in the office of a justice of the peace, the board of supervisors of the county shall appoint an eligible person to hold the office for the remainder of the unexpired term." These provisions, however, cannot be held to give the board of supervisors the power to fill the vacancy in question, if the office of city justice is a city office. Section 103 of the Code of Civil Procedure, as amended by the act of March 31, 1891, (St. 1891, p. 456,) provides that there shall be at least one justice of the peace in each township, elected by the qualified electors of the township, and gives the board of supervisors authority, when, in their opinion, the public convenience requires it, to establish two justices' courts in townships; and further provides: "In every city having fifteen thousand and not more than thirty-four thousand inhabitants there shall be one justice of the peace, and in every city having thirty-four thousand and not more than one hundred thousand inhabitants, two justices of the peace, to be elected in like manner by the electors of such cities respectively, and such justices of the peace of cities, and justices' courts of cities, shall have the same jurisdiction, civil and criminal, as justices of the peace of townships and township justices' courts. No person shall be eligible to the office of justice of the peace in any city having over fifteen thousand inhabitants who has not been admitted to practice law in a court of record; * * *. Every justice of the peace in any city having over fifteen thousand inhabitants shall receive an annual salary of two thousand dollars per annum, and shall be provided by the city authorities with a suitable office in which to hold court. All fees which are by law chargeable for services rendered by such justices of the peace in the cities aforesaid, shall be by them, respectively, collected, and on the first Monday in each month every such city justice of the peace shall make report, under oath of the city treasurer, of the amount of fees so by him collected, and pay the amount so reported into the city treasury, to the credit of the general fund thereof." Here it will be seen that not only are dif-

ferent designations given to justices in cities and townships, but that different qualifications are required; that, as to township justices, the board of supervisors have the power to increase the number from one to two, but are charged with no duty, discretion, or power in regard to city justices; that the number and the salary of city justices are definitely fixed by the legislature; that the city must provide suitable places for holding their courts; that the city justices must report to the treasurer of the city, and pay over all fees collected; and by another statute the salary of the justice must be paid by the city. The same distinctive appellation is given in numerous other statutes; as in the municipal government act, sections 390, 397, 402, (Pol. Code, pp. 794, 795;) and also by the act of March 18, 1885, (St. 1885, p. 213.)

In the county government act, approved on the same day as the above amendment of section 103, Code Civil Proc., it is declared that "the officers of a township are two justices of the peace, two constables, and such inferior and subordinate officers as may be provided by law or by the board of supervisors; provided that in townships containing cities in which city justices are elected, there shall be but one justice of the peace." St. 1891, p. 314, § 58. It is obvious that the local character of justices of the peace is not denied by any provision of the constitution, while all the statutes relating to their election and jurisdiction characterize them as local officers; and if justices of the peace elected by electors of a township, and exercising their jurisdiction therein, make them township officers, as declared by the foregoing statute, it is difficult to perceive why a justice elected by the electors of a city, and exercising his jurisdiction therein, is not a city officer. The constitution and statutes clearly distinguish between county organizations and governments and city organizations and governments. Each have distinct legislative bodies and executive officers. Nowhere is any duty or authority vested in the board of supervisors over municipal matters or officers, except in the case of consolidated city and county governments.

By still another act, approved March 31, 1891, (St. 1891, p. 292,) are city justices recognized as city officers. It is there provided that "the judicial power of every city having thirty thousand and under one hundred thousand inhabitants shall be vested in a police court, to be held therein by the city justices, or one of them, to be designated by the mayor, * * * and it is hereby made the duty of said city justices, in addition to the duties now required of them by law, to hold said police courts." The police court is given by said act exclusive jurisdiction of certain violations of the criminal laws of the state committed within the city, and is also given other powers concerning the violation of the criminal laws of the state, while sitting as a

police court; and in a certain class of cities, of which Oakland is one, a clerk is given said court, whose salary is paid by the city, and of whom a bond, to be approved by the mayor, is required; and the city justices, as well as the clerk, are required to report and account to the city; and by section 305 of the municipal corporations act (Deer. Pol. Code, p. 786) vacancies in city offices are filled by the council upon nomination made by the mayor.

The charter of the city of Oakland provides for a police court, to be held by a police judge to be elected by the city, and also provides for the election of two city justices of the peace, but provides that the justices' courts therein provided for are intended to be the justices' courts provided for by general law, and that there shall be only two justices of the peace in said city. In *Ex parte Ah You*, 82 Cal. 339, 22 Pac. 929, it was held that the police court provided for by the freeholders' charter of the city of Oakland has no legal existence; and in *People v. Toal*, 85 Cal. 333, 24 Pac. 603, the same conclusion was reached touching a similar provision in the charter of the city of Los Angeles. In each of these cases there was a dissenting opinion, but they have not been overruled, and are therefore authoritative. It follows, therefore, that the act of March 31, 1891, (St. 1891, p. 292,) is in force in the city of Oakland. But it does not follow that, because inferior courts in incorporated cities and towns can only be established by the legislature, under section 1 of article 6 of the constitution, and that their jurisdiction, powers, duties, and responsibilities must also be fixed by the legislature under section 13 of the same article, a valid provision for filling vacancies in city offices may not be made in the charter. Such provision in no way trenches upon the constitutional provisions above cited relating to establishing inferior courts and fixing their jurisdiction; nor can it affect the question that city justices are provided for in the general municipal government act and in the Code of Civil Procedure. They are local officers, elected by the electors of the city, with qualifications different from that of township justices, and adapted to the wants of the city and the requirements of its business, with a special jurisdiction added that is purely municipal. If the naming of officers and prescribing their duties by the legislature can make them other than municipal officers, then the mayor and other officers, who are named in the municipal government act, and whose powers and duties are therein prescribed, are not municipal officers. But it is clear that city justices are not township or county officers, and, if so, it is equally clear that the board of supervisors has no authority to fill the vacancy in question. I advise that the judgment appealed from be reversed, with directions to the court below to enter judgment upon the findings in favor

of appellant, and that he be restored to his said office.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, and the court below is directed to enter judgment upon the findings in favor of appellant, and that he be restored to his said office.

KENNA v. CENTRAL PAC. R. CO. (No. 14,246.)

(Supreme Court of California. Jan. 3, 1894.)

INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company for causing the death of plaintiff's intestate, the court properly granted a nonsuit for the contributory negligence of deceased, where plaintiff's evidence shows that deceased was at work on a tower which stood between two tracks; that his work bench was between the tracks, 75 feet from the tower; that trains ran on such tracks every 15 minutes; that he knew of the danger; that in going from the tower to his bench he walked on the track; that, after he could have seen an approaching train which had passed the tower, he walked 15 feet without turning around to look, and was struck and killed; and that he could have seen his danger, and could have avoided it by a single step into the open space between the tracks.

In bank. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Kenna, as administrator of Patrick Fallon, deceased, against the Central Pacific Railroad Company, for negligently causing the death of plaintiff's intestate. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Frank Sullivan, for appellant. Frank Shay, for respondent.

HARRISON, J. Action to recover damages for causing the death of Patrick Fallon, the plaintiff's intestate. At the close of the plaintiff's testimony the court granted a nonsuit. The plaintiff moved for a new trial, and from the order denying the same, as well as the judgment, he has appealed.

In January, 1885, the defendant was engaged in erecting a tower on the Oakland mole, and constructing a signal system to be connected therewith. The plaintiff's intestate was employed by the defendant as a plumber, for fitting and connecting pipes to be laid in the tower and alongside its tracks. This tower was about 400 feet from the end of the mole, and a few feet to the south of the Alameda track. There were two tracks for the Alameda trains, and to the north of them were the tracks of the Oakland trains. Between these tracks, and about 100 feet to the east of the tower, there was an open space, in which was placed the plumber's bench. On the 10th

of January, Fallon started to go from the tower to this bench for the purpose of cutting a piece of pipe, and while walking upon the end of the ties on the outer or southernmost track, at a point about 75 feet east of the tower, was struck in the back by the locomotive of the Alameda train, and instantly killed. Directly to the south from this place, and 10 feet away, was a pile of ties against which he was thrown, and between this pile and the ends of the ties on which he was walking was an open space or depression in the ground, slightly uneven, and a little lower than the level of the track. The track at this place is laid upon a curve, and the tower aforesaid prevented a clear view of it to the end of the mole, but, from the point at which the deceased was walking at the time he was struck, it could be seen for a distance of about 150 feet. Four trains of cars passed over this track every hour, that is, one Alameda train in each direction at intervals of a half hour, and, in addition to these, the daily San Jose and Livermore trains. It appears from the evidence that the bell upon the locomotive which struck the deceased was not rung, nor was its whistle sounded. There is some uncertainty as to the speed at which it was moving; for, although plaintiff's witness testified that it was going at the rate of 20 miles an hour, the weight and accuracy of his testimony is somewhat impaired by his further testimony that when the train was opposite the tower the deceased was 60 feet away, and that he had walked 15 feet before he was struck by the locomotive. It may be assumed, however, that the defendant was guilty of negligence to such a degree that, in the absence of any other evidence, it would be liable in damages, but the contributory negligence of the deceased was, nevertheless, such as to prevent a recovery against the defendant. It appears from the evidence that Fallon was a prudent, cautious man, 22 years old; that he knew the danger of the place in which he was working; had talked with his uncle about it; had had the experience of several days in which to learn the frequency with which the trains passed over the track, and to become acquainted with the danger; and that owing to the curve in the track, and the obstruction caused by the tower, he could not see an approaching train until it came within a few rods of him. It was therefore incumbent on him to exercise a corresponding care and vigilance to avoid danger, rather than negligently and recklessly expose himself to injury. "His employment and the theater of his services may not be disregarded. They made him conversant with the locality, the character and frequency of trains, the necessity for incessant vigilance to avoid injury, and the fact that no one could venture upon the tracks, and escape injury, without the greatest circumspection." *Bresnahan v. Railroad Co.*, 49 Mich. 413 13 N. W. 797. The law demands

that one who is working in a place where he is exposed to danger shall himself exercise his faculties for his own protection, and does not permit a recovery for damages resulting from a neglect of this rule. Walking upon the line of a railroad where trains are at any time liable to pass is itself dangerous, and to do so without looking to see whether a train is approaching, is negligence per se. It is a fixed rule that it is the duty of any one, when attempting to cross a railroad track upon a highway, to be vigilant,—to look and to listen before attempting to cross; and a failure to do so is regarded as such negligence on his part as to preclude a recovery. *Glascow v. Railroad Co.*, 73 Cal. 137, 14 Pac. 518. With greater reason does the principle of this rule apply to one who is traveling laterally along the route of a railroad, and knows that engines will soon follow him. "It is negligence for a person to walk upon the track of a railroad, whether laid in the street or upon the open field; and he who deliberately does so will be presumed to assume the risk of the perils he may encounter. The crossing of the track of a railroad is a different thing. The one is unavoidable, but in the other case he voluntarily assumes to walk amid dangers constantly imminent." *Railroad Co. v. Hall*, 72 Ill. 222. See, also, *Anstin v. Railroad Co.*, 91 Ill. 35; *Roden v. Railroad Co.*, 133 Ill. 72, 24 N. E. 425; *McAllister v. Railroad Co.*, 64 Iowa, 395, 20 N. W. 488; *Delaney v. Railway Co.*, 33 Wis. 76; *Railroad Co. v. Depew*, 40 Ohio St. 121; *O'Donnell v. Railroad Co.*, 7 Mo. App. 190; *Schmolze v. Railway Co.*, 83 Wis. 659, 53 N. W. 743, and 54 N. W. 106; *Baltimore & O. R. Co. v. State*, 69 Md. 551, 16 Atl. 212; *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835; *Holmes v. Railroad Co.*, 97 Cal. 161, 31 Pac. 834. The deceased, in the present instance, selected the track as his route for his own convenience, and not through any necessity. There was ample space for him to walk in safety and convenience between the track and the pile of ties. The only reason assigned for his not doing so is that it was not quite as convenient as the track, because it was uneven. It also appears that there was a sufficient space between the Alameda tracks and the Oakland tracks in which to place the plumber's bench, and no reason was shown why he did not cross the tracks at the tower, and go upon the north side of the Alameda tracks. "He voluntarily and needlessly put himself in a highly dangerous place; a place, however, where he might go without incurring any liability as a wrongdoer, but where his own safety required his attention to his surroundings without one moment's interruption. If he risked himself in such a place, he must take whatever injury came from his own want of attention to his danger." *Railroad Co. v. Depew*, 40 Ohio St. 127. If there were any circumstances which would

excuse the apparent negligence of the deceased in walking upon the track without taking any precaution to avoid danger, it was incumbent upon the plaintiff to establish them at the trial. When the facts are undisputed, and the plaintiff's negligence clearly appears therefrom, or when the uncontradicted evidence on the part of the plaintiff is such that the only reasonable construction that can be drawn therefrom is that the injured person did not exercise such care as men of ordinary prudence usually exercise in positions of like exposure and danger, the issue of negligence is a question of law to be determined by the court. There is no issue of fact to be submitted to the jury, but it is the duty of the court to grant a nonsuit. *Flemming v. Railroad Co.*, 49 Cal. 253; *Glascock v. Railroad Co.*, supra. In the present case the facts connected with the killing of Fallon were presented by a single witness on behalf of the plaintiff, and his testimony was clear and unequivocal that, when the train passed by the tower, Fallon could have seen it if he had turned around; that he had time to turn around and look before the engine struck him; that he walked 15 feet after the engine came within the range of view; that he did not turn around and look—did not look at all—to see if the train was coming; that there was a space of 10 feet between the track on which he was walking and the pile of ties, where he could have stepped, and over which he could have walked, instead of walking upon the track; that he could have got out of the way of the engine by stepping a single step into this space. These facts appearing in the plaintiff's testimony, and nothing to impair their effect, the court properly granted the nonsuit. The judgment and order are affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; GAROUTTE, J.; DE HAVEN, J.; FITZGERALD, J.

NATOMA WATER & MIN. CO. v. HANCOCK et al. (No. 14,847.)

(Supreme Court of California. Jan. 5, 1894.)

WATERS AND WATER COURSES—RIGHTS IN STREAMS ON PUBLIC LANDS—DIVERSION OF SURPLUS.

The appropriator of water, who constructs a dam across the bed of a stream in public lands for the purpose of raising the surface of the water to a level which will cause it to flow into his canal, does not thereby acquire such exclusive right in the bed and banks of the stream as entitles him to restrain a subsequent appropriator of the surplus water from tapping the stream for its diversion at a point above the dam and below the head of slack water. *McFarland and De Haven, JJ.*, dissenting. 31 Pac. 112, reversed.

In bank. Appeal from superior court, Sacramento county; John W. Armstrong, Judge.

Action by the Natoma Water & Mining Company against John Hancock and Joseph

Wild for an injunction. There was judgment for plaintiff, and defendants appeal reversed.

For opinion in department, see 31 112.

Barclay, Wilson & Carpenter, J. G. Barclay, and S. Solon Holl, for appellants; Daniel Titus, for respondent.

BEATTY, C. J. This is an action to join the appellants from diverting water from the south fork of the American river at a point immediately above the dam of the respondent, and the principal question involved in the case may be stated as follows: If a prior appropriator of water constructs a dam across the bed of a stream for the purpose of raising its surface to a level which will cause it to flow into the head of his ditch, does he thereby acquire such exclusive right in the bed and banks of the stream as far as the slack water extends above his dam that he can enjoin a subsequent appropriator of the surplus from tapping the stream, and diverting such surplus at any point above the dam and below the head of the slack water? The decree of the superior court, from which the defendant appeals, cannot be sustained without affirming this proposition, as will clearly appear from a statement of the case.

The south fork of the American river is a considerable stream heading in the Sierras, and like other mountain streams varies greatly in volume from year to year and from season to season. It reaches its lowest stage in each year towards the end of the dry season, and when the rains begin (usually in the fall) its flow increases in proportion to the amount of precipitation. Ordinarily, it reaches its highest stages during the winter and early spring, at which period it is subject to heavy floods. After the rains cease in the spring its volume subsides, but its flow is maintained by melting snows at a comparatively high stage until the latter part of the summer. These are features common to all the streams flowing from the Sierras to the Sacramento valley, and are matters of universal notoriety. Such being the case, it is evident that an appropriation covering the entire flow of the stream at its lowest stages may leave a large surplus of water at flood, or even ordinary stages. The plaintiff in this case in the year 1851 gave notice of his intention to dig a canal and appropriate, for the purpose of mining and irrigation, enough of the water of the south fork to fill at all times a canal 8 feet wide and 4 feet deep, with a current running 10 miles per hour. In pursuance of this notice it proceeded to construct a canal 10 or 15 miles in length, but not of the capacity mentioned in its notice. At the present capacity, as found by the court, it is 6 feet wide at the bottom, 8 feet wide at the top, 3 feet deep, and with a grade or

of 4 feet to the mile. In seasons when the water has been unusually low in the dry summer months, the capacity of the canal was sufficient to take all the water of the river, but ordinarily, at the lowest stages of the stream, considerable quantities of water are discharged over the dam after the canal is filled. The system of head works by which the plaintiff diverts water from the river is of the ordinary type. The upper section of the canal, for a distance of about 300 yards, is of considerably greater capacity than the canal proper, and is furnished with waste gates and sand gates for the discharge of silt and surplus water. At the lower end of this larger section, and at the head of the canal proper, is a gate, by which the influx of the water is controlled. By means of a dam across the stream a short distance below the head of the canal, the water is raised to the proper level to fill it. This dam, which is of stone, is about 300 feet long on its crest. Neither the findings nor the evidence show what its height is; but, according to the only testimony on the point, it sets back the water about three-quarters of a mile,—say 3,000 feet, or 10 times the width of the dam, and 20 times the mean width of what plaintiff calls its pond. The crest of the dam is about 10 inches lower than the level at which the water must be held in order to turn a full supply into the head of the plaintiff's canal, and it appears from the evidence that the dam cannot be made permanently higher without endangering the head of the canal and its banks in times of flood. Ordinarily, the amount of water flowing in the stream is so large that the permanent dam holds it at a sufficient height for plaintiff's purposes; but, as the water falls with the advance of the dry season, and especially during years of extraordinary scarcity, it is necessary to add a false crest of lumber or riprap and gunny sacks, by which the dam is raised so as to prevent any water from passing over it.

Disregarding some minor facts, and some qualifications which it will be more convenient to state in connection with another branch of the case, it may be said that the foregoing statement applies to the whole period of time from the completion of the plaintiff's dam and ditch, in 1852 or 1853, down to the trial of this action. The plaintiff has at all times diverted water to the full capacity of its canal, and applied the whole of it to beneficial uses, for mining and irrigation. It still requires, for irrigation and other useful purposes, all the water so diverted, and, as against a subsequent appropriator, has an undoubted right to continue such diversion unmolested and undisturbed, except in so far as a lawful appropriation and diversion of the surplus at a point above its works may involve the necessity of altering and perfecting the appliances which have thus far proved sufficient to fill its ditch. The question is whether it is any infringement of this right of plaintiff for

the defendants, in order to appropriate the surplus and divert it to an irrigating ditch on the opposite side of the river, to tap the stream above the dam and below the head of the slack water. There can be no question, as between the parties to this action, that the defendants have a perfect right to appropriate such surplus by any lawful means of diversion; and the only question is whether the plaintiff can shut them out from access to the stream at all points between the upper and lower ends of what counsel call its pond. The plaintiff's canal is on the south side of the river. The defendants, or some of them at least, are successors in interest to the owners of a mining and irrigating ditch on the north side, which was originally constructed and used as early as 1854, and was known as the "Boyd's Bar Ditch." In March, 1854, the plaintiff entered into a written agreement with the proprietors of the Boyd's Bar ditch, by which it granted to them the right to "put in, insert, and maintain in the dam of said Natoma Water and Mining Company" a box of sufficient size to supply their ditch, reserving the right, in case of a deficiency of water to fill its own canal, to close the gate of the Boyd's Bar ditch, and keep it closed while such deficiency continued. In pursuance of this agreement the predecessors of defendants put in a box two feet square on the north side of the river, and a few feet above plaintiff's dam, through which they have ever since drawn water to supply their ditch. In 1887 the defendants posted a notice of their intention to enlarge their ditch to a capacity of 2,000 inches, the diversion to be made at the Natoma dam. In accordance with this notice they had completed the proposed enlargement up to within a short distance of the dam, when this action was commenced for the purpose of enjoining them from "completing the construction of said ditch, and tapping the said south fork of the American river at the plaintiff's dam, and from taking water therefrom, or from any point above said dam," etc. The enlarged ditch of defendants was of sufficient capacity to carry all the water of the south fork at its lowest stages in a dry year, and, its level being some 10 inches lower opposite the dam than that of plaintiff's canal, it would have been in the power of the defendants upon the completion of their ditch to drain the stream, and deprive plaintiff of all or of a great part of the water to which it is entitled. But they have at all times disclaimed any intention of taking any but the surplus water over and above the quantity to which the plaintiff is entitled by its prior appropriation. In their posted notice of intention they say nothing about surplus water, but by their answer to the complaint in this action, by their testimony at the trial, and by their declarations pending and prior to the commencement of the action, they have uniformly insisted that they have no intention to divert any but the surplus water. There is no finding that they have any other

intention, and no evidence upon which such a finding could be sustained. The court, however, does find that, "in order to draw the surplus from plaintiff's dam without taking the water from plaintiff's canal, it would be necessary to raise plaintiff's dam from 22 to 24 inches higher, and also to raise the banks of plaintiff's canal." This finding, and the fact that defendants upon completion of their ditch would have the power to drain plaintiff's canal, are the sole grounds upon which the superior court has enjoined the defendants from completing their ditch, and it only remains to consider whether they are sufficient to uphold the decree.

It is to be observed, in the first place, that the defendants are not in any worse position than they would be if they had not succeeded to the rights of the original owners of the Boyd's Bar ditch under the contract of 1854. Claiming, as they do, the privilege granted by that contract, they must concede, as they do concede, the prior right of the plaintiff to all the water carried by its canal at the date of the contract; but as to the surplus they stand upon the same footing as other citizens, and may, like others, appropriate it by any lawful means. This, indeed, is not disputed, and the contention of counsel here is for the identical proposition enunciated in the findings and conclusions of the superior court,—that no subsequent appropriator can tap the stream above the dam and within the slack water, because, if he did, it would be in his power to drain plaintiff's canal; and, even if he strictly limited his diversion to the actual surplus, it would compel the plaintiff to raise its dam and the banks of its canal. As to this last finding it is not sustained by the evidence, because, although there is some slight testimony to that effect, it is contrary to reason. The findings, no less than the evidence, show that there are times when the river carries barely enough water to fill plaintiff's canal. At such times it is necessary to raise the dam by means of a false crest of riprap and gunny sacks, high enough, and to make it tight enough, to prevent any water from flowing over or leaking through. The diversion of the surplus at any stage of the river would impose upon the plaintiff the necessity of doing nothing beyond what it is accustomed to do when from natural causes the surplus gradually diminishes and falls. It would simply have to raise its dam by a false crest, and make it tight enough to prevent any waste. The diversion of a part of the surplus would require a proportionate addition to the crest of the dam, and the whole effect of any diversion above the dam would be to compel the plaintiff to commence the annual operation of building a false crest a little earlier in the season than it has been accustomed to do, and to make it high enough and tight enough to prevent any waste during some years when without such diversion a less efficient crest would serve to fill its canal. This is as plain and self-

evident as the proposition that two and two make four, and testimony to the contrary is not worthy of consideration.

The question to be decided, therefore, resolves itself to this: Must the defendants be enjoined from tapping the stream merely because they would thereby gain the power to drain plaintiff's canal, though they claim any such intention? Or must they be enjoined from diverting the surplus merely because such diversion would compel plaintiff to perform its annual task of raising its dam earlier in the season every year, and of making it tight and efficient oftener than they have been accustomed to do? To answer either of these questions in the affirmative would be equivalent to holding that there never can be a lawful appropriation of the surplus at any point above the plaintiff's dam, for it is self-evident that a ditch leading in the stream above the slack water of a dam sufficient to fill it would give its proprietors the same, or even more complete power to drain plaintiff's canal than a heading in the slack water; and it is equally evident that a diversion of the surplus, in any portion of it, at any point above the head of plaintiff's ditch, would lower the head of water behind the dam to precisely the extent that it would be lowered by a diversion of the same quantity from the slack water. It is apparent, therefore, that there is nothing in either of the two grounds upon which the injunction was sought and granted, and upon which it is defended here, which would not equally support a similar decree if the defendants, instead of seeking to divert the surplus at the head of their new ditch in plaintiff's called pond, had gone a mile above the head of the slack water for that purpose. But, as above remarked, there can be no question as to the right of any lawful appropriator to divert the surplus either above or below the plaintiff. Suppose the defendants had headed their new and enlarged ditch at any point on the stream entirely above plaintiff's dam, and an injunction had been sought upon either or both of the grounds now being discussed. As to the control of the stream, would thereby acquire over the flow of the stream, and the mere power it would give them to drain plaintiff's canal, the objection would be: "The defendants have no perfect right to appropriate the surplus at any point you have to the quantity first appropriated. They can take it either above you or below you, as their interest or convenience may dictate. They choose to take it below. They cannot divert the surplus without putting it to a dam and ditch, and therefore the right to the surplus involves the right to the dam and ditch. It may be true that their dam and ditch will put it in their power to take the water when the stream is low, and thereby drain your canal; but it does not follow that they will make such unlawful use of their power. They disclaim any intention of doing so. Necessarily, they will be compelled to provide their ditch with a proper

gate, and other suitable appliances for controlling the influx of water, and when the stream falls they can readily limit or shut off the flow into their ditch, so as always to leave you the quantity to which you are entitled. In the mean time they cannot be enjoined from using the means essential to the exercise of their undoubted right merely because they would thereby gain the power to infringe yours. It will be time enough to enjoin them when they threaten or attempt to injure you, and the powers of a court of equity are entirely adequate to the conservation and enforcement of the rights of both parties. If the defendants fail to provide their ditch with proper head works, and you are thereby deprived, or threatened with the deprivation, of any of the water by you first appropriated, an injunction specifically framed to meet the case will compel the defendants to provide suitable works, and to exercise their rights in such manner as to leave yours unimpaired. As to the necessary lowering of your head of water by the diversion of the surplus, that will no doubt cause you some inconvenience and trouble, which you have heretofore escaped; but it is *damnum absque injuria*." There is but a limited supply of water in this state available for irrigation and other useful purposes, and a paramount public policy requires a careful economy of that supply. So long as there is but a single appropriator of water on a stream it matters not how imperfect or wasteful may be the means by which he diverts the quantity of water to which he is entitled. No one else is affected, and there is no ground for complaint. But when subsequent appropriators divert the entire surplus at points above him he is required to use all reasonable diligence to husband what is left, and if, by such diligence, and the use of ordinary means of diversion, he can obtain all that he is entitled to, he cannot complain on account of the trouble and expense which it may involve.

In the case of *Barrows v. Fox*, 98 Cal. 63, 32 Pac. 811, (recently decided,) we had occasion to consider this policy of the law of appropriation, and to apply its principle. There a riparian owner of lands below the point at which a portion of the stream had been diverted by a prior appropriator sought and obtained an injunction which in effect required the appropriator to substitute an iron pipe in place of his ditch and flume, in order that he might receive the quantity of water he could put to a beneficial use without diverting so large a quantity from the stream. We held that the decree was in this respect erroneous, because ditches and flumes are the usual and ordinary means of diverting water in this state; and parties who have made appropriations by such means cannot be compelled to substitute iron pipes, "though they may be compelled to keep their flumes and ditches in good repair, so as to prevent any unnecessary waste." Accordingly, we decided that the

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appropriator had a right to divert from the stream water enough to yield at the place of use the quantity required after the loss by absorption and evaporation of so much thereof as is necessarily so lost in a ditch and flume well constructed and kept in good condition. This is but the latest of a long series of decisions recognizing and enforcing the same policy, and the soundness of the doctrine upon which they rest is unquestioned. While the right of the prior appropriator is carefully protected, he is compelled to exercise it with due regard to the rights of others and the paramount interests of the public. The quantity of his lawful appropriation cannot be diminished, but he must return the surplus to the stream without unnecessary waste, and he must use reasonable diligence and reasonably efficient appliances in making his diversion, in order that the surplus may not be rendered unavailable to those who are entitled to it. Upon the same principle it must be held that a prior appropriator, whose means of diversion become insufficient for his purposes, by reason of their inherent defects, when the surplus is diverted above him, must take the usual and reasonable measures to perfect such means. And it is no injustice to this plaintiff to allow the diversion of the surplus waters of the south fork by a lawful appropriator, so long as a resort to the same means it is accustomed to employ in periods of scarcity will enable it to fill its canal.

Having thus, as I think, clearly shown that the doctrine upon which the decree of the superior court is expressly based, and upon which counsel seek to uphold it, involves the absurd conclusion that the surplus waters of the south fork cannot be diverted by a qualified appropriator at any point above the head of plaintiff's canal, I will next consider some of the more technical grounds upon which counsel base their further contention. They seek to claim that, irrespective of any question of actual injury to the plaintiff by a diversion of the surplus, and conceding that it will cause no greater or other inconvenience to take it from the dam than would be occasioned by taking it from the stream above the dam, the plaintiff has, nevertheless, such an exclusive property in the bed and banks of what they call its pond or reservoir, that to take it from the dam would be an invasion of its strict legal rights,—a trespass upon its property. Indeed, the argument of counsel is that they have the same right to the pond that they have to their canal, and, if the defendants can put the head of their ditch in the former, they can with equal right put it into the latter. But clearly this is not so, for, in the absence of any proof of title derived from a paramount source, there is an obvious and radical difference between the canal and the river. The plaintiff made the canal, its bed and banks; it did not make the channel of the river. It has been permitted, for its convenience, to

obstruct the flow of the river; to raise its level, and, necessarily, to retard its current, and to widen and deepen it above the dam; but this change in its condition leaves it still a part of the river, and it is difficult to see how those who had a right of access to it before plaintiff's dam was erected have lost such right merely because, by the liberality of the government, the plaintiff has been permitted to raise its level and set back its current.

There is no finding as to the ownership of the soil covered by the dam or either of the ditches. Nor is there any evidence, so far as I can discover, touching the point. In the absence of proof to the contrary, it must be assumed that these lands are public lands of the United States, as they unquestionably were at, and long after, the time when plaintiff constructed its dam and canal and made its appropriation. The rights of plaintiffs are therefore such as have been conferred by the grant or license of the United States. The extent of this grant or license is clearly defined by the act of congress of July 26, 1866. It confirms such rights to the use of water as have been recognized and acknowledged by local laws and customs and the decisions of courts, and grants a right of way for ditches and canals. 14 Stat. 253. It does not grant any land whatever, but merely the right to divert and use the water, and a right of way,—an easement. There is nothing in the letter of the statute or the terms of the grant which authorizes the erection of a dam across a natural stream, but, assuming that the grant of the water right carries with it the right to employ this reasonable and usual means of forcing the water into the canal, it cannot be held to carry anything not necessary to the enjoyment of the right granted, nor to deprive the government of such control of the stream as is essential to the protection of other equally deserving objects of its bounty. To say that the first appropriator gains an exclusive right of access to the river as far above his dam as it sets the water back is to say that he takes as an incident to what is expressly granted something that is in no way essential to the enjoyment of his rights, but is in the highest degree prejudicial to the government by whose liberality he profits, and to all other citizens who may desire to participate in its bounty upon fair and equal terms. Suppose that the land covered by this dam has been granted, or shall hereafter be granted, by the United States to homestead or pre-emption claimants, will any one contend that such grantees have taken or will take it subject to any right of plaintiff, except the mere easement to flow it? It does not seem possible that there can be more than one answer to this question. As against the United States, and those who connect themselves with the United States, the plaintiff does not own a foot of land covered by its so-called pond, or bordering upon it. If the

land still belongs to the United States, defendants are granted, by the same statute under which plaintiff claims, a right of access to the river for the purpose of making a lawful appropriation of any water covered by a prior right, and the plaintiff, by raising the level of the river, has not requested one foot of its natural channel except so much as is covered by the material structure of its dam, or is essential to its support. To call this inclosure formed by the dam and the sides of the canon a reservoir is an abuse of terms. A reservoir is formed by damming a natural water course where the object is the storage of a large body of water; but the object of plaintiff's dam is not the storage of water, and there can be no pretense that the plaintiff has any right of property in the body of water it holds back. The whole object of plaintiff's dam is to raise the level of the stream as a means of diverting a part of it into the canal, leaving the surplus to flow above the dam and down the canon. According to the testimony, the slack water extends more than 3,000 feet above the dam, and the so-called pond or reservoir has therefore a length more than 10 times its greatest width at the dam, and more than 10 times its mean width. Through it there is at all times flowing all the water of the river, out of which the plaintiff has a right to divert a limited quantity, leaving the surplus to flow on. It is therefore vastly unlike what nature made it, a part of the natural channel, than what counsel call it, a pond. There is no analogy between the point involved in this controversy and the point decided in *Rupley v. Welch*, 23 Cal. 100. There the plaintiff had constructed a reservoir for impounding the waters flowing down a ravine, which he used for irrigating his garden and orchard. The defendants, not claiming the right to take the surplus, but, as miners, claimed the right to divert "the water"—that is, all the water—into plaintiff's reservoir to their sluices, and accordingly done so. The report of the case is very meager, but its meaning is perfectly plain to any one who knows how sluice washing was conducted at that date. The defendants were digging and sluicing above the reservoir, and, of course, could not draw water for that purpose from the reservoir. What they wanted was to turn the water into their sluice above the reservoir, and discharge it below, thereby diverting it from the reservoir. The question as to their right to tap the stream of water in order to appropriate the surplus could not possibly have arisen, and the case was not decided. The point, and the point, contended for by the defendants, was that a prior appropriation of water for irrigation was of no avail against a subsequent appropriation for mining. The court had decided that the appropriation for irrigation was as good against miners as against others, and that the defendants could not pre-

the water so appropriated from flowing into the reservoir prepared for impounding it. This is a doctrine which, at the present day, no one disputes; but in early mining times the paramount right of the miner was strenuously insisted upon by the miners, and in the mining sections often exercised with a high hand, as it was by the defendants in *Rupley v. Welch*.

To recapitulate, and to conclude upon this branch of the case: The plaintiff has shown no right to the land above its dam, or to the bed and banks of the stream, except such as it can base upon the act of congress of July 26, 1866, above cited. By that act it has been expressly granted a right to use the water it has appropriated, and a right of way for its ditch. It can take nothing as incidental to what has been expressly granted, except what is reasonably necessary to its enjoyment. Conceding that this includes the site of its dam, and the right to maintain it, and to flow the lands above it, it does not include an exclusive right to the water course above the dam and below the head of slack water, because such right is not only unnecessary to the enjoyment of that which is expressly granted, but it infringes the equal rights of others. If the land above the dam is public land, the same act of congress grants to defendants a right of way over it to the stream, and to all parts of the stream, for the purpose of diverting the surplus. If the land belongs to the defendants, or if they have the grant or license of the private owner, their right of access to the stream is equally undoubted. They are bound only in appropriating the surplus, whether within or above the slack water, to provide proper head works for their ditch to regulate the influx of the water, so that the plaintiff may, at all times, have the quantity by it first appropriated.

These conclusions necessarily involve a reversal of the judgment, but in remanding the cause it is proper to notice other errors assigned. The defendants, for some reason not clearly apparent, set up in their answer the contract of March, 1854, granting to the owners of the Boyd's Bar ditch a right to put a box in plaintiff's dam, etc. They did not allege any infraction or threatened infraction of their rights under that contract, and asked for no affirmative relief. It is not easy to see what bearing the facts connected with that contract have upon the case made by the complaint, or the question which it presents. But at the trial evidence was taken as to those matters, and the court made findings,—not very full or explicit,—upon which are based certain provisions of the decree regulating the exercise by the parties of their contract rights. The effect of the decree is to limit the defendants to a box two feet square and eight feet long, set upon a level grade with the top of the box on a level with the surface of the pond, reserving to plaintiff the right to close this box at all times when there is not a full supply of

water for plaintiff's present ditch. Neither the findings nor the evidence supports this part of the decree. It clearly appears from the evidence, and partially from the findings, that the present capacity of the ditch is materially greater than it was at the date of the contract. It is found that the canal was enlarged, and its capacity increased, "in places," in 1862; but it is said the evidence does not enable the court to determine how much. As to the expression "in places," we know what is meant when a ditch owner enlarges his ditch and increases its capacity in places. He does not enlarge it in the large places, but in the small places, and by so doing increases its capacity throughout. The evidence in the record shows without contradiction that plaintiff's ditch was widened to six feet on the bottom wherever it was of less width, as it was in many places. The only conflict is as to whether it was, prior to the enlargement, four feet or five feet wide on the bottom. But, whichever it was, the enlargement was material, and a finding as to its extent was absolutely essential to a decree settling the right of the parties under the contract. On the hypothesis most favorable to the plaintiff the capacity of its ditch prior to 1862 is indicated by a section 5 feet wide at bottom, 7 feet wide at top, and $3\frac{1}{2}$ feet deep, equal to 21 square feet. Its present capacity is measured by a section 6 feet wide at bottom, 8 feet wide at top, and $3\frac{1}{2}$ feet deep, equal to $24\frac{1}{2}$ feet. Its capacity in miners' inches is not found, and the testimony does not show with any degree of certainty what it is; but, assuming that it is 2,450 inches, each square foot of the section would represent 100 inches, and the $3\frac{1}{2}$ added in 1862 would represent 350 inches. The right to this quantity of water perpetually, or to a half or a quarter of it, is too important to be decreed away without a finding, and without evidence to support a finding. But the superior court seems to have thought it unnecessary to consider the evidence on this point, because, in its opinion, the acquiescence of the defendants and their predecessors for nearly 30 years in the enlargement of plaintiff's ditch raised an estoppel against them. But the defendants were not complaining of the enlargement of the canal, or of its increased capacity. They never had a right, either under their contract or independent of it, to complain of such enlargement. They could only object to the closing of their ditch or the box that supplied it when there was more than sufficient water to supply the canal according to its capacity at the date of the contract, but not sufficient to supply it as enlarged. And the evidence shows that their box never was closed by plaintiff after the enlargement of its canal. Nor is it found that the plaintiff ever did any other act adverse to the rights of defendants under the contract in such manner or for such time as to gain a prescriptive right. The decree is also unsupported by any finding as to the dimensions and setting of the

but the court does not find whether these enlargements increased the capacity of the ditch. It simply finds that "at the point where this widening of the canal occurred the capacity was increased, but to what extent the evidence does not enable the court to determine." The rights given to the defendants by the contract referred to ought not to be affected by any subsequent alteration of the plaintiff's ditch, and, unless the plaintiff has acquired the right to use the ditch in an increased capacity through the acquiescence of the defendants, the judgment is erroneous in that regard. In its conclusion of law the court found that "by reason of the long acquiescence of the defendants, for a period of about 25 years, without objection, in such increased capacity of plaintiff's canal as may have resulted from the widening of portions of the canal in 1862 and 1864, the defendants are now estopped from making any complaint of said widening of said canal, and are not entitled to any relief with respect thereto." It is earnestly claimed by appellants that there is "not a scintilla of evidence to sustain the finding or conclusion of law that defendants lost or plaintiff acquired any right by acquiescence or by estoppel of any kind." This contention is based upon the proposition that the defendants' gate has never been shut down since the plaintiff's ditch was widened; that there has always been sufficient water for both ditches as they now exist; that plaintiff had a right to enlarge its ditch to any size it chose, as long as it did not interfere with the defendants' ditch; that, as no right was interfered with, there was no ground for objection, and no suit could have been maintained until defendants' rights were interfered with. The legal propositions involved in this contention are sound, but whether they are supported by the record, as claimed, we deem it unnecessary to determine, as the case must go back for another trial.

GAROUTTE, J. I concur in the reversal of the judgment, and also in the views of Mr. Justice PATERSON upon the principal question discussed.

DE HAVEN, J. (dissenting.) I dissent from the judgment. Upon the main question therein discussed I concur in the opinion written by Mr. Justice McFARLAND in deciding this case in department, but, after a more careful examination of the judgment appealed from, I think it erroneous in so far as it reserves to the plaintiff the right to close the box through which the defendants are to divert the water to which they are entitled under the Boyd's Bar ditch contract whenever there is not sufficient water to supply the capacity of plaintiff's ditch as at present constructed. It is not clear to me from the evidence that the capacity of this ditch has not been materially increased since the date of the Boyd's Bar ditch contract,

but the court below has failed to make any finding whatever in relation to the fact. The cause should be remanded, with directions to the court below to find whether the capacity of plaintiff's ditch has or has not been increased, and thereupon to modify its judgment so as to permit the defendants to exercise all the rights enjoyed by their predecessors under the contract above referred to.—the full rights given by that contract,—unaffected by any subsequent alteration of plaintiff's ditch.

In re LUX'S ESTATE. (No. 15,346.)¹
(Supreme Court of California. Dec. 30, 1893.)

EXECUTORS—FAMILY ALLOWANCE PENDING ADMINISTRATION.

1. When an inventory, completed, signed, and delivered by the appraisers to the executors, is presented by the latter's attorney to the judge in chambers to procure an order for payment of the appraisers, and the order as made recites that the appraisers have completed their work, the inventory is "returned," within Code Civil Proc. § 1464, entitling the widow to reasonable provision for her support till such return, though the executors do not attach their affidavits of the completeness of the inventory, as required by section 1449, and the inventory is not actually filed with the clerk till long afterwards.

2. Code Civil Proc. § 1466, requiring the court, after return of inventory, to make a reasonable allowance for support of the family, to continue during administration if the property set apart to them be insufficient, applies to a widow to whom sufficient property has not been set apart, though she have enough of her own. *Sawyer v. Sawyer*, 28 Vt. 245, followed.

Department 2. Appeal from superior court, San Mateo county; George H. Buck, Judge.

In the matter of the estate of Charles Lux, deceased. Appeal of Miranda W. Lux, the widow, from an order relating to her allowance for support pending administration. Reversed.

Garber, Boalt & Bishop, for appellant. D. M. Delmas and J. H. Campbell, for respondents.

DE HAVEN, J. This is an appeal by Miranda W. Lux, widow of Charles Lux, deceased, from an order of the superior court, made May 17, 1892, allowing her the sum of \$1,000 per month as an allowance for her support, from August 30, 1888, to November 16, 1891. Charles Lux died testate in March, 1887, leaving an estate of the value of \$4,000,000 or more, of which 90 per cent. was the partnership interest of the deceased in the firm of Miller & Lux. The indebtedness of the estate appears to be about \$4,000. Under the partnership agreement, as well also as by the terms of the will, the surviving partner was given seven years after the death of the other within which to settle the business of Miller & Lux. The order appealed from is the second order for family allowance. The first was made May 4, 1887, prior to the return of the inventory

¹ Rehearing denied. See 35 Pac. 639.

of the estate, and allowed the widow \$2,500 per month from the date of the decedent's death "until said inventory is returned, or until the further order of this court;" and it appears that this allowance was actually received by her up to the 16th of November, 1891, the date when, under the terms of the order now under review, the family allowance ceased. The order setting apart to the widow the exempt property to which she was entitled by section 1465 of the Code of Civil Procedure was not made until March, 1892. The court below found that the inventory of the estate was returned on August 30, 1888, but 't also appears that the same was not filed until May 16, 1890. It is claimed by the appellant that the first order in relation to the family allowance remained in force according to its terms until the date of the order appealed from, and that, if it did not, but is to be construed as terminating upon the return of the inventory, the date when the inventory was filed, or when the executors attached thereto their affidavits, as required by section 1449 of the Code of Civil Procedure, is the time of its return, and the finding of the court that it was returned prior thereto, upon August 30, 1888, is against the evidence; and that under either construction the order appealed from is erroneous—First, because it is retroactive, and attempts to deprive her of a portion of the allowance to which she was entitled under the first order, and which had actually been paid to her in obedience to its directions before the last order was made; and, second, because it does not provide for a family allowance during the entire period of the settlement of the estate; and, lastly, that the allowance of \$1,000 a month is not sufficiently large, and is not a reasonable one, in view of the value and condition of the estate.

1. The order of May 4, 1887, as already stated, made a family allowance to the widow of \$2,500 per month "from the date of the death of the deceased until said inventory is returned, or until the further order of this court." The words, "or until the further order of this court," were not intended to continue the allowance beyond the date of the return of the inventory, and until some further order of the court in the matter, as argued by appellant; but the true construction of the order is that the allowance thereby given shall terminate upon the return of the inventory, or before that time if the court shall so order. The order simply refers to two events, upon the happening of either one of which the allowance is to cease. This is not only the natural construction of its language, but makes the order itself in harmony with section 1464 of the Code of Civil Procedure. That section is as follows: "1464. When a person dies, leaving a widow or minor children, the widow or children, until letters are granted and the inventory is returned, are entitled to remain in possession of the homestead * * *

and are also entitled to a reasonable provision for their support, to be allowed by the superior court or a judge thereof." The order referred to in this section was made at once upon the filing of the petition for letters, and when the court is without definite information concerning the value of the estate which is afforded by the inventory and appraisement; and that the allowance here provided for is intended to be of the nature of a preliminary or temporary allowance, not extending beyond the return of the inventory, becomes clear when this section is read in connection with section 1465 following, which imposes upon the court the duty to make a further allowance after the return of the inventory, if the property apart to the family is insufficient for support, and which allowance is to be of more permanent character, and to continue during the administration of the estate, unless the estate is insolvent, in which case it is not to continue longer than one year.

2. The order appealed from was made on May 13, 1892. It is entirely retroactive in effect, and gives to the widow \$1,000 a month, commencing August 30, 1888, the date of the return of the inventory as found by the court, and ending November 15, 1891. The appellant claims that this order covers a portion of the time when the order of May 4, 1887, was in force, and is erroneous because it reduces the family allowance during such period, and attempts to deprive her of a part of the allowance to which she was entitled by that order. The decision on this question thus presented depends entirely on the fact as to when the inventory was returned. If the finding of the court is sustained as to the date of its return is sustained by the evidence, then the order under review is not open to the objection that it interferes with any rights which vested in appellant by virtue of the prior order of May 4, 1887. It appears from the record that the inventory and appraisement was actually completed by the appraisers, and signed and delivered to them by the executors of the estate on August 20, 1888; and it was presented by an attorney for the executors to the judge of the superior court at his residence, on August 30, 1888, for the purpose of procuring an order fixing the compensation of the appraisers, and on that day an order was made fixing such compensation, and directing payment, the order reciting that it appeared to the court that the appraisers had completed the work of appraising the estate at the time the inventory was so presented to the judge the executors had not attached thereto their affidavits, as required by section 1449 of the Code of Civil Procedure. It did not fully comply with the law in this respect until February, 1890; and the inventory was not actually filed with the clerk until May 16, 1890. On the day when the inventory was presented to the judge for the purpose of procuring the order fixing the compensation of the appraisers, it was

bally agreed between the attorney for the executors and the attorney for certain devisees named in the will that the inventory need not be in fact filed, and that it might be retained in the custody of the attorney for the executors, but should be treated for all purposes as filed on that day. The will of the deceased provides that no inventory of the estate shall be filed, and the attorneys doubtless proceeded upon the assumption that they could properly so far comply with this direction as not to place the inventory on file for public inspection. We have alluded to this verbal stipulation, not because we think it affects the question we are now discussing, but simply as a matter established by the evidence. Assuming the foregoing facts to be true, when was the inventory returned? The filing of an inventory with the clerk of the proper court would certainly constitute its return, but, while this is so, we do not think such filing an indispensable step which must be taken in order to effect the return of such a paper. An inventory is returned within the meaning of the law when it has been completed by the appraisers, and presented to the court or judge for information, and as a basis for some judicial action to be taken in the proceeding for the settlement of the estate to which it relates; and if the inventory was completed so as to have a legal existence when it was presented to the judge of the superior court on August 30, 1888, such presentation was sufficient to constitute its return. The fact that it was so presented to the judge at his residence, and the order fixing the compensation of the appraisers was there signed, is not material. The order was one which the judge had a right to make at chambers, and he could properly receive and act upon the inventory there. Code Civil Proc. § 166. A judge's chambers are not confined to some particular room in the courthouse or other place for the usual transaction of judicial business not required to be done in open court. *Von Schmidt v. Widber*, (Cal.) 34 Pac. 109. "Chamber business may be done, and often is done, on the street, in the judge's own house, at the hotel where he stops when absent from home; or it may be done in transitu on the cars in going from one place to another within the proper jurisdiction of the court." *In re Neagle*, 14 Sawy. 265, 39 Fed. 833. But it is further contended by appellant upon this point that the inventory was not completed when presented to the judge of the superior court on August 30, 1888, nor until the executors attached thereto their affidavits, as required by law. Section 1449 of the Code of Civil Procedure does make it the duty of the executor or administrator to indorse upon or annex to the inventory, after it is completed by the appraisers, an affidavit to the general effect that the inventory contains a true statement of all the property of the decedent of which he has any knowledge, and of all claims which the decedent had against him; but, in our

opinion, this affidavit is not necessary to give a legal existence to the inventory itself. An inventory may be said to be completed when the work of the appraisers has been concluded, and the instrument showing the result of their labors has been signed and delivered by them. The purpose of the statute in requiring the affidavit mentioned in section 1449 of the Code of Civil Procedure is to furnish an additional assurance that the inventory contains a full statement of all the property of the estate known to the executor or administrator, and also to obtain his solemn admission that he is properly chargeable in his accounts with all that is shown by the inventory; and the court may, upon its own motion, or upon the application of any person interested in the estate, compel the executor or administrator to comply with this section; but the failure of the executor or administrator to discharge this duty would not render the inventory, properly signed and delivered by the appraisers, of no effect as an inventory. Our conclusion is that the finding of the court that the inventory was returned on August 30, 1888, is sustained by the evidence, and that the order appealed from is, therefore, not in conflict with the previous order of May 4, 1887, and does not deprive the appellant of any rights vested in her by that order.

3. The order appealed from in effect was a denial of the petition of the widow for an allowance for her support during the progress of the settlement of the estate. The order was retroactive, and the allowance therein given ceased on November 15, 1891, more than six months prior to its date. Did the court err in refusing to continue the allowance after that date, and until the distribution of the estate in whole or in part? Section 1486 of the Code of Civil Procedure provides that, if the property set apart for the use of the widow and minor children "be insufficient for the support of the widow and children, or either, the court * * * must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances during the progress of the settlement of the estate, which in case of an insolvent estate must not be longer than one year after granting letters testamentary, or of administration." The court below found that the property set apart to the widow is insufficient for her support, and also made additional findings to the effect that the deceased in his will bequeathed to her a legacy of \$500 per month during her life, and a life estate in certain property from the rents and sale of her interest in which she had received \$137,000, and that the deceased also provided in his will, as well as by agreement with his partner, Miller, that said Miller should pay to her monthly such sum as might be needed for her support. It is claimed by respondents that these findings show that the widow has sufficient property of her own to support

herself, and that, under such circumstances, she was not entitled to any allowance whatever from the estate, and therefore she cannot be heard to complain because the order appealed from does not continue the allowance during the administration of the estate; and in support of this proposition it is argued that the object of the statute is "to meet the actual wants and necessities of the widow and her family," and that when, as in this case, the widow is childless and has abundant private means of her own, there are no wants or necessities to relieve, and the law does not contemplate that any allowance shall be made for her support. But, however the rule may be in other states, (and there are decisions which seem to support this contention of respondents,) we do not think section 1466 of the Code of Civil Procedure can be so construed. Its language is express and mandatory, and "the duty of maintaining the family, which the law imposed upon the deceased husband or father in his lifetime, is continued against his estate pending its administration," if the estate is solvent. It declares that the court must make a reasonable allowance out of the estate if the property set apart to the family is insufficient for their support; and for the court to hold that no allowance shall be made to the widow if she has sufficient property of her own, although the property set apart to her is insufficient of itself for her support, would be, in effect, an amendment of the law by judicial construction. There was nothing actually decided in *Estate of Walkerley*, 77 Cal. 643, 20 Pac. 150, in conflict with this conclusion, although it may be conceded that there are expressions in the opinion which, considered apart from the facts before the court, lend some support to the argument of respondents on this point. Of course we are not to be understood as holding that the value of the property set apart for the use of the family, under section 1465 of the Code of Civil Procedure, or the income of such property, is not to be considered in determining what is a reasonable allowance to be made from the remaining portion of the estate for the support of the family during the progress of the settlement of the estate; nor that such order for family support, when made, may not be subsequently modified by the court if the condition of the estate or the relation of the family thereto should change; as if, for instance, it should appear that the value of the estate was materially less than shown at the date of the order sought to be modified, or that its indebtedness is greater than was then supposed, or in the event of a partial distribution to the widow or children before the final distribution of the estate.

The law of Vermont in regard to the family allowance is substantially the same as that of this state, and in *Sawyer v. Sawyer*, 28 Vt. 245, the supreme court of that state held that the widow's financial ability to support herself without aid from

the estate was immaterial in considering the question of her right to a family allowance. In that case it was urged that the widow was not entitled to such allowance because she was in receipt of a pension and was living with her father, who was wealthy, and who made no charge against her for her support. In answer to this argument the court in that case, in an opinion delivered by Redfield, C. J., said: "The exceptions claimed in the present case are, first, on the ground of the pension which the widow obtained as such upon the decease of her husband. This is no difficulty in principle from her being possessed of the ability to maintain herself in any other mode so as not to require assistance from the estate, and, indeed, the general ability of the appellee, or the widow in this case, from her living with her father, and the wealth of the family, and the very great improbability of his making any personal claim against his daughter for her board, was also alluded to in the argument, and is stated in this case, and seems to us to come fairly under consideration in the same connection; but we are not prepared to say that any such exception can fairly be ingrafted upon the statute. If it had been the purpose of the legislature to allow maintenance only in the case of such widow and children as were without the means of subsistence in any other mode, it is difficult to conjecture how it occurred that the provision should have been expressed in the general and unlimited manner it here is. It is incomprehensible that, if the provision were intended only for the indigent and necessitous, it should have been made general." This decision of a learned court upon a statute similar to section 1466 of the Code of Civil Procedure is entitled to great weight, and we adopt it as expressing our own views of the proper construction to be given to this section.

4. In view of the conclusion reached upon the preceding point, it is unnecessary for us to express any opinion upon the question of the reasonableness of the amount allowed the court for the period covered by its order. The amount of the allowance is a question which rests very largely in the discretion of the superior court, and its action in the matter will not be disturbed on appeal unless it clearly appears that the discretion has been improperly exercised. Of course, as was said in *Re Stevens*, 83 Cal. 323, 23 Pac. 379: "The court is not restricted, in making this allowance, to a bare support of the widow. Regard should be had not only to the mode in which she lived during the lifetime of her husband." The allowance should be sufficient to provide all the necessities of life, and this will include all those things which are reasonable and proper for use at the home and in social intercourse, in view of the condition and value of the estate, and the station and surroundings of the family. The order appealed from will be reversed.

and the superior court will, upon the evidence already before it, and such further evidence as the parties may desire to present, make an order for an allowance to the widow, to continue during the progress of the settlement of the estate, and in such amount as it shall deem reasonable, and without regard to the fact that she may have separate property sufficient for her support. Order reversed.

We concur: FITZGERALD, J.; McFARLAND, J.

In re LUX'S ESTATE. (No. 15,345.)
(Supreme Court of California. Dec. 30, 1893.)
EXECUTORS—ACCOUNTING—FAMILY ALLOWANCE
PENDING ADMINISTRATION.

When the court grants an order for family allowance for a past period pending administration, payable in 20 days, the executors, having without an order paid the widow more than the sum allowed, are entitled to a present credit for the sum allowed.

Department 2. Appeal from superior court, San Mateo county; George H. Buck, Judge.

In the matter of the estate of Charles Lux, deceased. Appeal by the executors from an order denying them credit for a certain item in their account. Reversed.

Garber, Boalt & Bishop, for appellants.
D. M. Delmas and J. H. Campbell, for respondent.

DE HAVEN, J. This is an appeal by the executors of the estate of Charles Lux, deceased, from an order settling the first and second accounts filed by them in the course of the administration of the estate. Many of the questions arising upon this appeal were involved in *Re Lux's Estate*, 35 Pac. 341, (No. 15,340, recently decided by this court,) and were passed upon in the opinion in that case. It was there held that the family allowance fixed by the order of May 4, 1887, terminated upon the return of the inventory of the estate, and that the finding of the superior court that such inventory was returned on August 30, 1888, was sustained by the evidence. As these questions were there presented upon substantially the same record as the one before us, the decision in that case is decisive of the same matters presented on this appeal.

The only question requiring discussion at this time relates to the refusal of the court to allow the executors any credit whatever for the sum of \$97,500, paid by them to the widow as a family allowance between August 30, 1888, and November 16, 1891. At the time this money was paid there was no order of the court authorizing the executors to make such payments; but afterwards, on March 25, 1892, and before the date of the order settling the accounts, the court made an order for a family allowance to the widow, in which the court "ordered and decreed that

an allowance of one thousand dollars per month from the 30th day of August, 1888, until the 15th day of November, 1891, making altogether the aggregate sum of \$39,000, be paid within twenty days by the executors of Charles Lux, deceased, to said Miranda W. Lux." This order was a determination by the court that the widow was entitled to a family allowance of \$1,000 per month for the period therein named, and the executors, having paid the same, were entitled to a credit in the statement of their accounts for the amount thus fixed by the court as a reasonable and proper sum to be paid to the surviving widow for that purpose. The fact that the order made such allowance payable within 20 days after its date does not affect the right of the executors to a present credit, as it was shown that an amount far in excess of that allowed by the order had already been paid by them to the widow as a family allowance for the period of time covered by the order; and the fact that such payments were made without a previous order of the court does not deprive the executors of the right to a credit therefor, to the extent that the court found such advances were reasonable and proper. In the matter of paying a family allowance, "the administrator is not required to wait for an order of court, but may make the necessary expenditures as the exigencies occur, and the court will allow such sums as may be reasonable in the settlement." 1 Woerner, Adm'n, § 92; *Sawyer v. Sawyer*, 28 Vt. 248; *Simmons v. Byrd*, 49 Ga. 288. It follows that the court erred in refusing to credit the executors with that portion of the advances made by them to the widow on account of the family allowance, which the court found to be reasonable and proper for that purpose. Order reversed.

We concur: FITZGERALD, J.; McFARLAND, J.

In re LUX'S ESTATE. (No. 15,146.)
(Supreme Court of California. Dec. 30, 1893.)
EXECUTORS—ACCOUNTING—LIABILITY FOR INTEREST.

1. Code Civil Proc. § 951, requiring one appealing from an order to furnish copies of the order and of the papers used on the hearing, and Sup. Ct. Rule 32, requiring such papers or evidence to be authenticated by bill of exceptions, when no other mode is provided, do not demand a bill on appeal from an order settling an executor's account, where the clerk's certified transcript contains the accounts, reports, and exceptions, (these being pleadings which the clerk must attach to the judgment, under Code Civil Proc. § 670, to form the judgment roll,) as well as the judgment and findings, (which last are properly a part of the judgment,) the errors being thus assigned on the face of the record.

2. Under Code Civil Proc. § 1585, giving the surviving partner possession of the firm assets till the business is settled, while paying the executor from time to time any balance to which deceased would have been entitled, it is not error to settle an annual account of ex-

ecutors without an accounting between them and the surviving partner, though such partner himself be one of the executors.

3. Where executors, one of whom is the widow, have in good faith, but without an order of court, paid said widow a family allowance in excess of what the court afterwards allows, they are liable for interest on the excess at the legal rate, compounded annually.

Department 2. Appeal from superior court, San Mateo county; George H. Buck, Judge.

In the matter of the estate of Charles Lux, deceased. Appeal of certain devisees from an order settling an annual account of the executors. Reversed.

Garber, Boalt & Bishop, for appellants. D. M. Delmas and J. H. Cambell, for respondent.

DE HAVEN, J. The superior court made an order settling certain accounts rendered by the executors of the estate of Charles Lux, deceased, to which accounts exceptions had theretofore been filed by certain devisees named in the will of the deceased. This appeal is taken by said devisees, and is from so much of the order as fails to charge the executors interest upon money which the court found was improperly paid by them to the widow as a family allowance, and in so far as it fails to require a full accounting of the partnership affairs of the firm of Miller & Lux, of which firm the deceased was a member at the time of his death. The transcript on appeal as amended contains the accounts of the executors, and reports accompanying them, the objections or exceptions to the accounts, the findings of the court thereon, and the judgment or order settling the accounts. There is no bill of exceptions in the record, but the papers just referred to are certified by the clerk of the court from which the appeal is taken to be copies of the originals on file in the matter of the estate of Charles Lux, deceased. The respondents have made a preliminary motion to dismiss the appeal upon the ground that the papers contained in the transcript are not authenticated by a bill of exceptions as required by rule 32 of this court. Section 951 of the Code of Civil Procedure makes it the duty of a person appealing from an order to furnish this court with a copy of the order appealed from, and copies "of papers used on the hearing in the court below," and rule 32 of this court provides that such papers or evidence must be authenticated by a bill of exceptions, when no other mode of authentication is provided by law. This rule was only intended to apply to those appeals in which the order is sought to be reversed, because of matters alleged to be shown by affidavits or evidence used or taken upon the hearing in the court below. Such was the case of *White v. White*, 88 Cal. 429, 26 Pac. 236, cited by respondents. But a fair interpretation of its language, as well as a considera-

tion of its object, will show that this rule the court can have no application when the order appealed from is attacked for matters appearing upon its face, or upon the face of the record of which it forms a part. The settlement of the accounts of an executor or administrator, though sometimes spoken of as an order, is in effect a judgment; and it was held in *Estate of Isaac*, 57 Cal. 238, that in a proceeding for the settlement of such an account "the petition, account, and the written objections filed thereto, are the pleadings which the clerk of the court is required to attach to a copy of the judgment, (section 670, Code Civil Procedure); these constitute the judgment roll;" and the same effect is the earlier and well-considered case of *Estate of Isaacs*, 30 Cal. 400, and while, in such a proceeding, it is incumbent upon the court to make and express findings, still, when the account is assailed in any particular for matters appearing upon its face, the court may properly make express findings upon such matters as was done in *Estate of Moore*, 96 Cal. 31 Pac. 584, and when it does so such findings become as much a part of the judgment roll as the judgment or order itself, and constitute the pleadings of the parties. The findings in this case are to be regarded as a part of the judgment roll, as we think must, then every objection urged by the appellants to the order appears upon the face of the judgment roll, and in such a case a bill of exceptions has no office to permit its only purpose being to make that part of record which would not otherwise appear as such. The record here being sufficient to present the questions raised by the appellants upon this appeal, the motion to dismiss the appeal must be denied.

2. The court did not err in settling the accounts of the executors in the absence of an accounting between them and the surviving partner of the firm of Miller & Lux. The accounts filed were not intended to be as a final account. The purpose of an executor's account is to show what property the estate has come into his hands, the disbursements made by him, and the balance, if any, remaining in his possession. Under section 1535 of the Code of Civil Procedure the surviving partner has the right to take possession of the partnership assets until the business of the partnership is settled, and then to pay to the executor from time to time the balance to which the deceased partner and his estate have been entitled. The court may, upon application of the executor, compel the surviving partner to render an account of the partnership business, and the executor's proper proceeding may doubtless, if the partner cause appear therefor, be required to deliver an accounting from the surviving partner and return the same into court; but the failure of the executor to apply for an accounting requiring the surviving partner to ac-

is no reason why the court should refuse to settle an annual account of the executor, which, as we have seen, is only intended to show what property has been received by him, and what he has done with it; and the fact that in this case the surviving partner is also one of the executors of the estate of the deceased partner is not any reason for refusing to settle his accounts as an executor because of the absence of a statement showing the condition of the partnership affairs. Of course, when any portion of the assets of a partnership have come into the hands of an executor as such, he must charge himself therewith in his accounts.

3. The findings of the court show that Miranda W. Lux is the widow of the deceased, and also one of the executors of his will, and on May 14, 1887, the superior court made a family allowance to her of \$2,500 per month, to continue until the return of the inventory or the future order of the court; and that the inventory was returned on August 30, 1888, but the executors continued thereafter, until November 16, 1891, to pay to the widow the sum fixed as a family allowance in the order of May 14, 1887, thus paying to her for that purpose the sum of \$97,500, without any order of the court therefor. It is further found that on March 25, 1892, the court, upon petition of the widow, made an order directing the executors to pay to her as a family allowance "the sum of \$1,000 per month during the period extending from the 30th day of August, 1888, to the 15th day of November, 1891." The court, in its order settling their accounts, refused to allow the executors credit for any part of the \$97,500 so paid out by them during the period of time covered by the second order for a family allowance, and also refused to charge them interest thereon. The contention of the appellants here is that the court erred in holding that the executors ought not to be charged with interest upon this sum so advanced by them to the widow. We think the findings, when read in connection with the accounts filed, show that these payments were made to the widow, who was also one of the executors, to be used by her for her own personal benefit and advantage. Upon these facts the executors are chargeable with legal interest, computed with annual rests, upon so much of the sum so paid as appears to have been improperly advanced by them for the private use of one of their number. When an executor uses the funds of an estate in his own business, or for any purpose of his own, the rule in this state is to charge him with legal interest, compounded with annual rests. *Estate of Clark*, 53 Cal. 355; *Estate of Stott*, 52 Cal. 408; *In re Hilliard*, 83 Cal. 427, 23 Pac. 393. It is true that in this case there was no actual bad faith or intentional wrongdoing upon

the part of the executors, and they doubtless supposed that such expenditure or use of the funds of the estate would be approved by the court. The payments, however, not being authorized by a present order of the court, were made at their peril, and to the extent that they were not approved by the subsequent order of the court constituted a wrongful use of the money of the estate for the personal advantage of one of the executors, all of the executors consenting to such use. The rule which makes an executor or other trustee chargeable with compound interest upon trust funds used by him in his own business, is not adopted for the purpose of punishing him for any intentional wrongdoing in the use of such fund, but rather to carry into effect the principle enforced by courts of equity that the trustee shall not be permitted to make any profit from the unauthorized use of such funds. *Wheeler v. Bolton*, 92 Cal. 159, 28 Pac. 558; *Cruce v. Cruce*, 81 Mo. 684; *Schleffelin v. Stewart*, 1 Johns. Ch. 620. The rule is intended to secure fidelity in the management of trust estates, and where, as in this state, the conventional rate of interest exceeds the statutory rate, the executor should be charged with legal interest, compounded annually, in order to fully reach the profit realized by him from the use of the trust fund. The court, in settling the accounts in this case upon the findings which appear in this record, should have allowed the executors credit for the sum named in the second order as a family allowance during the period covered by the accounts, and then have charged them legal interest, computed with annual rests, upon the excess paid by them as a family allowance to the widow for the same period. Order reversed.

We concur: FITZGERALD, J.; McFARLAND, J.

In re LUX'S ESTATE. (No. 15,107.)
(Supreme Court of California. Dec. 30, 1893.)

Department 2. Appeal from superior court, San Mateo county; George H. Buck, Judge.

In the matter of Charles Lux, deceased. Appeal of certain devisees from an allowance to the widow. Reversed.

Garber, Boalt & Bishop, for appellants. D. M. Delmas and J. H. Campbell, for respondent.

PER CURIAM. This is an appeal by certain devisees named in the will of Charles Lux, deceased, from the same order for a family allowance involved in the case of *In re Lux's Estate*, 35 Pac. 341, (No. 15,346, just decided,) and the judgment in that case disposes of all the points urged by the appellants here for a reversal of the order adversely to their contention. The motion of respondent to dismiss the appeal is denied on the authority of *In re Lux's Estate*, Id. 345, (No. 15,146,) and, as the order here appealed from was reversed in *Re Lux's Estate*, Id. 341, (No. 15,346,) the same order will be made on this appeal, but without costs to the appellants. Order reversed, without costs.

PAYNE et al. v. ENGLISH et al., Harbor Commissioners. (No. 15,269.)

(Supreme Court of California. Jan. 3, 1894.)

BOUNDARIES—ARTIFICIAL—UNLOCATED HIGHWAYS.

In 1852 the city of San Francisco leased a block, represented on the then official city map as "Block No. 12 of the South Beach Water Lots," and described as bounded by a line beginning at the southwest corner of B. and T. streets; thence southwest, along B. street, 825 feet, to F. street; thence southeast 275 feet, to C. street; thence northeast 825 feet, to T. street; and thence 275 feet, to the place of beginning. The block and surrounding streets were covered by water from 1852 to 1865, so that there could be no marks to show the corners of the block and the street lines. In 1865 a plank driveway was laid along the southerly side of B. street, from T. street to F. street. In 1866 the city surveyor surveyed the southerly line of B. street, and the lessee of the block then filled in along such line. In 1867 the owners of the opposite block built along the northerly side of B. street, which, as thus established, has ever since been a recognized thoroughfare of the city. *Held*, that the location of block 12 may be determined by reference to B. street as now located.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Suit by Warren R. Payne and S. P. Dewey to enjoin William D. English and others, as the state board of harbor commissioners, from building a wharf in front of plaintiffs' lot. Judgment for plaintiffs. From an order denying a new trial, defendants appeal. *Affirmed*.

F. S. Stratton and T. C. Coogan, for appellants. Cope, Boyd, Fifield & Hoburg, for respondents.

BELCHER, C. This is the second appeal in this case. On the first appeal the judgment, which was in favor of the defendants, was reversed, and a new trial ordered. 79 Cal. 540, 21 Pac. 952. The second trial resulted in a judgment for the plaintiffs, and the present appeal is from an order denying the defendants' motion for a new trial.

The facts of the case are very fully stated in the opinion rendered on the former appeal, and need not be repeated here at length. The plaintiffs allege that they are, and for more than 30 years have been, the owners of that certain lot or parcel of land in the city and county of San Francisco, bounded by Berry, Channel, Third, and Fourth streets, and having a width, between the two first-named streets, of 275 feet, and a length, between the two last-named, of 825 feet. The defendants, in their answer, admit that the plaintiffs are the owners of the lot or parcel of land described in their complaint, except a strip of the uniform width of 30 feet, extending along the southeasterly side thereof; and they allege that this strip of land is, and for more than 30 years has been, a portion of Channel street, and that plaintiffs have not now, and never had, any right, title, or interest therein or thereto. The court found

that the original plaintiffs were, at the commencement of the action, and for more than 30 years prior thereto they, and those upon whom they claim, had been, the owners of that certain lot or parcel of land particularly described in the complaint; "that no portion of said lot or parcel of land is, or ever was, a part of Channel street;" and "that the southerly portion of said lot or parcel of land mentioned and referred to in the answer of the defendants, as a strip of the uniform width of thirty feet, and extending from Third street to Fourth street, being a distance of eight hundred and twenty-five feet, is and never was, a portion of Channel street." Whether this finding as to the 30-foot strip was justified or not is the principal question presented for decision.

The deed under which the plaintiffs claimed title was executed in 1852, and described the premises conveyed as "beginning at a point forming the southwesterly corner of Third and Berry streets, and running thence southwesterly, on the line of Berry street, three hundred varas, to Fourth street; thence southeasterly, along the line of Fourth street, one hundred varas; thence northeasterly, at right angles, along Channel street, three hundred varas; and thence northwesterly, along the line of Third street, one hundred varas, to the place of beginning." The distance named in the deed are equal to 825 and 275 feet, and the premises described are therefore of the dimensions claimed by plaintiffs. In 1852, and thereafter until 1865 or 1866, the land conveyed by the deed, and the streets surrounding the same, were covered by the navigable waters of the bay of San Francisco. Channel street was then, still is, an arm of the bay, extending up general blocks past and beyond the block in question; and in 1868 an act was passed by the legislature which declared that a certain 140 feet wide, located in the middle of Channel street, should forever remain open for the purposes of drainage and navigation. When the deed was made, there was an official map of the city, called the "Eddy" "Red-Line" map, on which the land conveyed was represented as block No. 12 of the South Beach water lots, but there were then and could be, no marks or monuments upon the ground designating the corners of the blocks or the lines of the adjacent streets. In 1865 piles were driven and planked crosswise along the southerly side of Berry street, and a new street, now established, between Third and Fourth streets, so as to form a driveway therefrom, and within a year or two thereafter the strip of land was filled in to about its present grade, and made 82½ feet wide. In 1866 the owners of block 12, or their tenants, began to erect buildings along the northerly line of their block, and at their request the city surveyor surveyed and marked out for them the southerly line of the street. They continued this building until 1867, when they had nearly the whole front of the block

built upon. They also built several wharves leading back from the rear of their buildings to the north line of Channel street, as they locate it. In 1867, also, the owners of the opposite block, on the northerly side of Berry street, began to build along the street, and they continued this work until nearly the whole front of the block was built upon. As thus established and built upon, Berry street has remained ever since—now nearly or quite 25 years—a recognized thoroughfare of the city, which has been, and is, largely used by the public for the purposes of traffic over it. At both trials it was claimed by defendants that the plaintiffs' block of land was only 240 feet wide, and on the first trial the court found, upon evidence which this court held inadmissible, that it was only 245 feet wide. This claim is practically abandoned now, but it is insisted that "while plaintiffs' deed may properly be construed as calling for a tract of land 275 feet in width," still it is necessary for them to locate their grant upon the ground, which could not be done by measuring from the present practical location of Berry street. The answer raises no issue as to the location of Berry street, and the record contains no evidence tending to show that it is not correctly located. On the contrary, the evidence on the part of defendants refers to the southerly line of the street as correctly fixing the northerly line of block 12. George F. Allardt, a civil engineer and surveyor of long experience, was called as a witness for defendants, and testified that in 1868 he was the chief surveyor of the board of tide-land commissioners, and as such made a survey and map of the block in question, as well as other blocks on Mission bay, and the streets surrounding them. He was asked: "Where did you get the data from which you located the northerly line of Channel street? A. From the maps on file in the city and county surveyor's office, and the maps on file in the secretary of state's office. The southerly line of Berry street being visible on the ground by reason of improvements, in order to find the northerly line of Channel street, which is the southerly line of block 12, it was only necessary to measure the distance so obtained in the data referred to. It was only necessary to measure the two hundred and forty feet which I found on these maps. Q. You stated that the southerly line of Berry street was a well-defined line by buildings being erected upon it? A. Yes, sir. Q. And you assumed that the northerly line of Channel street was two hundred and forty feet from that point, didn't you? A. I so measured it on the ground. I assumed it, and measured it on the ground I located."

Now if, as defendants contend, Berry street, as now located, cannot be looked to for the purpose of determining the location of block 12, because it was practically located after the deed to plaintiffs was made, then it would seem to be impossible to mark

out on the ground the northerly and southerly lines of the block, and the grant must therefore ever remain a float. But we do not think this can be so. When Berry street was established and built upon, and was accepted, recognized, and used by the city authorities and the public, it became a street of the city, and presumably the street referred to in the deed. The following language used by this court in deciding the case of *Orena v. City of Santa Barbara*, 91 Cal. 621, 28 Pac. 268, is applicable to the case in hand: "In determining the line of the street, measurements on that street would naturally be of more value than elsewhere; but if they, or the places where they were, cannot be located, it would be important to ascertain the boundaries of the street as actually opened and used; and if such location has been generally acquiesced in by the public, by landowners, and the municipality, in the absence of more certain evidence, it will be conclusive." And again: "In order to build cities and towns, there must be some finality as to the location of blocks and streets." It must be held, therefore, that the court below was fully justified in finding that the 30-foot strip in controversy was not a part of Channel street.

Counsel for defendants next call attention to the late decision of the United States supreme court in the *Chicago Water Front Case*, 146 U. S. 387, 13 Sup. Ct. 110, and urge that, under the law as declared in that case, "plaintiffs cannot assert title and claim as against the state, where such assertion will actually interfere with the paramount interests of commerce." We are unable to see how that case can control or affect the decision in this. As has been stated, the defendants admit the plaintiffs' ownership of block 12, and only deny that the strip in controversy is a part of that block. This question having been decided against their contention, they, as members of the board of state harbor commissioners, are by the statute given no control over the strip. Pol. Code, § 2524. We advise that the order appealed from be affirmed.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

SAN JOAQUIN LAND & WATER CO. v. BEECHER. (No. 18,216.)

(Supreme Court of California. Jan. 6, 1894.)

CORPORATIONS—SUBSCRIPTIONS—ACTION ON ASSESSMENT.

1. A subscriber to stock becomes liable to suit for delinquent assessment thereon by the directors, under Civil Code, § 349, where a majority of the subscribers have met and organized for the objects and with the capital and number of shares specified in the subscription agreement, and have elected the directors who levy the assessment.

2. In a suit on an assessment, the subscriber cannot show, in contradiction of the secretary's minutes, that the directors were not elected by ballot.

3. Under Civil Code, § 331, authorizing directors, when one-fourth of the stock is subscribed, to levy and collect assessments on the "subscribed capital stock," a notice describing the assessment, in conformance with section 335, as "levied upon the capital stock," will sustain a collection on the stock subscribed.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; J. K. Law, Judge.

Action by the San Joaquin Land & Water Company against J. L. Beecher on a subscription to stock. Judgment for plaintiff. Defendant appeals. Affirmed.

Jas. H. Budd, J. E. Budd, and W. L. Dudley, for appellant. Baldwin & Campbell and S. D. Woods, for respondent.

SEARLS, C. This is an appeal from a final judgment in favor of the corporation plaintiff, and from an order denying defendant's motion for a new trial. On the 19th day of November, 1887, the defendant, and over 60 other persons, entered into a written agreement with each other, and one with the other, to form a corporation under the name of the San Joaquin Land & Water Company, for the purpose of procuring water rights, purchasing and constructing dams, reservoirs, canals, aqueducts, etc., and to conduct, supply, and sell water for mining, farming, irrigation, and other purposes; to buy, sell, let, cultivate, and improve lands, etc.—in certain named counties of the state of California. The capital stock of the corporation, it was provided, should be \$1,000,000, divided into 10,000 shares of \$100 per share. The parties to the agreement each agreed to take the number of shares set opposite his name thereunto subscribed, and to pay 20 per cent. of the par value of the shares so subscribed, within five days after the articles of incorporation were filed in the office of the county clerk of the county of San Joaquin; payments to be made to F. M. West, at the Stockton Savings & Loan Society, at Stockton, Cal. They further nominated and appointed L. U. Shippee, J. L. Beecher, (the defendant and appellant herein,) and George Gray as their agents, and the agents of the corporation to be formed, to negotiate for the purchase of any one or more water rights, canals, reservoirs, etc., for said corporation, and to pay for the same by drawing from West the money to be paid in by them under the contract, and further provided that all contracts of the agents should be binding upon them and the corporation to be formed. The contract was signed by all the parties thereto, the appellant included, and the number of shares subscribed by each affixed to his name; the aggregate of all the shares subscribed being in excess of 3,000, of which number the appellant herein subscribed for 100 shares. Questions growing out of and relating to the validity of this agreement

have been twice before this court for adjudication, viz. in *West v. Crawford*, 80 Cal. 19, 21 Pac. 1123, and in *Water Co. v. West*, 94 Cal. 399, 29 Pac. 785. In each of these cases the body of the agreement above specified is set out at length. Hence, it is deemed necessary to repeat it in full here. On the 17th day of December, 1887, appellant, and a majority of the persons who had signed said agreement, including persons who had subscribed for a majority of the shares of stock therein subscribed, met in the county of Stockton, county of San Joaquin, Cal., and organized for the purpose of forming a corporation in accordance with the agreement. The appellant herein was selected and acted as the presiding officer of said meeting. Nine of the persons who had signed the agreement of November 19th, including the appellant, were selected, voted for by the parties to the agreement, and elected directors of the corporation for the first year. A committee to prepare a set of by-laws was appointed, and an attorney chosen to prepare articles of incorporation. A list of the subscribers to the capital stock was ordered to be placed in the hands of the president (appellant) until such time as the directors should be elected and qualified. Articles of incorporation of the San Joaquin Land & Water Company, the plaintiff and respondent herein, were prepared, with the name, capital stock, number of shares, and for the objects and purposes specified in the agreement aforesaid, and with the shares subscribed and names of subscribers as in said agreement, which articles of incorporation were signed by the nine persons who had been selected as directors, who duly acknowledged the same (appellant included) on the 19th day of December, 1887, before a notary public; and thereafter, and on the 20th day of December, 1887, said articles so executed were filed in the office of the county clerk of the county of San Joaquin; Stockton, in said county, being named as the principal place of business of said corporation. A certified copy of said articles was duly filed in the office of the secretary of state for California, and on the 21st day of December, 1887, a certificate of incorporation of respondent was duly issued by said secretary of state under the seal of the state of California. On December 18, 1887, the board of directors met at the office of appellant and organized by electing appellant president, to act until by-laws were adopted, and transacted corporate business, such as issuing a call for a meeting of stockholders for January 14, 1888, to adopt by-laws; appointing a committee of three, including appellant, with full power to purchase water rights, etc. Appellant, as such president, gave notice, etc., of the meeting of stockholders, as provided for by the directors, which meeting assembled January 14, 1888, pursuant to call. Appellant called the meeting to order, stated its object, and it appeared upon a call that stockholders represented

2,200 shares of the subscribed capital stock were present, and that number being a majority of the capital stock subscribed, viz. a majority of 3,302 shares, by-laws were thereupon adopted, a board of nine permanent directors elected, to which board power to purchase water rights was unanimously granted. On the same day the new board of directors organized by selecting L. U. Shippee as president, George Winter as secretary, and appellant as treasurer. Thereupon, other corporate business was transacted. Appellant acted for a time as treasurer of the corporation, and paid to it the 20 per cent. on the 100 shares of stock subscribed by him in the agreement of November 19, 1887. Under the by-laws the board of directors held monthly meetings at the office of the corporation, in the city of Stockton, on the first Thursday of each month. On the 7th of August, 1890, the corporation, being largely in debt, levied an assessment of \$10 per share upon the subscribed capital stock of the company, payable September 20, 1890, etc., and provided for giving notice thereof as provided in sections 337-339, Civil Code. Notice was given of the levy of the assessment, in which notice it was stated that "an assessment of \$10 per share was levied upon the capital stock of the corporation," which notice appellant contends should have stated, "upon the subscribed capital stock." On October 3, 1890, at a meeting of the board of directors, the assessment was declared delinquent, and a resolution adopted waiving proceedings for collecting such assessment by sale, etc., and electing to collect the assessment by action at law, etc., as provided in section 349, Civil Code, whereupon, after notice and demand, this action was brought, a trial had before the court without a jury, and, upon the written findings filed, judgment was entered in favor of plaintiff and against defendant for \$1,000 and interest.

The first point made by appellant is that no action will lie against a stockholder of a corporation to recover assessments against members who have subscribed for shares of stock, when there is no express agreement to pay such assessment, and that plaintiff's only remedy, if any, is the sale of the delinquent shares pursuant to statute. In support of this proposition, we are referred to *Turnpike Corp. v. Gould*, 4 Amer. Dec. 80; *Turnpike Corp. v. Adams*, 5 Amer. Dec. 81; *Cotton Mills v. Abbott*, 9 Cush. 423; In re *South Mountain Con. Min. Co.*, 8 Sawy. 366, 14 Fed. 347. These cases, except the last cited, arose in Massachusetts, in which state there was no express statute authorizing an action to recover an assessment levied by a corporation, and in which state—contrary, as we think, to the great weight of authority—the courts hold that a mere subscription for shares in a corporation, without an express promise to pay therefor or to pay assessments thereon, raises no implied promise to pay such assessments as may be levied

by the corporation, and that the only remedy of the latter is by a sale of the delinquent shares under the statute. In New York it is held that an agreement to take a certain number of shares of the capital stock of a corporation thereafter to be formed creates, if not an express, certainly an implied, promise to pay for the shares; and this implied promise will sustain an action by the company, on its complete incorporation, against the stockholders, to recover calls duly made upon the stock. The interest acquired by the subscriber upon the incorporation of the company is held a good consideration to support the implied promise to pay for such stock, and raises a sufficient mutuality of contract between him and the company to render the contract a binding one on him. *Railroad Co. v. Dudley*, 14 N. Y. 336; *Thomp. Liab. Stockh.* § 105; *Railroad Co. v. Mason*, 16 N. Y. 451. The right of action, in such cases, is held cumulative to the right of the corporation to forfeit the shares of stock for nonpayment of calls under the statute. It is not deemed necessary to quote the decisions at length upon this point. That they are not uniform is very apparent, and it may well be concluded that to settle this disputed question was one of the objects of adopting section 349 of our Civil Code, which is as follows: "On the day specified for declaring the stock delinquent, or at any time subsequent thereto, and before the sale of the delinquent stock, the board of directors may elect to waive further proceedings under this chapter for the collection of delinquent assessments, or any portion thereof, and may elect to proceed by action to recover the amount of the assessment and the costs and expenses already incurred, or any part or portion thereof." It will be perceived the Civil Code provides two methods for the enforcement of the liabilities of stockholders to the corporation, by reason of assessments levied upon the capital stock,—one by a sale of the stock, in pursuance of the plan devised in the statute; the other by an action at law, at the option of the board of directors. The latter method would seem equally valid, and may, in many cases, be much more efficacious than the former.

In *Re South Mountain Con. Min. Co.*, 8 Sawy. 366, 14 Fed. 347, which was the case of a mining corporation, Sawyer, Circuit Judge, distinguished mining corporations from the ordinary corporations, and held them to be, in many particulars, sui generis, and denied an application of an assignee in bankruptcy of such a corporation for an order requiring the levy of an assessment on the stockholders for the payment of corporate debts, to be enforced by actions in personam against delinquent shareholders. That the doctrine of this case, if it can be upheld, is to be confined strictly to the class of corporations to which it applied, is abundantly established by the later decisions of this court. *Harmon v. Page*, 62 Cal. 459.

460; *Baines v. Babcock*, 95 Cal. 583, 27 Pac. 674, and 30 Pac. 776. Sawyer, J., did not, however, hold that an action could not be maintained to recover from a stockholder an assessment. In referring to that question, he says: "I am not prepared to say now that an assessment properly levied by the directors of a corporation, under the statute, may not be collected by a personal action, instead of a sale of stock. I do not think it necessary to go so far as to sustain the order of the district court, of which a review is now sought; and I therefore express no opinion upon that point, either way." Actions have been repeatedly brought and maintained without question under this section, and no good reason is apparent why it should not be done as against the stockholder in a corporation organized like the present, under the general law of the state. *Railroad Co. v. Spreckles*, 65 Cal. 193; *Hotel Co. v. Callender*, 94 Cal. 120, 29 Pac. 859. The agreement of November 19th, to form the corporation plaintiff herein, and to take the number of shares specified, was, as to incorporating, executory; but when the promoters met, and organized the corporation, under the name, for the objects, with the capital stock, the number of shares, etc., as specified in the agreement, and named the parties to said agreement, with the shares subscribed by each in the articles of incorporation, as subscribers to the capital stock, to the extent of the shares agreed to be by them, respectively, taken, it was an acceptance by the corporation of such parties as stockholders, and they became thereby and thenceforth bound as such. *Railroad Co. v. Mason*, 16 N. Y. 452; *Hotel Co. v. Friedrich*, 26 Minn. 112, 1 N. W. 827. It was not necessary to the validity of the corporation, or to the subscribers becoming stockholders, that they should all sign the articles of incorporation. Those who sign articles of incorporation act as the agents of the others. *Railroad Co. v. Hildreth*, 53 Cal. 129; *Plank Road Co. v. Griffin*, 21 Barb. 454. In another action growing out of this agreement, (94 Cal. 399, 29 Pac. 785,) and in *Power Co. v. Johnson*, 93 Cal. 538, 29 Pac. 126, this court held that these preliminary agreements inured to the benefit of the corporations thereafter formed, as contemplated by the agreements. To constitute the subscribers stockholders, it was not necessary that the certificates of stock should have issued to them. Civil Code, § 323; *Hotel Co. v. Callender*, 94 Cal. 120, 29 Pac. 859; *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110.

There are four separate appeals submitted here, by as many defendants, depending upon the same general principles, but differing somewhat in the evidence establishing the facts as to their becoming stockholders, and the foregoing remarks are indulged in part as applicable to all of the appellants. So far as this appellant is concerned, he signed the articles of incorporation, acted as an officer

of the company, and in various ways assumed his position as a stockholder in the company. In view of the reasoning in *Power Co. v. Johnson*, supra, in *Hotel Co. v. Callender*, supra, in *Baines v. Babcock*, 95 Cal. 581, 27 Pac. 674, and 30 Pac. 776, and in the two appeals heretofore prosecuted in matters growing out of the same agreement involved here,—all recent cases,—it is not deemed necessary to extend the reasoning to the point that the agreement of November 19th was valid and binding upon the subscribers, and sufficient, upon the organization of the corporation, and acceptance by it of the subscriptions, to constitute them stockholders in the corporation which they had agreed to form, and in which they had bound themselves to become such stockholders.

The objection that the directors of the corporation were not elected by ballot, required by law, and hence had no power to levy the assessment in question, is unavailing: (1) The minutes of the secretary show that the directors were elected by ballot; (2) If not properly, they were at least informally, elected, organized as a board of directors, and acted as such; and, being in fact officers, their acts as such are valid.

It is further objected that the assessment in question, of \$10 per share, was levied upon the subscribed capital stock of 3,302 shares, while the notice to the stockholders intimated that the board of directors had levied an assessment of \$10 per share upon the capital stock, instead of upon the subscribed capital stock. By section 331 of the Civil Code, the directors were authorized, if one-fourth of its capital stock had been subscribed, to levy and collect assessments upon the subscribed capital stock "in the manner and form, and to the extent provided herefor." The 3,302 shares of stock subscribed in excess of one-fourth of 10,000 shares, which the capital stock was divided, and the shares so divided became the basis for the assessment, the capital stock upon which the assessment was to be levied. The notice required to be given to stockholders in such calls must be such as the charter requires, or, what with us is the same thing, such as the statute prescribes; and in the absence of an express provision in the charter or the articles of association, or the law under which they are formed, it is said no notice is required. *Mor. Corp. § 147*. Our Civil Code, § 323, prescribes the form of a notice to be given to stockholders of the levy of an assessment, which form was followed in the present case. In describing the assessment, it describes it as being "levied upon the capital stock of the corporation," instead of upon the subscribed capital stock. The legislature has authority to designate the form of notice to be given, and having done so, and the secretary having given the notice thus provided, it was sufficient.

The other matters discussed in the briefs of the appellant are not material to the result.

judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

SAN JOAQUIN LAND & WATER CO. v. BELDING. (No. 18,215.)

(Supreme Court of California. Jan. 6, 1894.)

Department 1. Appeal from superior court, San Joaquin county; J. K. Law, Judge.

Action by the San Joaquin Land & Water Company against Charles Belding. Judgment for plaintiff. Defendant appeals. Affirmed.

Jas. H. Budd, J. E. Budd, and W. L. Dudley, for appellant. Baldwin & Campbell and S. D. Woods, for respondent.

PER CURIAM. The judgment and order appealed from in this case are affirmed, upon the authority of *Water Co. v. Beecher*, 35 Pac. 349, (No. 18,216, this day decided.)

SAN JOAQUIN LAND & WATER CO. v. HEWLETT. (No. 18,217.)

(Supreme Court of California. Jan. 6, 1894.)

Department 1. Appeal from superior court, San Joaquin county; J. K. Law, Judge.

Action by the San Joaquin Land & Water Company against H. H. Hewlett. Judgment for plaintiff. Defendant appeals. Affirmed.

Jas. H. Budd, J. E. Budd, and W. L. Dudley, for appellant. Baldwin & Campbell and S. D. Woods, for respondent.

PER CURIAM. The judgment and order appealed from in this case are affirmed upon the authority of *Water Co. v. Beecher*, 35 Pac. 349, (No. 18,216, this day decided.)

SAN JOAQUIN LAND & WATER CO. v. HITCHCOCK. (No. 18,218.)

(Supreme Court of California. Jan. 6, 1894.)

Department 1. Appeal from superior court, San Joaquin county; J. K. Law, Judge.

Action by the San Joaquin Land & Water Company against J. R. W. Hitchcock. Judgment for plaintiff. Defendant appeals. Affirmed.

Jas. H. Budd, J. E. Budd, and W. L. Dudley, for appellant. Baldwin & Campbell and S. D. Woods, for respondent.

PER CURIAM. The judgment and order appealed from in this case are affirmed, upon the authority of *Water Co. v. Beecher*, 35 Pac. 349, (No. 18,216, this day decided.)

WULZEN v. BOARD OF SUP'RS OF CITY AND COUNTY OF SAN FRANCISCO.

(No. 14,401.)

(Supreme Court of California. Jan. 3, 1894.)

CERTIORARI — REVIEWING ACTS OF CITY COUNCIL — CONDEMNATION OF LAND FOR STREET — DUE PROCESS OF LAW.

1. The action of a city council, to whom power has been delegated to appropriate land

for public use, in passing a resolution of intention to extend a street, and in declaring the width and length of such extension, is not subject to review on certiorari, as such action is the exercise of a purely legislative function.

2. Personal notice to those whose lands are to be taken for public use is not necessary to constitute due process of law.

3. Act March 6, 1889, relating to the taking by a city of land for public improvements, requires the city council, before making any improvement, to post near the land affected, and to publish, notice of the intention to make the improvement and of the character of the improvement. *Held*, that a fulfillment of these requirements constitutes due process of law in the matter of giving notice to those whose lands are to be affected.

4. An order of a city council, to whom has been delegated power to appropriate land for public use, declaring that certain land is hereby "condemned, appropriated, acquired, set apart, and taken for public use," is subject to review on certiorari, as such order is the exercise of a function judicial in its nature.

In bank. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Petition by D. H. Wulzen for a writ to have an order of the board of supervisors of the city and county of San Francisco reviewed. From a judgment dismissing the petition, petitioner appeals. Reversed.

J. C. Bates, for appellant. Pierson & Mitchell, for respondent.

PER CURIAM. The appellant here filed his petition in the court below to obtain a writ of review under section 1068 of the Code of Civil Procedure, to annul a certain order of the board of supervisors of the city and county of San Francisco, (a copy of which, marked "Exhibit C," is made a part of the petition,) which purported on its face to take and condemn petitioner's land, with that of many others, for an alleged public use, in the extension of Market street in a general southwesterly direction, from its present terminus to the Pacific ocean. The order sought to be brought under review follows the resolution of intention of the board, (which is also set out at length in the petition, and marked "Exhibit A,") and the portion thereof against which the objections of petitioner are more particularly directed is as follows: "Section 1. Market street is hereby declared to be an open public street of the city and county of San Francisco, from its present termination at its intersection with Castro and Seventeenth streets, thence southwesterly and westerly, with a uniform width of 120 feet, to low-water mark of the waters of the Pacific ocean. The said street, as extended, embracing all the land included in the boundaries hereinafter described, is hereby condemned, appropriated, acquired, set apart, and taken for public use, except those portions of said lands included therein, and now held by the city and county as open public streets or highways." The petition avers that no compensation was made to petitioner for his land taken, and also that it is not, and never has been, for the public use or conven-

lence, or necessary thereto, to open or extend said Market street, and specifies reasons for this conclusion. An order requiring defendant to show cause why a writ of review should not be allowed issued, in answer to which defendant appeared, and for cause answered "that the proceeding sought to be reviewed herein was not, and is not, a judicial act, but was and is a legislative act, and not the subject of review on a writ of certiorari." Upon a hearing the court below sustained the position taken by defendant, and denied the writ and dismissed the petition. From the judgment, petitioner appeals.

It is admitted on all hands that certiorari does not lie to review the action of an inferior tribunal or board in the exercise of purely legislative functions which are not judicial in their character. *People v. Board of Ed. of Oakland*, 54 Cal. 375; *Myers v. Hamilton*, 60 Cal. 289; *Williams v. County of Sacramento*, 65 Cal. 160, 3 Pac. 667; *Bixler v. Board*, 59 Cal. 698; *People v. Bush*, 40 Cal. 344. At the oral argument much stress was laid by counsel for appellant upon the insufficiency of the notice provided by the statute to be given to the owners of property to be affected by the improvement. The position taken was not that the notice must be "due process of law," in the strict sense of the term, as defined in proceedings taken in the courts, but that it must be its equivalent, with only such modification as the nature of the proceedings and the surroundings render necessary. Justice Bradley, in discussing what is due process of law in *Davidson v. New Orleans*, 96 U. S. 97, uses the following language: "In judging what is due process of law, respect must be had to the cause and object of the taking,—whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law, but, if found to be arbitrary, oppressive, and unjust, it may be declared to be not due process of law." In commenting upon the above quotation in *Lent v. Tillson*, 72 Cal., at page 414, 14 Pac. 71, Temple, J., says: "In other words, the sufficiency of the notice must be determined in each case from the particular circumstances of the case in hand. And, further, in matters of assessment and taxation, the same character of notice is not required as in ordinary actions in a court of justice, for the reason, I presume, that in such summary proceedings it is not practical or usual." In the present case the statute of March 6, 1889, (St. 1889, p. 70,) under which the proceedings were taken, requires that before ordering any work done or improvement made, as authorized by section 1 of the act, the city council shall pass a resolution of intention to do the work or make the improvement, describing the work or improvement, and the land deemed necessary to be taken therefor, and specifying the

boundaries of the district to be affected benefited by the improvement, and to be assessed to pay expenses. Notices are required to be posted upon the contemplated improvement, not more than 300 feet apart, not less than three in any case, which shall be headed, in letters of not less than one inch in length, "Notice of Public Work," shall contain notice of the passage of resolution of intention, its date, and, briefly, the work or improvement proposed, "and refer to the resolution for further particulars." A like notice is required to be published in 10 days in a daily newspaper (if any) published and circulated in the city where the work is to be done, etc. Within 10 days after completion of publication, all parties interested objecting may file their objections, when a day for hearing their objections must be fixed, the parties objecting notified, and hearing had; and, if the objections are sustained, all proceedings are stopped; if overruled, or if no objections are filed, the council is deemed to have acquired jurisdiction to order the work done or improvement made. The notice was given by posting and publication, as prescribed by the statute.

The terms "due process of law," or "course of law," or "law of the land," all of which signify the same thing, are sometimes defined as "law in its course of administration through courts of justice." As applied to judicial proceedings, this definition is precise and precise, but in a broader sense the term signifies such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. Administrative process, it has been said, of the customary sort, is as much due process of law as judicial process. To settle the question as applied to a given state of facts, we have but to examine the previous condition of things in use, and regarded as essential to the protection of the rights of the individual under such circumstances; and, if substantial compliance with such essential requirements of the course prescribed may be said to be consonance with the law of the land, and constitute due process of law. The power of taxation is confided to the legislative department of the government, and "an act levying taxes and providing the means of enforcement is within the unquestioned and unquestionable power of the legislature. It is therefore the law of the land, not merely so far as it lays down a general rule to be observed, but in all the proceedings and the process which it points out or provides for in order to give the rule full operation." *Cooley, Tax'n*, pp. 48, 49. It was said in *Kelly v. Pittsburgh*, 104 U. S. 80: "They have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government

ture of the duty to be performed, and customary usages of the people have had a different procedure, which, in relation to that matter, is, and always has been, the process of law."

The burden sought to be laid upon proprietors in this case is not, it is true, on, in the strict sense of the term. *Supervisors of Yolo Co.*, 47 Cal. 234. An assessment for a local—for a municipal improvement, which is sought in the present case under review; but in principle it is not respects subject to like consideration in cases of taxation. The determination as to whether or not the right of eminent domain should be exercised, and as to what is necessary to be taken in the exercise of that right, is a political and legislative question, and not a judicial one. Its determination rests exclusively with the legislature, and with such subordinate legislative bodies as it may be properly devolved upon. The question of whether the exercise of the power is wise or not is one with which the judicial department has no concern. The question as to whether a given use is in fact a public use may be inquired into by the courts, but that question determined in the affirmative, as it must be here, and the power of the court is confined to seeing to it that the demands cast upon the citizen are in conformity with the methods prescribed by the legislature, and that those methods are not in conflict with the fundamental rights of the citizen. *Gilmer v. Lime Point*, 18 Cal. 324; *Railroad Co. v. Moss*, 23 Cal. 324; *City of Los Angeles*, 86 Cal. 37, 24 Cal. 1; *In re Fowler*, 53 N. Y. 62; *People v. ...*, 21 N. Y. 595. In the case last cited it was said: "The necessity for appropriating property for the use of the public is a question for the government is not a judicial question. The power resides in the legislature. It may be exercised by means of a statute, which shall at once designate the property to be appropriated and the purpose of the appropriation; or it may be delegated to public corporations established to carry on enterprises in which the public is interested. There is no restraint upon the power, except requiring compensation to be made; and, when the power is committed to public officers, it is a subject of legislative discretion to determine what prudential regulations shall be established to secure a discreet and judicious exercise of the authority." We are in consensus of opinion—the weight of authority is to the effect that, in a case like the present, the legislative authority would have the perfect right, without any notice to the parties to be affected by its action, in the exercise of a statute requiring notice, to open Market street, and determine the portions to be affected thereby, the latter of which was done and upheld in the case of *Opening of Dupont street*. *Lent v. Tillamook*, Cal. 404, 14 Pac. 71. In that case

it was said, in substance, that the parties affected had no constitutional right to be heard until the assessment was made. The notice in the present case is made necessary by the act under which the council received its authority, and was in accord with the requirements of the act, and was as specific and certain as is practical under such circumstances, and was substantially such as has been approved in many cases in this state and elsewhere. To require such a notice to name all the persons to be affected, and to be served upon them personally, would, for a variety of reasons, require an impossibility.

We are of opinion, therefore: (1) That the proceedings of the council in passing the resolution of intention, and in declaring the exterior boundaries of the district to be affected by the contemplated improvement, were legislative in character. (2) In matters of taxation and assessment the state is not bound to accord personal service of process upon the citizen. (3) That the notice and the mode of its service was in obedience to the requirements of the statute, and not violative of any inherent or constitutional right of the persons to be affected thereby, and hence in accord with the law of the land, and amounted to due process of law in such a case.

No objections were filed, so far as appears, to the improvement, or to the extent of the district of lands to be affected or benefited by such improvement; hence, under section 5 of the act, the council "is to be deemed to have acquired jurisdiction to order any of the work to be done or improvements to be made." Thereupon the city council passed the ordinance set out in the transcript and marked "C," which it is claimed by appellant was the exercise of judicial power, and in excess of the jurisdiction conferred upon the city council by the act of March 6, 1889. That order or ordinance (Order No. 2,319) purports to be an order for "opening and extending Market street from its present termination, in a southwesterly and westerly direction, to the Pacific ocean." By section 1, "Market street is declared to be an open public street of the city and county of San Francisco, from its present termination at its intersection with Castro and Seventeenth streets, thence southwesterly and westerly, with a uniform width of 120 feet, to low-water mark of the waters of the Pacific ocean. The said street, as extended, embracing all the land included in the boundaries hereinafter described, is hereby condemned, appropriated, acquired, set apart, and taken for public use, except those portions of said lands included therein, and now held by the city and county as open public streets or highways, to wit." Then follows a description of the proposed street. Section 2 names and appoints three commissioners to assess the benefits and damages resulting from the opening and extending the street, as provided for in resolution of intention, and to have and exercise general supervi-

sion of the proposed work and improvement until the completion thereof pursuant to the provisions of an act of the legislature, etc., describing the objects of the act approved March 6, 1889, (St. 1889, p. 70, etc.)

The questions presented are: (1) Was the act of the board of supervisors judicial in its character and effect? and, if so, (2) was it in excess of the jurisdiction conferred upon the board? The passage of ordinary resolutions for opening streets in cities by the board of supervisors or city council, under the authority conferred by the act of March 6, 1889, and providing for commissioners, etc., is clearly, we think, a legislative act. A legislative act is said to be one which predetermines what the law shall be for the regulation of future cases falling under its provisions, while a judicial act is a determination of what the law is in relation to some existing thing done or happened. *Mabry v. Baxter*, 11 Helsk. 690; *Sinking Fund Cases*, 99 U. S. 761. In the case last cited it was said: "Whenever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions. Thus, an act of the legislature of Illinois authorizing the sale of the lands of an intestate to raise a specific sum to pay certain parties their claims against the estate of the deceased for moneys advanced and liabilities incurred was held unconstitutional, on the ground that it involved a judicial determination that the estate was indebted to those parties for the moneys advanced and liabilities incurred. The ascertainment of indebtedness from one party to another, and a direction for its payment, the court considered to be judicial acts, which could not be performed by the legislature. *Lane v. Dorman*, 3 Scam. 238." Whenever an act determines a question of right or obligation, or of property, as the foundation upon which it proceeds, such an act is, to that extent, judicial.

The order in question went beyond the legislative function of declaring a street an open and public one. It purported to and condemned, appropriated, acquired, set apart, and took for public use all the land within the exterior boundaries of the street, except that already held by the city. To condemn land is to set it apart or expropriate it for public use. "To appropriate" is to make a thing one's own; to make it the subject of property; to exercise dominion over an object to the extent, and for the purpose, of making it subserve one's own proper use or pleasure. "To acquire" is, in the law of contracts and descents, to become the owner of property; to make property one's own. "To take" signifies "to lay hold of," and, when applied to land, implies "to gain or receive into possession; to seize; to deprive one of the possession; to assume ownership.

Thus, it is a constitutional provision that man's property shall not be taken for public uses without just compensation." *Black Law Dict. tit. "Take."* The terms used in this order are the usual and apt ones made use of in proceedings in the courts for final condemnation of land under the exercise of the power of eminent domain. They are not the usual expressions made use of in the exercise of legislative power. The jurisdiction of the board conceded, and the terms used were sufficient to divest the title of the petitioner, and vest it in the public, to appropriate the property to a public use. This was the exercise of judicial power. It would not do to say that the board of supervisors had no such power, and therefore we must presume that in the order they merely intended their action as preliminary to proceedings to condemn, should they become necessary. The order in question speaks in no uncertain terms. It uses language capable of only one interpretation, and it is as showing an intent to condemn the land indicated in praesenti. The order included not only a legislative expression of the will of the board adopting it that a street should be opened, but, in addition thereto, sought to perform the judicial act of taking the land of citizens, rendered necessary under the legislation involved in the order. To the extent which it sought to accomplish this object it was judicial.

As to the action of the board, so far as it was judicial, being in excess of its jurisdiction, we entertain no doubt. It is true that boards of supervisors, city councils, and like local boards and commissions are not within the inhibition of section 1 of article 3 of the state constitution, and may be invested with powers belonging to either or all of the departments of our government. *People v. Supervisors*, 8 Cal. 60; *People v. Provisional Board*, 34 Cal. 532; *Kimball v. Alamenda Co.*, 19 Cal. 19. The objection to that portion of the order is not simply that it seeks to exercise judicial power, but that it involves an exercise of such power not conferred by statute, and in a manner which no statute can authorize. When land within a street is "condemned, appropriated, acquired, set apart, and taken for public use," it would seem that the last act in the series essential to vest in the public a right to its use as a thoroughfare is accomplished. It is a defence, not of an intention to take and condemn the land in the future, as provided in the statute we have referred to, but of present condemnation, segregation, and dedication to the use of the public. It follows from these views that the court below erred in holding that Order No. 2,319 was and was not a judicial act, and the judgment of the court below is reversed, and the cause remanded.

BEATTY, C. J. I concur in the judgment.

**KELL v. BOARD OF SUP'RS OF CITY
D COUNTY OF SAN FRANCISCO.**
(No. 15,027.)

eme Court of California. Jan. 3, 1894.)

ank. Appeal from superior court, city
nty of San Francisco.
ion by Brickell for a writ to have an or-
the board of supervisors of the city and
of San Francisco reviewed. From a
nt dismissing the petition, petitioner ap-
Reversed.

Bates, for appellant. T. Z. Blakeman
nn D. Durst, for respondent.

CURIAM. On the authority of Wul-
Board, 35 Pac. 353, (No. 14,401; this day
,) the judgment is reversed.

STATE v. ROSENER.

me Court of Washington. Jan. 9, 1894.)

FORMATION—VERIFICATION—CRIMINAL LAW—
INSTRUCTIONS.

The fact that a deputy clerk of court
the jurat to the verification of an infor-
in the name of his principal, by him-
deputy, instead of in his own name as
deputy, does not render the information in-
t.

In a prosecution for assault with a dead-
pon, where the court has defined a
y weapon" as one likely to produce death
at bodily injuries," a further statement
same instruction that such a weapon is
ely to produce death or an "injury"
not have misled the jury, and is no
for reversal.

An instruction defining "reasonable
as such a doubt as would make a man
nary prudence waver or hesitate in ar-
at a conclusion, in considering a matter
importance to himself as the case on
to defendant, is not objectionable as
g less positive proof of facts in cases
or importance than in those of a graver

real from superior court, Whatcom
; John R. Winn, Judge.

L. Rosener was convicted of assault
eadly weapon, and appeals. Affirmed.
court, in his charge, referring to what
easonable doubt, said: "What might
easonable doubt in one case would not
easonable doubt in the mind of a juror
other case. . . . Of course, a sen-
and humane man, were his acts of
erable importance, or the duty he is
to perform of great importance, he
necessarily be more cautious in ar-
at a conclusion than he would in an
of less importance. So, a 'reasonable
might be defined to you as such a
as a man of ordinary prudence and
ility, in considering a matter of like
ance to himself as the case on trial
he defendant, would make you waver
itate in arriving at a conclusion."

k & Leaming, for appellant. Thomas
wman, Pros. Atty., and W. C. Jones,
Gen., for the State.

HOYT, J. The appeal in this case is from
a judgment and sentence imposed upon the
appellant upon a verdict of a jury finding
him guilty of the crime of assault with a
deadly weapon, with intent to inflict upon
the person of another a bodily injury, where
no considerable provocation appears. Two
reasons are assigned why the judgment and
sentence should be reversed: First, on ac-
count of the insufficiency of the informa-
tion; and, second, for error of the court in
instructing the jury.

The information is attacked upon two
grounds: (1) There is no allegation of the
existence of the facts required by the statute
to authorize the prosecuting attorney to pro-
ceed by information; (2) it does not appear
therefrom that it had been properly verified.
It is only necessary to say, as to the first
point, that substantially the same question
was decided by this court adversely to the
contention of the appellant, in the case of
State v. Anderson, 5 Wash. 350, 31 Pac. 969.
As to the proof of verification, it is contended
that it is insufficient, for the reason that the
deputy clerk signed the jurat in the name
of his principal, by himself as deputy, in-
stead of in his own name as such deputy.
This irregularity, if irregularity it was, was
not sufficient to destroy the force of the
jurat. In State v. Doe, 6 Wash. 587, 34 Pac.
154, an information was attacked on the
ground that the deputy signed the jurat in
his own name, instead of that of his prin-
cipal, and this court held such verification
good; but, from the discussion therein, it
will appear that while some of the courts
have held that the deputy must sign the
jurat in the name of his principal, and that
to sign it in his own name would render it
invalid, and others that the contrary prac-
tice was the correct one, the weight of au-
thority was in favor of holding that the
verification was good, in whichever form the
jurat was signed. So long as the officer
before whom the person to be sworn actu-
ally appears is authorized to administer
the oath, and the jurat, when reasonably
construed, shows that he so appeared, and
was sworn by such officer, its particular
form is immaterial.

Error is founded upon two instructions
given to the jury. In one of them, the court,
in defining the term "deadly weapon," as
used in the statute, first stated that a deadly
weapon is one likely to produce death or
great bodily injury, and afterwards, in the
same instruction, made use of the expres-
sion that such weapon was one likely to
produce death or an injury upon the com-
plaining witness. Appellant seems to rely
with much confidence upon the fact that the
omission of the words "great bodily," in
the second reference to the nature of the
weapon, constituted reversible error. If
there had been but one definition or descrip-
tion of a "deadly weapon," and such words
had been omitted therefrom, such omission

would have rendered the instruction so faulty that for the giving thereof there should be a reversal. But it is the duty of this court to look at the instructions as a whole, and, as it appears therefrom that a definition entirely satisfactory to the defendant was first given, the fact that, in referring again thereto, such words were omitted, could not, in our opinion, have misled the jury. The second definition does not, in terms, contradict the first one. A great bodily injury is still an injury. Hence, the second attempted definition, from which the words "great bodily" are omitted, does not contradict the first one, in which they were correctly used.

The other instruction to which exception is taken is that in which the court defined "a reasonable doubt." This instruction defined a "reasonable doubt" in substantially the language of the supreme court of the territory in the case of *Leonard v. Territory*, 2 Wash. T. 398, 7 Pac. 872; and it is contended on the part of the appellant that it is erroneous, for the reason that it recognizes the right of a jury to require less positive proof of facts in cases of minor importance than in those of a graver nature. There may be some ground for a critical mind to draw some such conclusion from the language used, but when the definition is taken as a whole, and reasonably construed, it is at least as favorable to the defendant as he could ask. In fact, if the definition contained in such instruction is open to just criticism, it is for the reason that it is too favorable to the defendant. When the court therein says that, whenever the state of the proofs is such that every necessary fact is not made so evidently to appear that a man of common prudence would act thereon without any pause or hesitation whatever, the defendant should be acquitted, the state, and not the defendant, has reason to find fault with the instruction. The judgment and sentence must be affirmed.

DUNBAR, C. J., and SCOTT, STILES, and ANDERS, JJ., concur.

PHILBRICK v. ANDREWS.¹

(Supreme Court of Washington. Jan. 9, 1894.)

COMMUNITY PROPERTY — ACTION FOR DIVORCE — DECREE—HOMESTEAD—JUDGMENT LIEN—EXECUTION SALE—VALIDITY—NOTICE TO PURCHASER.

1. Where a father and minor children by his first wife reside on a tract of land patented to him during her life, a sale of the whole of the tract under a judgment recovered against him after her death is void, as the land was community property, and her half descended to her children.

2. In an action by a second wife for divorce and alimony, the court could neither award her husband's half of the homestead claim to her, nor render a money judgment, and make it a specific lien on his half, prior to his right of homestead exemption, if the land was not brought before the court by the pleadings.

3. A specific lien which would take precedence of the husband's right of homestead exemption could neither be established by, be presumed from, an execution levy, under 2 Code, § 449, of a judgment for the wife's alimony, if such judgment did not purport to establish a lien on any particular property.

4. Gen. Laws 1877, § 346, providing that the word "homestead" must be entered of record on the margin of the homestead exemptioner's recorded title, was repealed by Code 1889, which omitted such provision, and inserted in lieu thereof, section 342, which provides that "such homestead may be selected at any time before sale."

5. Occupancy of land by the head of a family with his family is notice to a purchaser thereof at execution sale under 2 Code, § 449, that it is "claimed" as a homestead.

6. The purchaser of a homestead on execution sale is chargeable with notice as to whether the execution creditor has filed an affidavit that the homestead exceeds \$1,000 in value, required by 2 Code, § 484.

Appeal from superior court, Jefferson county; R. A. Ballinger, Judge.

Ejectment by W. W. Philbrick against Augustus Andrews. Judgment for defendant. Plaintiff appeals. Affirmed.

Geo. W. Tyler, for appellant. Johnson Moody, for respondent.

SCOTT, J. Respondent and his two minor children of his first wife live upon certain land patented to him during the life of his wife, by the government, as a homestead claim. The first wife died, and he married a second time, and his second wife procured a divorce from him. The decree of divorce adjudged that the wife have and receive of her husband (respondent here) the sum of \$1,500 as alimony, the same to be a lien upon the property of the said defendant. No property, real or personal, was mentioned or described in the decree, nor does it appear that any property was described in the proceedings in said divorce action, the pleadings and proofs therein not having been made a part of the record in this cause. A judgment for \$1,500 and the costs of the case docketed June 19, 1891, and a general execution was issued thereon August 15, 1891. The sheriff proceeded to levy upon and make sale of the land above mentioned, which was stated of 160 acres in Jefferson county. At the sale, appellant bid \$1,600 for the whole tract, and paid the officer \$50 cash, as required by law, to bind the sale, payment of the balance being promised upon the following day, but appellant refused to pay the balance on the day named, or at all, and, when execution lapsed, the sheriff returned it unsatisfied, with a statement of the facts and the \$50. This return was made in October, 1891. Subsequently, and in February, 1892, the plaintiff in the divorce suit moved, in part, for the confirmation of the sale to the appellant, and, in aid of said motion, filed with the court his affidavit to the effect that he paid to the plaintiff the sum of \$1,550 on the day of the sale, in satisfaction of the judgment; the receipt of the plaintiff for

¹ Rehearing denied.

was also filed; and thereupon, and same day on which the motion was made, the court ordered the sale confirmed. At the expiration of the time of redemption, the sheriff executed to appellant a deed in and to the land, and this action of ejectment followed for the purpose of obtaining possession of the land. Judgment was entered for the defendant.

It is in question whether the property was community property of the defendant and his first wife, and, after her death, one-half of it descended to her minor children. There is no question that the court had power in the divorce to award the half belonging to the defendant, or any part of it, to the plaintiff, or under a judgment for a sum of money, to create a specific lien thereon which should take precedence of a homestead exemption. But to do either it was necessary that the property should have been brought before the court, (*Webster v. Webster*, 2 Or. St. 417, 28 Pac. 864;) and the proper thing to have done this was to describe it in the findings, (*Bamford v. Bamford*, 4 Or. St. 267, 28 Pac. 520.) Section 484, volume 2, of the present Code, which was section 345 of the 1881 Code, provides that a creditor may have a "homestead claimed under the provisions of this act" sold under execution upon making and filing an affidavit that it exceeds \$1,000 in value; and, if it sells for more than that sum, the excess applies upon the execution debt, and the \$1,000 exempted belongs to the homestead claimant. No sale could be had unless the sum bid exceeded \$1,000. The statute is somewhat indefinite when it speaks of a homestead "claimed under the provisions of this act," no way being specified as to how the same shall be claimed, and no definite time fixed, only that it may be done at any time before sale. We do not think it was the intention to require the homestead claimant to attend the proposed sale, and make proclamation of his rights and claims in this regard, for he might have no knowledge of such proposed sale, although legal notice thereof was given; nor is he required to notify his creditors. Such exemptions, being necessary to the welfare and protection of the family, and designed to prevent the absolute destruction of the home, are favored in law, and ought not to be subject to defeat by reason of any such failure or omission. It is necessary that the homestead should be occupied as such, and this is probably the only way by which it can be selected under our present laws,—certainly, it is the most effectual way; and the defendant, with his family, was so occupying the land in question during all of said times, and appellant was bound to take notice of such occupancy when he purchased,—in fact, he had actual notice. He is also chargeable with notice of the prior proceedings in said case by virtue of which the sale of said lands

selected at any time before sale. No way was pointed out as to how the same should be selected. Section 346, p. 72, of the General Laws of 1877 made provision for a like homestead exemption, but required the person claiming the same to cause the word "homestead" to be entered of record on the margin of his recorded title to such lands to obtain the benefit of such exemption, and was silent as to when the same should or could be done. This provision with reference to the entering of the word "homestead" was dropped from the compilation of 1881, and in lieu thereof was added the following clause, viz.: "Such homestead may be selected at any time before sale." Section 342. Appellant contends that section 346, Laws 1877, aforesaid, is in force in this particular, and, as the defendant did not cause the word "homestead" to be so entered of record, he was not entitled to any homestead exemption; but, without going into any discussion of this subject, we are of the opinion that such provision was repealed by the 1881 Code. See sections 762, 3319, 3320, 3325; also, *Graetz v. McKenzie*, 3 Wash. St. 194, 28 Pac. 331; *Marston v. Humes*, 3 Wash. St. 267, 28 Pac. 520. Section 484, volume 2, of the present Code, which was section 345 of the 1881 Code, provides that a creditor may have a "homestead claimed under the provisions of this act" sold under execution upon making and filing an affidavit that it exceeds \$1,000 in value; and, if it sells for more than that sum, the excess applies upon the execution debt, and the \$1,000 exempted belongs to the homestead claimant. No sale could be had unless the sum bid exceeded \$1,000. The statute is somewhat indefinite when it speaks of a homestead "claimed under the provisions of this act," no way being specified as to how the same shall be claimed, and no definite time fixed, only that it may be done at any time before sale. We do not think it was the intention to require the homestead claimant to attend the proposed sale, and make proclamation of his rights and claims in this regard, for he might have no knowledge of such proposed sale, although legal notice thereof was given; nor is he required to notify his creditors. Such exemptions, being necessary to the welfare and protection of the family, and designed to prevent the absolute destruction of the home, are favored in law, and ought not to be subject to defeat by reason of any such failure or omission. It is necessary that the homestead should be occupied as such, and this is probably the only way by which it can be selected under our present laws,—certainly, it is the most effectual way; and the defendant, with his family, was so occupying the land in question during all of said times, and appellant was bound to take notice of such occupancy when he purchased,—in fact, he had actual notice. He is also chargeable with notice of the prior proceedings in said case by virtue of which the sale of said lands

was attempted, and of the fact that no affidavit had been filed, as required by section 484, aforesaid; furthermore, that the same could not be sold except for a price in excess of \$1,000, and this for the undivided half interest of the defendant. Appellant's bid of \$1,600 was for the whole tract, and, although there was no authority for selling the undivided half belonging to said children, the situation would not be altered. It follows that such purported sale was void, and consequently the irregular proceedings by which a confirmation thereof was attempted could not lend any force to it, and were without effect. Affirmed.

DUNBAR, O. J., and ANDERS and STILES, JJ., concur.

HILL v. HILL et al.

(Supreme Court of Washington. Dec. 21, 1893.)

DESCENT AND DISTRIBUTION—CHILDREN OMITTED FROM WILL—EXTRINSIC EVIDENCE.

1. Gen. St. § 1465, providing that a testator shall be deemed intestate as to such of his children as are not provided for in his will, applies to community property as well as to testator's separate estate.

2. Where a testator is deemed intestate as to such of his children as are not provided for by his will, (Gen. St. § 1465,) extrinsic evidence is inadmissible to show that testator had provided for such children otherwise than by his will.

Appeal from superior court, King county: J. W. Langley, Judge.

Action by Alice S. Hill, executrix of William C. Hill, deceased, against Elizabeth Hill and others, for the construction of decedent's will. From the decree rendered, plaintiff appeals. Affirmed.

Junius Rochester, and Fishback, Elder & Hardin, for appellant. Chas. F. Munday, for respondents.

STILES, J. The appellant asks a construction of the will of her husband, William C. Hill, deceased, as between herself and the respondents, children of her and the said William C. The deceased left a will in which all of his property was devised to the appellant, no mention being made therein of any of his children. Certain of this property is community real property in this state. The will was executed December 17, 1888, and when found and offered for probate, in 1890, there was also found, in a sealed envelope with it, a letter signed by the deceased, and dated December 26, 1888, which letter was addressed to appellant, and made certain recommendations to her with regard to the management of the property devised to her, and of the children, three out of nine of whom were named. The court below held, following the cases of *Bower v. Bower*, 5 Wash. 225, 31 Pac. 598, and *Barnes v. Barker*, 5 Wash. 390, 31

Pac. 976, that the deceased died intestate to his children, and this appeal is from construction thus given to the will.

Appellant submits two propositions:

1. Does the statute (Gen. St. § 1465) was construed in the above-cited cases as to community property? which we untastefully answer in the affirmative. The way in which a deceased person can dispose of property in this state is by will. The term "testamentary disposition" is used both the law of the property rights of married persons, (Code 1881, § 2411,) and law of descent of real property, (Id. § 3 Gen. St. § 1481,) but the meaning is "disposition by will." The very same statute which used the words "testamentary disposition" also used the word "will," in the active way, to convey the same meaning. Code 1881, § 2409. But, without this, common usage the world over is to employ the words "will," "testament," and "last will and testament" as exactly synonymous. Again, the fact that, during the life of husband and wife, the property acquired by purchase by either is held in common, community property, does not destroy its quality as property which, subject to disposition by will, to the extent of one-half, by either spouse. The statute, the purpose of such disposition, speaks of it as "his or her half of the community property," and of the descent of "it" to children or the survivor. Gen. St. § 1465. Wherever the ownership of such property may be during the life of the husband and wife, the power to dispose of one-half by will is at all times as full and complete though inchoate, as though each undivided half were the property of an unmarried person. So, too, the statute of wills, though passed in 1854, long before the community property system was thought of in this state, applies equally to such property. Gen. St. § 1458, empowers any adult of sound mind to devise all of his or her real and personal, and this includes any and every kind of property, whether theretofore conceived of or not; and the provision in section 1465 limit and qualify the power to devise as to community property, as to any other over which the testator has anything more than a mere testamentary power.

2. It is submitted that there is a difference between our statute (Gen. St. § 1465,) that of any other state on this subject, which ought to cause a change in our former rulings excluding parol proof to show that a testator had provided for his children otherwise than by his will. The point raised is a new one, and is based upon the language of the statute, which, at the pertinent portion, reads thus: "Every such testator, so far as he shall regard such child or children, or their descendants, not provided for, shall be deemed to die intestate," etc. Oregon and Missouri statutes, which

wise like ours, omit the word "he."ellant's contention is that the sense of the statute is: "Every such testator shall seem to die intestate so far as he shall (consider) that such child is not provided for;" that is, it must appear, either the will itself or by parol proof, affirmatively, that the testator's mind, at some subsequent to the making of his will, that one or more of his children or theirendants were not provided for, and necessarily that he continued of that opinion at the time of his death. Such a contention would make an obvious absurdity of the whole statute, for it would leave a will to be attacked by children or grandchildren, whether named as devisees or not, with a showing that the testator had some way made it known that he did consider that he had provided for the child. What he would be shown to "consider" one day would be contradicted by something he said the next, and stated as his "mind" on a subsequent day.

The mental wanderings of a sick person would be watched, and noted and laid to use in case the reading of the will should fail to disclose more than a nominal provision. In short, the sins of avarice and perjury would receive an impetus not to be dreamed of in connection with decedent's estates. The letter of the statute repealed to, and the rules of construction invoked, and it is conceded that they would be given due force. But this word "he" has been in our statute for almost 40 years, and it has never received the construction here contended for. Whether it ever before called to the attention of the court we are unable to say. It seems not to have been heretofore expressly passed upon by this court; but the statute has undoubtedly been under consideration by courts of the state and territory hundreds, if not thousands, of times, and vast property interests are held under it. In full view of the construction universally given to it, the legislature has frequently re-enacted it in the same verba, and we shall not now disturb the construction, especially to give it the startling and alarming effect which would follow if the varying state of mind of the testator were to be let in to affect his own will. In defense of the construction which has prevailed, it may be justly said that this was not the first law of its kind by any means. When Washington was a part of Oregon, and in 1849, the territorial legislature enacted this precise section, with the word "he" omitted. Abb. Real Prop. p. 61. Many other states had similar laws, the general purpose of which was to protect children from unjust omissions in the disposition of their parents' estates. In the case of these laws the right of the child to inherit was defeated by a showing that the omission was intentional, and the intention might be made to appear by evidence

dehors the will. But the object of all such statutes was the same, and we believe that our own provision had the same inspiration. It is incredible that our legislature could have intended to introduce into the law of wills such a self-destroying and confusing element under the guise of a benevolent statute which had long been in operation in other states. There are nine children interested in this estate, eight of whom are minors. They reside in the District of Columbia, know nothing of our law, and were all served by publication. If this estate were now distributed to the sole devisee, would they be estopped, upon their respectively coming of age, to show that their father at some time after the date of his will regarded them as unprovided for? And, if not, must the matter be left open during the 10 or 15 years which must elapse before the youngest child arrives at majority? Facts which would fully justify the court in finding that the testator was wholly dissatisfied with his will, and regarded all of his children as unprovided for, may exist, may be easily provable, and may be known to the devisee; but the court is called upon to proceed without them, and with no power or means of calling for their production, except as its demand may be addressed to infants, who are incapable of caring for their own interests. True, there is a guardian ad litem, but he cannot be supposed to be in a position to make proof of such matters; and so the whole case of the children must go by default, unless there be no estoppel as to them. But, be these arguments good or bad, the long administration of the law as contended for by the respondents, and its evident purpose, constrain us to uphold the construction heretofore given it, and the judgment before us will therefore be affirmed.

HOYT, SCOTT, and ANDERS, JJ., concur.

STATE ex rel. THURSTON COUNTY v. GRIMES, State Auditor.

(Supreme Court of Washington. Dec. 22, 1893.)

COSTS IN SUCCESSFUL PROSECUTION OF FELONY—WHEN PAYABLE BY STATE.

1. Code, §§ 2106, 2107, previous to 1883, required the territory to pay the costs allowed in every successful prosecution for felony. Gen. St. § 3053, amending such sections, provided for the transmission of a cost bill, as allowed, to the territorial (state) auditor, and that the auditor should allow the same, "or so much thereof as may be allowable against the territory," and credit "the amount so allowed" to the county from which the bill came. *Held*, that the auditor should allow all items, except such as are chargeable to the county alone.

2. The auditor should not allow the clerk's or sheriff's fees, since they are salaried officers.

3. Nor should he allow items of expense for a stenographer and plat of the scene of the

crime, since they are conveniences, merely, not authorized by statute.

4. Since the counties are expressly made liable for the payment of the per diem and mileage of jurors in criminal cases, (Gen. St. § 3031,) and each juror is entitled to a certificate of his per diem and mileage, without regard to whether the cases were civil or criminal, (Gen. St. § 3049,) the auditor should not allow jurors' fees and mileage.

5. The auditor should allow the fees of defendant's as well as the state's witnesses, on a conviction, which must be included in the cost bill, (Gen. St. § 3049; Code Proc. § 1382,) as to refuse to allow defendant's witness fees would be a denial of his constitutional right to have compulsory process to secure the attendance of his witnesses.

6. Such constitutional provision does not apply to a preliminary examination, and the fees of defendant's witnesses at such examination are not recoverable against either the county or state, and should not be allowed by the auditor.

7. Const. art. 2, § 25, which prohibits diminishing the compensation of any public officer during his term, applies only to officers receiving fixed salaries, and not to officers who receive specific fees for specific services.

Petition by the state of Washington, on the relation of Thurston county, for a writ of mandamus directed to L. R. Grimes, state auditor, to compel him to allow and issue his warrant in payment of certain items contained in a cost bill in the case of a successful prosecution for felony in the superior court of such county. Writ denied.

M. A. Root, for relator. Jas. A. Haight, Asst. Atty. Gen., for respondent.

STILES, J. The respondent, as state auditor, refuses to allow, and issue his warrant for, certain items contained in a cost bill in the case of a successful prosecution for felony in the superior court of Thurston county, and a mandamus is asked for to require him to do so. The items disallowed are as follows:

1. Clerk's fees.....	\$ 28 80
2. Sheriff's fees.....	131 10
3. Stenographer, 6 days.....	60 00
4. Plat of scene of crime.....	20 00
5. Fees and mileage paid trial jurors..	382 60
6. Same paid jurors on special venire..	290 40
7. Fees of defendant's witnesses on trial	358 40
8. Same on preliminary examination..	110 20

The fees of the justice of the peace who held the preliminary examination, and of the constable attending the justice, were allowed in part, only,—the auditor claiming that they should be based on the fee bill of 1893; and the relator, that the schedule of fees theretofore existing should apply. This is one of the most difficult matters which this court has had to pass upon, not because of any principle of law involved in it, but because of the almost total lack of statutory guidance. Previous to 1883, the Code, §§ 2106, 2107, contained definite provisions on the subject, under which the territory was required to pay the costs allowed by the district judge in every case of successful prosecution for felony. But the act of November 28, 1883, (Laws 1883, p. 35,) amended both of those

sections, very little to their improvement, far as the construction of them goes. Section 2106 was only slightly changed, to provide for the transmission of a triplicate of the cost bill, as allowed by the territorial auditor. But section 2107, altered in its entire scope, so far as the territory was concerned. It provided as follows: "On receipt of the certified copy of said bill, the territorial auditor shall examine said audit said bill and allow the same or so much thereof as may be allowable against the territory and shall credit the amount so allowed to the county from whence the bill came, so much territorial tax paid." Thus the statute remains at this time. Gen. St. § 3054. Now, the general rule, under our system of county organization, is that the counties are burdened with the entire cost of the administration of the criminal laws within their boundaries; and, in turn, they receive from the state an appropriation for their own use all fines and costs collected in criminal cases. Gen. St. § 3054; Code Proc. § 1335. In unsuccessful prosecutions, no matter what the grade of crime, they bear the entire expense; and in all cases they must, in the first instance, reimburse for all such expenses, and are then liable to officers, witnesses, jurors, etc. Section 2107, however, gave them an absolute offset for expenses in successful prosecutions for felony, against so much of the territorial taxes, when the judge had approved the cost bill. But the amendment of section 2107, changed all this, took away the finality of the judge's approval, and the absoluteness of the territory's liability, and made the territorial auditor's approval a necessary condition, and the auditor's action was limited to so much of the bill as was "allowable against the territory." Therefore, the difficulty is to say what is "allowable," the legislature having repealed the only portion of the Code which ever provided that anything should be so allowed. Under the general rule in the counties, nothing whatever would have been allowed against the territory but for section 2107; and, with that section repealed, the counties would have been left to pay all such expenses. But we now have an implication that something is to be paid by the state, a considerable annual appropriation for that purpose, with no guide as to what particular items are chargeable to the state, except that it may be got by implication from scattered provisions of the statutes. The real proposition is that the auditor should allow all of the items of the cost bill, except as are by law chargeable to the county. This is perhaps as good a rule as can be framed, and we shall proceed to examine the items before us according to that standard.

1. The clerk is a salaried officer, and does not collect no fees against the county or state. It may be that clerk's fees can be included in the judgment against a prisoner who is convicted, but such fees are not embraced in the cost bill here spoken

list of such expenses of the parties as are not otherwise provided

regarding applies, also, to sheriff's

grapher is a convenience, merely, and is not required by any statute. This facility in the trial of criminal cases, when necessary, is not allowable at all, must be provided by the county.

or map is of the same character as the services of a stenographer.

counties are expressly made liable for the payment of the per diem and mileage of jurors, (Gen. St. § 3031; and this is placed in opposition to "costs in criminal cases," which are spoken of in another section in the same section. Each juror is to receive from the clerk, at the expiration of his term of service, a certificate of his per diem and mileage, and the court is to award to the cases he has been called upon, whether civil or criminal. Gen. St. § 3031. Every venire is either the general venire authorized by law, or a special venire authorized by the court. The judge does not issue certificates to jurors, and their expenses do not belong in the cost bill of a case. A prisoner, when convicted, is allowed with a jury fee of \$12, which is added to the cost bill against him. Gen. St. § 3031. A jury is an essential part of a criminal case, which the county must provide.

Witnesses are allowed fees and mileage for their services, which must be included in the cost bill, certified by the clerk, and approved by the judge, (Code Proc. § 1382; Gen. St. § 3031). Although this is said more because of the statutory provision on the subject than for any other reason. It is highly proper, that the judge, who is best qualified to say whether a witness was necessary or not, than any other official, should pass upon such allowances, and that is the only means of bringing witnesses before him. Gen. St. § 233, makes it the duty of prosecuting attorneys "to care for the cost bills in criminal cases," and that no useless witness fees are a part of such costs." But the conclusion is that defendant's witness fees are allowable in case of a conviction, and at any rate, they are not allowable in the case of a state. This opinion, rejecting the argument, would carry with it a denial of the writ of mandamus; for the application, as a whole, and cannot be refused or granted as to the rest. But it is only to save another like proceeding if it is found that the defendant's views as to these witnesses are not correct. The constitution guarantees to an accused person the right to have compulsory process to compel the attendance of witnesses in his own behalf, without the payment of money or fees to secure this. It cannot be that the measure of the constitutional requirement would be filled by the issuance of a subpoena by

the clerk, leaving to the accused the burden of making service, and paying fees and mileage. Such a construction would be to give the shadow, and withhold the substance, and we think the constitution can only be satisfied by the production of the witness in court without the payment of fees or mileage in advance. To bring this about, of course, the accused is not at liberty to sow the country broadcast with subpoenas. He ought to apply to the court or judge for an order for the issuance of a subpoena, and the service thereof, and make a showing, in general terms, of the necessity, so that there may be no wasteful expense. Witnesses thus subpoenaed, and other witnesses voluntarily appearing and giving material testimony at the trial, should have their per diem and mileage taxed in the cost bill, and paid by the county, which will then be entitled to recover the amounts from the accused in case of conviction. The cost bill coming to the auditor ought to show on its face that witness fees and mileage allowed by the judge were of this character, and such fees and mileage ought to be allowed against the state, since they are not expressly chargeable to the counties.

8. But defendant's witnesses at a preliminary examination are an entirely different matter. The constitutional provision referred to applies to trials only, and a preliminary examination is not, in any proper sense, a trial. Whatever expense the defendant incurs there is his own matter, and is not recoverable against either the county or the state, if the defendant is held.

9. Touching the justice's and constable's fees, it is claimed that as the fee bill of 1893, which reduced fees materially, was passed subsequently to their election and qualification, the prohibition against diminishing the compensation of any public officer, contained in article 2, § 25, of the constitution, operates to postpone the effect of that law until the terms of these officers expire. But one authority is cited, (Board of Sup'rs v. Hackett, 21 Wis. 620;) and that case held that such a constitutional provision applied only to such officers as receive a fixed salary out of the public treasury, and not to officers who receive specific fees for specific services. The section of the Wisconsin constitution construed is exactly like our own, and we think the reasons given for the ruling in the case cited are conclusive. The application for a writ is denied.

DUNBAR, C. J., and HOYT, SCOTT, and ANDERS, JJ., concur.

UPPER v. LOWELL et al.

(Supreme Court of Washington. Dec. 28, 1893.)

HIGHWAYS—WIDTH—USER UNDER COLOR OF TITLE.

The width of a highway created by use under an attempted establishment by the coun-

ty commissioners is not limited to the width as used, but is that attempted to be established, the attempted establishment constituting color of title.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by J. S. Upper against George Lowell, M. McDougal, and the county of King for the taking of gravel. Judgment for plaintiff. Defendants appeal. Reversed.

John F. Miller, Pros. Atty., and A. G. McBride, for appellants. Pratt & White, for respondent.

DUNBAR, C. J. The judgment in this case must be reversed on the sixth instruction given by the court, which was as follows: "The court further instructs you that as a matter of law the alleged road, at the point where the gravel is alleged to have been taken, is such a width as the jury believes from the evidence has been actually used by the public for the period of twenty years or more." One of the defenses in this action was that an attempt had been made by the county commissioners to locate a road at the place where the gravel was alleged to have been taken, and that such attempt, together with user, constituted a road 60 feet in width; and the instruction of the court takes from the consideration of the jury the attempt to locate the road by the county commissioners, and does away with the distinction between roads that are established by user alone, and roads that are established by user in conjunction with an attempt to establish by the board of county commissioners. "If the right to the way depends solely upon user, then the width of the way and the extent of the servitude is measured by the character of the user, for the easement cannot be broader than the user; but if there were defective proceedings, and the use was under color of the claim supplied by them, then the extent of the easement is to be measured by the claim exhibited by the proceedings, and by them intended to be established. This is in strict accordance with the elementary principle of the law of real property, which declares that where there is color of title, and possession of parties taken under the claim of title, it will cover the whole, but, where there is no color of title, the right will not extend beyond the actual possession,—the *pedis possessio*." Elliott, Roads & St. p. 136, and cases cited. It is urged by the appellant that, conceding the instruction to be wrong, it is evident that the jury were not misled, and that, the error being without prejudice, the judgment should stand. But this court is unable to say whether the verdict of the jury was brought about by finding the fact to be that the gravel was outside of the 60-foot limit, or whether they took the instruction of the court into consideration, and found from the testimony that it was outside of the road actually used, without regard

to the ineffectual attempt to establish a road 60 feet in width; and, it not appearing affirmatively that the error was without prejudice, the judgment must be reversed. There is some question under the evidence as to whether the gravel was taken outside of the 60-foot limit, which is exclusively the province of the jury to determine; also, as to where the user was, and the extent of the user,—so that, upon the reversal of the judgment, a new trial will be ordered.

ANDERS, SCOTT, and STILES, concur.

SOULES v. McLEAN et al.

(Supreme Court of Washington. Dec. 2, 1903.)

TRUST—PURCHASE OF LAND—PARTNERSHIP—EVIDENCE.

S., who had an option on land, entered into an agreement with L., whereby L. was to furnish the money to purchase the lands at \$15 per acre, and S. and K. were to have an interest in the profits. The lands were to be sold as lots; and the contract was that a partnership was to exist between S. and K. the three, whereby, after taking out the expenses, S. and K. were to each have a share of the profits. L. claimed that the partnership was to exist but two years, and that the land then unsold was to belong to him alone. The lands were conveyed to L., who appointed S. and K. agents to sell. The contract recited the agreement between the parties, but they were silent as to the disposition of the land unsold. S., and his wife and children, testified that L. requested that the title be put in him, to facilitate sales; he testified that he was trustee for the partnership. Several parties testified that L. spoke of S. as part owner. During the two years, only a part was sold; not amounting to the value of the improvements, which were mostly left unsold. All of the expenses, including taxes for all the land, were charged to the partnership. K., apparently against his interest, testified for L., but stated that the land was worth \$30 per acre. Held, that L. was the land in trust.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by T. W. Soules against George D. McLean and others. Judgment for defendants. Plaintiff appeals. Reversed.

Sinclair & Smith, for appellant. Houser, for respondents.

SCOTT, J. This is an action brought by plaintiff for the purpose of settling up the affairs of a copartnership consisting of himself and the respondents and George D. McLean. He asked for an accounting, and that the defendant D. McLean, in whose name certain land stood, which the plaintiff claimed belonged to said copartnership, be decreed to be holding the same as trustee, and established as a trustee of the plaintiff of a one-third interest therein, which he alleged to be his individual proportion of or interest

and also that said McLean be required to account for certain moneys, notes, contracts, and evidences of indebtedness which had been received by him in the conduct of the firm's business. The lands in question consisted of a large portion of the town site of the town of Burlington, in Skagit county. Plaintiff's application to buy these lands had been granted on January, 1890, by the defendant McLean, who was the original owner thereof, to himself and three other persons, not parties to this action. Near the expiration of the term, it seemed likely that said persons would be unable to comply with the terms of the purchase, whereupon plaintiff sought to effect a new arrangement, whereby an association would be formed to take said lands, and obtained permission from McKay to do so, if he could. With this in view, he approached the defendant McLean, and induced him of said prior arrangement, and being likely to fall through, and his purpose to effect a new arrangement, whereby said lands could be taken, and of the terms of which the same could be procured from McKay. The lands comprised several hundred acres, in quantity; and he informed McKay that McKay would dispose of the same at the rate of \$15 per acre, and an interest in the profits that might be made from the same, and selling to other persons. Furthermore, that McKay desired to secure a loan of several thousand dollars. Plaintiff contends that McLean was induced to effect the proposed arrangement, and that it was agreed between himself and the defendants, McKay and said McLean, that they would, and that they did, form a partnership for the purpose of taking an interest in said lands at the rate of \$15 an acre, and platting the same as a town site, and that they were to make various improvements thereon, and place said lands, when sold, upon the market. That the price of the same per acre, and the expense of platting and making such improvements as should be made together with other necessary expenditures should be charged up as expenses, and the proceeds received, over the cost price and other expenditures, should be divided between said parties,—one-half to McLean, and one-fourth to plaintiff, and one-fourth to McKay. That a written contract to this effect had never been executed by said parties. That the same was drawn by McLean, but that he, at a time subsequently, came to plaintiff's residence, in said town of Burlington, and induced him, in the presence of his wife and daughter, that he had reduced said contract to writing, but had not brought it with him, because he had thought of a new arrangement; that it was likely to pass them a good deal, in disposing of said lands, if the legal title was allowed to remain in McKay, for the reason that he was absent from said town and county a large portion of the time, and that it would be difficult to find him, to execute convey-

ances and attend to other necessary business, and for that reason he thought it better that the title to said lands, or a portion of them, be conveyed outright; and, upon being asked in whose name he proposed to have the title, he said that, as he was to advance the money, he thought it would be no more than right, as affording him additional security therefor, that the title should be taken in his name. Some further conversation was had in relation thereto, and subsequently an arrangement was effected, whereby several hundred acres of said land were deeded by McKay to McLean, and the same were thereafter platted, as previously talked of, and improvements were made thereon, in the way of building a schoolhouse, grading and planking streets, clearing said lands, etc.; and certain papers were executed, appointing plaintiff and McKay agents for the purpose of effecting sales of said lands to other parties. The defendant McLean did not reside at Burlington aforesaid, and McKay was away therefrom a large portion of the time. Sales were negotiated by plaintiff of various tracts to outside parties, and money and evidences of indebtedness received therefor, which were delivered to McLean, as custodian of the firm's property. Several thousand dollars were expended, in the way of making improvements upon said lands, but none of said amounts are definitely apparent, from the testimony. The books, contracts, etc., by which it is claimed the same appear, were admitted in evidence. It is further contended by plaintiff that, upon the expiration of the time limited for said copartnership to continue, all lands remaining unsold were to be divided between the members of said firm, of which plaintiff was to receive one-fourth. The defendants answered, denying all the material allegations of the complaint, but admitted in their testimony that a copartnership was formed for the purposes claimed, to continue for two years, but denied that either plaintiff or McKay was to have any interest in the lands remaining unsold at the expiration thereof. The court below dismissed the cause, and plaintiff appealed.

Notwithstanding the fact that the learned judge of said court heard the witnesses testify, we are unable to agree with the conclusions reached by him upon the evidence, which appeals to us so strongly in favor of the plaintiff that we are constrained to reverse the findings of the lower court thereon. We deem it unnecessary to set the evidence forth in detail, or to give more than a brief summary of it. The evidence upon the part of the plaintiff consisted of the testimony of himself and his wife and daughter, and several persons who had purchased some of the lands in question, or who had negotiated therefor, many of them being entirely disinterested in the result of the case. From the testimony of these disinterested witnesses, it appears that the de-

defendant McLean, upon a number of occasions, spoke of plaintiff as being part owner, partner, and part proprietor in the ownership, of said lands; and, from the testimony of the plaintiff and his wife and daughter, it appeared that upon the occasion of defendant McLean's calling at their house, when he proposed the arrangement with regard to taking the title to the lands in his own name, he expressly stated that the effect of it would be that he would hold the same only as a trustee of the copartnership. The testimony of McLean as to these matters is not satisfactory, as supporting his contention with reference to the agreement. Some of these statements, so claimed to have been made by him, he admitted to be true. He denied some of them, and could not remember with regard to others. He admitted having written a letter to one Wilson, who was negotiating for a mill site upon said lands, which letter was introduced in evidence, and which clearly referred to the plaintiff as a part owner of the lands in controversy. McKay testified in favor of McLean, and, apparently, against his own interests. He testified that neither himself nor the plaintiff was to have any interest in the lands remaining unsold, but that the same were to belong to McLean, exclusively, at the expiration of the time limited for their copartnership to continue; that he was to get \$15 per acre for the land conveyed, and one-fourth of the profits arising from such sales as should be made, whatever there might be; that all expenses for improvements, etc., were to be first paid from the moneys received from the sales. He further testified that said land was of the value of \$30 per acre. Under the agreement, according to his testimony, he would be compelled to part with all of said land for the sum of \$15 per acre, and for the further sum—much or little, as it might be—arising from a one-fourth interest in such profits as might be made from the lands that should be sold, if any, during the copartnership, after paying for all improvements upon the whole of said lands, and other expenses. The defendant Ella R. McLean, and two other witnesses, who were called in to advise McKay with regard to the transactions in question during certain negotiations had at the city of Olympia, between himself, McLean, and the plaintiff, at which time the title was conveyed by McKay to McLean of certain of the lands, and a mortgage executed by him to McLean upon the balance, for moneys loaned by McLean to him, testified for the defendants. Said mortgage contained an option or agreement to purchase the mortgaged lands, by virtue of which McKay agreed to convey the same to McLean at the price aforesaid; the lands conveyed and the lands mortgaged being the whole of the lands which plaintiff had previously, with others, obtained the option to purchase as aforesaid, and plaintiff executed a quitclaim deed to

convey his interest in said lands under original option. Written authority as agent was also executed at that time by McLean to McKay and the plaintiff, which writing recites the terms of the agreement, except with reference to certain tracts which were to be selected by individual members of the firm, and to belong to each separately, and except said nothing with regard to any disposition of the lands which should remain unsold.

It was contended by plaintiff that the authority to act as agent was executed in instance of McLean, who represented that it would be necessary to have some one to show intending purchasers that he had authority to negotiate sales, as the title to the lands stood in him. It is evident that these other witnesses who testified that the defendants knew nothing of the talks or arrangements between the parties. It appears that they supposed that the actions there had evidenced the whole agreement between the parties. It appears from the testimony that the larger portion of the money expended in making improvements was expended upon that part of the lands which is still unsold, and which McKay claims is his individual property. It was contended by McLean that the expenses for improvements exceed the amount of moneys received from such sales as were made by several thousand dollars. It further appears that the moneys paid for improvements made by McLean under the option agreement contained in the mortgage were charged as expenses against the copartnership, as well, also, as the taxes paid by him on the lands. It also appears that McLean was secured for all moneys advanced and received by him in said transactions by virtue of the arrangement, and that he was to receive the agreed rate of interest thereon. The general manner of making improvements upon the whole of said lands, and the charging of expenses against the copartnership, together with the fact that contemplated sales by side parties might be few, and amounting to little, compared with the amounts invested and expended, tend very materially to support the claim of the plaintiff that McKay was to hold all of said lands in trust for the copartnership; and under said view of the transaction was apparently a profitable transaction for all parties, while, under the contention of the defendants, it might result disastrous to all except McLean, and especially to the plaintiff, who was to devote his entire time to the copartnership business, which it appears he did do, and that he received, at most, but very small remuneration therefor individually. Of course, there is that it might so result would not be conclusive evidence that the parties did not make a hard bargain, so far as plaintiff is concerned; but it is a circumstance to be taken in connection with the other testi-

porting the contention of the plain-
 e of the opinion that the cause must
 ed and remanded, with instructions
 accounting be had upon the evidence
 ed, and such further evidence, if
 the lower court may permit to be
 ed for that purpose, upon a proper
 of the business and transactions of
 and its members,—especially, of all
 and property received by the defend-
 erge D. McLean, and of all moneys
 l by him for the firm; and that
 endant George D. McLean be de-
 trustee for said firm and its mem-
 the proportions stated, of all lands
 and that the amount thereof be as-
 ; and that, in case he has expended
 neys for the firm than he has re-
 e have a lien on the lands unsold
 amount thereof, with interest thereon,
 e agreement; and that said indebted-
 o him shall first be paid out of any
 arising from the collection of notes
 lences of indebtedness to the firm,
 ing from future sales ordered by the
 any; and that a full accounting
 of all the business of said firm; and
 other relief and proceedings as may
 sary to dispose of the copartnership
 and property in accordance with the
 ere expressed, and to protect the
 f the parties meanwhile; and, fur-
 at as it appears the defendant Ella
 an has no interest in the property
 firm or in said lands, except such
 ay have by way of a community in-
 f any, as the wife of said George
 an, that it be adjudged that she has
 est in the proportion of all the said
 and lands belonging to plaintiff.
 d and remanded, accordingly; the
 y and exhibits to be remitted to said
 court of Skagit county.

and STILES, JJ., concur. DUN-
 J., and ANDERS, J., not sitting.

STATE v. TOWNSEND.

the Court of Washington. Dec. 26, 1893.)

—SUFFICIENCY OF INDICTMENT—INDOLSE-
 OF WITNESSES—INSTRUCTIONS—INTIMA-
 OF GUILT—NEW TRIAL—NEWLY-DISCOV-
 EVIDENCE.

an indictment drawn under Pen. Code,
 oviding that an assault with a deadly
 with an intent to inflict bodily injury,
 o considerable provocation appears, "or"
 e circumstances of the assault show a
 malignant, and abandoned heart, shall
 etc., which alleges that defendant, with
 nt to do great bodily harm, and with-
 siderable provocation, "and" with a will-
 nignant, and abandoned heart, did make
 lt with a deadly weapon, is not bad,
 icity, as one crime, only, is charged,
 making "an assault with a deadly weap-
 an intent to do great bodily injury."

2. A verdict in a criminal cause, on con-
 flicting evidence, will not be set aside, on ap-
 peal, as being against the weight of the evi-
 dence.

3. As the object of 2 Hill's Code, § 1236,
 providing that the names of the witnesses for
 the state shall be indorsed on the back of the
 indictment, is merely to give defendant notice,
 that he may prepare his defense, a conviction
 will not be reversed because certain witnesses,
 whose names did not appear on the indictment,
 testified for the state, where no continuance
 was asked.

4. It cannot be said that the trial judge im-
 timated his belief in the guilt of defendant
 because, in an instruction, he gave the penalty
 attached to the crime with which defendant
 was charged, where the instruction was a mere
 reading of the statute under which the indict-
 ment was drawn, and it was necessary, owing
 to its peculiar phraseology, to read the part
 fixing the penalty, to complete the sense.

5. A motion for a new trial alleged that
 the prosecuting attorney had stated, in open
 court, that he did not intend to further prose-
 cute defendant; that this statement was com-
 municated to defendant, then in jail; that de-
 fendant, relying on it, failed to summon any
 witnesses; that at the trial the witnesses were
 Indians, and defendant did not know that any
 white person was present at the difficulty; and
 that it was not until after the trial that he dis-
 covered that a white person was present. *Held*,
 that the motion should have been granted.

Hoyt, J., dissenting.

Appeal from superior court, Snohomish
 county; John C. Denney, Judge.

John Port Townsend was convicted of mak-
 ing an assault with a deadly weapon, and ap-
 peals. Reversed.

Coleman & Hart, for appellant.

The information charged more than one
 crime. State v. Goodwin, (Kan.) 6 Pac. 890;
 1 Chitty, Crim. Law, 54; Whart. Crim. Pl.
 §§ 244-255; Bish. Crim. Proc. 433-444; 2
 Hill's Code, § 1233.

L. C. Whitney, Pros. Atty., for the State.

DUNBAR, C. J. The information in this
 case, omitting the formal part, is as follows:
 "The said John Port Townsend, on the 9th
 day of May, 1893, in the county of Snohomish
 and state of Washington, did willfully and
 feloniously, with the intent to do great bodily
 harm to one Skagit Jerry, and without con-
 siderable provocation, and with a willful, mal-
 nignant, and abandoned heart, make an as-
 sault upon the person of the said Skagit Jerry
 with a deadly weapon, to wit, a certain
 pocketknife, and did then and there beat,
 bruise, wound, and illtreat him, the said
 Skagit Jerry, against the peace and dignity
 of the state of Washington." To this infor-
 mation the defendant demurred on the ground
 that more than one offense was charged. The
 contention is that the information is bad, un-
 der section 1238 of the Code of Procedure,
 which provides that the indictment or infor-
 mation must charge but one crime, and in one
 form only. This contention, we think, can-
 not be sustained, and it is not borne out by
 the authorities cited by appellant. In State
 v. Goodwin, (Kan.) 6 Pac. 890, the defend-

ant was charged with feloniously taking away from her father a certain female, for the purposes of prostitution and concubinage, under the statute which provides that every person who shall take away any female, etc., for the purposes of prostitution or concubinage, shall, upon conviction, be punished, etc.; and the court very properly held the indictment bad, for duplicity, because there were two distinct crimes charged, in the conjunctive, and a misjoinder of two distinct felonies in one count. "If," says the court, "the appellant took away the female for the purpose of prostitution, he would be guilty of one offense; but if he took her away for concubinage, but not for prostitution, he would be guilty of another offense." And the court proceeds to show the difference, in fact, between the two different acts or crimes. But there is no similarity between that case and the one at bar. The statute under which this indictment was drawn provides that "an assault with a deadly weapon with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears or where the circumstances of the assault show a wilful, malignant and abandoned heart, shall subject the offender to imprisonment," etc. Pen. Code, § 23. The information follows the language of the statute, but instead of stopping with the allegation, "where no considerable provocation appears," adds also the other condition mentioned by the statute, namely, "with a wilful, malignant and abandoned heart." But the one crime, only, is charged, and that is an assault with a deadly weapon, with intent to do great bodily harm; and when that is coupled with either of the conditions, namely, "without considerable provocation," or "with a wilful, malignant and abandoned heart," a crime is made out; and it is as clearly made out when both the conditions accompany the act, as when it is accompanied by one, and is exactly the same crime in both instances. Either condition constitutes the crime. Both together do no more.

The contention that the verdict was against the weight of the evidence, we need not seriously consider. That was the main question for the consideration of the jury. The testimony was as conflicting as testimony could well be, and the verdict of the jury will not be disturbed by this court on that ground.

It is also contended by appellant that the court erred in permitting certain witnesses to testify, whose names had not been indorsed on the indictment before the trial. There seems to have been no excuse for not indorsing the names of these witnesses on the indictment, in compliance with the requirements of section 1230 of the Code of Procedure, and we do not now decide that any excuse would avail the state for the want of notice; but as the object of this statute is evidently only to give notice to the defendant who his accusers are, and to prevent him from being forced into trial without this

knowledge, which would presumably enable him to intelligently prepare his defense, we do not think that a simple objection to the indictment is sufficient to warrant a reversal of the case. If it were true that by reason of a want of notice the defendant was not prepared for trial, he should have made known to the court by a motion for a continuance. Not having done this, it is reasonable to presume that he considered himself ready for trial, and that he was not injured by want of notice.

We do not see any merit in appellant's fourth and fifth assignments of errors. There is no doubt true that the jury has nothing to do with the penalty which attaches to offense, but in this instance the court simply reversed the jury the statute under which the information was drawn; and, under the peculiar phraseology of that statute, the common sense could not be obtained without reading the whole section. We think the idea that the jury must have concluded that the defendant believed the defendant was guilty, because the penalty was mentioned, is purely fanciful, and not warranted by the instructions.

The last contention of the appellant, however, that the court should have granted a new trial upon the showing made of newly discovered evidence, we think is meritorious, and that the defendant was deprived of a substantial right by the refusal of the court to grant a new trial for the purpose of obtaining the testimony of the witness E. This application for a new trial was supported upon the affidavit of Louis F. Hart, defendant's attorney, and the matters and facts sworn to are undisputed. The affidavit shows that the prosecuting attorney, in the session of the court, and in the presence of divers and sundry persons, stated to the court that he did not intend to further prosecute the defendant, John Port Townsend, and that said cause would be dismissed; that this statement was communicated to the defendant while he was confined in the county jail, and was published in the *Hallen Times*,—a paper published, and of great circulation, in the community and neighborhood where the defendant and his family all reside; that by reason of said statement the defendant and his friends, depending upon said statement, failed and neglected to raise any money, or to communicate or correspond with the defendant's attorneys as to the advisability and necessity of procuring witnesses to testify in defendant's behalf on the trial of the action; that all of the witnesses upon said trial were Indians, and that at the time the judgment and sentence were passed upon the defendant the attorneys for this defendant, neither of them, knew, or had any reason to believe that any white person was an eyewitness to the difficulty, row, or fight between defendant and Skagit Jerry on the night alleged in the information; that it is some 25 miles from the jail, where the defendant was confined

where the difficulty occurred. The state takes to guaranty to every person a fair trial; and, to insure a fair trial, ample preparation by the defendant is given. The prosecuting attorney is under the duty of the state to whose care and the prosecution of this defendant was committed by the law; and if he made the statement attributed to him, in open court, a statement which, if not carried into effect, would be almost certain to mislead the defendant and his attorneys, and cause them to cease their preparations for defense. It was the cause of their not discovering the truth. The testimony is certainly a reasonable one, and must be conceded, under the allegations of the affidavit, which are too numerous to copy here. The material testimony of House cannot be disputed. It is urged that the testimony is false, and that, therefore, a new trial should be granted for the purpose of setting it aside. This, no doubt, is the general rule, but there are many exceptions. State v. House, 3 Wash. St. 208, 28 Pac. 337. In this case the court said: "No fixed standard can be established for the measurement of the case, no iron-bound rule prescribed, but the case must be governed by the circumstances surrounding it." The circumstances in this case appeal more strongly to the court, in favor of a new trial, than the circumstances in the Stowe Case. In the Stowe Case the defendant was not misled, but he had failed, without any fault on his part, of obtaining his testimony. The defendant had been actually misled by an officer of the court and of the jury. The prominent feature which comes out of the reason of the rule of exclusion of the testimony is the fact that the testimony required here is the only white witness in the case. The testimony adduced at the trial was exclusively the testimony of Indians; all of them, evidently, on one side or the other, and in a debilitated condition, from the combined effects of hatred and rum at the time the difficulty occurred. Their testimony was given through the medium of interpreters, and was, at the best, disjointed, unreliable, and unsatisfactory; and, whether the sentiment be founded in reason or not, it is a fact well known to citizens of this coast that jurors will not give the same credence to Indian testimony as they do to the testimony of respectable white witnesses. In fact, they have not the same standard for judging the credibility of the testimony of a foreign language, as they do of a witness who speaks their own language, and it cannot be denied that, if the testimony of House would testify to the state of the case, the affidavit states he will, then the trial would probably be different. If that be true, then the testimony of House falls within the inhibition of cumulative testimony. We think, under all the

circumstances of this case, the judgment should be reversed, and a new trial allowed.

STILES and SCOTT, JJ., concur. ANDERS, J., not sitting. HOYT, J., dissents.

BOWEN v. CAIN et al.

(Supreme Court of Washington. Dec. 26, 1893.)

APPEAL—NOTICE OF STATEMENT OF FACTS—SUFFICIENCY.

Under 2 Hill's Code, § 1422, which provides that on appeal any party desiring to have any facts made a part of the record shall prepare and file a statement, and shall give notice thereof to the opposite party within thirty days after the judgment, a notice of the filing and preparing of a statement, mailed to the opposite party, residing in the same town as the filing party, on the thirtieth day, and not received until two days after the mailing, is insufficient, as there is no statute provision for serving notices by mail where both parties live in the same town.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by George H. Bowen against James Cain and others. Judgment for plaintiff. Defendants appealed. Appeal dismissed, and judgment affirmed.

Fairchild & Rawson, for appellants. J. P. de Mattos and Bruce & Brown, for respondent.

DUNBAR, C. J. Respondent moves to dismiss the appeal, and to affirm the judgment in this case, for the reason that no notice of the statement of facts was given within the 30 days required by the statute¹ after the rendition of the judgment appealed from. The judgment was rendered on the 19th day of November, 1892. The affidavit of the respondent's attorney sets up the fact that the notice of the settlement of the statement was received by him on the 21st day of December, 1892, from the post office at Whatcom, where he resided, and that the envelope containing the notice showed that the same had been mailed on the 20th day of December, 1892; while the appellants' attorney makes affidavit that the notice was mailed by him before 6 o'clock P. M. on the 19th day of December, 1892. Conceding, for the purpose of this decision, that the notice was mailed on the 19th, as claimed by appellants, yet we think this motion will have to be sustained, for the reason that there is no provision of law for serving notices by mail where parties, appellant and respondent, both live in the same town. The General Statutes provide that the service of notices of appeal shall be governed by laws governing the

¹ 2 Hill's Code, § 1422, provides that in all actions in which an appeal lies to the supreme court any party who desires to have any material facts made a part of the record shall prepare and file a statement of such facts, and shall give notice thereof to the opposite party within 30 days after the judgment appealed from was rendered.

service of notice in the superior court. Section 20, p. 414, of the Laws of 1893, provides that service by mail may be made when the person making the service and the person to whom it is to be made reside in different places, between which is a regular communication by mail. There is no other provision for service by mail. In this case it is conceded that the parties live in the same place or town. Rule 26 of this court (28 Pac. vii.) also provides that service may be made by mail when the parties making the service, and the parties on whom such service is to be made, reside in different places; and the service by mail is restricted to that condition. In this case the party was not without a remedy. If the matters alleged in his affidavit are true, he could have served the notice within the time by leaving it at respondent's place of abode with some one competent to receive it. No service having been made as required by law, the statement of facts must be stricken, and, it being an equity case, the cause will be dismissed, and the judgment affirmed.

STILES, HOYT, SCOTT, and ANDERS, JJ., concur.

AGEE v. SMITH et al.

(Supreme Court of Washington. Dec. 27, 1893.)

WAGES—PAYMENT BY ORDER.

An order given to plaintiff for labor performed, directing another to "pay to [plaintiff] \$180," is not an evidence of indebtedness for wages payable "otherwise than in lawful money of the United States," within the prohibition of Act Feb. 2, 1888.

Appeal from superior court, King county; Richard Osborn, Judge.

Action by S. P. Agee against Lysander Smith and Albert E. Smith, partners doing business as the Kent Mill Company, and others. Plaintiff had judgment; and defendants appeal. Reversed.

John G. Barnes, for appellants. William Martin, for respondent.

HOYT, J. This action was brought to recover upon three several causes of action, but, as the questions arising on this appeal as to each of them are identical, it will be necessary to refer only to the first. Such cause of action was founded upon the claim of plaintiff that he had rendered personal services for the defendants, who were manufacturers of lumber, and that a balance of \$180 was found to be due to him upon a statement of the account. It was further alleged that the defendants issued to the plaintiff, for payment of said work and labor, a paper writing in words and figures as follows, to wit: "No. 1,013. Kent, Wash., July 7, 1891. To Treasurer King County Fair Association: Pay to S. P. Agee one

hundred eighty dollars, order Kent Mill on acct. \$180.00. A. T. Vandevanter, ident. B. S. Van Bokkelen, Sec." Defendants, by their answer, denied that upon statement of such account the amount claimed by the plaintiff was found due. It was averred that on such statement a much larger sum was found due. A trial resulted in judgment against the defendants for the amount claimed, from which they have appealed.

It was claimed on the part of the respondent that the amount named in the statement above set out was conclusive of the amount found to be due to him upon the account stated, and with this claim the trial judge seems to have agreed, as it instructed the jury as follows: "The court instructs you that under the pleadings in this case, and under the undisputed facts, and under the facts, in this case, the whole case turns upon the amounts contained or mentioned in those respective warrants; that there is no other question as to the amount of wages, or what their accounts were; that the amounts, if there is any liability in this case, in favor of the plaintiff and against the defendants,—that the amount has been fixed by these warrants, by the parties themselves, and there is no other question before you as to the question of amount. That part of the case is settled, if there is any liability at all, that you are to determine from the instructions given you." The defendants excepted to this instruction, and we think that the exception was well taken. There was no sufficient evidence to go to the jury in support of the facts alleged in the answer of the defendants. The court further instructed the jury that "if you find from a preponderance of the evidence in this case that these warrants, offered in evidence, and designated as 'County Fair and Agricultural Association Warrants,' which are signed by A. T. Vandevanter as president of the association, were issued and delivered by the defendants to the plaintiff and his associates, Williams and Wilson, in payment for work and labor performed, and that demand for payment has been made upon the treasurer of the fair association for the payment of these warrants, and payment refused upon demand, then it will be your duty to find for the plaintiff for the respective amounts named in the warrants, and also as follows: "The court holds, and instructs you, that the issuance of such warrants as this in payment for wages, and which were not paid upon demand, would be in violation of law; and it matters not, if they were issued, whether the defendants had not paid it or not. If they themselves delivered the warrants in payment for wages, it would be a violation of law, unless they were paid on demand. As the undisputed evidence shows they were not paid, (these warrants,) they would be in violation of law, and would not be a payment,"—and in so doing commencing

the prejudice of appellants. Such errors were clearly erroneous, unless the above set out came within the provision of the act of the legislature of February 2, 1888; and from the fact of giving of these instructions, as well as the language of some of the others, it is evident that the trial court held that error did come within the provisions of the act. If such was the fact, the ruling of the court could perhaps be sustained; but the instructions above set out were clearly erroneous. It therefore becomes necessary for us to determine as to whether the defendants, in delivering the order in question to the plaintiff, (if they did so), as to which there was a dispute of testimony, violated the provisions of the act.

By its terms it was made unlawful to issue, pay out, or circulate for pay-
wages any order, check, memorandum, or evidence of indebtedness, in whole or in part, otherwise than in lawful money of the United States. Does the order come within the terms of such statute? We are unable to find that it does.

It had been payable in something other than lawful money of the United States. It is questionable whether it would have come within the provisions of said act, if it was not the order, check, or memorandum of the person making the payment. The order is not called upon to decide that it was for the reason that this order was made payable in lawful money of the United States, as such must be held to be its legal effect, though the words "in lawful money of the United States" are not set out in the order.

It follows that when the court instructed the jury that, if defendants had failed to order to the plaintiff, they would be liable for the amount thereof if the same was not paid, it committed error, for the reason that if the giving of such order was not lawful, it would have been necessary for the plaintiff to have presented it for payment, if not paid, to have seasonably notified the defendants of that fact; but this was not the point of presentation and seasonable notice of nonpayment was entirely omitted from the instruction. The other instruction, in which the jury were told that the issue was to be decided by the defendants would be in error of law if the same was not paid on was equally erroneous, in view of the fact that we construe the order not to be within the terms of the act of the legislature above referred to. Some other error was suggested by the brief of the appellants, but the material questions in the trial, so far, at least, as they relate to the issue to be raised upon a retrial, are not affected by what we have said. The judgment must be reversed, and the cause referred to a new trial.

MR. C. J., and STILES, SCOTT, and ERS, JJ., concur.

WADSWORTH v. SCHOOL DIST. NO. 1 OF WHATCOM COUNTY et al.¹

(Supreme Court of Washington. Dec. 27, 1893.)

SCHOOLS AND SCHOOL DISTRICTS—CONTRACTORS' BONDS—SUFFICIENCY.

1. In an action to recover of a school district for material furnished a contractor for a schoolhouse, on the ground of defects in the bond required by Laws 1887-88, p. 15, to be taken by municipal corporations from contractors, an objection that the sureties on such bond did not justify as to their financial responsibility, as required by Laws 1887-88, p. 15, is not available in the absence of proof that the sureties were not in fact of such financial responsibility as would have warranted them in justifying.

2. The fact that a bond given by a schoolhouse contractor under Laws 1887-88, p. 15, was in terms payable to the school district instead of to the state of Washington, and in other respects failed to follow the form required by statute, does not render it void.

3. The fact that the bond was not filed till after plaintiff had furnished the materials was not prejudicial to him, if the bond was filed, and plaintiff had notice thereof, before bringing suit; the object of filing such bonds not being to give them validity, but to give notice to all persons interested.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by L. C. Wadsworth against school district No. 1 of Whatcom county and others. A verdict for plaintiff was set aside, and a new trial granted, and plaintiff appeals. Affirmed.

Albert S. Cole and J. W. Romaine, for appellant. Bruce & Brown, for respondents.

HOYT, J. This action was brought to recover of a school district for material furnished to a contractor, and used in the erection of schoolhouses by said district. The ground upon which the plaintiff sought to hold the district liable to him for such material was that it had not taken a bond, as required by the act authorizing municipal corporations to take a bond from contractors, approved January 31, 1888, (Laws 1887-88, p. 15.) In the progress of the case it was found that a bond had been taken by the district, and the action of the plaintiff could not be maintained unless the bond so taken was for some reason without force, as related to the plaintiff. Three reasons are suggested by the appellant why the bond was not binding as to him: (1) The sureties did not justify as to their financial responsibility; (2) that the bond was in terms payable to the school district instead of to the state of Washington, and was in other respects informal in its terms; (3) that it was not placed on file in the auditor's office of the county until after the material had been furnished by the appellant. As to the first objection, the plaintiff, in order to make it available, should have shown that the sureties were not in fact of such financial responsibility as would have warranted them in justifying as required by the statute. In the absence of such allegation and proof, the omission

¹ Rehearing denied.

was a simple irregularity, not shown to have been injurious to the rights of the appellant. It is not necessary to say more as to the second objection than that a bond fully as informal in its terms and conditions, and not payable to the state of Washington, was sustained by this court in the case of *Ihrig v. Scott*, 32 Pac. 466, 5 Wash. 584. The third objection is also untenable. It appears from the transcript that the bond was placed on file, and plaintiff had notice thereof, before he commenced his action. The object of filing these bonds at all is not to give them validity, but simply for the purpose of giving notice to all persons interested; and, if the appellant had notice of the fact of the giving of the bond in question at the time he desired to go into court for the purpose of enforcing rights growing out of the furnishing of said material, the whole purpose of such requirement was subverted. It follows that, in our opinion, the bond was sufficient, and that the court below rightly set aside the verdict against the district, and granted a new trial; and its action in so doing must be affirmed.

DUNBAR, C. J., and STILES, SCOTT, and ANDERS, JJ., concur.

GULEY v. NORTHWESTERN COAL & TRANSP. CO.

(Supreme Court of Washington. Dec. 28, 1903.)

PLEADING AND PROOF—APPEAL—WEIGHT OF EVIDENCE.

1. Where evidence is received without objection that it is not admissible under the pleadings, and no motion to strike out, or suggestion of surprise, is made, a nonsuit is properly refused.

2. In an action by a 13 year old boy, in defendant's employ, for injuries sustained in running a coal car from the mine, down grade, to the scales, plaintiff testified that he had been ordered so to do by defendant's superintendent; that a stick given him by the latter, with which to manage the brake, broke when he used it to turn the brake, throwing him from the car; and that after the accident the superintendent admitted that he was to blame. Plaintiff's foster mother, and a disinterested person, corroborated plaintiff as to such admission. The superintendent denied that he ordered plaintiff on the car, or that he made the admission, and testified that plaintiff had been twice discharged for getting on cars in disobedience of frequent and positive instructions, and as to the giving of such instructions, he was corroborated by several witnesses. The superintendent's son, a boy of plaintiff's age, testified that he and plaintiff climbed on the car to catch a ride, and that plaintiff picked up the stick which he used in attempting to turn the brake. *Held*, that a verdict in plaintiff's favor would be set aside on appeal as unsupported by the evidence. Dunbar, C. J., and Scott, J., dissenting.

Appeal from superior court, Thurston county; W. W. Langhorne, Judge.

Action by Ernest A. Guley against the Northwestern Coal & Transportation Company for injuries sustained while in defend-

ant's employ. From a judgment in plaintiff's favor, defendant appeals. Reversed.

Phil. Skillman, for appellant. C. S. bury, Will H. Thompson, Eduard P. and John E. Humphries, for responder.

STILES, J. The complaint in this case alleged that on the 8th day of March, 1903, plaintiff, then a boy of 13 years, was employed by defendant, at its coal mine in Thurston county, as a screener, and while so employed he was ordered by defendant's superintendent to leave his car, and, with the assistance of another boy, to take a car with coal down a steep grade to the scales at said mines. Paragraph 6 then proceeds as follows: "That the plaintiff was experienced in handling the brakes of coal cars, and that the brake on said coal car was defective, and the same was known to defendant, and, despite the utmost efforts and exertions of plaintiff and his companions, the car got beyond their control and ran down a steep grade with such great force that plaintiff was thrown from said car, falling in such a manner that his right hand lay across the rail of the track, and was permanently injured, the hand being crushed and mangled by the car running over his right hand, and that amputation was necessary, and the fingers of said right hand were in consequence amputated, and the hand crippled for life. The answer admitted the plaintiff's employment as a coal screener; denied having ordered plaintiff to get upon the car, or that the brake was defective; and set up as a defense that he had, in spite of the defendant's commands, and without its knowledge, left his work, and gone upon the car, and that he was injured by his own carelessness. The answer was a general denial of the facts alleged in the complaint, and of plaintiff's contribution. The plaintiff alone testified to the facts, in substance as follows: "Ismay, the superintendent, called me to his son, a boy of my own age, from the mine where we were working, to run a coal car down to the scales, to weigh them. He gave me a stick to put in the brake of the car. I could manage it. He said: 'Take the stick, and drop that car down. The brake is not good.' I knew nothing about the brake. Had run other cars down the same grade without a stick. Put the stick through the spokes of the brake wheel, and used a lever. The other boy helped, by taking the stick of the other side of the wheel. We ran the car down about 20 feet to the scales. My whole weight against the stick, the stick broke, and I fell upon the ground in front of the car, and was stunned, as I struck my head. Knew nothing more until I came out from under the car, and found myself crushed. Ismay was there, within about fifteen feet of me, and he took me home, back, and carried me home. When

er came in, he was blaming me for it, Ismay said: 'Don't blame the boy. I to blame for it. I told him to brake the down, and gave him the stick to brake it n with.'" Cross-examined: "The car s not running fast. The front truck only sed over me. Then it stopped. It was essary to have the brakes set to keep cars n running down. We loosened the brake. en the car started, ran about its own ght, and stopped. Had been discharged e-employed by the company twice be n the accident, and again afterwards. Is- y said, the first two times, that it was use I was lazy. The last time was be- e I was not able-bodied. Was not in the it of leaving my work, and getting on the s for a ride. Didn't know that any one s behind the car, pinching it ahead with a wbar. There might have been another behind the one I was on. If the stick not been rotten, I would not have fallen." Direct: "The brake was hard to throw, I wouldn't hold the car without the use unusual force. Ismay never told me to p away from the cars. Did not know of rule forbidding boys to go there." Plain- s foster mother and one Striker corrobora- ed him as to what Ismay said, in taking blame for the accident upon himself. father was dead, at the time of the trial. ker further stated that the railroad grade ween the bunker and the scale was not vy; enough to run a car down without ing it any, unless the track was dirty, t generally was at the bunkers. Didn't ak a car, along there, would run a mile our. This testimony by no means met allegations of the complaint that the in- y occurred by plaintiff's being thrown off car while it was running away down a p grade, and by reason thereof, and be- e the brake was defective, and would e justified the court in striking it all out. e having been received without objection, no motion to strike, or suggestion of sur- e having been made, a nonsuit was prop- y refused.

n behalf of the defendant, the superin- dent testified that plaintiff's discharges, h before and after the accident, were be- e he persisted in leaving his work and ing on the coal cars as they were being adled along the track. He also denied ing told plaintiff to get upon the car,—or ing given him a stick,—or to brake the , or that the brake was defective, to his owledge. The car in question had been ded and run down within a few feet of scales, where it was stopped by dirt on track. Witness was back in the rear of econd car, which had been loaded, and d been pinching the second car ahead so to strike the first car, and bump it on to scales. Just at the moment of the col- on, he turned, and saw plaintiff and his n boy on the front end of the first car, d saw plaintiff fall. He ran around, and

found the front truck not yet on the scales, and plaintiff lying under this truck, the first wheel of which had passed over his hand. Drew the boy out from under the car, and carried him home. Witness denied having said he was to blame, in having directed the boy to get on the car, and giving him a stick, or that Striker was present when he carried him in. Had instructed the boys, many times, not to get on the cars, and told other employes to see that they did not do so. Punished his own boy for getting on this car, and on other similar occasions. Ismay, Jr., testified: "We were screening coal, and my father, with two or three other men, went down to load some cars that the train had just brought in. So we hurried up with our screening, and went down to see if we could catch a ride from the bunkers down below. When we got down to the bottom of the stairs, we saw a car standing. We thought it was on the scales, and we started to get onto it; and we saw a stick lying off by a stump there, and both ran for it at the same time, but he got the stick first. We climbed upon the car to take the brake off, and he put the stick into the brake wheel, and swung around, and just as he swung around the car behind bumped, and as the car bumped the stick broke, and he fell on his back on the track. The car did not move more than six feet. My father had frequently told us to stay off the cars, and he whipped me for getting on at this time, as well as others. He did not tell us to get on the car." Other adult witnesses, several in number, corroborated the superintendent and contradicted the plaintiff; six of them, as to the frequent and positive instructions given the boys to keep off the cars. The jury, without any evidence to base it on, found, specially, that the brake was defective, and that defendant knew it. They also found that it was the breaking of the stick that caused plaintiff to fall; that another car collided with the car he was on; that there was no rule, of which plaintiff had knowledge, against his going on cars; and that he went upon the car under the order of the superintendent. They found generally for the plaintiff. While we shall ordinarily be very slow to interfere with the verdict of a jury, where the testimony is conflicting, we do not think justice would be done, were this one allowed to stand. There may be, and sometimes are, cases where the testimony of a single witness, even a child, will outweigh that of many opposed, where there are circumstances of suspicion connected with them. But there was not, in this case, a single attempt to break down or impeach a witness for the defendant; and much of what they did say, that was material, was not contradicted by the plaintiff, though he was called in rebuttal. Credible witnesses cannot be set aside in this way, and a verdict supported on the uncorroborated testimony of a single witness, and he the

party most interested. Where the clear weight of the evidence is with either side, there is no substantial conflict, and the court should take the decision of the case from the jury. *Thomp. Trials*, § 2250; *Wilds v. Railroad Co.*, 24 N. Y. 430; *Corning v. Nail Factory*, 44 N. Y. 577.

No part of the instructions given on the question of the defective brake was proper, in the case, because there was no competent testimony on that subject. One of the principal grounds urged to support the recovery was that plaintiff was a child of tender years, without knowledge or experience to enable him to care for himself. Yet his statement that the brake was hard to operate without the exercise of unusual force was all there was in the case on that point. He had no experience with brakes generally, and could not know whether this one was hard to operate, in comparison with others, or not; and, moreover, his only knowledge of this one was gained in the single moment of time in which he was pressing against it before he fell. It was more than he could turn with a rotten stick, and that was all there was of it. The only question in the case was whether Ismay directed plaintiff to get upon the car. If he did this, plaintiff might be entitled to recover; otherwise, not. The instruction as to the burden of showing contributory negligence was correctly given. *Spurrier v. Railway Co.*, 3 Wash. St. 659, 20 Pac. 346. Appellant is entitled to a new trial, and the judgment is reversed for that purpose, respondent having leave to amend his complaint so as to state the facts.

HOYT and ANDERS, JJ., concur.

DUNBAR, C. J. I dissent. The judgment in this case seems to be reversed solely on the ground that the weight of testimony is in favor of the defendant. This is a case of a plain conflict of testimony. If the statement of plaintiff is true, he ought to recover. According to his statement, Ismay, the superintendent, knew that the brake was defective, and gave him the defective stick to use, the breaking of which was the cause of the accident, and instructed him to use it as he did use it. He called the plaintiff from other work on which he was engaged, and instructed him how to run the car down. The instructions were literally followed. The means supplied by the superintendent were used, and in literally following the instructions of his superintendent, and by reason of the defective means employed, he was injured. It is true this statement was flatly contradicted by the superintendent and his son, a boy about the same age as the plaintiff, and the testimony of several other witnesses tended to contradict it. But it is too late in the history of jurisprudence to lay down the rule that the weight of testimony is to be ascertained by counting the number

of witnesses who testify pro and con proposition, and to go still further, and to error for a jury to believe the testimony of one witness, which was contradicted by the testimony of two or more witnesses; and this court, to reverse this case, must yield its allegiance to this doctrine, or to other equally fallacious one, that it is the duty of this court to constitute itself an appellate jury, and weigh the testimony, and render a verdict upon the facts in the case. My idea is that the law, if it is to be administered with any efficacy at all, must be administered as a system. That has been the idea of the lawmakers, and they have promulgated a system conferring certain jurisdictions and powers upon courts, and conferring certain other jurisdictions, powers and provinces just as firmly upon juries. It is not intended that these powers shall trench upon each other, and there is no reason for them to do so. It is the duty of the court to announce and enforce the law concerning the admission of testimony, and, on proper objection, that only that testimony is admitted. It may even go further, and decide that, as a matter of fact, certain testimony, if conceded to be true, would not constitute a defense, or would not sustain a judgment. But it has no right to weigh testimony, or to pass upon the credibility of witnesses, or to say what testimony is probable or improbable, or to say what circumstances are suspicious, than the jury has to usurp the functions of the court in construing the law, and to refuse to render a verdict for a plaintiff because, in the court's judgment, the complaint does not state sufficient to constitute a cause of action. The law makes it the special and exclusive province of the jury to weigh the testimony, and pass upon the credibility of the witnesses, for reasons which have been so often and so uniformly announced in the courts that it would be like citing elementary propositions to cite them here. In my judgment, the opinion cited by the majority from *Thompson v. Trials* does not tend, in any degree, to sustain the opinion. It is not contended by the majority that there was not sufficient testimony offered by the plaintiff to sustain the verdict, if it had not been disputed. The bald contention is that in the opinion of this court the jury was not justified in believing the testimony of the plaintiff because it was contradicted by a large number of credible witnesses "who were unimpeached;" "and credible witnesses," say the court, "cannot be set aside in this way, and a verdict sustained, on the uncorroborated testimony of a single witness, and he the party most interested." I am not aware of any law compelling the jury to believe the testimony of a witness because he has not been impeached, and I have always been of the opinion that the interest of the witness in a matter especially to be taken into consideration by the jury, as affecting his

out that there is no legal barrier to a believing him, notwithstanding his interest. If I am correct in this proposition, assumption, then, is that the jury did the witness' interest into consideration, that they executed their legal right of believing him, notwithstanding his interest. It is entirely possible that a jury also considered the interest of the witness Ismay, who was a servant of the company, and who was to have been the cause of the damage; and, if I should deem it worth while to enter into a discussion of the weight of the testimony, I might add that the records show that the statement of the boy was admitted, so far as the admission of the defendant is concerned, that the accident was his fault, by the mother of the boy, and the witness Striker, who testified that he was at the boy's home when Ismay was at the boy home, immediately after the accident, and that Ismay said to the boy's mother, "It wasn't the boy's fault, Fred. It was your fault. I ordered the boy to take the stick down, and gave him a stick to take it with; but the stick broke, and made him fall forward in front of the car." Ismay, at least, was a disinterested witness, and was "unimpeached." The jury had a right to believe his testimony; and, if it is true that Ismay made this admission at the time the accident occurred, it was very corroborative of the testimony of the plaintiff at the trial on the main issue in this case.

The very fact that the different members of this court, who were not present at the trial, and who did not hear the witnesses testify, differ as to where the weight of the testimony lies, shows the wisdom of the law in leaving all questions of the credibility of the witnesses to the jury, to whom the evidence was orally addressed, and this has been the uniform holding of this court. In *Noyes v. Railroad Co.*, 2 Wash. St. 653, 27 Pac. 548, this court said: "The first contention of the appellant is that the evidence fails to show employment of respondent by him, or that he ever requested the latter to perform the work for which he now seeks compensation, and that the court below erred in not setting aside the verdict for insufficiency of the evidence. Upon that point both parties were fully heard; and, there being a direct conflict between the testimony of plaintiff and defendant, it was for the jury to determine, after weighing all the facts and circumstances before them, upon which side lay the preponderance of the evidence." In *Lybarger v. State*, 2 Wash. St. 552, 27 Pac. 449, 1029, we held that where there was sufficient evidence to sustain the verdict of the jury, the supreme court would not pass upon the weight of the testimony.

In *Graves v. Banking Co.*, 3 Wash. St. 29, 29 Pac. 344, the court said: "The contention here is that the evidence did not support the findings. An appellate court, in such a case, will not usurp the functions

of the jury, or of a judge acting in the capacity of a jury, and reverse the judgment, because the weight of testimony seems to be on the other side, or because, in a case of conflict of testimony, the jury believed the testimony of witnesses that it does not believe. This doctrine is so elementary, and so universally announced by the court, that it would be idle to enlarge upon it, or discuss it further. It is sufficient to say that the jury is the judge of the facts. If the testimony on which the judgment is based is competent, and is legally introduced, and, if conceded to be true, would sustain the judgment, the appellate court will not inquire further as to its sufficiency." In *Railroad Co. v. Ingersoll*, 30 Pac. 1097, we decided that "the verdict of a jury will not be disturbed, where the testimony is conflicting, if there is sufficient evidence to sustain the verdict;" and in *Brasen v. Railway Co.*, 4 Wash. 751, 31 Pac. 34, that, "where there is sufficient legal testimony to support the verdict of the jury awarding damages, the verdict will not be disturbed in the supreme court." In *Dillon v. Folsom*, 5 Wash. 439, 32 Pac. 216, the court said: "An examination of the record satisfies us that there was a substantial conflict in the testimony upon the main issue, and, this being the case, the verdict must stand. If this court should set aside verdicts upon the ground that in its opinion a preponderance of the testimony was in favor of the other side of the issue presented to the jury, there would be little use in jury trials. All this court will do, in any case, is to investigate the record, so far as is necessary, and see whether or not there was substantial testimony to support all the issues necessary to be found by the jury, and, if such is contained in the record, the verdict will not be set aside for the reason that in its opinion there was a greater amount of testimony on the other side." In *Booth v. Railroad Co.*, 6 Wash. 531, 33 Pac. 1075, the court, after announcing that a certain proposition was denied, proceeds to say: "Whether or not it was successfully denied is a question for the jury to pass upon, and they have passed upon that question in favor of the contention of the respondents; and this court will therefore not presume to set aside their verdict, even though in its judgment the weight of testimony is in favor of the appellant." And in *Burden v. Cropp*, (decided by this court October 20, 1893,) 34 Pac. 834, the language of the court is: "The only question presented by the record in this case is that of the sufficiency of the evidence to sustain the verdict of the jury; and as we think that the testimony of the plaintiff's witnesses, if believed by the jury, was sufficient to establish the cause of action set out in the complaint, it follows, by well-established principles, that the verdict must be sustained, even though the testimony offered in opposition thereto is more satisfactory to our minds. It is not enough, to authorize

us to disturb the verdict of the jury, that we should be of the opinion that the evidence upon the other side is entitled to a greater weight than that upon which the verdict seems to have been founded. It is enough if there was any evidence which, if uncontradicted, would be sufficient to establish all the facts necessary to sustain the complaint of the successful party." The decisions cited above have been concurred in by every member of this court, and they have been so uniform, so clear, and so pointed, that the bar of the state had a right to rely upon them in the preparation of their briefs in this court; and the brief of the respondent in this case convinces me that they did rely on the law in that respect being settled, and therefore did not discuss the question upon which the case is reversed, but devoted their brief to the discussion of law points involved, upon which the majority seems to sustain them. I know of no good reason why this court should leave the well-beaten path which it has heretofore so uniformly trodden, in company with every other appellate court, and start out on another road, which, in my judgment, it cannot occupy without a plain usurpation of the province of another tribunal, without in effect denying a constitutional right to the citizen, and without bringing about the unfortunate disturbances which always follow the unsettling of a well-established principle. The judgment should be affirmed.

SOOTT, J., concurs.

ELWELL v. PUGET SOUND & C. R. CO.
(Supreme Court of Washington. Dec. 28, 1893.)
CORPORATIONS—NOTES—AUTHORITY OF OFFICERS.

1. Authority of the president and general manager of a corporation to issue notes in its name will not be implied from the fact that they had on former occasions executed notes in the corporate name, which they had taken care of, without the knowledge of the board of trustees.

2. Knowledge by one member of the board of trustees that the president and general manager had borrowed money and executed notes in the corporate name does not estop the corporation from attacking the validity of the notes, as having been issued without authority, though the money obtained thereon was used for its benefit. Dunbar, C. J., dissenting.

Appeal from superior court, Thurston county; W. W. Langhorne, Judge.

Action by Estella M. Elwell against the Puget Sound & Chehalis Railroad Company on several promissory notes. From a judgment for plaintiff, defendant appeals. Reversed.

Hughes, Hastings & Stedman and Chas. H. Ayer, for appellant. Phil Skillman and W. I. Agnew, for respondent.

STILES, J. Respondent alleged the execution and delivery to her by appellant, a

corporation, of its two certain promissory notes, for \$500 and \$550, respectively, which were unpaid, and that, as accommodation indorser, she had paid a note executed and delivered by appellant to the Capital National Bank of Olympia, in the principal sum of \$500, which sum and interest appellant refused to pay. The answer contained a general denial, and alleged affirmatively that the pretended notes were never executed by the appellant's board of trustees, or authorized by it, or executed by any persons so authorized so to do, either by the board of trustees or the by-laws of the corporation, and there was a further averment that the notes were not executed and delivered, if at all, without the consideration, and for the purpose of defrauding appellant. The first and second notes were signed, "P. S. & C. R. R. Co. L. P. Ouellette, President, W. S. Elwell, Man. & Supt.;" the third, "P. S. & C. R. Co. W. S. Elwell, Mgr.;" The manager of the corporation, the husband of respondent, and his signature and that of the president was produced. Respondent loaned the money for which the first two notes were given, and paid the amount of the third one. The proceeds of all the notes went into the bank account of the appellant, and were checked out and appropriated to pay its debts. The manager and the president, of course, were not out of the five trustees. The manager testified that, before the first of these notes was made, he had made other like notes, which had been paid with appellant's funds. The notes were not brought to the attention of the board of trustees. Witness told some of the members of the company of them. The principal place of business of the corporation, and the place of its corporate meetings, was Port Gamble. The transactions in question took place at Olympia. The president testified that in a conversation between himself, the manager, and Ames, also a trustee, at Port Gamble, he told Ames that he and the manager had to borrow money from respondent, which was used to buy certain cattle. Could not say whether he told Ames that any of the notes had been given. (None of the notes covered the money borrowed to purchase cattle.) Ames knew of the notes from having sent a man to Olympia to investigate the affairs of the company, where he found the notes. This man was sent in behalf of the Puget Mill Company, which had been furnishing appellant money to operate under a special contract. For the appellant, it appeared that the records of the company showed no authorization to the president or manager to execute notes. The corporation was engaged in a general logging business, and the manager's authority was limited by the by-laws to the supervision of the logging railroad, attending in detail to all matters pertaining to its successful operation, and keeping accurate

the time and services of employees, all timber and logs cut and transported. No officer was designated by any incorporation or by-law to borrow or execute notes.

Evidence thus summarized did not show a recovery upon the notes. What the general agent of an industrial corporation may do to bind his principal by made, by virtue of his implied authority, when it comes to uttering negotiable paper, to which, in the hands of individuals, there can be, practically, no such a strict rule applies. The agent never has express general authority to issue such paper, or express authority to issue particular paper, or there must be general authority, arising from such exercise of the power by the agent, or by ratification, as to constitute a part of the corporation, (*Duggan v. Boom*, Wash. 593, 34 Pac. 157,) or there must be ratification of the particular act, or power to deny that the agent had authority. Implied general authority, ratification, and estoppel are each invoked in this case. The substance of all the evidence presented amounted only to this: that the agent and manager had made some negotiable banks at Olympia, which they had done so of, without the knowledge of the trustees, and that, long after the question was due, an agent of the Olympia Mill Company, sent by Ames, who was an employe of that corporation, as well as a trustee of the appellant, had seen the negotiable banks at Olympia, and had, presumably, told them. Ames had been told that the agent and manager had borrowed money but not that any notes had been issued. The only witnesses for respondent in these matters were the two officers who uttered the notes, one of whom was the husband of respondent. These witnesses seem to have assumed to carry on business at Olympia more as though they were partners than as if they were officers of a corporation. The manager, under the terms of his employment, had nothing to do with the financial affairs of the company's business. The case, on all material points, is covered by *New v. Mine v. Negaunee Bank*, 39 Mich. 1, and *McLellan v. File Works*, 56 Mich. 1, 11 W. 321. Consideration that, as matter of fact, the proceeds of these notes went into the hands of appellant's agents, and were used to pay its debts, is not entitled to any weight in this action. In a proper action, on the defenses, legal and equitable, can be made, all sums which respondent contributed to the appellant's benefit can be recovered. Judgment reversed, and cause referred for dismissal.

ANDERS and HOYT, JJ., concur. DUNBAR, J., dissents.

STATE v. WILSON.

(Supreme Court of Washington. Dec. 28, 1893.)

CRIMINAL LAW—APPEAL—RECORD—FILING.

An appeal will not be dismissed for appellant's failure to file his transcript and briefs within the required time, when he has at all times been endeavoring in good faith to prosecute the appeal, and the delay has been owing to a misunderstanding with the clerk of the lower court. Hoyt, J., dissenting.

Appeal from superior court, King county; T. J. Humes, Judge.

Frank Wilson was convicted of burglary, and appeals. On motion to dismiss appeal. Denied.

G. D. Farwell, for appellant.

STILES, J. The state moves to dismiss the appeal in this case because of appellant's neglect and failure to file his transcript and briefs within the time required by the statute. From the affidavits on file, and the fact that the appellant, in response to the motion, has already caused the transcript to be filed in this court, and his brief to be served and filed, it appears that, although there has been considerable delay in complying with the law in regard to filing transcript and briefs, appellant has at all times been endeavoring in good faith to prosecute an appeal from the judgment against him, and that the delay has probably arisen more from a misunderstanding between his attorney and the clerk of the superior court than from any other reason. The motion to dismiss is therefore denied.

DUNBAR, C. J., and ANDERS and SCOTT, JJ., concur. HOYT, J., dissents.

GRAETZ et al. v. MCKENZIE et al.¹

(Supreme Court of Washington. Dec. 28, 1893.)

BLASTING—CONTRIBUTORY NEGLIGENCE—SUDDEN FRIGHT.

1. Blasting, in excavating for a building, so as to throw rocks on the street and adjacent property, is a nuisance, but giving fair warning of an impending blast absolves the excavators from damages for personal injuries, if the injured person failed to heed it.

2. Where warning of an impending blast was given to a pedestrian on a street before it occurred, and he was advised to take a place of safety along the wall of a building, the fact that he was seized with a sudden panic when the crash came, and rushed into the building, where he was killed by a stone hurled through the window, will not render the persons exploding the blast liable.

Dunbar, C. J., and Scott, J., dissenting.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by Bertha L. Graetz and Pearl Maude Graetz against Angus McKenzie and Timothy Glenn for the death of Louis W. Graetz, deceased. From a judgment for plaintiffs, defendants appeal. Reversed.

¹ Rehearing pending.

Turner, Graves & McKinstry, for appellants. David Herman, James Dawson, and Jones, Belt & Quinn, for respondents.

STILES, J. On the 20th day of June, 1890, appellants, while in the prosecution of grading work in the city of Spokane Falls, set off a rock blast, which caused the death of Louis W. Graetz, husband of one of the respondents, and father of the other. This was an action for damages, alleging negligence in the management of the blast. Among other defenses was that of contributory negligence on the part of the deceased, and it is urged here in support of appellants' motion for a nonsuit. The tracts of the Union Pacific Railroad, running east and west, cross Washington street at right angles a few hundred feet north of the Spokane river, and in the space between the railroad and the river, east of the street, appellants were removing a ledge of rocks, to prepare the ground for business purposes. South of the railroad, and west of the street, and exactly at their intersection, was a one-story wooden freight house, some 40 feet in width, and 70 or 80 feet long. The floor of this house was raised a few feet from the ground, after the manner of such buildings, and on the north and south sides and at the west end there was a five or six foot platform, which was overhung by a projecting roof. The east end of the house was flush with the street, without platform or eaves. Steps led up to the platform at the northeast corner of the house; and in the east end was the office, a room about 16 feet square. There was a door from the platform into the office a few feet from the northeast corner, and there were two windows opening into the office in the east end of the building. This work had been going on for several months, and, on the day above mentioned, a blast was made ready to be fired at noon, at a point about 150 feet southeast of the northeast corner of the freight house. A few minutes before the blast was expected to occur, the foreman of the rockwork, one Gannon, went to the freight office, gave warning of the explosion to the railroad employes, and stood on the platform at the corner of the building to watch it. The employes, several in number, left the office, and took positions on the platform, under the projecting eaves, along the north side of the building. After the fuse had been lit, and a little time before the blast exploded, deceased came south along Washington street towards the freight house, and was warned by Gannon of the blast, and told to stand back. He stepped upon the platform, and stood with the others, but when the explosion came, instead of remaining where he was, which turned out to be a perfectly safe place, he rushed through the office door directly towards one of the windows. At the same instant, a piece of rock, weighing 40 or 50 pounds, crashed through the windows,

struck him on the head and shoulder, killed him. The explosion was more so and destructive than any that had previously occurred in connection with that work. Cars upon the railroad tracks had their crushed in, and the freight house walls more or less damaged, but no stones except those which went through the windows entered the building. Obviously, the place within the range of the flying fragments was on the north platform of the freight house, since two walls, each oblique to the direction from which the pieces came, protected any one standing there; as obviously, a position in front of one of the windows was no safer than the street. Nobody but the deceased was injured, though another man, who was a stranger there, followed him into the office. When the building began to be struck, others ran further west along the platform.

Appellants were pursuing a lawful vocation, which, for the six or seven months during which they had carried it on, had caused no injury to no one; but by carrying it on in a way as necessarily to throw rocks over the street and adjacent property, as in the case at every blast, they maintained a nuisance, and were liable for such damages they might do. In this respect this case differs from *Klepsch v. Donald*, 4 Wash. 30 Pac. 991, and was, in principle, like *Wright v. Compton*, 53 Ind. 337; *St. Peter v. Munro*, 58 N. Y. 410; and *Munro v. Reclamation Co.*, 84 Cal. 515, 24 Pac. 303. Fair warning, however, of an impending blast, was impliedly held, in *Wright v. Compton* and *St. Peter v. Denison*, to be such extraordinary care would have absolved the defendants if plaintiffs had failed to heed it; and such would be the case by all rules of good sense. Under the motion for a nonsuit made in the court below, the question of warning became the vital one in the case, and the only thing upon which the motion could have been denied must have been that it was a question for the jury whether the warning given was not so shortly before the explosion that it ceased had no time for reasonable action. I say this was the only theory, because, a man of the most ordinary intelligence, upon mere suggestion of a rock blast right at hand, would lead to his taking such measures as lay in his power to insure his safety; and it ceased, in the language of the complaint, "a strong, healthy, sober man, 24 years of age, a skilled and expert bricklayer, and competent carpenter and joiner"—conditions attainable without intelligence. The evidence on this point for the respondents consisted of the testimony of three eyewitnesses. A. Curtis was a clerk in the freight office. A. Gannon had given the warning, this witness went to the south door of the freight house where he assisted a lady and some child to get into the house, and then walked across to the north platform at a point about 50 feet west of the office door, and almost immediately

ly the blast went off. He placed the warning at a minute or minute and a half before the explosion, and testified that deceased had not reached the platform at the moment of the explosion, and that he rushed right into the office. Heard nothing said to deceased by any one. He did not quicken his pace at all until he got on the platform. After that he seemed to do so. P. S. Webb, another freight clerk, testified to a much more deliberate proceeding. After receiving the warning, witness stepped out of the office to the north platform, where Gannon was. There was no one else there for some time, until a stranger came along from the north, and was stopped by the foreman, and told to step back, as there was to be a blast. Shortly after this another man came, and was not detained, for the same reason. The foreman said all there would better get back along the north side of the warehouse, but none heeded the advice. The second man to join the group was deceased, and his arrival was about five minutes before the blast occurred. Deceased said nothing, but remained with the group until the explosion took place. Immediately upon that, witness went west along the platform, but returned at once, and found deceased inside the office on the floor. John Williamson came from his home on his way to the Review building. Saw Gannon and two other men standing at the corner of the building, on the platform. Gannon told him a blast was going, and to look out or stand back. Went on the platform, and stood there with Gannon, deceased, and a railroad official. Stood right alongside of deceased for four or five minutes until the blast went off. Heard a mark passed that it was rather long going. As soon as the rocks began to come, deceased ran into the office, and witness as close behind him as he could get. Deceased was standing on the platform when witness came up. Stood at a point four or five feet from the east end of the freight depot. Deceased was within two or three feet of the window when struck, and right opposite to it. None of these witnesses were present at the trial, their testimony being presented by depositions taken at times several weeks apart. Neither the jury nor the trial court were, therefore, in any better position to judge of this testimony than ourselves; and we think it must be accepted that Curtis was mistaken in his statement. The only disagreement between Webb and Williamson is that the former makes deceased the second man to reach the platform, while the latter says that Graetz was there first. They both say that, after the last man arrived, some five minutes elapsed before the explosion. Curtis heard nothing said to deceased, but the others did, and they were within a very few feet of him and Gannon, while Curtis was at no time within 50 feet, and he says he did not see any of them until just at the instant of the explosion. In no other way than that

something was said to him could the presence of deceased on the platform at all be accounted for; otherwise, he would have gone on his way down the street. And if he was spoken to, and called to the platform, it undoubtedly was coupled with information concerning the blast. Nothing was visible to indicate danger, and it must have been the warning from Gannon that caused him to stop, go up the steps, and join the rest. He was warned, therefore. But, with even one minute's warning of this kind, there was ample time to avail himself of all the protection the building afforded, for in that time he could have walked the whole length of it at a pace of a mile an hour. In two minutes, walking twice as fast, he could have been far beyond any place where the evidence shows any stone to have fallen. There was a small triangle at the east end of the platform, which the building did not shelter from stones hurled upon it in a direct line; but the rest of it was as safe as the walls of the building were strong. Webb and Curtis were both called out of the office, and to the platform, for the purpose of getting them out of danger. Webb reports Gannon as advising that they go back along the platform; Williamson, that he told him, in the hearing of deceased, to stand back. They did not stand back, but argued rightly that they were safe enough where they were, close to the wall, and several feet from the corner. Gannon was nearer the corner than they were.

Now, unless appellants are responsible for the impulse or fright which seized deceased, as soon as the crash came, to get away from where he was, they are not liable for his death, because, although they did not point out to him a particular spot which was safe, and say, "You stand there," they informed him of the danger in time for him to adopt any one of several courses, and invited him to remain either with them, or along on the platform, one part of which was about as safe as another. The exercise of ordinary intelligence only was necessary to insure safety. To be sure, the hail of stones upon the building was, doubtless, alarming, but something of the kind was to be expected, else there would have been no occasion for taking refuge. The panic which led the deceased into the office must have been totally unforeseen, and could not have been provided against. There is a line of cases which hold that, where one precipitates a danger suddenly upon another, the liability for damages is not avoided, although the person threatened himself cause his injury by an ill-judged attempt to escape, when, if he had remained quiet, the injury would not have occurred. But no such case is reported where timely warning of the peril had been given, and the person warned, after taking up a position of safety, had abandoned it, and sought some other, in doing which the casualty happened. Respondents were respons-

ble for the testimony of witnesses Webb and Williamson, and for the credibility of each, and their depositions furnished a clear preponderance of the evidence that it was four or five minutes after deceased went upon the platform before the blast went off, and that it was his own voluntary act which caused him to go into the office, abandoning his safe position on the platform. The jury were not at liberty to disregard the evidence, and find but a momentary warning, upon the testimony of Curtis; and the court was bound to take notice of the state of the evidence which would require the granting of a new trial if a verdict were found for plaintiffs. *Thomp. Trials*, § 2250, and cases cited. There must be a reversal of the judgment, and remanding of the cause, with directions to sustain the motion for a nonsuit. So ordered.

HOYT and ANDERS, JJ., concur. DUNBAR, O. J., and SCOTT, J., dissent.

NIVER v. NASH.

(Supreme Court of Washington. Dec. 30, 1893.)

COUNTERCLAIM—SAME TRANSACTION—UNLIQUIDATED DAMAGES.

1. An unliquidated claim for damages may be set up as a counterclaim, where it is within 2 Hill's Code, § 195, permitting a counterclaim to be pleaded if it arises out of the same contract or transaction set up in the complaint.

2. Damages sustained by the owner of a building from defects in the architect's plans may be set up by way of counterclaim in an action by the architect for his plans and his services as superintendent, since both arise out of the same transaction.

Appeal from superior court, Spokane county; R. B. Blake, Judge.

Action by Worthy Niver against L. B. Nash for plans furnished for defendant's building, and for plaintiff's services in superintending its erection. From a judgment for plaintiff, defendant appeals. Reversed.

Turner, Graves & McKinstry and L. G. Nash, for appellant.

Felghan, Wells & Herman, for respondent.

An unliquidated claim for damages is not a subject for counterclaim, either legal or equitable. *Ricketson v. Richardson*, 19 Cal. 330; *Boyer v. Clark*, 3 Neb. 161; *Evens v. Hall*, 1 Handy, 434; *Shropshire v. Conrad*, 2 Metc. (Ky.) 143; *Dugan v. Cureton*, 1 Ark. 31; *Christian v. Miller*, 23 Amer. Dec. 251; *Gogel v. Jacoby*, 9 Amer. Dec. 339; *Duncan v. Lyon*, 8 Amer. Dec. 513; *Livingston v. Livingston*, Id. 562; *Smith v. Gaslight Co.*, 31 Md. 12; *Crenshaw v. Jackson*, 6 Ga. 509; *Drew v. Towle*, 27 N. H. 412.

HOYT, J. This action was brought to recover for certain plans for a brick building, and for services in superintending its erection. The defendant, in his answer, after making certain denials, and pleading a sepa-

rate defense, set up a counterclaim, in it was alleged that the plans furnished were defective, and the superintendence not it should have been, and that, as a thereof, he had been greatly damaged. The trial, defendant offered proof tend to establish such counterclaim. The court overruled the objection of the plaintiff, refused to sustain the objection, and the court allowed it, on the ground that the counterclaim as pleaded was insufficient. The appellant in his brief, while alleging some other errors, concedes that the merits of the appeal depend largely upon the question of the sufficiency of the allegations of said counterclaim. We shall therefore content ourselves with an examination of that question, and determination will satisfy the claims of the appellant, as the other errors alleged will be substantially determined by the decision of the court on this question. The allegations of such counterclaim are numerous, and are set out at length, and it is somewhat difficult to mine therefrom its legal effect. A number of them are directed to certain parts thereof, and doubtless have resulted in its being shown that many of such allegations. The defendant, however, did not move against it, but relied on it generally, and for that reason all its allegations must be overlooked, and the question determined as to whether or not the facts therein set out, if true, would in any manner constitute a counterclaim to the claim of the plaintiff.

Respondent, in the first part of his brief, has cited a long list of authorities for the purpose of establishing the doctrine that an unliquidated claim for damages is not a subject of counterclaim, either legal or equitable. Such citations fully establish the doctrine thus contended for under the statutes and rules of practice applicable where such decisions were rendered, but they can have little or no force here. The counterclaim to which such cases refer are substantially of the same nature as those which were nominated "set-offs," as distinguished from "recoupment," under the common-law doctrine; while under our statute the technical distinction between set-off and recoupment has been abrogated, and under the conditions prescribed that which would have been a proper and rightful subject of set-off or recoupment can be set up by way of counterclaim. It is therefore not necessary to enter into the discussion of these authorities.

The other cases cited by respondent are more nearly in point, but can have little force here, as our statute substantially terminates the question. It provides that the cause of action arising out of a contract or transaction set forth in the complaint shall be the foundation of plaintiff's claim or counterclaim, with the subject of the action may be set up by way of counterclaim. It will be seen from this provision that as to a cause of action arising out of the same contract

¹ 2 Hill's Code, § 195.

there is no distinction whatever liquidated and unliquidated damage. The only question to be determined by the statute is whether or not the damages alleged by way of counterclaim arose out of the contract or transaction upon which the plaintiff relies. This is, therefore, a question of fact which it is necessary for the jury to determine. Do the allegations of the counterclaim show that the damages alleged arose out of the contract or transaction in which the plaintiff founds his action? Determining this question it is only fair to say that we should find that one of the damages arose out of such contract or transaction, for the reason that, the rule of the court having been against the plaintiff as a whole, if any part thereof was erroneous, the voluminous allegations of said counterclaim sufficiently appear that the damages alleged arose out of the contract or transaction for the purpose for which they were used, and in the light of such facts expressly represented to the jury that he was a competent and skillful contractor and that a building built in accordance with said plans would be well lighted, and first-class in every respect, and that such representations were untrue, his building, erected in accordance with such plans, was not well lighted, and that by reason of the defective building, occasioned by the plans as represented, he had been put to expense and greatly damaged. Under the facts under which the representations were made, they must be held to amount to a warranty on the part of the plaintiff that they were as he represented them to be. He was an expert in such matters, whereas the person with whom he was dealing had no such knowledge. If, therefore, any of the items alleged in the counterclaim were proper, it is of the nature that they could be said to have arisen out of the insufficiency of the plaintiff to thus show that in fact they were of less, or of less value than they were if as represented, such damage arose out of the contract or transaction, or implied, and comes within the scope of which we have referred, and constitutes proper counterclaim as against the plaintiff for the price of such plans. Some of the damages thus set up are, in our opinion, of the nature above specified. It follows that the proper items of counterclaim, and evidence in regard thereto should be allowed by the court, and that for the purpose of rejecting it the judgment must be reversed, and the cause remanded for a new trial. The parties should be allowed to present their pleadings.

R. C. J., and SCOTT, STILES, and
J. J., concur.

CHURCH v. CAMPBELL et al.

(Supreme Court of Washington. Dec. 30, 1893.)

WRONGFUL ATTACHMENT—ACTION ON BOND—PLEADING.

1. A complaint, in an action on an attachment bond, which alleges that the principals "gave" the bond, with their codefendants as sureties, is fatally defective as to the sureties, because it does not allege that they executed the bond.

2. In an action on an attachment bond, plaintiff must plead and prove the nonpayment of the damages sustained by reason of the attachment, and a complaint which fails to allege such nonpayment is fatally defective.

Hoyt, J., dissenting.

Appeal from superior court, Clallam county; James G. McClinton, Judge.

Action by John F. Church against John G. Campbell & Co. and others on an attachment bond. From a judgment of nonsuit, plaintiff appeals. Affirmed.

W. R. Gay and Geo. C. Hatch, for appellant. Benton Embree, for respondents.

DUNBAR, C. J. This was an action for damages on an attachment bond. The fourth allegation of the complaint is as follows: "That after filing said affidavit, and before said attachment issued, said John G. Campbell & Co., as required by law, gave an attachment bond for the protection of this plaintiff, with defendants J. L. Worthley and W. H. Van Lehn as sureties, in the words and figures following. * * * There is no allegation in the complaint that the damages claimed to have been sustained had not been paid. At the close of plaintiff's case, the defendants moved for a nonsuit, on the grounds (1) that the complaint failed to state a cause of action against the defendant; (2) that the testimony of plaintiff's own witness shows that no damages had resulted from the levy of the attachment; (3) that the plaintiff has wholly failed to show that there was no probable cause for the defendant believing the ground upon which the attachment was issued; (4) that the plaintiff wholly failed to show that the damages incurred have not been paid. This motion was sustained by the court, and judgment entered for the defendants, and the cause brought here upon the alleged error of the court in sustaining the motion for a nonsuit.

The respondents contend that the allegation that Campbell & Co. gave a bond does not mean that they executed the same, but simply that they procured a bond, and that there is no allegation that the sureties executed the bond. This contention, we think, will have to be sustained, under the rulings of this court in *Crockery Co. v. Haley*, 6 Wash. 302, 33 Pac. 650. The objection that there is no allegation in the complaint that the damages alleged to have been sustained by reason of the attachment have not been paid, and no proof on that proposition, we think is also well taken, and warranted the

court in granting the motion for a nonsuit. It is the breach of a covenant that is the basis of an action on a covenant, and the breach of this covenant was the nonpayment of the damages incurred by the plaintiff. That was the condition of the obligation, viz. that they should pay all costs and all damages which he might sustain by reason of the attachment. If the damages had been sustained, and had been paid, there would have been no ground for action; and, if a breach has been made by nonpayment of the damages, there must be an allegation of this breach before a recovery can be had. The cases cited by appellant in answer to this proposition are not in point. They simply sustain the general proposition that payment is a matter of defense, but are not applicable to the breaches of covenants of this kind. Drake, *Attachm.* (7th Ed.) 168, in discussing attachment bonds, lays down the rule as follows: "A declaration which fails to aver the nonpayment of the damages sustained is bad on demurrer;" and the cases cited by that author fully sustain the text. We have been unable to find any authority to the contrary. So far as the second and third grounds alleged in support of the motion for nonsuit are concerned, we think there is testimony which was competent to go to the jury, and sustain a verdict; but, for the reasons alleged above, the judgment will be affirmed.

SCOTT, STILES, and ANDERS, JJ., concur. HOYT, J., dissents.

STATE v. NORDSTROM.¹

(Supreme Court of Washington. Dec. 30, 1893.)

CONSTITUTIONAL LAW—INDICTMENT—PRELIMINARY HEARING—INDORSING WITNESSES' NAMES—HOMICIDE—EVIDENCE—REBUTTAL—INSTRUCTIONS—NEW TRIAL.

1. The requirement of the federal constitution, that criminal prosecutions be begun by indictment of the grand jury, does not apply to prosecutions for crimes against state laws; and hence the constitution of Washington, permitting such prosecution to be begun by information, does not contravene the enabling act of congress, which provides that the state constitution shall not be repugnant to the federal constitution.

2. A complaint made before a justice of the peace on preliminary examination may be dismissed, and a new charge made before another justice, where a full examination may be had.

3. Where an information, with the names of the witnesses indorsed, has been served on defendant, as required by Code Proc. § 1267, notice to defendant of the addition of the names of new witnesses is sufficient, and another copy of the information, with their names indorsed, need not be served.

4. Boots and shoes worn by defendant when arrested, and other personal effects taken from him in the course of the usual search of his person, are admissible on the trial to identify him as the person committing the crime; and an objection against their admission as having been obtained by an unreasonable search, and as compelling him to give evidence against himself, is properly overruled.

5. On a murder trial, where it is contended that the murderer wore a pair of rubber boots produced in court, and defendant testifies he cannot get them on, and makes apparent extraordinary but ineffectual efforts so to do in the presence of the jury, the state may, in rebuttal, call a shoemaker to measure defendant's feet and the boots, who may then give his opinion as to whether defendant can get them; and the state may also call other persons to put on the boots in the presence of the jury, and then prove by the shoe maker that their feet are as large as defendant's.

6. On a murder trial, defendant's testimony that he was in a saloon several days from the homicide when it occurred was not excluded by the saloon keeper, but on his cross-examination the certainty of his recollection was somewhat shaken. *Held*, that on redirect examination the state could show that on the following day the witness knew that defendant was suspected of the crime, as a reason why the witness would not have forgotten his alleged visit of the night before; and such evidence is not objectionable as an unfair method of showing that defendant was believed to be guilty in the community. Dunbar, C. J., dissenting.

7. On a murder trial, it is proper to instruct that the jury have the right to consider defendant's great interest in the verdict in determining the credibility of his evidence.

8. Where the court has charged that the state's failure to prove motive is a circumstance for the jury to consider, it is proper to refuse a further instruction that such failure raises a strong presumption of innocence.

9. On a murder trial, where defendant testified that he could not get on a pair of rubber boots admitted to have been worn by the murderer, a new trial should not be granted on the affidavit of a newly-discovered witness that, while it was possible for defendant to get on the boots, he could not wear them.

Appeal from superior court, King county. T. J. Humes, Judge.

Charles W. Nordstrom was convicted of the murder of William Mason, sentenced to death, and appeals. Affirmed.

On the evening of the 27th day of November, 1891, William Mason, a young man, 25 years of age, living near Cedar Mountain, King county, Wash., was shot and instantly killed by an assassin firing through the window from the outer darkness. The weapon used was a 45-70 caliber Winchester. It was Thanksgiving night, and, about 10 P. M., the deceased, in company with two brothers, the schoolmaster, and a man, was seated at the supper table nearest the window. A bright light sat on the table, while no curtain hung over the window. The bullet entered about 18 inches below the point of the left shoulder and passed through the entire body, resulting in less than a minute. Suspicion from the first, pointed towards defendant, Charles W. Nordstrom, as the murderer. The sheriff, upon being informed, hastened to the scene, and, after making a hasty observation of the premises, sought Nordstrom's capture. Footprints on the outside of the house showed the assassin had been within five feet of the window, and by the turning of the foot in the soft ground indicated the nature of the boot he wore, the size of the boot, and the direction in which

¹ Rehearing denied.

he fled. The tracks were pursued for some distance. Then they were lost, and soon tracks made in stocking feet were observed, these last tracks lead to a deserted cabin in the forest, where the rubber boots, corresponding identically with the tracks made near the window, were found. From the deserted cabin, leather-boot tracks of a very peculiar kind were found, pursuing an unfrequented and solitary trail, past another deserted cabin, and over the mountains, in the direction of Gilman. At this second cabin appellant's hat was found; also a portion of a memorandum book. The sheriff pursued the tracks, and the capture resulted in two days. Defendant had in his possession the 45-70 Winchester rifle, loaded with the same kind of a peculiar bullet as was found in the body of the deceased. He also wore, at the time of his arrest, a cap which he had taken from the deserted cabin at the time he left his hat. His stockings were muddy, and the boots he wore, by reason of some very peculiar "patches" on the soles, corresponded with the tracks leading from the cabin where the rubber boots were found. The defendant, who had formerly worked in the mines at Gilman, and where money was still due him, evaded the town, and lived on some crackers and cheese in an old cabin in the mountains. The defendant denied all knowledge of the crime, and sought to implicate another.

Jas. Hamilton Lewis, (Arthur E. Griffin and Gill & Keene, of counsel,) for appellant. John F. Miller, Pros. Atty., Jas. A. Haight, Asst. Atty. Gen., and A. G. McBride, for the State.

STILES, J. 1. Again the question is presented here that the appellant, under the federal constitution, is entitled to have the charge against him presented upon an indictment found by a grand jury. In this instance the contention is based upon the language of the enabling act, which provided that the constitution of Washington should be republican in form, and "not repugnant to the constitution of the United States." Much learned investigation and ingenious argument have been expended by counsel in an endeavor to impress this court with the view that inasmuch as the constitution of the United States, in prescribing the method of initiating prosecutions for infamous crimes against federal laws, makes the grand jury a sine qua non, and its indictment the only lawful means of charging an offense, therefore the state constitution must conform to the same method, and any authority to prosecute by information must be repugnant to the supreme federal law, and void. We may, and do, yield assent to all that is thus said, with one exception; and we should be justified in going further than the argument made, and in holding that, if the provisions of the fifth amendment to the federal constitution apply to the matter of prosecutions for

crimes against state laws, it would make no difference were there no mention of the federal constitution in the enabling act or the constitution of the state; the constitution of the United States would still be the supreme law of the land, and all provisions of the state constitution or laws which were actually repugnant would be utterly void; nor could any act of congress make any such provision one whit the less void or inoperative. But the difficulty is that the constitution of the United States does not assume or pretend to regulate prosecutions for offenses against state laws, and we see no reason why there should be any departure from the views on this subject expressed in *Lybarger v. State*, 2 Wash. St. 552, 27 Pac. 449, 1029. See *Spies v. Illinois*, 123 U. S. 131, 8 Sup. Ct. 21.

2. The information was identical with those in *State v. Freidrich*, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, and 31 Pac. 332, and *State v. Day*, 4 Wash. 104, 29 Pac. 984.

3. Appellant alleges error because the court below refused to quash the information upon a showing that he had not a preliminary examination; but his real ground for the motion was that, whereas a charge was made against him before Justice Neagle, that charge was not pursued, but was dismissed, and a new charge made before Justice Von Tobel, before whom there was a full examination. No error.

4. The names of certain witnesses were indorsed upon the information before the trial commenced, by special order of the court, as the statute permits. Code Proc. § 1230.

5. Upon filing the information, the prosecuting attorney caused a copy of it, with the names of witnesses indorsed, to be served upon appellant, and appellant complains because he was not furnished another copy when the names of new witnesses were added. The evident purpose of the statute (Code Proc. § 1267) is to apprise the accused, as soon after the information is filed as is reasonably possible, of the charge made against him, and the names of leading witnesses. After that, notice of the addition of new names of witnesses meets every reasonable requirement; and there was notice in this case.

6. The state sought to connect the appellant with the homicide by means of certain boot tracks and tracks of feet wearing only socks, impressed in soft or muddy ground near the scene of the crime, and, in pursuit of its endeavor, called a deputy sheriff to produce the boots and socks of appellant. These articles were taken from appellant's person upon his arrest, and were retained by the sheriff to be used as evidence,—the boots because it was claimed that they fitted the tracks, and the socks because they were muddy. No force whatever seems to have been used by the officers in getting possession of these things, but they were taken from the prisoner in the course of the usual

search of his person upon his arrival at the jail. Appellant complains of the admission of the boots and socks in evidence on the ground that they were obtained by an unreasonable search of his person, and that it was a method of compelling him to give evidence against himself; but we cannot sustain his position. It is generally held that an accused person cannot be compelled to exhibit these portions of his body which are usually covered for the purpose of securing his identification, or in other ways affording evidence against him, though that proposition has been reduced, in at least one case, to prohibiting exposure only where decency would be infringed. *State v. Ah Chuey*, 14 Nev. 79. But it has never been held that personal effects of every kind could not be taken from the person of a prisoner, and used upon his trial for what they may be worth as criminating evidence. *State v. Graham*, 74 N. C. 646. The same observations apply to the memorandum book taken from appellant's pocket, and exhibited to the jury to show that a leaf found in a cabin in the woods, where it was claimed appellant had been, belonged in his book; and also to the cap which he wore when arrested, and which, it was claimed, had been hanging on a nail in the same cabin until the night of the homicide.

7. There was testimony tending to show that the person who fired the shot that killed William Mason had worn a certain pair of rubber boots, which it was conceded did not belong to appellant. When appellant went upon the stand he testified that he could not get these boots upon his feet, and, at the request of his counsel, made apparently extraordinary efforts to put them on in the presence of the jury, but without effect. In rebuttal the state called a shoemaker, and had him measure the boots and appellant's feet, whereupon he testified that a foot of that size could wear those boots. Other persons were then called, and in the presence of the jury they put the boots on, after which the shoemaker measured their feet, and found them at least as large as appellant's. All this was done against objection, on the ground that the measurement of appellant's feet was compelling him to give evidence against himself. But in our judgment, after the exhibition made by appellant in his apparent efforts to get the boots on, the measurement of his feet was only a legitimate way of cross-examining him, and the subsequent testimony of the shoemaker and the other witnesses was proper rebuttal. When the shoemaker took his measurements he had not been sworn, but he was sworn before he gave any testimony.

8. The homicide was committed on Friday evening, November 27, 1891, at 6:30. Appellant, by way of accounting for himself, told of his movements that afternoon and evening, and stated that at a little after 8 o'clock he went into the saloon of one Cooper,

at Gilman, several miles from the place where deceased was shot, and bought of Cooper a bottle of whisky and a glass of beer, the testimony tending to show an admission. On rebuttal, Cooper was called, and testified with some positiveness that appellant was not in his saloon, and did not buy anything from him on that night. On cross-examination, this occurred: "Q. Is it possible he could have come in there on Friday night, and bought fifty cents' worth of beer, and you not remember the next day?" Well, I do not think so; I think I cannot remember it. Q. Why do you think you cannot remember that? A. I cannot remember it. Q. Why would you remember that particular thing? A. Many other questions were asked me, and I answered them. Q. Was it the purpose of getting an admission from him, even though the witness had seen appellant on Friday night at his saloon, he might have forgotten it, and the certainty of his recollection was left somewhat shaken. But on the redirect he was asked: "Did you see appellant on Saturday night that this man was suspected of the murder of Willie Mason?" He answered that he did, and that he learned the fact about noon of that day. Q. Did citizens in Gilman talk anything to you about the crime? (Objected to as leading.) Court: His question is proper. Q. The people living there in Gilman? A. Yes, sir. Q. Quite a number of them? A. Yes, sir. Q. You heard them talking about the crime? A. Yes, sir. Q. What did you hear them say? (Objected to as hearsay, immaterial, and incompetent.) Court: Objection overruled. A. They said a certain man had been suspected,—that they suspected him of the crime. Q. Who was that certain man? A. That I do not know. Q. Defendant; I forget the name." The object of this examination was to show that the purpose of this examination was to show that the witness was not an additional reason why the witness might not have forgotten the alleged visit of appellant to his saloon the night before, and that one of the reasons therefor having been that he was challenged on the cross-examination, though the witness, upon the direct question being asked, testified that he had no knowledge that appellant was suspected, and that he would have been likely to perceive the fact of such a visit in the witness's mind, sustained an objection to it. On the part of appellant here urged that this recross-examination was an unfair and improper method of getting before the jury the fact that the Gilman community not only suspected him of the crime, but believed him to be the guilty party; but we cannot see how any such construction should be put upon the testimony. The principal questions were left unchallenged except on the ground of leading character, and the whole attention of the court and jury must have been directed to the circumstances, to the point whether the witness had any real recollection of appellant, whether appellant was not there, or a mere absence of recollection as to whether he had been in the saloon or not. Nothing was intended to show that any person believed in appellant's guilt, but only that he was

and the very first answer which was expected to give that information. No was made to limit the jury's consideration of the evidence, and it was evi- thought of but minor importance, as not mentioned in appellant's brief in

ention is called to alleged improper of counsel for the state to the jury, rulings of the court thereon; but, as as said is not preserved in the state- cannot know what the fact was. ts were filed by both sides, but the as never called upon to settle the matter.

giving the usual cautionary charge ry as to the credit to be given to wit- the court used this language: "In the the defendant you have a right to the great interest he has in your The statement was true; a jury ght to consider the interest of every (Dodd v. Moore, 91 Ind. 522,) and rt does not err in so instructing. e, in a criminal case, where the de- testified under peculiar circum- he ought to be singled out as point- was here done, may be questiona- no point is made on that.

merous verbal criticisms are made of portions of the instructions, but such were either given at the request of ellant, or were not excepted to. singly nor as a whole do they de- fairness or justness of the admira- ge given by the court.

pellant asked the court to instruct illure to prove a motive for the com- of the crime would raise a strong tion that the accused was innocent. ould be no necessity for, or propriety g such an instruction. The general tion of innocence covers it fully. The re told that this would be a circum- for them to consider; to have said ould have been to trench upon the on against commenting on the facts. cases motive may, as counsel sug- a very material element in deter- the degree of a prisoner's guilt; but ould be no such question in this case, accused was either guilty of a base ation, or he was entirely innocent, present, and did not fire the fatal

e affidavit of Waldrowf, produced on on for a new trial, was wholly in- for any purpose, relating, as it did, ng but indefinite hearsay about im- matters. Claus Berglin undertook hat, while it was possible appellant ve put the rubber boots on, he could e worn them. Appellant was fully before the trial that one of the main a the case would be whether he had ose boots or not, and the first thing when he went upon the stand was nstrate that he could not possibly

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get them on his feet. We think it is too late now to ask that the case be opened to al- low the admission of testimony which would contradict his own sworn statement.

14. The insufficiency of the evidence to justify a conviction is strongly urged; but as to this point, without extended review, we shall only say that, while it was wholly circumstantial, we doubt whether any impartial reader of it would come to a conclusion different from that arrived at by the jury. Others might, perhaps, hesitate, if burdened with the responsibility of the jury, to give as conclusive effect as they have to the evidence; but all such responsibility, under the facts proven, rested with the jury alone, and they have decided the question, after receiv- ing the fairest possible instructions from the court. Other points raised were either im- material, or were not sustained by the rec- ord, and it is only left for us to direct an affirmance of the judgment, and that the sen- tence imposed upon the appellant be carried into execution. So ordered.

ANDERS, SCOTT, and HOYT, JJ., con- cur.

DUNBAR, C. J. In concurring in this opinion I wish to say that if the admission of the testimony of the witness Cooper, concern- ing the defendant's being suspected by the people of Gilman, had been properly and duly assigned as error, I should feel bound to reverse the judgment on that ground, for I think it was most palpable prejudicial error; but, as it was not assigned in appellant's first brief, I will treat it as though it were waived, and hence I concur.

CATLIN v. HARRIS.

(Supreme Court of Washington. Dec. 30, 1893.)

CONTINUANCE—ABSENCE OF ATTORNEY—PAROL EVIDENCE.

1. Where judgment by default has been set aside, and the trial of the cause has been fixed on a day suggested by defendant, the trial court does not abuse its discretion in re- fusing a continuance because of the absence of defendant's attorney, who had, when first en- gaged, notified defendant that he could not at- tend to the case on the day it had been set for trial.

2. In an action on a note, evidence of a prior parol understanding that it did not rep- resent the actual amount due, or the true rate of interest, is inadmissible.

Appeal from superior court, King county; R. A. Ballinger, Judge.

Action by Jerome Catlin against James Harris on a note. From a judgment for plaintiff, defendant appeals. Affirmed.

Will H. Thompson, Eduard P. Edsen, John E. Humphries, J. T. Ronald, and S. H. Piles, for appellant. Allen & Powell, for respondent.

DUNBAR, C. J. It is strenuously urged by the appellant that the trial court abused its

discretion in not granting a continuance on the showing made. It seems to us that the affidavit of S. H. Piles, upon which the appellant places great reliance, does not in any way strengthen his case. The affidavit shows that Piles, on account of rush of business, declined, in the first place, to accept the employment of appellant, advising him to employ Thompson, which he did. In the second instance, he could not in any way have been taken by surprise so far as Piles not being able to attend to his case is concerned, for when he made application to Piles he told him plainly that he could not attend to the case on the 19th of June, the date for which the trial was set. It is true that in a spirit of accommodation he made an application for a continuance for him, and stated in his affidavit that he could attend to the case if it were continued. But appellant cannot urge as a reason for reversing the action of the court that he did not prepare for his defense because he relied upon his application for a continuance. That would be destroying the discretion of the court, and would logically make the reliance upon the application a ground for granting it. Considering all the circumstances surrounding the case, as shown by the affidavits of both parties, including the fact that respondent had defaulted in the first instance; that said default had been set aside on his application; and that the date of the trial had been fixed at his own suggestion, and that he had notice that his case would be called for trial on the 19th day of June,—at least 11 days prior to that date; and of the further fact, of which the court will take judicial notice, that there is no dearth of competent and trustworthy attorneys in the city of Seattle,—we do not feel justified in reversing the judgment of the trial court on a question that is so largely discretionary with the judge who tries the case, and who is familiar with all the circumstances connected with the application. 3 Amer. & Eng. Enc. Law, p. 808.

It is also contended that the court erred in not permitting the plaintiff to testify in reference to the understanding of the parties as to the execution of the notes sued on, objection having been made that it was an attempt to vary the terms of the contract by parol evidence. We think there was no error committed by the court in sustaining the objection. As we understand the position of appellant, he does not dispute the general proposition that written contracts cannot be contradicted or varied by parol evidence; but it is insisted that this case does not fall within the rule. We are unable to agree with this contention. The contracts are unambiguous, and all the terms are definite and distinct. The cases cited by appellant we do not think are supported by the weight of authority, but even they do not go far enough to sustain appellant's view. In *Chapin v.*

Dobson, 78 N. Y. 74, the action was contract to buy certain machinery, and defendant was allowed to prove an guaranty on the part of the seller, and court admitted the evidence under an exception to the general rule, on the ground that the contract and guaranty did not relate to the same subject-matter, and because, as the court said, "there was nothing upon its face to show that it was intended to express a whole contract between the parties." The principle announced is based on the rule laid down in *Johnson v. Oppenheim*, 100 N. Y. 280, which allows a collateral agreement made prior to or contemporaneous with a written agreement, but not inconsistent with or affecting its terms, to be given in evidence. But the defense here certainly is inconsistent with the terms of the contract, and most certainly does affect the terms of the same very essentially. One of the statements of the affirmative defense is "the truth and in fact said promissory note does not represent the true amount due at the time of such settlement, and at the date of such promissory note mutually due from defendant to plaintiff." The very statement of this defense, it seems to us, precludes the argument, for it is self-evident that the defense, if allowed, would vary the terms of the note, and do away with the presumption that all previous understandings have merged and incorporated in the contract, which speaks the agreement of the parties, and which, as Lord Coke so well said, "is not to be controverted by an averment of the parties to be proven by the uncertain memory of slippery memory." If fraud had been perpetrated in obtaining the execution of an instrument, that is an equitable defense; and certainly, under all the authorities, it cannot be asserted as a legal defense to so plain a contract as a note that at the time it was executed there was an oral understanding between the parties that the note did not represent the actual amount due, the true rate of interest. The authorities sustaining this view are so overwhelming, and so numerous that we content ourselves with citing *Burnes v. Scott*, 117 U. S. 547; *Davis v. Randall*, 115 U. S. 547; 17 Amer. & Eng. Enc. Law, pp. 426 and cases cited; 1 Daniel, Neg. Inst. §§ 8 and cases cited.

The offer to amend was hardly deserving enough to amount to an amendment, in construing it as an amendment offered in our view of the law as to the admission of the testimony under the pleadings at the time the trial was commenced, the amendment would admit an entirely new defense, and we think the trial court did not abuse its discretion in refusing the amendment. The judgment is affirmed.

ANDERS, HOYT, SCOTT, and STINEBAUGH, JJ., concur.

STATE v. PAGANO.

(Supreme Court of Washington. Dec. 30, 1893.)

HOMICIDE—CIRCUMSTANTIAL EVIDENCE.

Evidence that accused, through his relations with deceased, could have committed the crime; that the hatchet which was probably used looked like one formerly used in defendant's fruit stand, then occupied by another; that there were blood stains, or what looked like them, round the finger nails and on the arm and shoes of accused; that accused behaved oddly the day after the murder; that his vest had a piece cut out of it,—is insufficient to convict, in the presence of proof that others had equal opportunity and better motive; that neither the identity nor exclusive possession of the hatchet were certain; that the stains were not shown by the best evidence attainable by the state to be human blood, and, if so, might have accrued when accused helped lift the corpse; that accused's conduct was more compatible with innocence than guilt, and that the piece cut from his vest had become a patch on his pantaloons.

Appeal from superior court, Pierce county; Frank Allyn, Judge.

Salvador Pagano, alias Salvator Picani, convicted of murder in the first degree, appeals. Reversed.

John V. Evans and Orra L. C. Hughes, (Marshall K. Snell, of counsel,) for appellant. W. H. Snell, Pros. Atty., (Chas. Bedford, of counsel,) for the State.

HOYT, J. Appellant was put on trial for murder in the first degree. A verdict of guilty was rendered, motion for a new trial made and determined, and judgment and sentence of death imposed. From this judgment and sentence this appeal is prosecuted. The proceedings by which the case has been brought to this court have been somewhat irregular, and out of the ordinary course, but upon stipulation of the appellant and the prosecuting attorney all irregularities have been waived. It therefore becomes our duty to pass upon the merits of the case as presented by the record.

At the close of the state's case a motion was interposed by the defendant, asking that he be discharged, for the reason that the evidence introduced was not sufficient to go to the jury. The motion was denied, and an exception allowed, and such ruling is here assigned as error. The rules which should govern in passing upon motions of this kind are well understood. All of the evidence introduced by the prosecution should be taken as true, and the criminating facts shown thereby determined; and if such facts, and every presumption unfavorable to the defendant that can be founded thereon, can reasonably consist with his innocence, the motion should be granted. If they cannot reasonably be explained upon the hypothesis of his innocence, and can only be explained upon the theory of his guilt, it should be denied. At the time the plaintiff rested it had introduced evidence as to some circumstances which tended to cast

suspicion upon the defendant as the person who might have committed the crime. The six to which reference is hereafter made were the only ones which rose to the dignity of proof as in any way pointing to the defendant as the actual guilty party. First, that by reason of his relations with the deceased he had an opportunity to commit the crime; second, the hatchet with which the crime was probably committed had the same general appearance as one which had formerly been used in the fruit stand belonging to the defendant, but at the time in the actual occupancy of another; third, blood stains, or what appeared to be such, around the finger nails and upon the arm of the defendant; fourth, something that appeared like blood stains upon his shoes; fifth, his conduct on the day following the night of the murder; and, sixth, the vest of the accused with a piece cut therefrom. Were these facts so inconsistent with the innocence of the accused as to justify his conviction? As to the first, it can have no weight whatever, for the reason that it clearly appeared from the testimony that others as well as the defendant had an opportunity to commit the crime. As to the second, it is sufficient to say that the proof of the identity of the hatchet was not established beyond a reasonable doubt; and, even if it had been, there was no such exclusive ownership and possession of the hatchet shown to have been in the defendant as to exclude a reasonable hypothesis that some other person might have made use thereof in the commission of the crime. The third was by far the strongest circumstance proven against the defendant, but it does not so clearly and exclusively point to his guilt as to exclude every other reasonable hypothesis. It was not shown beyond a reasonable doubt that the stains were made by the blood of a human being. The testimony might have been sufficient to have warranted such a finding if the plaintiff had not had it within its power to have furnished further proof of such fact, if fact it was. This being the strongest circumstance in the chain relied upon by the plaintiff, it should have made it as conclusive as possible by establishing beyond a reasonable doubt the fact that such stains were caused by the blood of a human being. No sufficient effort was made in that behalf, and it must therefore be held that the fact was not proven as required by the rules of criminal practice. Further, if the stains were caused by human blood, their presence was so explained that no conclusive presumption of guilt could be drawn therefrom. Their existence was accounted for upon fully as reasonable a hypothesis as that upon which the theory of the prosecution was founded. The stains around the finger nails of the defendant were much more satisfactorily accounted for upon the theory that they were made at the time defendant took hold of the dead

body than that he would have been so careless as to have allowed them to remain upon his hands during the entire day following the murder, when he had every opportunity to have removed them. The alleged stain upon the arm lacked a good deal of being satisfactorily proven, and, even if it were so proven, it might have been made at the time he took hold of the corpse as above mentioned. As to the fourth, such stains were too remote, and too easily accounted for upon several theories reasonably consistent with the innocence of the accused, to have any conclusive force against him. It is only necessary to say as to the fifth that, in interpreting the conduct of the defendant on the day following the murder, all of the circumstances surrounding him, and his personal peculiarities, as disclosed by the evidence must be taken into consideration; and, when this is done, his acts and demeanor can much better be explained upon the theory of his innocence than that of his guilt. As to the vest, the theory of the prosecution that such piece had been cut out because blood had been gotten thereon at the time of the murder, in view of the fact that the whole vest could have been so easily destroyed, very nearly approached the ridiculous, without any explanation on the part of the defendant. Not only was such circumstance of little value, if unexplained, but that little was taken from it by the explanation of the defendant, and the production of the piece cut from the vest as a patch on his pantaloons. They can therefore furnish no warrant for his conviction. Not only were all these circumstances explainable upon some other reasonable hypothesis than the guilt of the defendant, but there were other circumstances which appeared in the proofs which went to show that there was at least an equal probability that another than the defendant had committed the crime. There was shown absolutely no motive worthy of the name for the commission of the crime by the defendant, and incidentally there crept into the case the fact that there was something like a motive existing on the part of another for the killing of the deceased. This was the state of the case when the motion on the part of the defendant that he be discharged was interposed, and it follows from what we have said that, in our opinion, at that time there had not been a single circumstance proven against him from which even an inference could be reasonably drawn consistent with his guilt and inconsistent with his innocence; nor was the case against him materially strengthened by anything which appeared in the testimony introduced on the part of the defendant, or by that in rebuttal thereof. Taken together, the actions and bearing of the defendant from the time of his arrest, and while upon the stand, and all that he said both off and on the stand, were as consistent with his innocence as

could reasonably be expected under a circumstances surrounding him. His called admissions and statements were admissions, nor were they statements were so unreasonable as to justify an unfavorable inference therefrom; and his money, taken altogether, put his case in a favorable light upon the hypothesis of innocence as could have been reasonably expected. There was no other testimony either in the principal case or upon rebuttal which pointed in the least degree to the guilt of the defendant, except some alleged contradictions as to the time when he last saw the deceased, which could have been reasonably explained upon a theory of mistake as to the time, or forgetfulness on the part of the witnesses; and the evidence of the witness Dick as to what he saw on the night of the day before the discovery of the murder. His testimony was objected to as not proper in rebuttal of defendant's case, and most of it was open to objection on that ground, and should have been excluded by the court until some showing had been made by the plaintiff why it had been introduced at the proper time. Regardless of this question, his testimony was no more than to show that the defendant had the opportunity to commit the crime to which we have already spoken, and that there was a certain degree of suspicion upon him as to every circumstance testified to could have existed and have been reasonably consistent with the innocence of the accused. But if any force whatever was given to such testimony, it would be upon the theory that the murder was committed in the evening of the day before the body was discovered, whereas the testimony of the expert witness introduced on the part of the prosecution and in no manner sought to be explained was that the murder was committed in the morning of the same day. Such expert testified that he saw the body about 10 o'clock in the evening, and that it had then been extinct from 12 to 16 hours. Besides, the only theory upon which the testimony of said witness could cut any force, excepting as tending in some degree to show that he and the deceased had some conversation at the time they were passing in front of the witness' house, would have required that the murder should have been committed in a space of time estimated by the witness to be half a minute, and without any noise which he could hear, though he was near enough to testify in detail as to persons with whom he was little acquainted, in the darkness of the night, unbroken by moonlight, or, so far as the witness remembered, even by stars. In our opinion, the criminalizing circumstances, if such they can be called, were as reasonably consistent with the innocence of the accused; that the most that was established by them was that there was a probability that he was the guilty party. It is not the policy of the law that a person

convicted of crime, especially a
ne, upon the doctrine of probabili-
l, even if it were, at least one other
as by the proofs in the case shown
been as probably the guilty party
cused. The only theory upon which
ct of the jury can be accounted for
here was at the time great excite-
wing out of the atrocity of the mur-
ther with the fact that the accused
eigner, and by the jury to some ex-
doubt believed to be of an inferior
ective race. The judgment and sen-
tence be set aside, and the appellant
d.

R. C. J., and STILES, SCOTT, and
J., concur.

Ex rel. BALDWIN v. SEAVEY.

Court of Washington. Jan. 3, 1894.)

NOTICE AND BOND — BOARD OF HEALTH.
When notice of appeal has been given in
t, but bond not filed within five days
t, a new notice and bond filed seven
r the first will support the appeal.
dissenting. *Manufacturing Co. v.*
Pac. 753, 32 Pac. 462, and 5 Wash.
ved.

bond for costs, and to stay proceed-
the amount fixed by the court for a
as, is sufficient as an appeal bond.
dissenting.

The governor, having sent to the senate
as for the board of health for the col-
district of Puget sound, (Code 1881,
which were refused confirmation, after
ent, assumed that the offices were va-
filled them by appointment. The ap-
having qualified, received the official
pers, etc., without opposition from the
ard. *Held*, that they were de facto

the health officer for the district of
nd, under Code 1881, c. 159, being the
officer of the district board of health,
nted by it, and having no prescribed
m, is removable at the board's pleas-

from superior court, Jefferson coun-
Ballinger, Judge.

tion, in the nature of quo warranto,
on of C. M. Baldwin, against L. T.
Judgment for relator. Defendant
Reversed.

& Fitzgerald and A. R. Coleman,
ant. Geo. H. Jones, for respondent.

3, J. The appeal, initiated by no-
pen court June 10th, was not per-
the filing of a bond, and a new
appeal was given June 17th, and
led on the same day. This entitled
lant to have his case heard. *Manu-*
Co. v. Wolff, 5 Wash. 264, 31 Pac.
ac. 462.

nd was a bond for costs, and to
ceedings; and although it was in the
xed by the court for a supersedeas,
parate bond for costs was given, it

was sufficient. *Erving v. Van Wagenen*, 6
Wash. 39, 32 Pac. 1009.

It is conceded in this case that on the 21st
day of March, 1892, Henry Landes, Thomas
Jackman, and R. C. Hill constituted the board
of health for the collection district of Puget
sound, authorized by chapter 159, Code 1881.
It is also conceded that on the day named
the said board duly appointed the respondent
health officer of the said district, and that
he qualified as required by the statute, en-
tered upon his duties, and was at all times
present, ready and willing to continue the
performance of the same, until the interfer-
ence of the appellant, hereinafter mentioned.
It further appears that although the names
of the three commissioners above mentioned
were communicated to the senate at its last
session, by the governor, as nominees for
positions on the board, the senate refused
confirmation, and that after the legislature
had adjourned, and on March 24, 1893, the
governor, assuming the several commis-
sionerships to be vacant, appointed and com-
missioned Frank A. Bartlett, L. B. Hastings,
and R. C. Hill to be such commissioners,
and that they qualified as required by law.
The former members of the board continued
to act until the qualification of their suc-
cessors; but upon such qualification they made
no opposition, but surrendered the books,
papers, and other belongings of the board to
the new appointees, and ceased to act, or to
claim to act, as commissioners. The new
commissioners organized as a board, and
among their first acts they declared the po-
sition of health officer vacant, and appointed
the appellant thereto; and he duly qualified,
and proceeded to exercise the functions of
health officer. This action was brought to
inquire by what right he assumed to act,
and the court below found against him, and
enjoined him from further interference with
respondent, who was declared to be the only
legal health officer. In determining the case
below, the court held that the relator could
raise the question whether the governor had
power to make the new appointments, there
being no actual vacancy in the office of com-
missioner, and, upon consideration of the
main question, decided against the existence
of that power. We are urged to reverse that
ruling by one side, and to sustain it by the
other; but, in view of its manifestly great
importance, we shall not do either at this
time, it being not necessary to the disposi-
tion of the case before us.

In our opinion, on the 3d day of April,
when the newly-constituted board assumed
to declare the position of health officer va-
cant, it was a de facto board, and could ex-
ercise all of the powers of a de jure board,
because, in form, the appointment of its
members was regular. They had qualified in
the manner provided by law. They were in
possession of the paraphernalia of the office,
and there were no legally appointed com-
missioners contesting their right to act. If,

as matter of fact, they were illegally appointed, they were vulnerable to a direct attack, but they could not be ousted in any collateral proceeding to which they were not parties. *Plymouth v. Painter*, 17 Conn. 585; *State v. Carroll*, 38 Conn. 449; *In re Ah Lee*, 5 Fed. 899; *Osborne v. State*, 128 Ind. 129, 27 N. E. 345; *Hamlin v. Kassaf*, 15 Or. 456, 15 Pac. 778; *Hildreth v. McIntire*, 19 Amer. Dec. 61, notes. The question to be determined, therefore, is whether, in removing respondent, the board was attempting to do an act which a de jure board could lawfully do. The health officer, under the statute, is the executive officer of the board of health, with such fees for his compensation as may be fixed by the regulations of the board, within prescribed limits. The law providing for his appointment gave him no official term, and evidently contemplated his appointment and removal at the pleasure of the board. Although required to file a bond and take an oath of office, the tenure of his office is not within the purview of any of the statutes governing appointments or removals. "When the tenure of the office is not fixed by law, and no other provision is made for removals, either by the constitution or by statute, it is a sound and necessary rule to consider the power of removal as incident to the power of appointment." *Mechem, Pub. Off. § 445*. Being in possession of their offices, and no one directly contesting, the commissioners had full power and authority to control their subordinate, and to remove him, and appoint another, if they saw fit. Judgment reversed, and cause remanded, with instructions to dismiss the complaint.

DUNBAR, O. J., and SCOTT and ANDERS, J., concur.

HOYT, J. I concur in the opinion on the merits, but dissent as to the motion to dismiss.

EARLES v. BIGELOW.

(Supreme Court of Washington. Jan. 5, 1894.)

ASSUMPSIT—EVIDENCE—CANCELLATION OF CONTRACT.

1. Plaintiff leased his sawmill to defendant for a year, the latter, at the end of his term, to have the right to remove his improvements, and keep and return the premises in their then good condition. The same day plaintiff agreed to furnish defendant a quantity of logs at a certain price. Some months later he agreed in writing with defendant and another that whereas they owed plaintiff about \$2,900, and were about to ship lumber worth \$1,450, they would, on receipt of the bill of lading, draw on the consignee in plaintiff's favor for \$1,450, and afterwards for \$1,250, on shipment of a second cargo, for which plaintiff promised to supply the logs; plaintiff, on receipt of the second draft, to cancel the lease, and pay them the reasonable value of their improvements. Held, in a suit by plaintiff for rent due and the value of logs furnished, it being admitted that de-

fendant's co-contractor was merely his agent, that the later agreement was admissible.

2. Even if the former contracts were canceled by the latter, defendant could not appeal, object that plaintiff should have for the contract price of the logs, instead of their value, since he demanded no more than such price, and had made proof of value without objection.

3. Nor could the introduction of the contract by which plaintiff agreed to furnish logs to defendant prejudice the latter, even if material on the question of value of the logs.

4. Defendant having erroneously been allowed to counterclaim for improvements, the value of which he had agreed to arbitrate, was harmless error to allow plaintiff to rely on opinion evidence that defendant had agreed the premises more than the improvements were worth.

5. A verdict for the value of the logs, to the contract price, was sustained by production of said contract, and a witness' testimony that the price was very moderate for the logs furnished.

6. Remarks of the trial court, unless specifically called to that court's attention, will not be assigned as error.

HOYT, J., dissenting.

Appeal from superior court, King county. T. J. Humes, Judge.

Action by Michael Earles against Bigelow on contract. Judgment for plaintiff. Defendant appeals. Affirmed.

James Leddy and Fishback, Elder & Son, for appellant. Edward Brady, for respondent.

SCOTT, J. This action was brought to cover the sum of \$2,305.29, as a balance for logs, lumber, and piling sold by the plaintiff to the defendant, and for services performed by the plaintiff with his horses and hired men for the defendant, and the full sum of \$233.33, as the rent of a sawmill which was leased by the plaintiff to the defendant. The plaintiff obtained judgment for the amount claimed, and the defendant appealed. It appears that respondent is the owner of a sawmill at Clallam Bay, and he leased to appellant on the 11th day of December, 1891, for the term of one year, commencing on the 14th day of said month, a rental of \$50 per month. Said lease was in writing, and was introduced in evidence without objection, as plaintiff's Exhibit A. It further provided that the lessee might purchase said mill property at any time during the term of said lease for a price then stipulated, and it further authorized him to remove, at the expiration of the lease, any machinery that he might place upon the premises, or to remove any building which he might erect upon the land upon which the mill stood. It further provided that the lessee, at the expiration of the lease, should return the premises in question, in case he did not purchase the same, in as good condition as they were when the lease was executed, use, wear, inevitable accident, and loss by fire excepted, and contained the further statement that said premises were at that time in good order and condition.

that the lessee would keep the same in good repair during said term at his own expense, with other provisions therein contained. On the same day the lease was executed, plaintiff entered into another contract in writing with the defendant, whereby he agreed to cut and deliver to the defendant 20,000 feet of merchantable logs per day for the period of four months from the 12th day of December, 1891, at three dollars per thousand feet. This document was introduced in evidence as plaintiff's Exhibit D. It further appeared that on the 11th day of April, 1892, a further instrument in writing was entered into between plaintiff and the defendant, from the face whereof it appeared that one D. E. Bigelow was interested with the defendant. This instrument was introduced in evidence as plaintiff's Exhibit E. The defendant objected to its admission, but no ground of objection was stated. This instrument recites that whereas the said first parties (I. N. Bigelow and D. E. Bigelow) are indebted to the second party "in about the sum of (\$2,900) twenty-nine hundred dollars, (the exact amount not having been ascertained)," and that as said first parties are about to make shipments of lumber to various persons, and particularly one shipment of the value of \$1,450, now being loaded on a certain ship named, and as said first parties were desirous of having the second party receive the proceeds of said shipment, it was agreed that the first parties would, as soon as they received the bill of lading from the captain of the said ship, draw a draft on the consignee, directing the consignee to pay said second party the sum of \$1,450 aforesaid. It further contained a like agreement to draw a like draft for the sum of \$1,250 subsequently, upon the shipment of a second cargo. It was further stipulated therein that the second party, upon the receipt of the second draft mentioned, would cancel the lease aforesaid, and "release the said first parties from all obligations incurred thereunder, and that said second party would pay to the said first parties the reasonable value of all improvements made upon said property by the first parties, said value to be determined by disinterested appraisers, three in number, two of whom were to be selected by said parties, and the third to be selected by the two chosen;" and, further, that said first parties were to give up quiet and peaceable possession of said property to the second party upon the cancellation of said lease. And said second party thereby agreed to furnish logs sufficient for the completion of the second cargo above referred to. And it further stated "that it is understood, by and between the parties hereto, that this contract is not to be construed as determining the amount due, or that may become due, to the party of the second part." The defendant, after denying some of the allegations of the complaint, set up a counterclaim in the sum of \$2,513 for goods sold and delivered to the

plaintiff during the time of the operation of the mill, the same consisting of machinery furnished for the mill; and a further counterclaim in the sum of \$50 for work performed in constructing a log boom,—the whole relating to improvements upon the mill property by the lessee while operating the mill under the lease; and further set up the contract, (Exhibit D aforesaid,) and alleged the failure on the part of the plaintiff to deliver the logs as therein contracted, to the damage of the defendant in the sum of \$1,532. The plaintiff replied to this new matter, denying most of the matters alleged, but admitting the execution of Exhibit D, a copy of which was set forth in said pleading, and alleged his compliance therewith.

The errors alleged upon the part of appellant will be taken up in the order in which they are argued in his brief. First, it is contended that the court erred in admitting plaintiff's Exhibit E as an admission by appellant that he was indebted to the respondent. In this connection, however, the failure of appellant to state any ground of objection to the admission of said document when it was offered was insufficient to raise any question over its admission. It appears that appellant subsequently moved to strike this exhibit from the evidence, on the ground that it was not between the parties to this action. The proof showed, however, that it was in relation to the same business, and D. E. Bigelow, who executed the same with the defendant, was alleged by the plaintiff in his complaint to have been an agent, only, of the defendant, I. N. Bigelow, and this was not denied in the amended answer. It clearly appears that said instrument concerned the same matters here in controversy, and that it was the indebtedness of the defendant to the respondent which was referred to. This motion was denied by the court, and properly so, under the circumstances.

The next point urged is that the court erred in admitting plaintiff's Exhibit D, to the admission of which the defendant objected on the ground that it was irrelevant and immaterial under the state of the pleadings. It is not clear that this instrument was of any special importance in the case, although the contract price mentioned may have been some proof of the value of the logs; but we are unable to see how its admission could have prejudiced the defendant in any way.

The next point complained of is over a question asked the defendant while on the stand, as to whether he had not asked one Kellogg to go his security upon his indebtedness to the plaintiff. This was objected to, but no ground was stated. The court overruled the objection. The defendant having denied being indebted to the plaintiff in any sum, the fact of his having asked another person to go his security was some evidence of his being so indebted; but no point is

raised here because of the failure of the defendant to state any ground in his objection to the admission of such testimony.

The fourth point is that the court erred in allowing the plaintiff to prove that the defendant had damaged the mill, while in his possession, more than enough to offset the value of the improvements for which the defendant sought to recover. It is contended that this proof was inadmissible under the pleadings, and we are of the opinion that this objection was well taken in that respect. Notwithstanding this, however, we think there was no prejudicial error, for the reason that the proof of these improvements by defendant, for which he sought to recover in his first and second counterclaims, was improperly admitted. The plaintiff objected to the admission of this testimony, and moved to strike the same, upon the ground that, as the defendant had agreed in writing to submit the claim to arbitrators, he could not maintain a suit therefor. It appears that the defendant amended his answer during the trial, setting up the counterclaims for these improvements. It further appears that the only agreement upon the part of the plaintiff to pay for the same was contained in said Exhibit E, and this was to pay the value thereof, to be determined by arbitration. It further appears that, in pursuance of this agreement, arbitrators were appointed, but that they failed to proceed with the arbitration, because of the refusal and failure of the defendant to attend, and to proceed upon his part in the premises. Such being the case, the original lease having provided that the defendant might remove all improvements from the premises at the expiration of the lease made by him during the term, and as the plaintiff had never agreed to pay for any of said improvements excepting by virtue of the agreement contained in said Exhibit E, and as there had been no determination of the value of said improvements as provided in said agreement, which was due to the failure upon the part of the defendant to proceed in the premises, the court should not have permitted proof of such improvements to be made, and the proof of damages to the mill was only introduced by plaintiff for the purpose of offsetting this particular claim. No amount of damages was proven, it only appearing from the testimony of certain witnesses that in their opinion the amount of the damage to the mill by the defendant was sufficient to offset, or more than offset, the value of all improvements he had placed thereon. This makes the action of the court in admitting proof of such damage harmless, and not prejudicial to the defendant, and the whole of said testimony will be considered as stricken from the case. It is evident from the amount claimed in the complaint, and from the verdict for this precise sum, that the jury allowed the plaintiff nothing for such damages beyond offsetting the same

against the improvements claimed; could they have done so under the proof.

The fifth error complained of is that the court commented on the facts. Two instances are alleged wherein it is claimed the court erred in this particular. The first, in answer to a question asked by one of the jurymen as to whether the defendant admitted in the contract that he owed so many dollars, and he answered, "I don't understand that he has admitted anything;" and further, in answer to another question, "the contract did not purport to fix amount as due from the defendant to the plaintiff," the contract referred to being Exhibit E aforesaid; and that "it was only simply for the purpose of showing that the probability is that there was a balance from the defendant to plaintiff at that time which had not been paid, but that he did not undertake to fix that amount." If this be an error, it was not prejudicial to the defendant. The second instance complained of arose wherein a witness had stated that the defendant left the mill peaceably, and the plaintiff demanded any possession of the improvements or any property therein, whereupon the court said, "And this transaction took place three months after this action was instituted." It is not clear what bearing, if any, this remark would have upon the result of the trial. The appellant contends that it would have an effect prejudicial to him, as emphasizing the fact that the defendant peacefully vacated the premises three months after the present suit was commenced. However, it may be, the remark was not excepted to at the time, nor does it affirmatively appear that it was ever called to the attention of the court thereafter. In his motion for a new trial, and as one of the grounds therefor, which the defendant asked therefor, he alleged irregularity in the proceedings of the court occurring at the trial, but there was no attempt to specify what these irregularities were. Before a point can be relied upon as error in this court, it must appear that it has been called to the attention of the trial court, and, if not so appearing in this instance, the point is waived.

The sixth and seventh points raised by the appellant are over the instructions which were given by the court to the jury; but an examination of the record shows that no exceptions were taken to any of the instructions, and consequently no point was raised by reference to them.

The next point alleged is that the testimony is insufficient to sustain the verdict, that there is an entire absence in some of the material points, and that, as to others, the overwhelming weight of the evidence was against the defendant. It is contended that there was no evidence of the value of the log mill which the plaintiff sought to recover. This contention, however, is not borne out by the record. It appears that one of the witnesses while upon the stand, stated that three

thousand was a very reasonable price for the logs which had been sold by the plaintiff to the defendant, at the contract price mentioned in Exhibit D. The evidence of the value. This is sustained by the appellant, but he contends it would be evidence only of the value of the merchantable logs, and that a quantity of the logs delivered by the defendant were not merchantable. Upon this, however, the court is conflicting. We think there was evidence of the value sufficient to sustain the case as to the further question raised by the weight of the proof, the case presents for no interference upon our part hereto.

The point urged is that the action for the logs should have been brought on the original contract, Exhibit D. It is of the opinion that this point was not sustained, whether there is any merit in it. The parties saw fit to go to trial upon the pleadings as they stood, and testimony of the value of the logs was introduced. The objection is rejected. We are also of the opinion that the original contract with regard to the logs was abrogated by the subsequent contract E aforesaid, wherein the plaintiff agreed to deliver sufficient logs to complete the particular cargo mentioned. The contract was made by the parties, as expressed by this contract, and was evidently to provide for the completion of, and to abrogate, all former contracts between them in relation to the logs in controversy. As to whether the defendant could have been bound by the contract mentioned in said Exhibit D is not a question, for he only sought to recover \$1000 per thousand feet, which was the amount therein stipulated; and as to whether the logs were merchantable or not, the proof was conflicting, and the jury to pass upon. We are of the opinion that there was no error in the judgment of the court, and the judgment is affirmed; consequently judgment is affirmed.

MR. C. J., and STILES and AN-
N, concur. HOYT, J., dissents.

DEWING v. CRUEGER et al.

Court of Washington. Jan. 5, 1894.)

DEBT—SATISFACTION—RIGHTS OF GUARANTOR.

A person who guarantees a promissory note, with coupon interest notes, as a mortgage which empowered the guarantor or his assignee to take possession of the mortgaged premises, on nonpayment of the notes. The mortgagee assigned the mortgage, as the mortgagor knew, and the guarantor, and the prompt payment of the coupons. *Held*, that the assignee's action on the notes could not be affected by the fact that the mortgagee had taken possession of the mortgaged premises under the mortgage, as he did so as agent of the assignee.

2. A person who guarantees a promissory note secured by a mortgage, and the prompt payment of coupon interest notes, is not thereby constituted the agent of the owner of the notes and mortgage, nor has he such an interest in the matter as would authorize him to take any steps which the owner himself could take under the terms of the mortgage.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Action by Charles S. Dewing against Edward G. Crueger and Anna C. Crueger. From a judgment for defendants, plaintiff appeals. Reversed.

A. W. Frater, for appellant. Frank F. Randolph, for respondents.

STILES, J. Appellant brought suit to recover upon a promissory note and certain interest coupons made by respondents when residing in the territory of Dakota. The note was made to the Security Investment Company of Yankton, as payee, by which corporation it was indorsed to appellant before maturity. By its terms it was made payable (as were the coupons, also) at the office of the American Loan & Trust Company, Boston, Mass., and was to be construed, in all respects, by the laws of Dakota. The answer set up some matters which tended to establish an equitable defense to this action, viz.: The transaction evidenced by the note and coupons was a loan of money by the security company to respondents upon a long-time mortgage of real estate. The mortgage was set out in the pleading, and contained a power of sale, under which, at the option of the mortgagee or its assignee, in addition to the usual right of mortgagees to sue on the debt or proceed by strict foreclosure, possession of the mortgaged premises could be taken, and the same could be sold for the debt, interest, taxes, insurance, costs, etc.; the surplus, if any, to be rendered to the respondents. By the same instrument the security company was constituted the agent of the respondents to effect such a sale and convey title to the purchaser, with power to appoint an agent or a substitute, and this power of attorney was declared to be irrevocable. It was further alleged that the appellant, in September, 1888, demanded possession of the mortgaged lands, and that respondents surrendered the same to him in full payment and satisfaction of the note and coupons. Now, if it could be established that such a surrender of the mortgaged real estate had been made upon a distinct agreement that it should be in satisfaction of the debt, it would, of course, be inequitable that appellant should now maintain an action upon the note, although no conveyance had been executed. He could have specific performance of that contract by tendering the note and coupons, and compel the execution of a proper deed. But the evidence disclosed no such state of facts. On the contrary, respondents claimed at the trial that they never knew of the existence of appel-

lant, or of his having the note, but always supposed, until this action was commenced, that the security company was the owner and in possession of it. Their case did, however, develop another state of facts, which would also have been sufficient to suspend appellant's right of action on the note, if he had been connected with the transaction by proper evidence; for it was shown that the Security Investment Company did demand and receive possession of the mortgaged land. Without any proof in the record, however, that there was an express agreement that this possession was to be received in satisfaction of the debt, it must be presumed that such possession was demanded and received in accordance with the power of sale contained in the mortgage, and not otherwise. But if there was such a possession taken at the instance of the appellant, or with his knowledge or assent, for his benefit, whether he knew it before or after the fact, there ought to be no judgment on the note until after sale in accordance with the terms of the power. Having elected his remedy by sale, appellant would have been bound to proceed in that course until the land was exhausted and a deficiency resulted. Such is the general rule of law, and such, we understand from the citations given, was the statute of Dakota, as it is in this state.

Appellant proved that he had taken his assignment of the note and mortgage within a month of their execution, in July, 1887; but respondents showed that they had never had any dealings with appellant, and did not know him to be in any way connected with their note and mortgage. They invariably received notice of the maturity of the interest coupons from the security company, paid their money to it, and received from it the canceled coupon, and thus traced a connection between appellant and the security company. On the other hand, appellant declares that he never appointed the security company as his agent for any purpose whatever, and did not know that it was acting in any such way. But it is easy enough to understand how it came about that the company made the collections. The coupons were payable at the office of the trust company, in Boston, and it was respondents' duty to remit their money there to meet them. The security company had guaranteed the prompt payment of these coupons, and therefore it sent out notices urging payment to it nine days before the maturity of each coupon. These notices put the matter more strongly than the law of the case warranted, for they implied that the money must be paid to the sender, whereas there was nothing to prevent the respondents from remitting their money directly to the trust company. In making these payments to the security company, however, respondents merely availed themselves of its voluntary services in transmitting their money to the place of payment, and made it their own agent for that pur-

pose. It was appellant's duty to present coupons at the office of the trust company, and, if they were paid, it did not concern by what means the money arrived there. Appellant surrendered his coupons to the trust company, and had no more concern about the matter. In addition to this, the notices to respondents by the security company were obtained upon their face a statement that the note and mortgage belonged to other parties, and that it had no authority to waive the condition contained therein.

Having thus been warned that the ownership of the note was no longer the owner's, respondents were bound to see that their dealings with the security company was acting within the scope of its apparent authority, if they proposed to claim the note as the agent of the owner. The mortgage did not purport to give it authority to take possession of the land, unless it was the owner of the note at the same time, nor could it, unless it was such owner, of its own motion, proceed to make a sale and conveyance of the mortgaged premises. Whoever owned the note, if he saw fit to take possession, and make use of the power of sale, he himself must demand and take such possession, or appoint an agent specially authorized for that purpose, and not until he demanded it to proceed could the security company make a legal sale. All this the respondents were bound to know when asked to surrender possession. They should have required the production of authority for making the demand, and, if it was not forthcoming, they should have refused to surrender. If the note and mortgage were re-assigned to the security company, and been exhibited, that would have justified them in treating it as the owner, and making any terms agreeable to themselves, except a satisfaction of the debt, when that would have been surrendered. But, as it was, they dealt with a mere volunteer, whose acts appellant was in nowise responsible, under the evidence.

Respondents make the point that because the security company guaranteed the payment of the coupons, and the payment of the principal within one year after maturity, it was thereby, *ex vi termini*, constituted the agent of the owner, and had such an interest in the matter as would authorize it to take any steps which the owner himself could take. This position is apparently inconsistent with that rule of law which allows a creditor to require the debtor to proceed with diligence to exhaust the debtor, or to require the debt and be subrogated to the rights of the creditor. But the theory propounded here has not received the countenance, or even consideration, of courts, so far as we are aware, and it would certainly be a novelty in the law of guaranties. We are of opinion that the court below ought to have granted appellant's motion to direct the jury to return a verdict for the amount claimed. Therefore, the judgment is reversed and the

and, with instructions to enter a judgment for the appellant without further trial.

SAR, C. J., and HOYT, SCOTT, and S, JJ., concur.

KIMBLE et al. v. FORD.

the Court of Washington. Jan. 6, 1894.)
ON APPEAL — HARMLESS ERROR—AGREEMENT FOR SUPPORT—REMEDY FOR VIOLATION.

judgment that is correct upon the facts be reversed because of the erroneous admission of evidence or of an erroneous instruction.

the father conveyed part of his estate to the son and verbally agreed to let the son control the personal estate, and to give it to him, in consideration of the son's promise to support him for life. Held, that a conveyance by the father of such personal estate, after the son had taken possession under the agreement, was void, because of an alleged violation of the agreement, was void, as the remedy of the court in such case was a bill in equity to enforce the agreement.

the bill from superior court, Skagit county; affirmed. McBride, Judge.

the bill by Clara Kimble and another against David Ford for the recovery of certain personal property. Judgment for the plaintiffs affirmed.

Quinby and Sinclair & Smith, for appellants. D. H. Hartson and Million & Hartson, for respondent.

THE COURT, J. Plaintiffs alleged that they were the owners and entitled to the possession of certain personal property which the defendant had unlawfully withheld from them, and, after demand, defendant had refused to deliver the same. Defendant admitted the withholding, denied plaintiffs' ownership, and alleged ownership in himself. Plaintiffs alleged adverse possession by him for more than three years. Upon the trial it appeared that the plaintiff Clara Kimble and defendant were brother and sister, and that their controversy arose out of a bill of sale made by the father and mother of the parties to the plaintiff named, in consideration of a promise to support, feed and furnish them with medical attendance during their lives. Levi M. Ford, the father, wife, the parents, had resided for many years upon certain land belonging to them in Skagit county. They had several children, but these had all left home, and were maintaining themselves elsewhere. The property consisted of the farm, and the personal stock, poultry, machinery, and other effects. Advancing years required that they should have assistance, and they proposed to the defendant, who was a grown man, that he should come and support them, and in return should convey to him a part of their property, and allow him the use of all of it, give him the control and management of the land and personal property, and at their

deaths leave the latter to him. He came, and for more than 10 years carried out the arrangement to the apparent satisfaction of all parties. A deed was executed to him, which was intended to cover the land promised him; and he raised and marketed the crops, bred and reared cattle and other live stock, materially increasing the number on the farm, bought and sold live stock, and added to the machinery. Perhaps a portion of the increase of stock and machinery was paid for with earnings of defendant derived from work performed for others off the farm. He was generally regarded as the owner of everything, and dealt with it without any interference on the part of his father. But just before the bill of sale in question was given there was some difficulty between him and his parents. His father thought that not enough was done for himself and his wife, and the latter was confessedly mistreated on one occasion. It was also rumored that the defendant was planning to sell off the personal property, and go away, and cease caring for his parents, thus defrauding them of the complete fulfillment of his agreement; and this led to the making of the bill of sale. Defendant knew nothing of this proceeding until his sister made demand on him for the possession of the property, and substantially ordered him to leave the place. Plaintiffs based their claim upon the absolute right of Ford, Sr., and his wife to deal with their own property as they saw fit, while defendant planted himself upon the ground that he was the owner by an executed agreement with his parents; and, as has been seen, he set up adverse possession by him for a period of three years. The verdict was for defendant, and judgment was entered thereon.

Appellants complain of various errors of the court in admitting testimony and in charging the jury. But, as we view the evidence, which is submitted to us under an allegation of insufficiency, be these alleged errors as they may, the conceded facts make the judgment a correct one, and therefore it is not to be disturbed for the errors suggested. Appellants were not deprived of any testimony, and, so far as any testimony may have been wrongly admitted against them, it was immaterial in view of the admitted facts. Here was a case where it is conceded that there was a mutual agreement, put in writing so far as the land was concerned, but remaining in parol as to the personalty, except that the possession of the latter was surrendered to the respondent. For more than 10 years this arrangement has been carried out, and it did not, therefore, lie in the power of Ford, Sr., and his wife to annul it in the informal way which they adopted. It was a contract which they could have called upon the court of their county to enforce or annul; but property devoted to the performance of the contract by respondent, and delivered to him for that pur-

pose, could not be taken from him summarily, and without consultation with or notice to him. If respondent was threatening to dispose of this property in such a way as to defraud his father and mother, the court would have interfered to prevent him; for although, as to innocent third parties, he may have had all of the indicia of ownership, and could have made good title, as between him and his parents he was not the absolute owner. In conducting the business of the farm he could undoubtedly dispose of stock and produce in the ordinary way, but he could not make a wholesale disposition of the property committed to him, so as to put it beyond the purpose for which he received it. At the death of his parents, if his rights are not forfeited in some legal way before, his title will become absolute, but not until then. For these reasons we find the judgment to have been correct, and it is therefore affirmed.

DUNBAR, C. J., and HOYT, SCOTT, and ANDERS, JJ., concur.

VINCENT v. SNOQUALMIE MILL CO. et al.
PARKE & LACY MACHINERY CO. v.
SAME.

(Supreme Court of Washington. Jan. 5, 1894.)
CORPORATIONS—HINDERING CREDITORS—MORTGAGES—AFFIDAVITS OF NOTARY PUBLIC—OBJECTION ON APPEAL—CLAIM FOR LIEN.

1. A corporation executed a mortgage on a mill property and machinery to secure money advanced for purchase of the mill property, the purchase price of the machinery, sold to it by the mortgagee, and a small debt of the corporation, assumed by the mortgagee. It had some other property, the value of which was not shown. It was not clearly apparent that at the time it was insolvent, though it was being pressed by creditors; and it was doubtful whether the general market value of the property equaled its debts, but the mortgage appeared to be given in good faith. *Held*, that the mortgage was not void, as being intended to hinder and delay creditors by continuing the corporation after insolvency. *Thompson v. Lumber Co.*, 30 Pac. 741, 31 Pac. 25, 4 Wash. 600, distinguished.

2. The insertion in a mortgage by a corporation of provisions authorizing the mortgagee to keep the property insured, to take possession, and to foreclose in case the property is attached, does not make the mortgage void, though the resolution of the trustees authorizing it does not describe or specially mention conditions to be inserted.

3. The fact that the affidavit attached to a chattel mortgage states that it "was" instead of "is" made in good faith does not affect its validity.

4. The fact that the notary public before whom an affidavit to a chattel mortgage was made fails to specify thereon his place of residence is immaterial, this being given in certifying to the acknowledgment to the same instrument.

5. Objection cannot be made for the first time on appeal to proof of liens by judgments establishing them, on the ground that the receiver of a corporation was not a party to the suits, and that the claims were barred by limitation.

6. It cannot be objected that a claim is for labor on a building is not that of a mechanic within the lien law.

7. A claim for lien on the property of a corporation for work in constructing a mill for it is defective in not alleging that any interest in the land over which it was constructed.

Appeal from superior court, King county. I. J. Lichtenberg, Judge.

Two actions, one by Nazaree Vincent, and other by the Parke & Lacy Machinery Company, against the Snoqualmie Mill Company and others, consolidated, and tried as one case. From a judgment for plaintiffs, defendants Washington Iron Works, S. D. Gustin, George W. Tibbetta, and Moritz appeal. Affirmed.

Preston, Albertson & Donworth, J. Barnes, and Jas. M. Epler, for appellants; Cox, Teal & Minor and White & Mendenhall, for respondents.

SCOTT, J. Two actions were begun in the superior court of King county, which afterwards consolidated and tried together, and a single judgment rendered in both actions in favor of the plaintiffs. Certain of the defendants appealed. One was an action in which Nazaree Vincent was plaintiff, and he sought to foreclose a laborer's lien for labor performed for the Snoqualmie Mill Company. The other action was brought by the Parke & Lacy Machinery Company to foreclose a certain mortgage, covering real and personal property, given to the sum of about \$50,000, alleged to have been executed by the Snoqualmie Mill Company to said plaintiff. The numerous defendants in the action, aside from the Snoqualmie Mill Company, were brought in on the ground of their having or claiming to have liens against the property. Upon trial the lien claims of W. B. Main, McConnell, Angus McDonald, John W. Andrew Ballingall, John F. Keenan, S. D. Gustin, W. G. Fowler, Neal Davis, Schardt, and Nazaree Vincent were sustained by the court to be valid and regular against the real estate for various sums. All other liens, excepting Nazaree Vincent, however, were disallowed. Before the commencement of either of the actions, brought several actions against the Snoqualmie Mill Company, in which liens had been established. Being afterwards included as defendants in the consolidated actions, the court allowed the judgment of the former actions to be introduced in evidence of the liens, and the proper establishment thereof, and adjudged their validity against all parties to these actions. The claim of Nazaree Vincent was then sustained on the ground that the fact of proof in the consolidated action of the proof being satisfactory to the court, his lien was declared valid. All other judgments were ordered paid from the proceeds of the sale of the property as first in order. In the trial a single judgment was rendered directing a sale of the real and personal property.

property, (the personal property consisting of various items of machinery and gearing situated in the mill,) and directing that the proceeds be paid into court, and distributed first to the payment of the said lien claims, and then to the Parke & Lacy Machinery Company to the amount of its claim, then being \$52,703.32, with interest. The sum adjudged to the Parke & Lacy Machinery Company was made up as follows: From the face of the mortgage was deducted the sum of \$9,542.32, found by the court to have been paid by the Snoqualmie Mill Company, and to the balance there was added interest, and \$700 paid to a keeper and night watchman at the mill, \$2,470 paid for insurance on the mill, and \$500 for counsel fees; all expended by the Parke & Lacy Machinery Company. An order of sale was issued, and the property described in the mortgage was thereafter sold by the sheriff to the Parke & Lacy Machinery Company for the sum of \$54,895.10, which sale was confirmed by the court.

Two appeals were prosecuted in said action,—one by Samuel D. Gustin and George W. Tibbetts and the Washington Iron-Works Company, attacking the validity of the mortgage given to the Parke & Lacy Machinery Company, and the lien claims aforesaid allowed by the court; and the other by H. J. Moritz, who claimed a lien against the property for labor performed thereon, which claim the court found to be invalid. The Snoqualmie Mill Company was organized at Seattle in August, 1889, with Alfred Snyder as president and J. G. Startup as secretary, who, with T. G. Wilson, Lyman Elmore, and O. D. Gilfoill, were trustees of said company. Some time after, this corporation contracted with the Parke & Lacy Machinery Company for its mill plant, and the machinery for the plant was delivered to the mill company by the Parke & Lacy Machinery Company under a written contract, which is called a "conditional sale," whereby said machinery company agreed to sell certain machinery, all of which is specifically described, to the mill company only upon the full payment of the contract price for the same. The amount due on this conditional sale on October 31, 1890, the date of the mortgage in question, was \$32,000, with accrued interest amounting to \$1,494.45. After this conditional contract of sale, the said plaintiff at various times sold and delivered to the mill company, at agreed prices, other machinery and material to be used in said mill, amounting to \$15,688.63, all of which is specifically described in the mortgage, and includes all machinery mentioned excepting so much as is mentioned in the conditional contract of sale, and on which there was due on said October 31st, \$10,589.46 and \$295.85 interest. Said Parke & Lacy Machinery Company also assumed a debt to one Moore, owed by the mill company for labor, amounting to \$462.70, which was a lienable claim. The real es-

tate upon which the mill property was situated was not the property of the company, but was owned by said Alfred Snyder and his wife. On October 18, 1890, the trustees of said mill company met at Snoqualmie, which was its principal place of business, and passed a resolution authorizing the president and secretary to mortgage the property of the corporation to raise \$50,000, and adjourned to meet at Seattle subject to a call of the president; and on October 31, 1890, said meeting was called at Seattle, all of the trustees being present. An accounting was had between said mill company and the Parke & Lacy Machinery Company, when it was found that the mill company owed said machinery company \$45,106.09, and there was at said time due said Alfred Snyder \$3,916, the purchase price agreed to be paid for the real estate upon which the mill was situated. At this time it was agreed between the machinery company and the mill company that the machinery company would pay the amount due said Snyder for the real estate, in order that title thereto might be conveyed to the mill company, and would further sell it outright the machinery which it had contracted to sell conditionally as aforesaid, and would take a mortgage upon said real estate and the machinery which it had sold to said company to secure the same. All the trustees of the mill company were present, and all assented thereto, and authorized the president and secretary to execute the mortgage therefor accordingly. It appears that the mortgage in question covered no property whatever excepting the real estate aforesaid, for which the Parke & Lacy Machinery Company advanced the purchase price, and the machinery which had previously been sold by said machinery company to the mill company; and that said mortgage was given to secure the purchase price of such machinery and real estate aforesaid, with the exception of the small claim owed by the mill company to said Moore, which had been assumed by the machinery company, as aforesaid. It is contended that the mill company had no other property of consequence than that covered by the mortgage, but this point is contested, and it appears that at said time said mill company had a certain quantity of lumber, amounting to between 50,000 and 75,000 feet, of the value of at least \$6 per 1,000; some timber contracts; 80 acres of land; and a small amount of other property, the values thereof not being shown. Upon the execution of the mortgage the mortgagee at once entered into possession of the property covered by it, but did not operate the mill, which remained idle until some time in February following.

It is contended by the appellants Gustin and Tibbetts and the Washington Iron Company that the mortgage is void, as being intended to delay, hinder, and defraud creditors, and that the case falls within the de-

cision of this court in *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25, as appellants insist that the mill company was insolvent at the time this mortgage was executed. It is not clearly apparent that the corporation was insolvent at said time. It had been operating its mill up to within a few days before the execution of the mortgage. It was then being pressed by its creditors, and was unable to pay them at that time, and it is doubtful whether the general market value of its property equalled the amount of its indebtedness, but its evident desire was to continue in business, and to get the matters of the corporation in better shape by getting the title to the property which it was operating in its own hands; and it fairly appears from the record that the mortgage was executed in good faith for this purpose, and that the company, at the time the mortgage was given, intended to continue business through the mortgagee in the way of operating its mill, to whom possession thereof was transferred. After the execution of the mortgage a receiver was appointed by said court at the suit of Gustin and Tibbetts, to take possession of the mill property; and in February following, by permission of the court, the mill was leased to said Alfred Snyder by the Parke & Lacy Machinery Company. This lease was also ratified by the Snoqualmie Mill Company. Snyder operated the mill under the lease for several months, and from the proceeds of the business he paid the Parke & Lacy Machinery Company nearly \$10,000, by order of the court, to apply on its said mortgage claim; and thereafter, by order of the court, he paid to the receiver \$3,000 from such proceeds.

We are of the opinion that this case does not fall within the rule laid down in *Thompson v. Lumber Co.*, under the facts above stated. We are also of the opinion that the fact that the mortgage in question was given to secure the purchase price of the identical property covered by the mortgage would raise a sufficient equitable claim upon the part of the mortgagee thereunder to take it out of the rule laid down in said case, as the mortgage covered the very property the purchase price of which it was given to secure, the title to the greater portion of it having passed to the mill company in consequence of having given the mortgage.

It is further contended that the mortgage is void because it was not regularly authorized by the mill company. Several objections are raised in this regard, the first being that the business was finally concluded at Seattle, whereas the place of business of the mill company was at Snoqualmie, and its by-laws required the meetings of its trustees to be held there. And it is further contended that the resolution authorizing the giving of the mortgage would not authorize the insertion of the provisions contained in the mortgage relating to keeping the proper-

ty insured, and authorizing the mortgagor to take possession, and to foreclose the mortgage in case the property should be attached and some such other conditions. It is further contended that the record of the mortgage is defective, and insufficient to give notice. It appears, however, as stated, that the trustees of the company were present at both meetings authorizing the giving of the mortgage, and, while the resolution itself did not describe the conditions to be inserted, or specially mention the insertion of the conditions complained of, the fact that they were in the mortgage would not render the mortgage void, as the mortgagee at once entered into possession and remained in possession of the property, the giving of the mortgage was an immaterial matter. It is further contended that the mortgage is void, in so far as it purports to be a chattel mortgage, because of the defective affidavit, for the reason that the affidavit states that the instrument was in good faith, instead of saying that the instrument is made in good faith, and because the notary public before whom the affidavit was taken failed to specify his place of residence thereon. His place of residence was given in certifying to the acknowledgment, and we are of the opinion that this does no merit in any of these objections.

Said appellants further contend that the court erred in sustaining the several claims aforesaid, which were proven by the introduction of the judgment rolls in the suits wherein the same were established. It does not appear that appellants objected to the introduction of this proof at the time it was offered, but, on the contrary, they conceded the validity of said claims. Appellants' attorney stated to the court as follows: "Just before adjourning this morning, I conceded that the Washington Iron Works would not contest the liens. I would like to withdraw that concession and submit the matters on the facts just as they will rise in the case. The Court: Will you give you leave to do so." No motion was made, however, to strike the proofs which had been introduced, nor does the record show any special objections thereto upon the trial of this cause. It is now urged that the judgments establishing the liens were invalid because the receiver was not made a party to said suits, and that the claims were barred by limitation before the commencement of this action. The appellants cannot complain of these objections here, because it does not appear that they were raised at the trial, and an examination into their validity is unnecessary for that reason.

As to the lien of the plaintiff Vint, which was established at the trial, it is urged that his claim was not that of a mechanic, within the meaning of the statute, and that his notice of lien was defective. It appears that his claim was for labor performed upon and about the mill, and his

entitled to the benefit of the lien law. No ground is pointed out wherein the notice of lien is defective. Appellant Moritz's claim of lien was resisted by the respondent the Parke & Lacy Machinery Company. Said Moritz was made a defendant in the action brought by said company to foreclose its mortgage. He appeared, and filed a cross complaint, setting up his claim of lien for work done as foreman in the construction of a certain railroad described in the lien notice as "commencing on the line of the Seattle, Lake Shore & Eastern Railway, near Snoqualmie Falls depot, at Snoqualmie, King county, state of Washington, and running across the Snoqualmie river, and into and through section twenty-nine, (29,) in township twenty-four north, of range eight east, and thence in a general northerly direction into section twenty of the same township and range; said road being about one and $\frac{3}{4}$ miles in length, and being the only railroad found in said two sections." He further alleged in said notice "that the said Snoqualmie Mill Company is the owner and reputed owner of said railroad." This lien notice was made a part of the cross complaint. He further set up in said cross complaint that on the 8th day of March, 1891, he had commenced an action to enforce his said lien, and that at the date thereof a receiver of all the property of said Snoqualmie Mill Company had been appointed, and that said property was in the receiver's possession and under his control at said times, and for that reason no decree declaring the existence of the plaintiff's claim as a lien against the property was allowed by the court, and that a personal judgment only against the Snoqualmie Mill Company was rendered for the amount of his claim. The Parke & Lacy Machinery Company demurred to this cross complaint, and the demurrer was sustained. As one of the objections to appellant's claim of lien disposes of the same, it is the only one necessary to refer to. It is contended by the respondent aforesaid that the notice of lien is defective on the ground that it does not allege that the Snoqualmie Mill Company had any interest in or ownership of the land over and through which said railroad was constructed. The only reference to such railroad and ownership is contained in the quotations from the lien notice above appearing. It is not claimed in said notice that the Snoqualmie Mill Company had any interest in the lands aforesaid, nor any right of way whatever for its said railroad, and the objection of the respondent to this notice is well taken. *Railway Co. v. Johnson*, 2 Wash. 112, 25 Pac. 1084; *Nelson v. Clerf*, 4 Wash. 405, 30 Pac. 716. We find no error in any of the proceedings of the court, and its judgment is affirmed.

DUNBAR, C. J., and STILES, HOYT, and ANDERS, JJ., concur.

HOGAN v. KYLE.

(Supreme Court of Washington. Jan. 6, 1894.)

VENDOR AND PURCHASER — ACTIONS FOR BREACH OF CONTRACT — SPECIFIC PERFORMANCE — LACHES.

1. A vendor who waits until the last installment of the purchase price is due cannot sue the vendee for the unpaid purchase money without proof of performance, or readiness to perform, on his part; and the tender of a deed before suit is not sufficient, but it must be kept good, so that it may be taken into consideration in the entry of judgment.

2. In an action by a vendor for the vendee's breach of the contract, the measure of damages is not the contract price, but the difference between that price and the price for which the land could have been sold at the time of breach.

3. Where time is made the essence of a contract for the sale of land, a delay of over two years after the maturity of the last installment of the purchase price is such laches on the part of the vendor as will preclude him from specifically enforcing the contract.

4. A vendor who does not tender a deed or proceed to enforce the contract on default of the vendee in paying the purchase price at maturity must be deemed to have exercised the option to rescind the contract and forfeit the purchase money already paid, which was reserved to him by the contract; and he cannot, two years later, sue for specific performance.

Appeal from superior court, King county; Mason Irwin, Judge.

Action by F. V. Hogan against George M. Kyle for breach of contract to buy real estate. From a judgment for plaintiff, defendant appeals. Reversed.

Preston, Albertson & Donworth, for appellant. H. B. Slauson, for respondent.

DUNBAR, C. J. On the 27th day of February, 1890, respondent and appellant entered into a written contract to sell the appellant certain real estate for the sum of \$2,500, one-third of which was paid at the time of the execution of the contract; appellant to pay the balance of the purchase price in two equal installments, the first of which was to be paid on the 27th day of May, 1890, and the second on the 27th day of August, 1890. Time was expressly made the essence of the contract. The appellant paid no part of the purchase price, except the sum which was paid at the time the contract was executed. It does not appear that defendant entered into possession of the property, or exercised any control over it. On November 14, 1892, suit was commenced by the respondent to recover a money judgment against the appellant for the amount of the two unpaid installments, with interest. The complaint simply alleged the making of the contract, failure to pay, the ownership of the property, and the tender of a good and sufficient deed prior to the commencement of the action. A demurrer was interposed to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendant answered, alleging possession in the re-

spondent, but denying his power to give good title. Alleging that respondent had never demanded of appellant the contract price of the land at any time prior to November 14, 1892, the date of the commencement of the action, and never tendered to appellant any deed or conveyance purporting to convey said land until said 14th day of November, 1892, and never at any time conveyed said premises; that, long prior to said last-named date, appellant had informed and notified respondent that he did not have or claim any further interest in said property, and that he would not pay any further installment provided for by said contract, and that the plaintiff did not, up to said November 14, 1892, assert any further right to the balance of said contract price, nor dissent to nor deny said claim of defendant that he was no longer bound by said contract; and that long prior to said last-named date the plaintiff had exercised said option reserved to him under said contract, and had elected to rescind said contract, and to retain as a forfeit the first payment that had been made to him by the defendant thereunder, aforesaid. At the outset of the trial, appellant objected to the introduction of any testimony in behalf of the plaintiff on the ground that no cause of action was stated in the complaint. This objection was overruled. At the conclusion of respondent's testimony, appellant moved for a nonsuit, which motion was overruled. Thereupon, he rested upon his motion, and did not offer any testimony; and the judge instructed the jury to bring in a verdict against the appellant for the balance of the contract price, with interest; which being done, judgment was entered thereon, from which judgment appellant has appealed. At the commencement of the action the appellant moved to have the case transferred to the equity calendar, which motion was denied. The demurrer and the motion for a nonsuit raised substantially the same questions.

The judgment in this case will have to be reversed, in any event, for under its terms the appellant recovers the full purchase price, and is allowed to retain the land which represented the purchase price. In this case these are dependent obligations upon which the respondent is suing. When the first installment became due, he could have recovered the amount then due as upon an independent contract; but having elected to wait until the last installment became due, and upon the payment of which defendant would be entitled to a deed, the obligations become dependent. They all relate back to the contract, and appellant cannot sustain an action for either installment without proof of performance or readiness to perform on his part. *McCroskey v. Ladd*, (Cal.) 31 Pac. 558, and cases cited. In that case the court said: "There is but one single cause of action,—one and indivisible. The defendant, if he would maintain his deed, must pay all; and

the plaintiff, if he would recover, must such a performance on his part as would title him to all the unpaid consideration. It is not enough that the deed was tendered at any particular time, but the tender must be kept good so that it may be taken into consideration in the entry of the judgment. Plaintiff here simply shows that the deed had been made prior to the commencement of the action, and it is therefore insufficient, excepting on the theory that the judgment could be rendered independently of the performance of his part of the contract by the vendor, which would result in allowing the vendor to keep both the money and the land. On that proposition we quote from *Wells v. Vendors*, (page 961:) "There are two rules, both in England and the United States, where, on the vendee's default, the vendor, having offered to perform, has been permitted to recover as damages the whole purchase price. The injustice of such a measure of damages, ever, is apparent on its face, for it gives the vendor his land, as well as its value, and is not now regarded as a correct rule in this country." The rule in such cases is that the vendor has a right to the fruits of his bargain, and is entitled to compensation for the loss he may suffer by reason of its non-performance. What his damages are, in such circumstances, must be alleged and proved like any other fact in the case. Under a different set of circumstances, the measure of damages might be one thing, and under other circumstances the measure might be governed by an entirely different rule. The land may have deteriorated in value, and his damages would be great, or it might have increased in value, and the damages would be none. As is well argued by the appellant in this case, so far as the complaint reveals, the land may be worth as much or more than it was when the agreement was executed; and the respondent, having received an advance payment, which is forfeited, may actually be benefited. The cases cited in *Warvelle v. Wells* sustain the announcement in the text, but as to the unfairness of allowing the vendor to retain the land and the money, and as to the measure of damages. In *Railroad v. Evans*, 6 Gray, 25, it was held that, where the action at law by the vendor to recover damages for the breach of a contract for the sale of land, the measure of damages is not the contract price, but the difference between that price and the price for which the land could have been sold at the time of the breach. Under this rule, which seems to be an equitable one, and one which has been adopted by many courts, the complaint is plainly deficient. The case last above cited also holds that a vendor may enforce in equity the specific performance of a written contract for the sale of land. In fact, the prevailing modern authority is that in a case of this kind the vendor can either sue at law for damages, or resort to equity for specific performance. Mr. Pomeroy, in his work

ts, (page 6,) bases his adherence to this on the ground of mutuality. The which is enjoyed by one party to a t must be enjoyed by the other, and xample he gives the simplest form of t for the sale of land, when the vendor to convey, and the purchaser merely s to pay a certain sum as the price. ne latter may, by a suit at equity, com- execution and delivery of the deed, mer may also, by a similar suit, en- ene undertaking of the vendee, although stantial part of his relief is the re- of money. "A suit in equity against dee, to compel a specific execution of act of sale, while in effect an action purchase money, has nevertheless al- een sustained as a part of the appro- and acknowledged jurisdiction of such lthough the vendor has in most cases remedy by an action at law upon the ent." *Warv. Vend.* pp. 779, 780, and lited. So that, considering it either gal or equitable action, and consider- complaint amended so as to incorpor- allegations of tender sought to be set ne reply, the action must equally fail, complaint, on its face, shows such a n the part of the respondent in bring- action that, unexplained, it amounts lver of respondent's rights under the t, and an acceptance of the forfeiture. ert of chancery was at one time in- o neglect all consideration of time in ecific performance of contracts for ot only as an original ingredient in ut as affecting them by way of laches. s now clearly established that the de- either party in not performing its n his part, or in not prosecuting his the interference of the court by the ion of an action, or, lastly, in not dili- prosecuting his action, when instituted, nstitute such laches as will disentile the aid of the court, and so amount, purpose of specific performance, to ndonment, on his part, of the con- Fry, *Spec. Perf.* § 1070. "The doc- the court thus established, therefore, laches on the part of the plaintiff, er vendor or purchaser,) either in exe- his part of the contract, or in apply- the court, will debar him from relief. y cannot call upon a court of equity cific performance," said Lord Alvanley, u) 'unless he has shown himself ready, s, prompt, and eager.' Or, to use the e of Lord Cranworth, 'Specific per- is relief which this court will not less in cases where the parties seek- come promptly, as soon as the nature ase will permit.'" *Id.* § 1072. To the ect, *Pom. Cont.* § 408, and cases cited. ue that a few of the states, notably old that the laches must fall outside statutes of limitation, but the great of authority, as we have been able to it from the cases, is to the contrary; v.35p.no.3—26

and relief has been refused on the principle that acquiescence for an unreasonable length of time after the party was in a situation to enforce his right, under the full knowledge of the facts, was evidence of a waiver or abandonment of right, and what shall be deemed a reasonable time must be determined from the circumstances of the case. Six months, in some cases, might be as unreasonable as six years in others. It must be borne in mind that a distinction is made, in the discussion of the cases, between the cases where time is made the essence of the contract, and where it is not; and the conclusion deduced from the authorities is that where time is made the essence of the contract the apparent delay or omission of duty must be explained, or the relief will not be granted.

In this case time was made the essence of the contract, by express terms. The complaint shows that there was no attempt to enforce the claim until two years and three months after the contract matured, and makes no explanation whatever for the delay. Nor are the averments of the complaint strengthened by the proofs, for the proofs show that no demand, of any kind whatever, had been made, on the part of respondent, until the day the suit was brought. The respondent should not be allowed to speculate in values, so far as this contract is concerned; to wait and see whether the value of the land would enhance or depreciate before he made his election either to enforce the performance or accept the forfeiture. We think the provision of this contract, that, "if the said party of the second part, his heirs, administrators, or assigns, shall fail to pay the full amount of either of the above-specified installments and interest when the same shall become due, as above specified, the said party of the first part shall have the right, at their option, to rescind and cancel this agreement, and in case of such rescission and cancellation all rights of the said party of the second part, his heirs and assigns, shall be terminated, and all payments heretofore made on this contract shall be forfeited," fairly construed, guaranties to the respondent a right which it must exercise at the maturity of the contract,—the time when he would have a right to make the election; and, as he did not proceed to enforce the contract, the appellant had a right to presume that, inasmuch as he had taken no affirmative action, by tendering the deed, he had elected the remedy which was consistent with silence, namely, the acceptance of the forfeiture; and, considering the rapid changes in value of the real estate in this country, we think an unexplained delay of two and a quarter years ought to prevent the respondent from asserting his claim in a court of equity.

The complaint, therefore, being insufficient, either at law or equity, appellant's demurrer should have been sustained. This conclusion renders unnecessary the discussion of the other errors assigned. For the reasons given,

the judgment will be reversed, with instructions to sustain appellant's demurrer to the complaint.

STILES, HOYT, SCOTT, and ANDERS, JJ., concur.

GARDNER et al. v. PORT BLAKELY MILL CO.

(Supreme Court of Washington. Jan. 8, 1894.)

COMMUNITY PROPERTY—TIMBER LAND—DEED—EVIDENCE.

1. Land acquired by a married man under Act Cong. June 3, 1878, (20 Stat. 89,) entitled "An act for the sale of timber land," is his separate, and not community, property, in view of section 2 of the act, which requires the purchaser to make oath that the purchase is not for speculation, but for "his own exclusive use and benefit," and of the practice of the federal government in permitting husband and wife to each make such purchases; and hence a deed by the husband alone conveys good title. Dunbar, C. J., dissenting.

2. The fact that the money of the community was used by the husband in making the purchase does not affect the title of his vendee, since the legal title to the land is vested in the husband. Dunbar, C. J., dissenting.

3. The fact that the record of a deed fails to show any acknowledgment does not render the deed itself, properly acknowledged, inadmissible in evidence.

Appeal from superior court, Kitsap county; John C. Denney, Judge.

Action by Genevieve Gardner and Rosaline Bemis against the Port Blakely Mill Company to quiet title. From a judgment for defendant, plaintiffs appeal. Affirmed.

Fred H. Peterson, for appellants. Hughes, Hastings & Stedman, for respondent.

SCOTT, J. This action was brought to quiet title to a quarter section of land in Kitsap county, which, on the 12th day of July, 1882, was government land. On said date, one William Cadwell made entry thereof under an act of congress entitled "An act for the sale of timber lands in the states of California, Oregon, Nevada and the territory of Washington," approved June 3, 1878, (20 Stat. 89.) At this time, said Cadwell was the husband of the appellant Genevieve Gardner, and they were living together in the territory of Washington, near the land in question. On the 20th day of January, 1883, a patent issued to said Cadwell under said act. July 15, 1882, said Cadwell executed a deed of said land to the respondent. The deed was drawn in form for his wife to sign, but she did not execute it, and refused so to do. On January 18, 1890, the respondent placed this deed, and the patent aforesaid, which was in its possession, on record. On the 24th day of October, 1882, said Cadwell procured a decree of divorce from his said wife, annulling the bonds of matrimony theretofore existing between them. No property was brought before the court in this action, and no attempt was made to dispose of the

property rights of the parties, in any in the decree which was therein rendered. September 30, 1891, said Cadwell executed another deed, purporting to convey said land to one Ella White Peterson, and on October 7, 1891, said Ella White Peterson, by her attorney, attempted to convey the same to appellant Bemis. This action was begun November 1, 1891. Neither of appellants has ever been in possession of said land, and it was times unoccupied. The respondent executed acts of ownership thereover, in looking after the timber, to prevent its destruction, and paid the taxes assessed against the land from year to year. A trial was had, and the court below found in favor of the respondent.

It is contended by appellants that the land in question was community property at the time it was acquired by Cadwell, and that at the time he executed the deed aforesaid to the respondent, and that respondent said times, knew said Cadwell was a married man, and, in consequence thereof, the deed was void, under the laws of the territory, preventing a husband from conveying community real estate. Appellants claim each own an undivided half of said land. Appellant Gardner by virtue of its having been the community property of herself and Cadwell while they were husband and wife, and appellant Bemis by virtue of the deed from Cadwell to Peterson, and from Peterson to herself, above mentioned. It is contended by the respondent that this land was the separate property of said William Cadwell, and this is the principal question in the case.

By section 2 of the act in question, the applicant is required to file a statement in writing, and sworn to, containing the following: "That deponent has made no other application under this act; that he does not intend to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire in the government of the United States should inure, in whole or in part, to the benefit of any person except himself." The practice to allow the husband and wife each to make an entry of 160 acres of land under the provisions of this act in this state, and that such entry can only be done upon the ground that the land acquired is the exclusive individual property of the person acquiring it. We know of no case where the point in question has been decided, but in the light of the provisions of the act itself, and the practice of the government, in allowing husband and wife to make application under the act, sufficient authority is afforded, in our opinion, for holding that land so acquired is the separate property of the person acquiring it; and being an act of congress, it takes precedence

of our laws relating to the acquisition of community property.

There is little or no proof as to whether the money used by Cadwell in paying for it was community property. There is some evidence tending to establish this, and also an attempt to prove the contrary, but, admitting that the money so used was the property of the community, the situation would not be altered, as to the ownership of the legal title to the land. As to whether the wife, on a showing that community money was used in the purchase thereof, could follow the same, and obtain any rights in the land, we are not called upon to decide. Such an attempt would have to be made without unreasonable delay, and, if sufficient appears in this case to establish such equitable claim upon the part of appellant Gardner, she would be estopped, by reason of her delay in the premises, from undertaking to affect the title thereto in the respondent. Appellant Bemis was not a bona fide purchaser without notice.

It is further contended that the court erred in allowing the original deed from Cadwell to the respondent to be received in evidence. It is contended by appellants that said deed was not acknowledged, and the record thereof fails to show any acknowledgment. The deed itself, when introduced, purported to have been regularly acknowledged before a notary public, and contains the certificate, signature, and seal of such notary. It is contended by the respondent that the certificate of acknowledgment is prima facie proof of the facts required to be recited therein, and, this being true, no further proof of execution was necessary to render the deed admissible in evidence. Our statutes providing for the execution and acknowledgment of deeds name the officers before whom acknowledgments can be taken, and set forth the form of certificate, in which the officer is required to state that the grantor has executed the instrument, and that the execution thereof was his voluntary act and deed. 1 Code, § 1437. Section 1436, relating to acknowledgments taken without the state, provides that the certificate of acknowledgment shall be prima facie evidence of the facts therein recited. It cannot be supposed that the legislature intended to give greater force and effect to acknowledgments taken without the state than to those taken by like officers within the state. Furthermore, it is provided that a certified copy of a deed duly recorded shall be admitted in evidence without further proof of execution. 1 Code, § 209; 2 Code, § 1685. We do not think the legislature meant to give to a certified copy any greater legal sanctity than could be given to the original document itself. Under the contention of appellants, the respondent had only to have the deed re-recorded, if the original record thereof was incorrect, and then obtain a certified copy of such record,

to have obviated the objections raised against it. We are of the opinion that the deed was properly admitted in evidence. Affirmed.

HOYT and STILES, JJ., concur. ANDERS, J., not sitting.

DUNBAR, C. J., (dissenting.) I am unable to agree with my brothers in the disposition of this case. I do not think that property rights of citizens of this state can be affected by any construction which departmental officers place upon the laws of congress. What is community property, and what is separate property, are questions which must be settled by a judicial construction of our own statutes enacted on that subject, although I do not think it necessarily is implied, by the action of the department in allowing both husband and wife to purchase a timber claim, that such claim becomes separate property. A husband and wife may both acquire various kinds of property, but, without it is acquired in the way pointed out by the statute for acquiring separate property, it is plainly community property. The affidavit of the applicant is substantially the affidavit required of a homestead applicant, and shows on its face that it is simply to prevent fraudulent or speculative entries. Applying the construction uniformly given by this court to the community laws to the conceded circumstances of this case, the money with which the land in question was purchased was community property; and, if that be true, the land which it purchased is equally community property. It seems to me hardly worth while to enlarge on this proposition. If, then, the land was community property, the original deed must be pronounced absolutely void, for the purchaser, as shown by the record, knew of the community relation; knew that Cadwell was a married man; knew that she was a resident of this state, and tried to get her to sign the deed, which she refused to do. There is no question of estoppel or of innocent purchaser in the case. The vendor bought with his eyes wide open, knowing the facts in the case, and he is presumed, of course, to have known the law. He, therefore, received nothing by the deed, and the wife was justified in absolutely disregarding the transaction. I am not able to agree with the other propositions urged by respondent, which the majority has not discussed, and believe the court erred in not sustaining the demurrer interposed to the answer.

JOHNSON et al. v. LIGHTHOUSE et al.¹
(Supreme Court of Washington. Jan. 9, 1894.)

APPEAL—NOTICE—APPEALABLE JUDGMENT.

1. An appeal by a defendant will be dismissed where notice of appeal was not served

¹ Rehearing denied.

on the codefendant, who appeared in the action.

2. In an action to foreclose a mechanic's lien, brought against a number of defendants, a decree against the owner and contractors alone, leaving the other defendants, who were also asserting liens against the property, without any adjudication whatever, is premature and partial, and no appeal lies therefrom.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by Frank L. Johnson and Bradford C. Hurd against J. C. Lighthouse, Margaret V. Lighthouse, his wife, C. H. Stocks & Co., and others, to foreclose a mechanic's lien. From a judgment for plaintiffs, defendants Lighthouse and Stocks appeal. Dismissed.

S. A. Callvert, Jerry Neterer, and T. E. Cade, for appellants. Bruce & Brown, for respondents.

STILES, J. Respondents move to dismiss the appeal because of appellants' failure to serve one of the defendants in the action, the Pacific Loan, Trust & Investment Company, which appeared in the action, with notice of the appeal. The point is well taken, and must be sustained. Code Proc. § 1406; Bellingham Bay Nat. Bank v. Central Hotel Co., 4 Wash. 642, 30 Pac. 671; Bank v. Bokien, 5 Wash. 777, 32 Pac. 744.

There is also another ground of dismissal which we find from the record, and which existed when the appeal was taken. This was an action to foreclose a material man's lien upon property of which the appellant Lighthouse and his wife were the owners. The Pacific Loan, Trust & Investment Company and a number of other parties were made defendants, under an allegation in the complaint that they were either contractors or parties who claimed to have or hold some interest in the property adverse to the claim and interests of the plaintiffs, but junior and inferior to the plaintiffs' claim. Whether all of these defendants were served with process or not does not appear, but, in addition to the principal defendants, and the Pacific Loan, Trust & Investment Company, three other defendants appeared. The Pacific Loan, Trust & Investment Company filed a demurrer to the complaint, which was never disposed of. The other three defendants filed answers. All of the defendants, except the one mentioned, were served with notice of the appeal, and they all, by their attorneys, admitted service, and were present, and took part in the settlement of the statement of facts. No default or other conclusion of the rights of any of these defendants, except Lighthouse and wife, was entered, and, for aught that appears, they may still be litigating the claim of respondents against them. The decree runs against the owners and contractors only, and leaves the other defendants without any adjudication whatever, and was therefore premature and partial only. No judgment purporting to be a final decree should have been en-

tered until all the defendants were disposed of, either by dismissal or by an affirmance or judgment of some kind. From the aspect of the case, and from statements of counsel, we gather that this was one of a large number of lien claims against the several defendants, and that the claimants were made defendants for the purpose of cutting them off from a participation in the proceeds of a sale. But each of the defendants commenced a similar foreclosure action for himself, instead of answering this case, and when all of the cases were before the court it consolidated them for the purpose of trial. In such a case it was never enough to enter a separate intermediate decree establishing the lien of each claimant, establishing a right thereto, but there must be but one final decree ordering a sale and application of the proceeds. There was nothing in this course preventing a sale on appeal by any claimant, owner, or contractor from so much of the decree as affected the sale, upon so much of the record as was pertinent, but the time for appeal and settlement of the statement would not begin to run until the final decree was entered. The costs of the foreclosure would be greatly lessened, and inevitable confusion would be avoided on both grounds specified the appeal is therefore dismissed.

DUNBAR, C. J., and HOYT, SCOTT, and ANDERS, JJ., concur.

LAFOND v. SMITH.

(Supreme Court of Washington. Jan. 9, 1910.)

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

In an action for the care and custody of defendant's horses, resulting in a personal judgment against him, a new trial should be granted for newly-discovered evidence that plaintiff had written a letter notifying defendant that he would resort to his lien on the horses, instead, waited until his bill exceeded that amount, and then sought to hold defendant for payment personally.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by Alfred Lafond against H. Smith for foreclosure of a livery keeper's lien for the care and custody of defendant's horses, and for a personal judgment over in case of a deficiency. Judgment for plaintiff, defendant appeals. Reversed.

Defendant made a motion for a new trial on the ground of newly-discovered evidence consisting of a letter written by plaintiff notifying defendant that he would resort to his lien on the horses to enforce payment of his bill.

"Upon the evidence and the findings of the jury, the court finds the following: (1) That plaintiff was and is a livery keeper in Skagit county. (2) That defendant and one Slipper are and were p-

in the ownership of the horses mentioned in respondent's complaint. (3) That on or about October 3, 1892, defendant lent said horses to two parties, Donahue and Wheelock, who delivered same to plaintiff, to be sent to the druggist at Sedro, Skagit county. (4) That said horses were sent to the livery stable at Sedro, and not delivered to the druggist there, and then taken back to Burlington. (5) That after being in possession of respondent until a bill of \$17 was incurred, on or about October 17, 1892, appellant specially requested respondent to care for and feed the horses. (6) That respondent kept said horses four months. (7) That \$120 is a reasonable price therefor. (8) That respondent still has them. And as conclusions of law: (1) That respondent has a livery stable keeper's lien on said horses for \$120. (2) That respondent is entitled to judgment of \$120, and decree of this court that said lien be foreclosed, and the horses sold upon special execution, and the proceeds thereof applied upon the costs herein and costs of sale under special execution and judgment, and that respondent have judgment over against appellant for any deficiency."

Sinclair & Smith, for appellant. J. O. Waugh, for respondent.

DUNBAR, C. J. The record in this case is exceedingly meager, and the special findings of fact by the jury are somewhat conflicting. So far as we are able to ascertain from the record, there is no merit in any of the allegations of error assigned by the appellant, except the error of the court in not granting a new trial on the ground of newly-discovered evidence. It seems to us that the letter upon which the application for a new trial was made shows pretty conclusively that the plaintiff had elected to seek his remedy against the horses, and that the appellant, after receiving the letter, had a right to presume that the respondent would take such action as he informed him in the letter that he would. He would not, therefore, be bound for any personal judgment. Instead of pursuing that remedy, however, respondent waited until the bill against the horses had become somewhat enormous, and then sought to hold the appellant for its payment personally, after having notified him that he would resort to his lien upon the horses. We think, if this letter had been introduced in testimony, the probabilities are that the verdict would have been different; and, as the affidavit of appellant seems to us to fully explain its absence at the trial, we think the court erred in not granting the motion for a new trial on this ground. The judgment will therefore be reversed, and the cause remanded, with instructions to grant a new trial.

STILES, SCOTT, ANDERS, and HOYT, JJ., concur.

BELL v. WASHINGTON CEDAR-SHINGLE CO.

(Supreme Court of Washington. Jan. 9, 1894.)

MASTER AND SERVANT—DEFECTIVE MACHINERY—ACTION FOR INJURIES—EVIDENCE—INSTRUCTIONS—SPECIAL VERDICT—CONSTRUCTION.

1. In an action for personal injuries through defects in defendant's machinery, it is not competent, on a cross-examination of defendant's witnesses, who have testified that the machinery was in good condition at the time of the accident, to ask whether changes had not been made therein since the accident.

2. The court having admitted evidence of such changes, it was error to refuse a charge that the fact that defendant made such changes after the accident was not a matter from which it could be inferred that the machinery was out of repair at the time of the accident.

3. An instruction assuming that to be a fact as to which there is conflicting evidence is properly refused.

4. An exception to the court's refusal to give an instruction, which reads: "The court refused to give instructions required by the defendant, number 1, 3, 4, 6, 8, & 10. To the refusal of the court to give each of said instructions, number 1, 3, 4, 6, 8, & 10, the defendant then and there duly excepted, and exceptions allowed by the court,"—is sufficient.

5. The jury, after finding that the injury was caused by defendant's negligence, found specially, that such negligence consisted in defective appliances; "also, in the sending of an inexperienced person to manipulate the same." Held not a finding that the sending of plaintiff, who was inexperienced, to the work in which he was engaged, was the cause of the injury, but that it only establishes the fact that, in the jury's opinion, plaintiff's inexperience contributed to the injury.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by William A. Bell against the Washington Cedar-Shingle Company. There was judgment for plaintiff, and defendant appeals. Reversed.

George Rice and G. V. Alexander, for appellant. E. E. Hardin and Bruce & Brown, for respondent.

HOYT, J. This action was brought to recover for personal injuries alleged to have been occasioned by the negligence of the defendant. The negligence charged was that the defendant had provided imperfect machinery and appliances, and had put plaintiff to work in connection therewith, without his being in any manner informed of the nature and use of the same. Plaintiff was allowed to show that, after the accident, changes had been made in such machinery and appliances. Proper exceptions were taken by the defendant to the introduction of such testimony, and the ruling of the court thereon is properly presented here for our consideration. That it is not competent for the plaintiff, in actions of this kind, to show that such changes have been made, is well established by the authorities in this country. That such is the fact will sufficiently appear from a quotation from a single case. The supreme court of the United States, in the case of Railroad Co. v. Hawthorne, 144 U. S. 202, 12

Sup. Ct. 591, in so holding, made use of the following language: "Upon this question there has been some difference of opinion in the courts of the several states. But it is now settled, upon much consideration, by the decisions of the highest courts of most of the states in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant. *Morse v. Railway Co.*, 30 Minn. 465, 16 N. W. 358; *Corcoran v. Peekskill*, 108 N. Y. 151, 15 N. E. 309; *Nalley v. Carpet Co.*, 51 Conn. 524; *Ely v. Railway Co.*, 77 Mo. 34; *Railway Co. v. Hennessey*, 75 Tex. 155, 12 S. W. 608; *Railroad Co. v. Clem*, 123 Ind. 15, 23 N. E. 905; *Hodges v. Percival*, 132 Ill. 53, 23 N. E. 423; *Lombar v. Village of East Tawas*, 86 Mich. 14, 48 N. W. 947; *Shinners v. Proprietors of Locks & Canals*, 154 Mass. 168, 28 N. E. 10. As was pointed out by the court in the last case, the decision in *Readman v. Conway*, 126 Mass. 374, 377, cited by this plaintiff, has no bearing upon this question, but simply held that in an action for injuries from a defect in a platform, brought against the owners of the land, who defended on the ground that the duty of keeping the platform in repair belonged to their tenants, and not to themselves, the defendants' acts in making general repairs of the platform after the accident 'were in the nature of admissions that it was their duty to keep the platform in repair, and were therefore competent.' The only states, so far as we are informed, in which subsequent changes are held to be evidence of prior negligence, are Pennsylvania and Kansas, the decisions of which are supported by no satisfactory reasons. *McKee v. Bidwell*, 74 Pa. St. 218, 225, and cases cited; *Railway Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408."

That such is the rule established by the courts of most of the states, is well settled. Respondent makes little contention against such rule, but claims that it is not applicable to the facts of this case. The testimony to which exception was taken by the defendant was not introduced as a part of the plaintiff's case. It was brought out upon the cross-examination of defendant's witnesses. Such being the fact, he contends that it was competent, for the reason that it had a tendency to discredit their testimony in chief, in which they had testified that the machinery in use at the time the accident occurred was, in their opinion, properly constructed, and in good condition. In our opinion, such cross-examination should not have been allowed. If the fact that changes had been made cannot be introduced to show negligence on the part of the defendant, for the

reason that it has no legal bearing upon the question, we are unable to see how the fact can in any manner affect the testimony of a witness who has testified as to the character of the machinery at the time of the accident. If the alterations had no tendency whatever to show that the machinery was unsafe, it is impossible to see how such could affect the testimony of a witness who has sworn to the condition of such machinery.

The respondent alleges another reason why such testimony was admissible, and that was that there had been, at the suggestion of the defendant, a view of the premises taken by the jury, on account of which he was entitled to show that the condition of the machinery at the time of the view was different from that at the time of the accident. It is no force in the position of the respondent and testimony for that purpose might have been admissible. But as it was only admissible for that purpose, and that not in the ordinary course of the trial, the court should have excluded it until the purpose for which it was admitted had been explained as to be fully understood by the jury. The more orderly way would have been for the plaintiff to have introduced his affirmative proof in rebuttal, and then by way of cross-examination of defendant's witnesses. It was not admissible as a part of the examination of anything which the witnesses had testified to, and for that reason should have been excluded, as offered.

At the conclusion of the testimony the defendant presented certain requests for instructions. One of them was in the following language: "You are instructed that the fact that the defendant covered or boxed the set screws, and made changes in the machinery for hoisting logs, after the accident in question, is not a matter from which the jury are at liberty to infer that it was out of repair, imperfect, or unsafe at the time the accident occurred." The court refused to give this instruction, and such refusal was alleged as error. In view of the action of the court in admitting the testimony as to the alterations, the defendant was clearly entitled to this instruction, and the failure to give it constituted reversible error.

The refusal to give one other instruction is assigned as error, but we think that the request for such instruction was properly refused. It required the court to assume that it was a fact, as to which there was some contradiction in the testimony.

Respondent contends that there was sufficient exception to the refusal to give the instructions requested, to justify the court in examining into this question. The language of the exception, as shown by the statement of facts, is as follows: "The court refused to give instructions requested by the defendant, number 1, 3, 4, 6, 9, & 10. The refusal of the court to give each of said instructions number 1, 3, 4, 6, 9, & 10

defendant then and there duly excepted, and exceptions allowed by the court." And we think it was sufficient.

Respondent presents the further point that notwithstanding the erroneous rulings on the part of the court, as above stated, the case should not be reversed, for the reason that the defendant could not have been injured thereby, as the jury found, specially, that the sending of the plaintiff, who was an inexperienced person, to do the work in which he was engaged, was the cause of the injury. If we could construe the special findings of the jury as the respondent does, we might agree with his contention, but we are unable to do so. The jury, after finding as a fact that the injury was caused by the negligence of the defendant, found that such negligence consisted in "an incomplete construction of appliances, and exposed set screws on the collar of the shaft; also, in the sending of an inexperienced person to manipulate the same,"—and when most strongly construed against the defendant, would only establish the fact that in the opinion of the jury the inexperience of the plaintiff contributed to the injury. It is not made at all to appear therefrom that the accident would have occurred, however inexperienced the plaintiff might have been, if the machinery had not been incomplete. It follows that it does not affirmatively appear that, if the jury had found such machinery to be complete and proper, they would have rendered the general verdict that they did. The judgment must be reversed, and the cause remanded for a new trial.

STILES and ANDERS, JJ., concur.

WILBUR'S ESTATE et al. v. BINGHAM.
(Supreme Court of Washington. Jan. 9, 1894.)

MARRIAGE—WITH INDIAN—VALIDITY.

1. The treaty of the United States with the Swinamish Indians, of April 11, 1859, setting apart a reservation for them, and prohibiting any white man from residing thereon, did not take the reservation out of the jurisdiction of the territory of Washington, in cases not affecting the rights or property of the Indians; and hence Acts 1866, p. 81, prohibiting marriage of white persons with Indians, was in force on such reservation, rendering void a marriage celebrated there, according to Indian rites, between a white man and an Indian woman.

2. The fact that the territorial statute was repealed soon after the marriage was celebrated, and that the parties thereafter cohabited for several years, did not render the marriage valid.

Appeal from superior court, Skagit county; Henry McBride, Judge.

On application for letters of administration on the estate of John T. Wilbur, deceased. From an order appointing O. E. Bingham as such administrator, Sarah J. Wilbur appeals. Reversed.

Million & Houser, for appellant. Sinclair & Smith, for respondent.

STILES, J. The disposition of this appeal depends upon whether there was a marriage between the deceased, John T. Wilbur, and a Swinamish Indian woman, Kitty, who, with her sons by said John T., proposes the respondent as administrator of the estate. Appellant claims administration for herself, if any be granted, as the only lawful wife of the deceased. In 1867 the Swinamish tribe were treaty Indians residing upon the reservation set apart for them, on Fidalgo island, Skagit county, by a treaty ratified by the United States senate and proclaimed by the president in 1859. Abb. Real Prop. St. p. 1123. Kitty, then about 13 years of age, lived with her parents on the reservation; and Wilbur, who had been a resident of the territory for some time, lived on government land which he had taken up at a few miles' distance therefrom. At that time there were almost no white women in the country, and many of the men had Indian women living with them. Wilbur became desirous of having the company of a "Klutchman," and selected Kitty for that purpose, and made such arrangements with her father and the authorities of the tribe that she left the reservation, and went to his place, and there lived with him for about nine years. She then left him, probably at his suggestion, and returned to the reservation, and he soon after married the appellant.

It is not contended that the relations which existed between this man and woman were preceded by any statutory marriage, or that they were attended by any such circumstances as would have amounted to a common-law marriage, had such an institution been recognized here. They lived together, and had children born to them, and that was all. But it is very strenuously urged, and the court below so found, that there was a binding marriage ceremony between them, upon the reservation, according to the customs of the Swinamish tribe; and without entering into details, which amounted to little or nothing, beyond the payment of a certain sum of money to the girl's father, and his directing her to go with the white man, we think it may be conceded that all of the requirements necessary to constitute a valid Swinamish marriage were complied with, and that, in the eye of the Swinamish law, these two persons would have been considered man and wife. Had they both been Indians, such would, undoubtedly, have been the case, and the general holdings of the courts would have recognized the relation. *Kobogum v. Iron Co.*, 76 Mich. 498, 43 N. W. 602. Marriages of this kind have been upheld when they existed between a white man and an Indian woman. *Johnson v. Johnson*, 30 Mo. 72, (see notes in 77 Amer. Dec. 606; *Wall v. Williams*, 11 Ala. 839,) though the contrary has been as stoutly maintained, (*Roche v. Washington*, 19 Ind. 53; *State v. Ta-cha-na-tah*, 64 N. O. 814; *Dupre v. Boulard's Ex'r*, 10 La. Ann. 411.

The general rule is that the *lex loci contractus* is controlling, in adjudications involving the validity of marriages, (*True v. Ranney*, 21 N. H. 52; *Story*, Conf. Laws, § 113,) though this doctrine has an important exception, which is involved in the case before us. Appellant claims that inasmuch as, at the time of the alleged marriage, there was in this territory a statute prohibiting a marriage between a white person and an Indian, (Acts 1866, p. 81,) even considering the reservation as a foreign jurisdiction, the marriage was void, because Wilbur thereby committed a fraud upon the law of his domicile, which was the territory. Where a marriage is prohibited, either by the statute, or by those rules of morality and decency which make it against the natural law of civilized nations for two persons to marry, as incestuous or polygamous marriages, it is in vain for them to go beyond their domicile, to engage in a contract of marriage, for the purpose of avoiding the prohibition. Their contract will be held void upon their return. *Kinney's Case*, 30 Grat. 858; *State v. Kennedy*, 76 N. C. 251; *State v. Bell*, 7 Baxt. 10; *Pennegar v. State*, 87 Tenn. 244, 10 S. W. 305; *Whart. Conf. Laws*, § 181; *Brook v. Brook*, 9 H. L. Cas. 223. In Massachusetts the contrary was held, in *Medway v. Needham*, 16 Mass. 157, and that case was followed there until a statute interfered. See notes to same case, 8 Amer. Dec. 133. In some courts a marriage contracted without the state, by a person under statutory disability, with another, whose domicile was in the foreign state, has been equally subjected to a declaration of invalidity. But this seems a harsh rule, as it might involve a perfectly innocent man or woman in unmerited confusion and disgrace; and the contrary was held in a very learned and conclusive opinion of Chief Justice Gray in *Com. v. Lane*, 113 Mass. 458. Respondent insists that this more lenient rule should be followed in the case of a marriage between a white person and an Indian upon a reservation; the locus being considered analogous to a foreign state, and the Indian custom the *lex loci*. *Morgan v. McGhee*, 5 Humph. 13, sustains the proposition, and *Johnson v. Johnson*, 30 Mo. 72; *Boyer v. Dively*, 58 Mo. 510; and *La Riviere v. La Riviere*, 77 Mo. 512,—go further, and hold that although there may have been no reservation at the place where the marriage took place, if it occurred in what used to be termed "Indian Country," it was sufficient, if the Indian customs were followed, although, under those customs, husband and wife could separate at will, and marry again. In none of the cases cited, however, does there appear any intimation that any law of the state was violated by the marriage of a white man with an Indian woman, and in Missouri the doctrine of common-law marriages has always been recognized. *Cargile v. Wood*, 63 Mo. 501; *Dyer v. Brannock*, 66 Mo. 391. But there was a prohibition in our

territorial statute of 1866, and the question is whether it had any force within the Swinamish reservation, so as to render void any marriage between Wilbur and his wife, however celebrated.

It has always been conceded that Congress had the right, when a new territory was organized, to exclude from its jurisdiction lands embraced within the territorial limits for any reason which it saw fit. More frequently than in any other cases, this conclusion was provided for as to lands embraced in Indian reservations. But it has not been by any means universal that either the civil or the criminal laws of a territory have been without force within the boundaries of an Indian reservation; and whether they have had such force or not has depended upon the acts of congress concerning the territories and public lands, and treaties with various tribes providing for reservations. In *Harkness v. Hyde*, 9 S. 476, it was held that process from a district court of Idaho could not be served within the Shoshone reservation, in that territory, because the act of congress of March 3, 1863, organizing the territory, provided that it should not embrace within its limits or jurisdiction any territory of an Indian tribe, where, by a treaty with such tribe, their reservation was not to be included within the territorial limits or jurisdiction of any state or territory without their consent; and because, five years later, a treaty was made with the Shoshone Indians, where it was agreed that no persons, except agents of the government, should be authorized to pass over, settle upon, or reside in the territory reserved. The court said that this territory "was as much beyond the jurisdiction of legislative or judicial, of the government of Idaho, as if it had been set apart within the limits of another country, or of a foreign state." But in *Langford v. Monteith*, 16 S. 145, the court acknowledged having made a mistake in the former case, in finding no existence in the treaty of the clause mentioned, and held that where no such clause or language equivalent to it, was found in the treaty with Idaho Indians, the lands held by them were a part of the territory, and subject to its jurisdiction, so that its process could run therein, although the Indians themselves might be exempt from such jurisdiction. In *U. S. v. McBratney*, 104 U. S. 621, held, that the United States circuit court for the district of Colorado had no jurisdiction of a case of murder committed by a white man upon another within the Utah reservation, because the act of March 3, 1863, authorizing the admission of Colorado as a state, contained no exception of jurisdiction over the reservation, such as had been made in the treaty with the Indians, but that the state courts, alone, could try the accused for the offense. An examination of the original act of Washington Territory shows only in regard to Indians and their lands:

vided, that nothing in this act contained shall be construed to affect the authority of the government of the United States to make any regulations respecting the Indians of said territory, their lands, property or other rights, by treaty, law or otherwise, which it would have been competent for the government to make if this act had never been passed." 10 Stat. 172. No act amending or enlarging this proviso came into operation until 1875, when Rev. St. U. S. § 1839, was made applicable to all the territories. In the mean time the treaty with the Swinamish Indians was made, taking effect April 11, 1859. This treaty ceded to the government all the lands formerly inhabited by the tribes of Indians joining therein, on both sides of Puget sound, from Vashon Island northward to British Columbia, and from the summit of the Cascade mountains to the divide between Hood's canal and Admiralty inlet, but reserved to them certain defined tracts, in these words, following the description: "All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them." This language, both of the organic act and of the treaty, was wholly different from that concerning the Idaho or Colorado Indians, and under *Langford v. Monteith* and *U. S. v. McBratney*, supra, must be taken to have left the reservation within, and a part of, the territory, for all legislative and judicial purposes not affecting the personal rights and the lands and other property of the Indians. Whether these could have been controlled by territorial statutes, we do not pretend to decide. But it must be, it seems to us, by every rule of jurisdiction, that when Wilbur went upon the reservation, even if he went there with the full purpose of procuring Kitty to be his wife, the law of the territory met him there, in all its force, and prohibited him from making a legal marriage with her, under any forms or ceremonies whatever; and she, although an Indian and a mere child, was bound to know that the same prohibition attached to her. Therefore, the only attempt to constitute a marriage between them was void, and the fact that the prohibiting statute was repealed a short time after they commenced to live together, viz. in 1868, made their case no better, since all that appears in the record concerning them subsequently is that they cohabited, and cohabitation did not constitute a marriage. In *re McLaughlin's Estate*, 4 Wash. 570, 30 Pac. 651.

The order of the superior court, granting letters of administration to respondent, must be reversed, and the matter remanded, with

directions to grant letters to appellant, if she be still capacitated; otherwise, to some other suitable person, as provided by law. Appellant protests against any administration, but we regard this as one of the cases where such a proceeding is most fitting, since deceased may have left heirs who are entitled to share in his estate, or there may be creditors who are unpaid. The court acquired jurisdiction of the estate through respondent's petition, and should now proceed regularly to final distribution.

HOYT and SCOTT, JJ., concur. DUNBAR, C. J., and ANDERS, J., not sitting.

MAYER v. FRASCH et al.

(Supreme Court of Washington. Dec. 30, 1893.)

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE.

In an action by an assignee for the benefit of creditors to set aside a deed of land worth \$1,000, executed by the assignor to his wife about a year before the assignment, it appeared that the assignor was a merchant; that his debts at the date of the deed amounted to \$2,200; that they had been fully paid during the following year, but that by reason of continued purchases he was never wholly out of debt; that the deed was recorded immediately after its execution; and that in occasional financial statements to his creditors the assignor did not include the land among his assets. *Held*, that the trial court properly refused to set aside the deed.

Appeal from superior court, King county; I. J. Lichtenberg, Judge.

Action by Laramie Mayer, assignee of Charles F. Frasch, against Charles F. Frasch and Kate Frasch, to set aside a deed. Judgment for defendants. Plaintiff appeals. Affirmed.

Strudwick & Peters, for appellant. Fred H. Peterson, for respondents.

SCOTT, J. This action is brought to set aside a conveyance executed by Charles F. Frasch to Kate Frasch, his wife, of 160 acres of land, situated in Whatcom county, on the ground that said conveyance was a fraud upon his creditors. Said Charles F. Frasch became the owner of the land on the 7th day of September, 1889, and on the 27th day of November of said year he intermarried with his codefendant, and the deed of the land in question was executed on the 12th day of April following. Said land was of the value of about \$1,000. During these times, and prior and subsequent thereto, the defendant Charles F. Frasch was engaged in the grocery business in the city of Seattle. On the 9th day of March, 1891, he made a deed of general assignment of all of his property, both real and personal, for the benefit of his creditors, to one Chris. R. Frasch, who was, upon objection made by certain of the creditors, thereafter removed, and appellant was appointed in his stead. It appears that upon the day said deed to Kate Frasch was

executed Charles F. Frasch was indebted to Schwabacher Bros. & Co. in the sum of \$700, and to Tilman & Bendel in the sum of \$1,500,—parties of whom he was accustomed to purchase groceries in the conduct of his business, and to whom he is indebted at the present time. It also appears that it was the custom of said creditors to send him monthly statements of his account, and for him to remit money to apply thereon from time to time. It further appears that after said conveyance he remitted to each of said creditors large sums of money, much more than sufficient to discharge the indebtedness existing on said April 12, 1890. It appears, however, that he was purchasing goods of them during all of these times, and it is not clear that he was at any time entirely out of debt to either of them. The lower court found that none of the claims now being pressed were in existence at the time of the execution of the deed, and for that reason that there were no grounds upon which the same should be set aside; and we are of the opinion that the finding of the lower court must be sustained in this particular. The proof upon the point is conclusive; and the fact, if fact it was, that said Charles F. Frasch was indebted to the creditors mentioned at all times from and including the execution of the deed, would not be sufficient to authorize them to attack the same, as the particular debts now in existence were incurred thereafter, the ones in existence at the time of the conveyance having been paid. It further appears that the deed was placed on record within a day or two after its execution, and that said land was only a very inconsiderable part of the property then owned by said Charles F. Frasch. It also appears that he occasionally sent statements to his said creditors of his condition, and of the property he owned, and in none of the statements did he make mention of the land in question as being owned by him. Affirmed.

DUNBAR, C. J., and STILES, HOYT, and ANDERS, JJ., concur.

GABRIEL v. SEATTLE & M. RY. CO.

(Supreme Court of Washington. Dec. 30, 1893.)

APPEAL—JURISDICTIONAL AMOUNT—PRACTICE IN JUSTICE COURT.

Where, in an action in a justice court to recover \$75, defendant's counterclaim is stricken out as not within the jurisdiction, the offer, on appeal to the superior court, of evidence to support the counterclaim, there being no application to file new pleadings, does not raise any question as to the ruling below, and therefore an appeal to the supreme court from a judgment of the superior court excluding the evidence will be dismissed, as the amount in controversy is less than \$200.

Appeal from superior court, Skagit county; M. C. Million, Judge.

Action by W. Gabriel against the Seattle & Montana Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Burke, Shepard & Woods, for appellant. D. H. Harrison and Million & House, for respondent.

SCOTT, J. This action was brought before a justice of the peace of Skagit county to recover the value of a cow killed by the defendant's train, the amount sued for being \$75. The defendant interposed a demurrer, alleging negligence upon the part of the plaintiff in allowing his stock, and especially the animal in question, to run upon the defendant's right of way, thus obstructing the passage of trains, and exposing the employees and passengers of the company to great peril; and asked damages therefor the sum of \$500. The plaintiff demurred to this defense upon the ground that the facts not state facts sufficient to constitute a cause of action, and because the amount claimed therein was beyond the jurisdiction of the justice of the peace. The court sustained the demurrer, a trial was had, and judgment rendered for plaintiff in the sum of \$75. A general appeal was taken by the railway company to the superior court of said county. No application was made to said court for the privilege of filing other or new pleadings, but the defendant sought to introduce evidence under this defense which had been introduced in the justice's court, to sustain the demurrer of plaintiff had been sustained as aforesaid. The court refused to receive the evidence in support of this defense, a trial being had, judgment was rendered for the plaintiff in the sum of \$50, whereupon the defendant appealed.

Respondent moves to dismiss the appeal upon the ground that the amount in controversy is less than \$200, and we are of the opinion that this motion must be granted. The amount in controversy, as determined by the pleadings as they stand, is \$75. Whatever the effect was, or whatever the result may have been in introducing evidence in a justice's court which is beyond the jurisdiction of said court, as to the effect of the same or any portion of the same introduced thereunder against the claim of the plaintiff, this defense was disposed of in the justice's court, and, if defendant desired to raise the ruling of the justice thereon, he should have removed said cause to the superior court by certiorari proceedings, and not by taking a general appeal. No proper proceedings were taken in the superior court to raise the point over this question. An offer of evidence in support of a defense which had been stricken out was insufficient to sustain that purpose. Dismissed.

DUNBAR, C. J., and HOYT, STILES, and ANDERS, JJ., concur.

BANK OF SHELTON v. WILLEY et al.

(Supreme Court of Washington. Dec. 30, 1893.)

STATEMENT ON APPEAL—TIME OF FILING—ACTION AGAINST PARTNERS—JOINT AND SEVERAL PROPERTY.

1. Where appellant's statement of facts is delivered to the clerk in the evening of the last day of the period prescribed by Code Proc. § 1422, and a notice of filing is posted so as to reach respondent's counsel within the statutory time in due course of mail, the appeal will not be dismissed, though the clerk does not mark the statement as filed till the next morning, and though the respondent's counsel does not receive the notice till a day late. Hoyt, J., dissenting.

2. In an action against a firm, where one partner, without authority from the other, files an answer consenting that judgment be rendered, the judgment should allow execution against the several property of the partner making the confession and the joint property of the firm, under Code Proc. § 416.

Appeal from superior court, Mason county; Mason Irwin, Judge.

Action by the Bank of Shelton against B. Willey and Alfred Metzger. From the judgment, Willey appeals. Modified.

W. L. Agnew and Phil. Skillman, for appellant. J. E. Sligh and White & Munday, for respondent.

ANDERS, J. This is an appeal from a decision of the superior court denying the petition of appellant, B. Willey, to vacate and set aside a judgment theretofore rendered in the above-entitled cause. It appears from the record that the order and judgment appealed from were made and entered on November 18, 1892. Appellant's proposed statement of facts was marked "Filed" by the clerk of said court on December 20, 1892, although it is shown by the affidavits of the clerk and of the appellant that the statement was in fact handed to the clerk at about 8 o'clock of the evening of December 19, 1892. Counsel for respondent reside at Seattle, and appellant's counsel reside at Olympia. According to the affidavit of one of appellant's counsel, notice of filing the statement of facts was deposited in the post office in Olympia on December 17, 1892, addressed to counsel for respondent, and the postage thereon paid, but the notice was not received by counsel for the respondent until December 20, 1892. Having previously filed their objections to the proposed statement of facts, counsel for the respondent appeared specially before the judge who tried the cause, and rendered the decision appealed from, at the time fixed for the settlement of the statement, and objected to the proceeding on the ground that the court had no jurisdiction to settle and certify the statement of facts, because the proposed statement was not filed with the clerk of the superior court within 30 days after the order, decision, and judgment appealed from were made and rendered, and because no notice that a statement of facts, designating the time and place of

settlement thereof, had been made and filed with the said clerk, as required by law, within said period of time. Upon the above-stated grounds, and for the further alleged reason that the so-called "statement of facts" is not properly or legally certified, and is not properly or legally a part of the record herein, and does not contain all of the material facts, nor all of the evidence, upon which the cause was tried and determined, the respondent moves this court to strike the statement of facts herein from the record, and also to dismiss the appeal.

This court has uniformly held that the provisions of section 1422 of the Code of Procedure are mandatory, and must be substantially complied with, and that facts not already a part of the record can only be made so by filing a statement of facts, and filing and serving the notice therein required, within the time therein limited. It is provided in section 794, Code Proc., that the time within which an act is to be done shall be computed by excluding the first day and including the last, unless the last day is a holiday or Sunday, and then it is also excluded. In this instance the 30 days within which the appellant was required to file his statement of facts, and serve notice thereof upon the opposite party or its attorney, expired on December 18, 1892. But that day was Sunday, and was therefore, by statute, excluded; and the filing of the statement of facts and service of notice were in time if made on the following day,—the 19th of December. As above indicated, the statement of facts was indorsed as filed by the clerk on December 20th, but, as it is shown by his own affidavit that he received it as such clerk on the 19th, we think, in justice to the appellant, it ought to be considered as filed upon the latter date; and as the notice was deposited in the post office, properly addressed, in time to have reached the counsel for respondent, in due course of mail, within the time limited by law, we are of the opinion that service thereof was timely made, although, as a matter of fact, the notice was not actually received until 31 days after the rendition of the judgment from which the appeal was taken. It does not appear that the respondent was in any way injured by not receiving the notice one day earlier, and it ought not, therefore, to complain. The certificate of the trial judge to the statement of facts is in substantial compliance with the statute. He certifies that it contains all the material facts presented on the part of the plaintiff and defendant in the trial of the cause, and all of the testimony upon which the cause was tried below, together with any and all objections or exceptions taken to the reception or rejection of testimony. The motion must therefore be denied.

On August 17, 1892, the respondent filed a complaint in the superior court of Mason county, in which it was alleged that B. Willey and Alfred Metzger were then, and at

all the times therein mentioned, copartners doing business under the name of B. Willey & Co., and that between July 1, 1890, and July 23, 1892, the plaintiff loaned and advanced to the defendants, at their request and for their use and benefit, the sum of \$7,500, which sum defendants promised and agreed to pay, but that no part thereof has been paid. On the same day, Alfred Metzger, one of the defendants, expressly appearing for himself and codefendant, and waiving service of process, and assuming to submit both defendants to the jurisdiction of the court, filed an answer to the complaint, admitting each and every allegation therein, and consenting that judgment might be entered against the defendants, as in the complaint demanded. Upon the filing of this answer the plaintiff moved for judgment upon the pleadings, which motion was granted, and thereupon judgment was rendered against the defendants for the said sum of \$7,500, together with interest and costs, with leave to issue execution against the partnership property of said defendants, but not against the individual property of either defendant. To vacate and set aside this judgment is the object and purpose of this proceeding. It appears from the testimony produced at the trial that the appellant neither consented to the entry of judgment against him, or the firm of which he was a member, nor authorized his copartner to consent thereto; in fact, he knew nothing of the pendency of any action against him, or against himself and copartner, until after the entry of the judgment complained of; and the question to be determined is whether or not his interest in the partnership property is liable to execution in satisfaction of said judgment. It is claimed on behalf of appellant that one partner has not the right or power to confess judgment in favor of even a partnership creditor without the consent of the other members of the partnership, and that the written waiver and consent of the one partner in this case amounted to nothing more than a simple confession of judgment, and must be so construed. It is a general rule of law that no partner or joint obligor is bound by a judgment confessed by his copartner or joint obligor without his express authorization. 2 Freem. Judgm. § 545; 1 Bates, Partn. § 377; 1 Black, Judgm. § 57; 1 Lindl. Partn. (2d Amer. Ed. by Ewell,) 272; Clark v. Bowen, 22 How. 270. This is the doctrine of the common law, and, unless modified by our statute, it must prevail in this case. Each member of a partnership is deemed to be the agent of the firm, with full power to bind it as to all matters legitimately within the scope of its business; but no partner, by virtue of his partnership relations merely, has the power, when sued jointly with his copartners, to consent to the entry of judgment against himself and copartners, without the express authority or assent of

the latter. Binney v. Le Gal, 19 Barb. Such a proceeding is beyond the scope of his agency, and therefore inefficacious to his copartners. But laws have been enacted in several of the states purporting to authorize individual partners or joint obligors to confess judgments against the defendants jointly liable in an action, whether served or not, to be enforced in a certain prescribed manner; and our own statute provides (see Code Proc. § 179) that when the action is upon a contract and against one or more defendants jointly liable, judgment may be given, on the confession of one or more defendants, against all the defendants thus jointly liable, whether such defendants have been served or not, to be enforced only against their joint property, and against the joint and several property of the defendant making the confession. Oregon has a similar statute, and the supreme court of that state, in coming to that holding, in Richardson v. Fuller, 2 Or. 179, that a partner cannot, under this provision, confess judgment which shall be binding upon his copartner, or upon partnership property, unless made in an action pending. Is the doctrine announced in that case, and which seems to us to be the correct interpretation of the statute, applicable to the case at bar? We think not. We also think that the original judgment in this case was, in effect, a judgment by confession, but, as it was rendered upon a partnership indebtedness, and in an action pending, its efficacy must be determined by reference to the section of the Code above mentioned; and under that section it was properly entered against the partnership, to be satisfied out of the partnership property. As already stated, the action was originally to recover money loaned and advanced to the defendants. The proof shows, however, that a portion of the money claimed was loaned to the firm of Willey & Freeburger, and payment thereof assumed by the defendants, but as it does not appear that appellant was surprised or injured thereby, and as the complaint might have been amended so as to conform to the testimony, we do not think there was any substantial error on the part of the court below in refusing to set aside the judgment on that ground. Nor are we able to say that the evidence offered at the trial of appellant's petition to vacate the judgment does not, in fact, sustain the judgment. The court below found that the testimony offered did not show that appellant had a valid defense to the action, and we are of the opinion that the evidence justified the finding. In fact, it appears from appellant's own testimony that he knew or nothing as to the indebtedness of the firm of B. Willey & Co. to the respondent. His copartner kept the firm books, and was also cashier of the respondent bank, and it may be that the books were not properly kept; but we are not now called upon

determine that question. But, while we do not find sufficient grounds for entirely reversing the judgment appealed from, we nevertheless think it ought to be modified in one particular. We are unwilling to concede that one who confesses a judgment which affects the property of another shall himself be entitled to any advantage or profit not conferred by law. In such cases the statute must be substantially complied with in every respect. 2 Freem. Judgm. § 543. In this case the judgment authorizes execution to issue against the joint property of the defendants, but not against the separate property of either defendant. But the law says that such judgments are to be enforced against the joint property of the defendants, and against the joint and separate property of the defendant making the confession. For aught we know, the very moving force that caused the confession may have been the immunity from execution against the separate property of him who made it, set forth in the judgment as entered. But, however, this may be, the judgment in this respect is somewhat suggestive of unfairness, as claimed by appellant. The cause is remanded to the lower court, with directions to modify the judgment so as to make it enforceable against the joint and separate property of Alfred Metzger, as well as against the joint property of both the defendants.

DUNBAR, C. J., and SCOTT and STILES, JJ., concur. HOYT, J., concurs in the majority opinion on the merits, but dissents from their conclusions as to the motion.

WASHINGTON MILL CO. v. CRAIG et al.
(Supreme Court of Washington. Dec. 30, 1893.)
DENIAL OF CORPORATE EXISTENCE—ESTOPPEL—
MECHANICS' LIENS—REQUISITES OF STATEMENT.

1. Where, in an action by a corporation to foreclose a material man's lien, the answer admits that defendant made a contract with plaintiff, defendant is estopped to deny plaintiff's corporate existence.

2. A lien claim which states that claimant furnished to defendant certain material under a contract whereby defendant promised to pay, on delivery of the material to him, the prices set forth in an annexed bill of particulars, sufficiently contains the "terms and conditions" of the contract.

Appeal from superior court, Spokane county; Wallace Mount, Judge.

Action by the Washington Mill Company against Charles J. Craig and others to foreclose a material man's lien. From a judgment for defendants, plaintiff appeals. Reversed.

Prather & Danson, for appellant.

STILES, J. The complaint in this case contained the usual allegations of a complaint for the foreclosure of a material man's

lien, showing an agreement to furnish mill work and lumber for respondent Craig's building,—mill work at a gross price of \$141.75, and the lumber at various prices per thousand feet, so that the whole claim amounted to \$333.85. The answer admits the furnishing of the lumber as set out in the complaint, and the ownership of the property, and then denies each and every other allegation of the complaint. This general denial was a sham, for in succeeding portions of the answer the defendants set up a contract with the plaintiff, (which estopped them to deny the existence of the corporation,) showing that all the items sued upon were agreed to be furnished, and that they were furnished, for the particular building described in the complaint; but it was alleged that the agreed prices of the lumber were less per thousand feet than those pleaded in the complaint, (the price for mill work being conceded,) and that there was delay in the delivery of a part of the materials beyond the time agreed upon. There was also a counterclaim repeating the same facts as were contained in the affirmative defense, and alleging many additional facts as a basis for a judgment for damages. In this aspect of the case there was nothing for the plaintiff to prove at the trial but the agreed prices of the lumber and the filing of its lien; everything else was admitted. A witness testified to the former point, and the lien was offered in evidence, but rejected; the ground of the rejection being, as the record shows, that the lien claim did not contain the "terms and conditions" of the contract. The statement in the claim is as follows: "That claimant furnished the material set forth in the bill of particulars hereto attached, and marked 'Exhibit A,' and hereby made a part of this claim of lien, to Charles J. Craig, and delivered the same to him, * * * under and by virtue of an agreement made by said Washington Mill Company with said Charles J. Craig, which said contract was made on or about the said 8th day of November, 1892; * * * that, as a part of said agreement, said Charles J. Craig promised and agreed to pay the prices set forth and charged in said bill of particulars so soon as said material should be delivered to said Craig." The respondents do not appear here, but stipulate that the case be submitted on the brief of the appellant, showing great confidence in their position, which the court below sustained. It is perhaps unfortunate that the case should not have been briefed on the other side, for we may be committing grave error in making a decision while thus unadvised; but, having examined the pleadings, the lien claim, and the evidence from what seems to us every possible standpoint, we are unable to see wherein the claim fails to state any material part of the contract, either as pleaded or proven. It says that the respondent Craig promised to pay for the materials described,

at certain prices, upon delivery, and that there was a delivery, which was the substance of the contract as pleaded and proved. It is true that the answer sets up an agreement to deliver within three weeks, and the failure of appellant to keep that part of the contract; but that is matter of defense, and, until this defense is established, the contract appears to be as claimed by the appellant. Judgment reversed, and cause remanded for a new trial.

DUNBAR, C. J., and SCOTT, HOYT, and ANDERS, JJ., concur.

WEIDEMAN v. TACOMA RAILWAY & MOTOR CO.

(Supreme Court of Washington. Dec. 30, 1893.)

NEGLIGENCE—FALLING BUILDING—NONSUIT—DECLARATIONS OF AGENTS.

1. In an action for personal injuries sustained by plaintiff while engaged in tearing down defendant's building, a statement of one of defendant's officers, made some time after the injury, and not a part of the *res gestae*, is inadmissible. Dunbar, C. J., dissenting.

2. Where an effort is being made to tear down a building, the mere fact that it falls before it is expected to fall is not evidence of negligence on the part of the owner, and a person injured while employed in tearing it down will be nonsuited, in an action for the injury, unless he makes a further showing of negligence on the owner's part. Dunbar, C. J., dissenting.

Appeal from superior court, Pierce county; John O. Stallcup, Judge.

Action by Frederick Weideman against the Tacoma Railway & Motor Company for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed.

Crowley & Sullivan, (Ashton & Chapman, of counsel,) for appellant.

Heilig & Hartman, for respondent, cited, to support the proposition that the mere falling of the building raised a presumption of negligence: *Mullen v. St. John*, 57 N. Y. 568; *Hamilton v. The William Branfoot*, 48 Fed. 916; *Gleeson v. Railroad Co.*, 140 U. S. 435, 11 Sup. Ct. 859; *Barnowski v. Helson*, (Mich.) 50 N. W. 989; *Transportation Co. v. Downer*, 11 Wall. 134; *Johnson v. Bank*, (Wis.) 48 N. W. 712.

HOYT, J. Plaintiff suffered personal injury while engaged in tearing down a building belonging to the defendant, and recovered a judgment for damages growing out of such injury, from which defendant has appealed.

One of the grounds upon which the appellant seeks a reversal is that the building was being taken down under contract, and that the plaintiff was working for the contractor, and not for the company. The conclusion to which we have come as to other questions involved makes it unnecessary that we should decide this one.

The next error alleged is that the court

allowed the plaintiff to put in evidence statement of one of the officers of the company, made some time after the date of injury. This action of the court constitutes a reversible error. The declarations of an agent made after the transaction cannot bind the principal unless they are so related to it as to constitute a part of the *res gestae*, and, as there is no pretense that the declarations in question were so related, they should not have been admitted. This alone would require a reversal of the judgment.

Appellant asks that we should go further and direct the nonsuit of plaintiff. A close of the testimony on the part of plaintiff, appellant moved for a nonsuit, which was denied, and exception taken; if the action of the court in denying the motion was wrong, appellant will be entitled to that measure of relief. It is therefore become necessary that we should pass upon the question of the sufficiency of the proof offered by the plaintiff, before we rested, to sustain a verdict in his favor. We have carefully examined all of the proof, and are unable to find anything in which sufficiently points to the negligence of the defendant to authorize the jury to find it guilty of such negligence. There is practically no proof tending to show negligence on the part of the defendant or its agents in tearing down the building, excepting the fact that it fell at a time when it was not expected that it would. The fact of the falling of a building which is designed to stand up has been held to furnish proof that it was negligently constructed, and respondent cites some cases of that kind to combat the theory of the appellant. But it is evident that they are not applicable to the case at bar. The fact that this building fell cannot be any proof of negligence, for to cause it to fall was the very thing which was sought to be accomplished by the labor in which the plaintiff was engaged. There is nothing tending to show what was the immediate occasion of the falling of the building. It is true that it sufficiently appears that what was being done by the plaintiff and those associated with him, had the effect of weakening the building, and increasing the probability of its falling; but there is nothing that shows that such had so far proceeded as to lead a person of reasonable prudence to expect that the building would fall until more had been done in the way of weakening it. For all that appears, everything done by those engaged in the work might have been such as a most careful man would have considered prudent, and not at all likely to lead to the present falling of the building; and that such a result only resulted in the falling by reason of the condition of the building unknown to the defendant or its agents, after reasonable effort to obtain the requisite knowledge had been exhausted by them. Some later

fect in the timber with which the building was constructed might have been the immediate cause of its falling. The proof fails to show to what extent the outside boards or planks had been removed. It only shows that boards had been knocked off and carried away; but how many, or what proportion they bore to the whole, is in no way disclosed. There may have been such a part thereof left upon the building as would lead a prudent person to believe that it would be safe to remove more of them before there would be any danger of the building falling, and before there would be any reasonable probability of the force engaged being able to push it over, or of a team being able to pull it down; and, notwithstanding such appearance on the part of the building, it may have fallen by reason of some inherent and undiscoverable defect in its construction. It was urged on the part of the appellant that, even though the manner in which the work was prosecuted constituted negligence, the plaintiff could not recover, for the reason that his eyes were open, and the nature of the danger to which he was exposed must have been apparent to him. There is much force in the argument of the appellant upon this question, but it is not necessary that we should say anything in regard thereto on account of the conclusion to which we have come, as above stated.

Respondent urges that the measure of relief asked by appellant should not be granted, for the reason that the trial court erroneously excluded proof offered by him, which, if admitted, would have shown negligence on the part of appellant. We cannot so find, as, in our opinion, the proof offered would not have materially strengthened plaintiff's case. The judgment must be reversed, and the cause remanded, with instructions to grant the nonsuit as asked by appellant.

STILES, SCOTT, and ANDERS, JJ., concur. DUNBAR, C. J., dissents.

BURDICK v. BURDICK.

(Supreme Court of Washington. Dec. 30, 1893.)

DIVORCE—ADULTERY—REQUISITES OF COMPLAINT—VERIFICATION.

1. The requirement of Code Proc. § 766, that a complaint in a divorce suit shall be under oath, means that it shall be verified as other complaints; and a verification to the effect that plaintiff believes the complaint to be true is sufficient.

2. Though the complaint in a divorce suit does not show that the last act of adultery was committed within one year before the beginning of the action, or that it was unforgiven, as required by Code Proc. § 764, subd. 2, if proof of both facts is admitted, a default judgment will not be reversed on appeal.

Hoyt, J., dissenting.

Appeal from superior court, King county; J. W. Langley, Judge.

Action for divorce by C. N. Burdick against Kate Burdick. From a judgment for plaintiff, defendant appeals. Affirmed.

John F. Miller, Pros. Atty., and A. G. McBride, Deputy Pros. Atty., for appellant.

STILES, J. The statute, (Code Proc. § 766,) which requires a complaint in a divorce case to be under oath, means only that it shall be verified as are complaints in other cases, and a verification to the effect that the plaintiff believes the contents of the complaint to be true is sufficient.

The cause of action based on the ground of adultery was insufficiently stated, because the complaint did not show that the last act of adultery was committed within one year before the commencement of the action, or that it was unforgiven. Code Proc. § 764, subd. 2. But proof was admitted, without objection, showing both facts, and we think the judgment should stand.

This was an appeal in the name of the defendant, (who had made default, and who did not appear,) taken by the prosecuting attorney. No appearance was made here by the respondent. Under these circumstances, some question has arisen in our own minds as to whether, in such a case, the prosecutor has a right to appeal; and we desire to say that, in passing upon the case, we leave the question of this right entirely open for future consideration. Judgment affirmed.

DUNBAR, C. J., and SCOTT and ANDERS, JJ., concur. HOYT, J., dissents.

WILEY et al. v. CITY OF SEATTLE.

(Supreme Court of Washington. Jan. 5, 1894.)

POWER OF MAYOR TO HIRE SPECIAL COUNSEL—UNUSUAL EMERGENCY.

An ordinance providing for the issuance by a city of \$700,000 worth of bonds was passed, under the advice of the city counsel, that it was legal, by an unanimous vote over the mayor's veto. The mayor refused to sign the bonds, and was served with an alternative writ of mandamus requiring him to do so. The city attorney refused to assist the mayor in defending the suit. The council were unwilling to pass an ordinance providing for the employment of special counsel, and thereupon, on behalf of the city, the mayor employed plaintiffs, who successfully defended the suit. Held, that the emergency warranted the mayor in employing plaintiffs, and they were entitled to recover for their services, though the charter limited to the council, with the concurrence of the mayor, the power to employ special attorneys, and provided that no person should be employed "in any capacity" unless such employment was specially authorized by law.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Wiley, Scott & Bostwick against the city of Seattle to recover attorneys' fees. From a judgment for defendant, plaintiffs appeal. Reversed.

Wiley & Bostwick, for appellants. George Donworth and James B. Howe, for respondent.

STILES, J. Appellants suffered a nonsuit in an action which they brought against the respondent for the services which they rendered, as attorneys for the defendant, in the case of *Chalk v. White*, 4 Wash. 156, 29 Pac. 979. Their offers of proof were to the effect that, after the mayor had vetoed the ordinance authorizing the issuance of the illegal bonds, it was passed by the unanimous vote of both of the bodies which constitute the legislative authority of the city, under the advice of the corporation counsel that such action was within their power; and that, when he was served with the alternative writ of mandamus requiring him to sign the bonds, the mayor applied to the corporation counsel to defend him in the action, and was refused, on the ground of the opinion he had given the council, because he believed his advice was right, and because he could not honorably at that time, and under such circumstances, take the other side. This refusal and these reasons were put in writing, and delivered to the mayor, and the counsel also refused to permit any of his assistants to act for the defense. The mayor then canvassed the members of both houses of the council, and found them unwilling to act favorably upon any ordinance which might be proposed looking to the employment of special counsel, and thereupon took his own course, and secured the successful services of the appellants. But, notwithstanding the result of the case, the auditing powers of the city would allow no compensation for the services rendered, or return of money expended, and hence this suit.

The ruling of the court below on the motion for a nonsuit was based upon the stringent language of the charter of the city, and the general rule of municipal corporations that, where the manner of exercising a power conferred upon a corporate agent is laid down in terms, his action, in order to be legal, must be taken in strict conformity to the mode thus prescribed. *Arnott v. City of Spokane*, 6 Wash. 442, 33 Pac. 1063. It is evident from the general tenor of this charter (*Freeholders'*, 1890) that it was the endeavor of its framers to require authority for every sort of expenditure to emanate from some legally constituted source, and in a formal and unmistakable way. In fact, a charter could hardly be conceived that would be more mandatory in its restrictions upon municipal officers. A corporation counsel was included among the officers of the city, whose duty it was, among others, to defend all actions or proceedings to which the city, or any officer, board, or department of the city, should be a party, or in which the rights or interests of the city should be involved; and, by an ordinance, this officer

could be allowed to employ one or more assistants. The council would also have authority, under the general powers conferred upon it, and with the concurrence of the mayor, to employ such special counsel in particular cases as it should deem necessary. But on this subject there was this provision: "No office shall be created, nor any person be employed in any capacity, * * * unless the same is specially provided or authorized by law or this charter." Nothing could be imagined that would completely tie the hands of an officer in the matter of employing counsel than this provision. It was the council's manifest intention, notwithstanding its hostility to the position, to provide him legal assistance when the attitude of the corporation was made apparent; but it could not be controlled in the matter, and it would undoubtedly have refused. The mayor was in this position: The constitution, the law, and the charter itself forbade him to sign the bonds, or do anything toward putting them in circulation, and, under the solemnity of his official oath, he was bound to obey; but, on the other hand, the ordinance passed over his veto by unanimous votes, and the alternative writ of mandamus from the court commanded him to sign them. It was a most important case, involving the city's liability for more than \$700,000, and no man in official position ought to be required to submit to a court without legal assistance. He could neither stand aside, nor retreat without peril; and the charter laid upon him the express duty to see that all laws and ordinances in the city were faithfully executed. The penalty of removal from his office, which the respondent's counsel intimate that, under the circumstances, the mayor had such a personal interest in the defense of the city, brought against him that he should employ himself employed the necessary assistance, but there is equally as strong an implication that he was not expected to do anything in the provision that the corporation counsel shall defend the officers in actions against them involving the interests of the city. Plainly, it was the city's liability that was in jeopardy in *Chalk v. White*. If the appellee was to any extent bound to employ counsel in that case, he was bound to pay the reasonable value of the services rendered. That he was so bound we consider to be demonstrated by the success of the defense, which proved the correctness of his position, and saves him from an immense apparent liability.

This case demonstrates that there is the nature of things there must be, something as an emergency in the affairs of a municipal corporation, as well as in the private corporations and individuals, which neither laws, charters, nor ordinances expressly provide. We venture that it never contemplated by the framers

charter that any such a condition of affairs as was developed in this case would occur, where both the legislative and the judicial departments of the city would be arrayed against its chief executive, to compel him to perform an illegal and unconstitutional act; and, if it had been intended by the charter to cover such a case, then the answer to that proposition would be that municipal corporations are not clothed, by the constitution or the laws, with power, either directly, through their charters or ordinances, or indirectly, through the failure or refusal of their officers to act, to prevent the honest and proper efforts of an executive officer to avoid a plain violation of the general law. This corporation is the creature of the state, and must exist, whether its people will or not, if the law of its creation is a valid law. But suppose some individual should make a direct attack upon its existence, and seek, through judicial action, a judgment that it was no corporation, and the same departments which opposed the mayor in *Chalk v. White* should take the position that the plaintiff was right, and ought to have judgment. The mayor in that case would be in a far less responsible position than he was in the bond case; yet, if he should employ counsel and defeat the action, it would be a strange thing, indeed, if the cost of that defense could not be recovered from the city, whose duty it was, under the law, to make it. But the case supposed is no stronger than the one before us. Paramount laws were to be upheld, and a paramount duty lay upon the city to uphold them. The city, violating its own self-made charter, in its corporate capacity, failed to respond to the duty imposed upon it; but the officer whom it had employed and sworn to be its faithful agent in such cases performed his part, with the only means available, and his authority to employ those means in the emergency must be conceded. To hold otherwise would be to let chaos rule, since officers are under no legal obligation to defend suits of this kind at their own expense, their patriotism not being a fund upon which municipal corporations have a right to draw for such purposes. The rule of law above alluded to—that, when the mode in which a municipal corporation may contract is specially and plainly prescribed and limited, that mode is exclusive, and must be pursued, or the contract will not bind the corporation—is firmly settled, and is supported by almost universal authority. *Dill Mun. Corp.* (4th Ed.) § 449, and cases cited in note 2. But none of the cases cited to our attention by the respondent reach the point that is in issue here. *Butler v. City of Charlestown*, 7 Gray, 12, came nearest to it; but in that case it did not appear that there was any unwillingness on the part of the corporation to furnish the aldermen who resisted an unconstitutional law with legal assistance. On the contrary, the case was rested upon what was assumed to be a custom of the city to permit committees and

officers to make such contracts, and there was no responsibility resting upon the aldermen to make any resistance to annexation of Charlestown to Boston. Two recent cases are cited by the appellants, however, one of which is practically on all fours with the case at bar, (*Barnett v. Paterson*, 48 N. J. Law, 395, 6 Atl. 15, and *City of Louisville v. Murphy*, 86 Ky. 53, 5 S. W. 194;) and in both cases the right of the mayor to employ counsel in such emergencies was upheld. In the former case, the mayor successfully resisted an attempt to compel him to sign illegal bonds; in the latter, he sought to enjoin the collection of an alleged illegal tax. We think the case before us presents as strong a case of emergency as could be made, and that the appellants were entitled to make their proofs, and have judgment for what their services were reasonably worth, as well as their necessary disbursements. Judgment reversed, and cause remanded for a new trial.

DUNBAR, C. J., and SCOTT, J., concur.

STATE v. GILE et al.

(Supreme Court of Washington. Jan. 9, 1894.)

HOMICIDE—SUBSTITUTED INFORMATION—INVOLUNTARY MANSLAUGHTER—WHAT CONSTITUTES EVIDENCE—SUFFICIENCY—DYING DECLARATIONS—INSTRUCTIONS—REASONABLE DOUBT—JURORS—COMPETENCY.

1. The court may permit the prosecuting attorney, before trial, to withdraw an information charging manslaughter, and file a new information charging the same offense.

2. Where, in a case of manslaughter, a juror states that he knows nothing about the case except what he read in a newspaper, which created a kind of impression on his mind which he "expected" would require evidence to remove, but that he could entirely disregard such impression, and his mind would yield as readily to the evidence as if he had never heard anything about the case, it is not an abuse of discretion to disallow a challenge to such juror.

3. On motion for a new trial two persons stated in an affidavit that a juror, before the trial, in a certain shop, expressed the opinion that defendants were guilty. In a counter affidavit he positively denied doing so, and it appeared that he and such affiants were not the only persons in the shop at the time. *Held*, that it was not shown that he made such statements.

4. The fact that a juror, before the trial, stated that from what he had read and heard he believed defendants would be convicted, and that, if what he had read was true, they ought to be convicted on general principles, is not ground for granting defendants a new trial.

5. An information charged that defendants unlawfully, willfully, and feloniously inflicted a mortal wound or wounds on one W., and then, for a specified time, unlawfully, willfully, and feloniously placed and kept him on a filthy, offensive, and unclean bed, in a filthy room, filled with vile, unhealthy, and poisonous atmosphere, until he died; "and so the prosecuting attorney aforesaid does say and give the superior court aforesaid to understand that the said" defendants, at the specified place, "in the manner, at the time, and by the means aforesaid, he, the said W., unlawfully, willfully, and feloniously did kill and slay, contrary to the form of the statute," etc. It was nowhere alleged that de-

defendants killed deceased, either voluntarily or involuntarily. *Held*, that the information charging involuntary manslaughter.

6. An information charging involuntary manslaughter by the infliction of mortal wounds, where defendant is a surgeon, and such wounds were made in the performance of a surgical operation, need not set out the relations existing between defendant and deceased to entitle the state to show the manner in which the operation was performed.

7. The dying declaration of a person on whom a surgical operation had been performed, that he had been "butchered" by the doctors, is not incompetent as the expression of a mere opinion, on the trial of the surgeon who operated on deceased for involuntary manslaughter.

8. Where defendant is charged with manslaughter, resulting from a surgical operation performed by him, it is error to charge that, if deceased consented to the performance of the operation, defendant must be acquitted.

9. A charge that "in showing the cause of the death the evidence must be so strong that it will not admit of a reasonable doubt, and you can indulge in no presumptions in aid of the evidence in order to arrive at the conclusion that the wound in deceased's hip, and the subsequent treatment of him, caused his death," was misleading, and properly refused.

10. A number of expert witnesses gave opinions as to the cause of deceased's death. Some were positive that the surgical operation was the cause, while others thought that death might have resulted from some other cause. The condition of deceased's hip at the time of the operation was shown to have been better than it had been for months previously. It was not shown that he was suffering from any disease, and it appeared that after the operation he never rallied, but steadily declined, until he died. *Held*, that a verdict of guilty was supported by the evidence.

Appeal from superior court, Lewis county; M. J. Gordon, Judge.

U. A. Gile was convicted of manslaughter, and appeals. Affirmed.

O. V. Linn and Swasey & Lemley, for appellant. A. E. Rice, Pros. Atty., B. W. Colner, and S. O. Herren, for the State.

ANDERS, J. An information was filed in the superior court of Lewis county by the prosecuting attorney in and for said county, purporting to charge the appellant, together with James D. Minkler and Catharine McCormick, with the crime of manslaughter in causing the death of one Alfred Wright. The appellant, at his own request, was tried separately, and a verdict of guilty was returned by the jury. A motion for a new trial was filed and overruled. A motion in arrest of judgment was then filed, which was likewise denied; whereupon the appellant was sentenced by the court to imprisonment in the state penitentiary for a period of four years.

Before the commencement of the trial the prosecuting attorney asked and obtained leave of the court to withdraw the information then filed, and to file a new information, charging the same offense. This proceeding was objected to by the defendants, and the ruling of the court upon the objection is here assigned as error. It is not claimed that the defendant was in any respect injured or prejudiced by the action of the court, nor is

it claimed that the proceeding wasstitutional; but the objection is urged upon the alleged ground that the court has no power to permit the filing of a new information, and that, when the prosecuting attorney had once made and filed an information, he had exhausted the power conferred upon him by law. Upon the facts as stated in appellant's brief, it is not necessary to enter into a discussion of the question whether or not a trial court has the power to permit an information to be amended after it has been filed with the clerk. That question, strictly speaking, is not raised by the facts of the court now under consideration. A request to withdraw the information is not actually a request to quash it, or set it aside, and that the court had discretionary power to do so on motion of the prosecuting attorney. 1 Archb. Crim. Pl. & Pr. (Pom. Note) 318; Code Proc. § 1372. Indeed, the appellant would have had no legal ground of complaint if a second information had been filed against him during the pendency of the first. *State v. Freidrich*, 4 Wash. 204, 21 Pac. 1065, 30 Pac. 328, and 31 Pac. 332.

We think the court did not abuse the discretion vested in it by section 1301 of the Code in denying the challenge for cause interposed by the defendant to the trial of Adams. The record discloses that upon trial of the challenge the juror stated that he was not acquainted with the defendant and knew nothing about the case, and that he read in a newspaper; that he had no opinion from what he had read of the guilt or innocence of the defendant, and then had no such opinion, but that what he read in the newspaper created a kind of impression upon his mind, which he would require a certain amount of evidence to remove. He further stated that as he could entirely disregard this impression and render a verdict according to the evidence and the law as given by the court, he had heard no discussion of the merits of the case by any person or persons; and he had, in response to a question propounded by the court, that his mind would yield assent to the evidence as if he had never heard anything whatever about the case. This state of facts, the doctrine announced in this court in *Rose v. State*, 2 Wash. 268, 26 Pac. 264, is not applicable. See Code Proc. § 346. It is evident from the whole examination of this juror that any impression of guilt or innocence of the defendant was evanescent and unsubstantial to his mind or cloud his judgment.

It is claimed on behalf of the appellant that the juror Whistler, who was not challenged, was in fact not impartial, and that previously to the trial, expressed an opinion indicative of prejudice against the appellant, and that for this reason the court erred in overruling appellant's motion for a new trial. Upon his examination as to his

petency to serve as a juror in this case the said Whistler stated, in effect, that he knew nothing about the case, further than a statement which he saw in a newspaper called the Winlock Pilot, to the effect that the defendants had had a preliminary examination, and were held for trial; that the article he read made no impression upon his mind, and that he had no bias or prejudice for or against the defendants, and had neither formed nor expressed any opinion as to their guilt or innocence. But upon the hearing of the motion for a new trial the appellant produced the affidavit of one Landrum, which was corroborated by Langhorne, in which it was stated that on January 21, 1893, Whistler, in a conversation in his barber shop at Winlock, remarked, in substance, that from what he had read and heard about the case he believed they (meaning the defendants) would be convicted, and that, if what he had read was true, they ought to be convicted on general principles, and he believed they would be convicted. Whistler, in a counter affidavit filed on behalf of the state, vigorously denied making any such remarks, and asserted that prior to the trial he took no interest whatever in the case, and had no conversation with any one as to its merits, and had at the time of the trial formed no opinion as to the guilt or innocence of the defendant. It appears from the affidavit of Whistler that at the time mentioned by Landrum and Langhorne the latter were not the only persons present in his barber shop, and it is therefore possible that both Landrum and Langhorne were mistaken as to the person who made the declarations attributed to Whistler. But, even if he did make use of the expressions set out in the affidavit, it does not necessarily follow therefrom that he was not a fair and impartial juror in the trial of the case. The opinion expressed was purely hypothetical, and would not alone have been sufficient cause for granting a new trial. It is not every opinion, formed or expressed, that will disqualify a juror, but only such as prevent the giving of a fair trial and impartial verdict.

No demurrer was interposed to the information in the court below, nor is it claimed here that the facts therein stated do not constitute a crime; but it is contended with much earnestness and ability by the learned counsel for the appellant that it charges the defendants with voluntary manslaughter, whereas the proof shows that, if any crime was committed at all, it was that of involuntary manslaughter, and that, therefore, the information was not sustained by the evidence, and consequently the court erred in refusing to grant the motion in arrest of judgment, which was based upon that ground. That a party informed against for voluntary manslaughter cannot, under section 7 of our Penal Code, be convicted of involuntary manslaughter, seems

to be conceded by counsel for the respondent; but they insist that the information in this case in fact charges the defendants with the commission of involuntary, and not voluntary, manslaughter. In order to determine which of these views is the correct one, it becomes necessary to determine what facts are set out in the information, the material portion of which, so far as the question now under consideration is concerned, is as follows: "Comes now A. E. Rice, prosecuting attorney for the said Lewis county, state of Washington, the said superior court of the said Lewis county being in session, and the grand jury for said county not being in session; and now here said prosecuting attorney gives the said superior court to understand and to be informed by this information that the above-named James D. Minkler, U. A. Gile, and Catherine McCormick are guilty of the crime of manslaughter, committed as follows: The said James D. Minkler, U. A. Gile, and Catherine McCormick, in said Lewis county, state of Washington, to wit, the 5th day of December, A. D. 1892, with force and arms, in and upon the body of one Alfred Wright, then and there being, unlawfully and feloniously did make an assault, and that they, the said James D. Minkler, U. A. Gile, and Catherine McCormick, did then and there unlawfully, feloniously, and forcibly, with a certain knife and saw and other edged instruments which they, the said James D. Minkler, U. A. Gile, and Catherine McCormick, in their hands then and there held, in and upon the right hip of him, the said Alfred Wright, then and there unlawfully, willfully, and feloniously did strike and thrust, giving to the said Alfred Wright then and there and thereby, with the said knife, saw, and other edged instruments, in and upon the said right hip of the said Alfred Wright, a mortal wound, of the breadth of four inches and of a depth of six inches, severing and mutilating the femur bone of the right leg of him the said Alfred Wright; and that the said James D. Minkler, U. A. Gile, and Catherine McCormick, did then and there continuously, from said 5th day of December, A. D. 1892, until the 18th day of December, A. D. 1892, unlawfully, willfully, and feloniously and with force and arms place and keep the body of him, the said Alfred Wright, in and upon a filthy, offensive, and unclean bed, in a filthy room, filled with vile, unhealthy, and poisonous atmosphere; and the said James D. Minkler, U. A. Gile, and Catherine McCormick did then and there continuously from the said 5th day of December, A. D. 1892, until the 18th day of December, A. D. 1892, unlawfully, willfully, and feloniously keep said wound upon the said right hip of him, the said Alfred Wright, in an unclean and filthy condition, then and there giving to the said Alfred Wright, by then and there unlawfully, willfully, feloniously and maliciously strik

ing and thrusting with the knife, saw, and other edged instruments aforesaid, in and upon the said right hip of him, the said Alfred Wright, and giving him, the said Alfred Wright, a mortal wound, four inches in breadth and of the depth of six inches, and severing and mutilating the femur bone of the right leg of him, the said Alfred Wright, as aforesaid; and by then and there unlawfully, willfully, and feloniously placing and keeping the body of him, the said Alfred Wright, in and upon a filthy, offensive, and unclean bed, in a filthy room, filled with vile, unhealthy, and poisonous atmosphere as aforesaid; and by then and there unlawfully, willfully, and feloniously keeping said wound upon the right hip of him, the said Alfred Wright, in an unclean and filthy condition as aforesaid, several mortal injuries in and upon the right hip and other parts of the body and the lungs, stomach, and blood of him, the said Alfred Wright,—of which said mortal injuries the said Alfred Wright, from the said 5th day of December, A. D. 1892, to the 23d day of December, A. D. 1892, in the county and state aforesaid, did languish, and, languishing, did live; on which 23d day of December, A. D. 1892, at the county and state aforesaid, of the mortal wounds and injuries aforesaid, the said Alfred Wright aforesaid, died. And so the prosecuting attorney aforesaid does say and give the superior court aforesaid to understand that the said James D. Minkler, U. A. Gile, and Catherine McCormick, at the said Lewis county, and state of Washington, in the manner, at the time, and by the means aforesaid, him, the said Alfred Wright, unlawfully, willfully, and feloniously did kill and slay, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Washington." It will be perceived that it is nowhere averred in this information that the accused killed the deceased involuntarily, but in the commission of some unlawful act; but such averments, though highly proper, are not absolutely necessary in order to constitute a charge of involuntary manslaughter, if, from the facts alleged, the inference arises that death resulted involuntarily from the commission of an unlawful act on the part of the accused. *Brown v. State*, 110 Ind. 486, 11 N. E. 447. Neither is it alleged in the information that the accused voluntarily killed the deceased, unless the language used in the closing portion thereof, commencing with the words "and so," amounts to such an averment. This is admitted by counsel for the appellant, but they contend that the words referred to clearly show that the crime of voluntary manslaughter was intended to be charged. We have heretofore had occasion to determine the effect of similar language in indictments, and it may be said to be the doctrine of this court that the allegations in question are but the statement

of a conclusion drawn by the accuser of the facts stated in the body of the indictment or information, and constitute no essential part thereof, (*Leonard v. Territory*, 2 Wash. T. 393, 7 Pac. 872; *Blanton v. State*, 1 Wash. St. 265, 24 Pac. 439,) and may properly be omitted altogether. While the information does state, in substance, that the defendants unlawfully, willfully, and feloniously inflicted a mortal wound or wounds upon the deceased, it fails, as we have to state as a fact that the killing of the deceased was willfully or voluntarily. We therefore conclude that it states sufficient to constitute the crime of involuntary manslaughter, and that there was no error committed by the court in refusing to arrest the judgment.

The evidence given upon the trial closes the fact that the appellant is a physician and surgeon, and that the wounds mentioned in the information were made in the performance of a surgical operation. The information is silent as to the relation existing between appellant and the deceased, and hence it is argued that it is defective in that regard, and insufficient to admit evidence of the manner in which the operation was performed. It is an elementary principle in criminal pleading that every statement of fact which constitutes an essential part of the offense charged must be fully set out in the indictment or information. *Wash. Crim. Pl. § 151*. And we would be inclined to adopt the view of counsel if we were satisfied that the fact that the defendant in this instance was a surgeon was such an essential ingredient of the crime charged that omission to state it in the information rendered it defective, or caused any injury to the defendant, or deprived him of any advantage whatever. But we are not so satisfied, and do not think that appellant was prejudiced by the want of such an averment. Nor is this information without precedent in this particular now under discussion. In the case of *Com. v. Pierce*, 138 Mass. 165, the defendant, who was a practicing physician, was indicted for manslaughter in causing the death of a patient, but it was never alleged in the indictment that the relation of physician and patient existed. The capacity in which the defendant acted was that case as in this, only disclosed by the proofs. It was a strongly contested question at the trial of this case whether the appellant did not in fact perform a highly dangerous and unnecessary surgical operation upon the deceased, without his consent or knowledge; and cogent testimony was produced before the jury for the purpose of proving that the appellant was only employed to reduce a supposed dislocation of the head of the femur by simply pulling the bone into its proper place. While the defendant himself testified that he did not do but what he was called and requested to do by the deceased, he also testified that

first thing he did, after rendering the old gentleman, Mr. Wright, insensible by means of anaesthetics, was to put deceased's right leg over his (appellant's) shoulder, and "surge" upon it until he found it impossible or impracticable to break up the ankylosis that existed between the dorsal part of the ilium and the head of the femur. This testimony, which was corroborated by other witnesses, tended to show to the jury that it might have been the understanding that the deceased was not to submit himself to a more dangerous operation with knife and saw. Failing to set the joint by pulling the leg as above stated, the appellant then made a long and deep incision in the hip of the deceased, and, with saw and forceps, removed a portion of the neck of the femur, for the purpose, as he says, of straightening the limb. The ankylosis, however, was not broken up, and in fact it was revealed upon a post mortem examination that the hip joint had been only partially dislocated, if at all, as the head of the femur was still in the acetabulum, and firmly attached to the side thereof. This operation consumed considerable time,—about an hour according to the testimony,—and the deceased, who was an old and rather feeble man, lingered some two weeks thereafter, and then died. The defendant undertook to justify the cutting on the ground that it was necessary in order to remove pus, which had gathered there to such an extent as to endanger the patient's life, and the removal of a portion of the femur on the ground that it was in a condition styled necrosis, or, in other words, decayed.

A great deal of the testimony touching the character of the operation, the propriety of performing it at all, and the subsequent treatment of deceased, was objected to on the ground that it was irrelevant and immaterial, and not sustained by the information. It is not practicable to set forth all of this testimony, and we will therefore simply say that, under the circumstances of this case, we are of the opinion that it was competent and admissible.

We think the dying declarations of the deceased were properly admitted in evidence. It was shown by competent testimony that after he had lost all hope or expectation of recovery, and while under a solemn sense of impending death, he made the statement, among others, that he had been "butchered" by the doctors and the old woman, Mrs. McCormick. The objection is that the declaration was but the expression of an opinion, and not the statement of a fact, as to the cause of the declarant's death; but we are inclined to view it otherwise. The word "butchered" simply means killed in an unusual, cruel, or wanton manner, and no more expresses an opinion than the word "killed" when used without qualification. The motion to strike out this portion of the testimony was properly denied.

At the close of the trial, counsel for the defendant asked the court to give numerous instructions to the jury, some of which were refused, and exception taken; and the ruling of the court thereon is alleged as error. Many of these objections, however, were not urged upon the argument in this court, and therefore will not be discussed. But some of them were earnestly argued, and pressed upon our attention, and will now be specifically considered. Upon the subject of reasonable doubt the defendant asked, and the court refused, the following instruction: "No. 14. A reasonable doubt is never an absolute, but always a relative, question. A reasonable doubt for a trial juror is such a doubt as a man of ordinary prudence, sensibility, and decision, in determining an issue of like concern to himself as that before the jury to the defendant, would allow to have any influence whatever upon him, or make him pause or hesitate in arriving at his determination." This instruction seems to be couched in the identical language of Chief Justice Greene in defining a reasonable doubt in the opinion delivered by him in the case of *Leonard v. Territory*, 2 Wash. T. 381, 7 Pac. 872. But, with due deference to the learning and ability of that eminent jurist and his concurring associates, we are constrained to say that we are not willing to accept that as the settled definition of this court, to the exclusion of all other definitions that may be given. Any instruction on the question of reasonable doubt which tends to explain the meaning of the term, without confusing the minds of the jury, ought not, in our opinion, to be deemed erroneous. In fact, as was well said by the supreme court of the United States in *Miles v. U. S.*, 103 U. S. 304: "Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." And, that being so, we apprehend it would be better in most cases not to undertake to explain it at all. In this instance the trial judge charged the jury as follows: "A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence. If, after considering all the evidence in this case, you can say that you have an abiding conviction of the truth of the charge, then you are satisfied beyond a reasonable doubt, and should convict; if you have not such a conviction, you should acquit." This charge having been given to the jury, we fail to see wherein the defendant was injured by the court's refusing to give the instruction requested by him. The jury were no doubt as much enlightened by the instruction given as they would have been by the giving of the one refused. The charge given was at least as comprehensive as that given to the jury by Mr. Justice Field in *U. S. v. Knowles*, 4 Sawy. 521, wherein he defined a reasonable doubt as a "doubt founded upon a considera-

tion of all the circumstances and evidence, and not a doubt resting upon mere conjecture or speculation."

It is also contended that instructions numbered 8, 11, and 29 should have been given as requested. They are as follows: "No. 8. If you fail to find from the evidence beyond a reasonable doubt that the deceased, Alfred Wright, died from the wound made by defendant in the hip, and you find that the deceased consented to the performance of the operation which the evidence shows was performed, then you must acquit the defendant of even assault and battery." "No. 11. That in showing the cause of the death the evidence must be so strong that it will not admit of a reasonable doubt; and you can indulge in no presumptions in aid of the evidence in order to arrive at the conclusion that the wound in deceased's hip, and the subsequent treatment of him, caused his death." "No. 29. If you find from the evidence that the defendant performed the operation without the consent of the deceased, but do not find beyond a reasonable doubt that the wound was the cause of his death, then you may find the defendant guilty of manslaughter or assault and battery." A mere glance at the instruction last above set forth will show that the court committed no error in refusing to give it to the jury without modification. If the operation was performed without the consent of the deceased, and did not result in his death, it is impossible to see how the defendant could be lawfully convicted of the crime of manslaughter. But it is argued that, if this instruction was wrong, then instruction No. 8 must be correct, and should not have been refused. But this instruction is also wrong, for the reason that it assumes that consent to a surgical operation in dangerous cases is a good defense, though the effect be fatal, irrespective of the manner in which it may be performed; which cannot, in our judgment, be the law. Consent is only a good defense, in such cases, where the operation is performed with due care and skill. *Desty*, *Crim. Law*, 33a; *Kerr*, *Hom.* § 26. It is no excuse for recklessness, or even want of usual skill. See 1 *Whart. Crim. Law*, § 362. See, also, *Com. v. Pierce*, *supra*. The eleventh instruction was misleading, and for that reason alone was properly refused. While intelligible to the mind of a lawyer, it would most likely have been entirely misunderstood by the jury. From a careful consideration of all the instructions given, we feel satisfied that the law applicable to the facts in this case was fairly and fully presented to the jury, and that was all the defendant had a right to claim.

The further point is made in appellant's brief that the cause of death was not shown beyond a reasonable doubt. A number of expert witnesses gave opinions upon that question. Some of them were positive that deceased died from the effect of the surgical

operation, while others seemed to think death might have resulted from some cause. The condition of deceased's hip at the time of the operation was shown to be better than it had been for months previously. He was not shown to be suffering from any disease; but it appears that the operation was performed he never died, but, on the contrary, steadily decayed until he died. With all the circumstances and evidence before them, the jury found adversely to appellant's contention, and was unable to say that their conclusion was supported by the evidence. Some other objections are raised by the appellant, but we do not think they are tenable, we do not further extend this opinion by discussing them. The judgment of the lower court is affirmed.

DUNBAR, C. J., and STILES, HOYT, SCOTT, JJ., concur.

MULDOON v. SEATTLE CITY RY.

(Supreme Court of Washington. Dec. 30, 1906.)

CABLE CARS—NEGLIGENCE OF SERVANTS—INJURY TO PASSENGER—RIDING ON FREE PASS.

1. A passenger riding on a street car gratuitous pass cannot recover for personal injuries occasioned by the negligence of the company's servants, where the pass contains a condition exempting the company from such liability.

2. It is not negligence per se for a passenger to stand on the front platform of the car of a cable train, where it is customary for passengers to do so, and there is no rule of the company against it.

Appeal from superior court, King county, Richard Osborn, Judge.

Action by F. M. Muldoon against the Seattle City Railway Company for personal injuries. From a judgment for defendant plaintiff appeals. Affirmed.

Andrew F. Burielgh, for appellant.
H. Thompson, Edouard P. Edsen, and E. Humphries, for respondent.

STILES, J. In this case the bare question is up for determination whether a person riding upon a public street car on a free pass, can recover for personal injuries suffered by him through the negligence of the street-railroad company's servants, when the pass had printed upon its back of it such a condition as the following: "The person accepting this pass assumes all risks of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether by negligence of their agents or otherwise, for injury to the person, or for loss or injury to the property of the person, using this pass." It is a general rule that carriers of passengers for hire cannot contract against liability for damages for injuries to passengers, and this rule has been frequently

held to be none the less operative when the evidence of the passenger's right to travel was put in the form of a free pass, if in fact there was a consideration for the issuance of it. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Railway Co. v. Stevens*, 95 U. S. 655. The cases above cited expressly refrain from any expression of opinion as to what the law would be were the pass purely a gratuity, with a condition against liability. There are dozens of such cases as *Railroad Co. v. Lockwood* in the reports, and the language of many of them is fully strong enough to justify counsel in claiming that they would cover the case of a gratuitous pass with conditions. However, nearly all of them are cases where drovers or other shippers, being under the necessity of accompanying their shipments of stock or other merchandise to properly care for it while in transit, were granted transportation without payment of fare eo nomine, but where the federal supreme court found that there was a valuable consideration, and therefore a contract of carriage for hire. But of all the cases called to our attention, or discovered by us in a somewhat extended examination of the subject, there are but eight where the naked question of liability under a free pass with conditions was presented. There may be some others, but they are most likely to be found in New York and Illinois, where the right of a carrier to contract against liability has long been recognized in some form or other. *Railroad Co. v. Read*, (1865,) 37 Ill. 484, held that a passenger traveling on such a pass could not recover; also, *Kinney v. Railroad Co.*, (1869,) 34 N. J. Law, 513. *Jacobus v. Railroad Co.*, (1873,) 20 Minn. 125, (Gil. 110,) held the opposite, as did *Rose v. Railroad Co.*, (1874,) 39 Iowa, 246. *Griswold v. Railroad Co.*, (1885,) 53 Conn. 371, 4 Atl. 261, and *Annas v. Railroad Co.*, (1886,) 67 Wis. 46, 30 N. W. 232, held there could be no recovery. *Railway Co. v. McGown*, (1886,) 65 Tex. 643, followed *Minnesota* and *Iowa*; but *Quimby v. Railroad Co.*, (1890,) 150 Mass. 365, 23 N. E. 205, decided against recovery. The *Iowa* case was largely based upon a statute of that state, which was construed to prohibit any attempt at limitation by the carrier. We have given these cases in their order of time, so that it may be seen that there is no absolute weight of authority on this subject. The language of the most of the text-books, of which a dozen or more have been cited, is, so far as any opinion is expressed, for the most part favorable to a right of recovery in such cases; but *Beach on Contributory Negligence* (section 172) and *Patterson's Railway Accident Law* (page 505) are the only books of this class which give any consideration to the cases above cited.

There can be no question as to the propriety of that rule of law which prohibits a common carrier from forcing upon any person who deals with it in its public capacity a

condition against liability arising from its own negligence. The very idea of a public or common carrier, with its features of monopoly and right of eminent domain, bears with it, to the modern mind, the duty of conveying passengers with safety, so far as its own acts are concerned, upon the payment of reasonable compensation. The duty which the carrier owes to the public and to the individual is to perform the service safely, without any limiting conditions; and therefore such conditions, when the imposition of them is attempted, violate an implied duty, and are justly held void. But when the intending passenger proposes to the carrier that it do something for him which it is not, under any conceivable circumstances, required by law or duty to do, viz. to carry him without any compensation whatever, and when the whole matter is at the option of either party to agree or not, it is difficult to see why public policy should step in, and deny the right of the carrier to limit its chances of loss in the operation, even though a careless servant cause unintentional injury to the passenger. The theory that the granting of passes upon conditions like this will tend to demoralize the servants of railway and other carriers, and thereby imperil the limbs and lives of paying passengers, seems to us mere fancy; and yet this is about the only consideration urged by those courts which hold that there is a public policy in the way of such agreements. Absolutely gratuitous passes represent but an infinitesimal portion of the mileage actually traveled, and of all the passengers carried but an infinitesimal number are injured by the carrier's negligence. The precautions adopted by managers and employes of land and water transportation companies are not gauged by the fact that there may be free passengers aboard, and never will be while the doctrine of respondeat superior has its present healthy existence. Considerations of business success, of competition, of the preservation of expensive machinery, of continuance in employment, of the safety of their own lives and limbs, and, to some extent at least, of humanity, have incalculably more influence upon the servants of these carriers in making them careful than any thought of damage suits in favor of free passengers. It is only in the rarest instances that disasters of this kind occur through recklessness, or through any other cause than the innate weakness of human nature, which cannot forever maintain a perfect guard. The cases from Massachusetts, New Jersey, and Wisconsin, above cited, seem to us to present, by conclusive argument, the better reason on this subject, and we adopt the views therein expressed, and hold that the person who accepts a pass with such conditions indorsed on it as those alleged in this case is bound by their terms. It follows that the demurrer to the first defense should have been overruled.

The nonsuit asked by appellant was properly refused. We do not think it can be said that it is negligence per se for a passenger to stand upon the front platform of the trail car in a moving cable train, in the absence of any rule of the company against it, and where it has been the custom for passengers to occupy that position. Doubtless there is more liability that accidents will occur where a car is propelled by cable than where horses are used, but common experience has not discriminated between the two to the extent of changing the rule of law. In most cases of this class the question of contribution is one for the jury. *Wills v. Railroad Co.*, 129 Mass. 351; *Nolan v. Railway Co.*, 87 N. Y. 63.

If the question of the conditional pass be not in the case, and the jury find that the appellant was negligent in causing the sudden stoppage of the car, and that no failure of respondent to use ordinary care to preserve himself from the danger of such accidents contributed proximately to produce his injury, then, upon a new trial, respondent will be entitled to recover; otherwise he will not. Judgment reversed, and cause remanded, with directions to overrule the demurrer to the first defense, and proceed with a new trial.

DUNBAR, C. J., and HOYT, SCOTT, and ANDERS, JJ., concur.

HALL & PAULSON FURNITURE CO. v. SCHMIDT et al.

(Supreme Court of Washington. Jan. 6, 1894.)

BOND AGAINST JUDGMENT—POSTPONEMENT BY STIPULATION—RELEASE OF SURETIES.

Where defendant gives a bond conditioned to pay all damages that may be recovered against him in a pending suit, a stipulation between the parties, after judgment against defendant, that further proceedings shall be stayed pending an appeal about to be taken to the supreme court in a suit between other parties involving the same principles, and that the parties shall be bound by the decision in such appealed case, does not release the sureties.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by the Hall & Paulson Furniture Company against Henry E. Schmidt, Fred Kirschner, and Charles Kennett. From a judgment for defendants, plaintiff appeals. Reversed.

Jacobs & Jacobs, for appellant. P. P. Carroll, for respondent Kennett. Turner & McCutcheon, for respondent Kirschner.

DUNBAR, C. J. This was an action on a bond furnished by defendant Schmidt in a certain action of unlawful detainer, in which the appellant was plaintiff and Schmidt was defendant. Respondents were sureties on the bond. Separate demurrers were filed to the complaint, and sustained by the court.

Appellant elected to stand on its complaint whereupon the court rendered judgment in favor of the respondents, respectively, their costs and disbursements. The error alleged are the sustaining of respondent demurrers, and the rendering of judgment thereon.

The complaint shows that on February 18, 1891, appellant brought an action (No. 10) in the superior court against the defendant Schmidt for the recovery of the possession of certain premises in King county, and for the recovery of the sum of \$220, as damages for said premises; that subsequent proceedings were filed by the parties, and a writ of restitution was duly made, and that a writ of restitution was granted and issued to the appellant that on July 15, 1891, defendant was granted leave by the superior court to recover possession of the premises upon filing a bond in the sum of \$1,000, with satisfactory sureties; that said Schmidt, on July 24, 1891, filed a bond with the clerk, and the execution of the writ of restitution was thereupon stayed; that on November 21, 1891, the superior court ordered that the bond of defendant Schmidt be increased to \$1,600; that on November 27, 1891, said Schmidt, as principal, and the respondents, as sureties, assented to said order of the court, jointly and severally executed and filed a bond in the penal sum of \$1,600, conditioned to pay to plaintiff such sum of money as plaintiff might recover for the use and occupation of the demised premises described in the complaint or any rent due, together with all damages that plaintiff might sustain by reason of defendant's occupying or keeping possession of said premises, and all the costs of the action; that on or about the 30th of December, 1891, the plaintiff and defendant entered into an agreement or stipulation in writing whereby said plaintiff and defendant agreed to stand to and be bound by the decision of the supreme court of the state of Washington in the case of *Furniture Co. v. Wills*, 30 Pac. 685, which involved the same general principles as were involved in said case No. 10,257, and which had been tried in the superior court of King county, and a verdict therein returned against the defendant, and defendant's motion for a new trial denied, and judgment by said superior court entered in the lower court in favor of the plaintiff and against the defendant therein, and which judgment an appeal was about to be taken to said supreme court; that it was agreed by said stipulation that the trial of said cause should be deferred pending the appeal, and if, upon such appeal, the supreme court should decide said appealed case on the merits against the defendants therein, Wilbur & Johnson, then the further prosecution of said action should cease; that defendant Schmidt should pay all costs in said superior court taxed in said cause No. 10,257, and that said Schmidt should pay

back rent then remaining due for the use of said premises, as provided by the terms of said lease; that said Schmidt should acknowledge his tenancy of said premises under the plaintiff, and remain in possession of the premises leased during the continuance of the lease, on paying the rent according to the terms thereof. The complaint further showed that on September 29, 1892, the supreme court of the state of Washington having decided said appealed case of Furniture Co. v. Wilbur in favor of the plaintiff, and in favor of the right of the plaintiff to lease said demised premises, and collect rent therefrom, on motion of appellant, and on said stipulation and the consent of the defendant Schmidt, the superior court rendered judgment in said action No. 10,257 in favor of appellant, and against said Schmidt, for the sum of \$2,680, as rent due for the use and occupation of said premises from January 1, 1891, to October 1, 1892, together with costs and disbursements of suit, taxed at \$74.70, and interest, amounting to \$68.50, and declaring said lease forfeited unless the defendant Schmidt should, within 10 days from September 29, 1892, pay or cause to be paid, to the plaintiff, said judgment and costs, and acknowledge in writing his tenancy of the said premises, and file such acknowledgment with the clerk, all of which said Schmidt has neglected and refused to do. The complaint alleges the amount due, the judgment, breach of the bond by defendant Schmidt and the other defendants, and asks for judgment.

The pertinent question here is, what effect had the stipulation set forth in the complaint on the rights of the sureties? No question is raised as to the regularity of the proceedings in the original action prior to the filing of the stipulation therein. It is claimed by the appellant that judgment against the principal is conclusive against the sureties, unless collusion or fraud is alleged and proven; that, without said allegation and proof, the sureties can question neither the validity nor the amount of said judgment. This contention seems to be sustained by *Tracy v. Goodwin*, 5 Allen, 409, and by the cases cited by 2 Brandt, Sur. § 632. But it seems to us that it is not necessary to go to this extent to sustain appellant's contention that the sureties in this case should not be discharged. It is conceded by appellant that the liability of a surety is not to be extended beyond the terms of his contract, and that the liability cannot be varied or enlarged by judicial construction; but it is contended that the complaint in this case does not show that the liabilities of the sureties were extended beyond the terms of their contract, or that they were in any wise enlarged or varied. This contention, we think, is fully sustained by *Boynnton v. Phelps*, 52 Ill. 210; *Conner v. Reeves*, 103 N. Y. 527, 9 N. E. 439; *Tracy v. Goodwin*, 5 Allen, 409; *Bank v. Jones*, 151

Mass. 454, 24 N. E. 593; *Steinbock v. Evans*, 122 N. Y. 551, 25 N. E. 929. This latter case is as near the case at bar as any one particular case is likely to be like another. There it was held that the mere postponement of one of the ordinary proceedings in a case in which an undertaking had been given did not release the sureties. There an order of arrest was issued. Defendant was arrested, and, on giving an undertaking as prescribed, was discharged. He answered, denying the alleged false pretenses. Thereafter the parties entered into a written stipulation, by which defendant withdrew his answer, plaintiff agreeing not to enter judgment before a day specified, and in case defendant paid the debt in installments, as stated, then that the action should be discontinued. In case defendant made default and plaintiff entered judgment, it was stipulated that he should have the same right to enforce the judgment as if it had been entered on a verdict in plaintiff's favor. The stipulation contained a clause to the effect that, while defendant recognizes his full liability for the debt, he "disclaims any admission of the truth of the allegations of fraud," and enters into the stipulation solely to provide security for the payment as stipulated, and to provide a remedy in case of default. Subsequently, defendant, by another stipulation, waived notice of application for judgment, and consented that judgment might be entered for the amount demanded in the complaint. Both stipulations were entered into without the knowledge of defendant's sureties. Judgment was entered upon the stipulations. In an action upon the undertaking, held, that the first stipulation did not amount to a waiver of the charge of fraud, and that the sureties were not discharged by the stipulation to delay entry of judgment. In that case the court said: "We do not think that a mere postponement of one of the ordinary proceedings in a case in which an undertaking has been given releases the sureties from liability. The rule contended for by the appellants would lead to the discharge of sureties on undertakings and legal proceedings in nearly all cases where the postponement of the day of judgment was had by consent of the parties to the action." And so, in this case, the stipulation here did not in any sense enlarge the liabilities of the sureties, and did not go further than the authority of the principals to stipulate for a continuance. It has never been held, and never can be held, in the interest of the orderly transaction of suits, that the principals to a suit cannot stipulate for a continuance of the cause, from time to time, or from term to term, as may best suit their convenience, without consulting and obtaining the consent of the sureties. It is not difficult to conclude from the allegations of the complaint that this stipulation was entered into for the benefit of both parties, and to save the incurring of unnecessary

costs, and the result shows that the principal, for whose obligations the sureties are bound, was saved a large amount of costs and disbursements by reason of the stipulation.

In *Conner v. Reeves*, supra, the court holds that, as a general rule, in an action upon a bond of indemnity against judgments, the sureties thereon are concluded, by the judgment recovered against the obligee, from questioning, except for fraudulent collusion for the purpose of charging the sureties, the existence or extent of his liability in the action wherein it was rendered. Where, however, the judgment was taken by consent of the obligee, while he is not excluded from the protection of the indemnity, the judgment is presumptive evidence only against the sureties, and they are at liberty to show that it was not founded upon any legal liability, or that it exceeds such liability. In that case the court very well said: "Can it be affirmed, as a matter of law, that the conditions of the bond only covered judgments obtained upon hostile and adverse litigation, and that no discretion was left in the sheriff to consent to a judgment, although he believed that, by so doing, money would be saved to the parties ultimately liable? This, we think, would be a too strict interpretation of the contract." The judgment in this case was rendered by the same court in which the action was commenced, and is in no way analogous to the cases cited by the respondents, where, after the commencement of an action and bond given, the principals submitted their case to arbitration, and judgment was rendered by another court. We have examined all the cases cited by respondents, and none of them sustain their position. *Murfrees on Official Bonds* (section 755) states the proposition that "a surety is released by the privity of the obligee to the breach of the bond, or by the interference of the beneficiary which causes a breach of the bond." This proposition, no doubt, is correct, but there are no cases cited under it which would sustain the theory that the circumstances, as set up in this complaint, would amount to a breach of the bond, or an interference of the beneficiary which causes a breach of the bond. In *Niblo v. Clark*, 3 Wend. 24, it was held that a license or permission by a plaintiff to a defendant to depart the state, and an agreement that all proceedings on the judgment against him shall be stayed until his return, may be pleaded in bar to an action against the bail on the recognizance. The decision proceeds upon the ground "that it is an act of fraud in the plaintiff, after having induced the principal to depart by agreeing to suspend all proceedings against him, (and, of course, against the bail,) to avail himself of such absence, induced by his own act, to charge the bail." And "that the plaintiff has, by his act, greatly increased the risk and hazard of the surety, by entering into an arrangement with the principal which induced him to leave the

state." The case can have no bearing on the case at bar. In *Rathbone v. Watson*, 587, where a plaintiff made an agreement with the defendant, against whom he had obtained judgment, and without going to sea, that he would not execute against him, for the purpose of fixing the bail, until after a certain day, the defendant paid the plaintiff a sum of money in consideration of this indulgence, and this arrangement was without the knowledge and consent of the bail, it was held that the bail was discharged. This, also, for obvious reasons, is foreign to the point under consideration. *Pirkins v. Rudolph*, 36 Ill. 306, is a case of replevin, which was referred to arbitration without the knowledge or consent of the sureties on the replevin bond. The stipulation in this case was in substance that the case should be submitted to an arbitrator, and the decision was simply an agreement to await the decision of a higher and controlling tribunal. The question of law involved in the case was not the question of law involved in the case of *Andre v. Fitzhugh*, 18 Mich. 94, an assumpsit suit was commenced against the defendants. On the trial the case was discontinued as to two of the defendants, and proceeded against the third, and judgment was rendered against the third. It was held that the case was discontinued as to the two defendants, and for the best of reasons, viz. that such a change of parties as to the defendants in this case would not only transform the nature of the action from a joint to an individual action, but would necessarily alter the operation of the contract of the sureties, and require the consent of the sureties. In *People v. Brown*, 2 Mich. 9, a joint and several bond was given for the faithful performance of the duties of a sheriff, drawn in the penalty of \$25,000, having been signed by the sheriff and several obligors and his sureties, was altered by the judges of the circuit court, who were empowered to direct the amount of the bond, by making the penal sum \$20,000, and was then signed by 17 other sureties, who proved and filed according to the order of the court. The court held, that the bond was void as to those sureties who signed before the alteration, but valid as to those who signed afterwards. This case raised an entirely new question, viz. the question of the responsibility of sureties on altered bonds. And so with all the other cases cited by respondents in both briefs. They all sustain the general propositions that the liability of a surety is to be construed strictly, and is not to be varied or enlarged by judicial construction; or that the plaintiff has no right to stay the execution after its levy on the property of the principal until the lien is satisfied; or that the principal is not to be granted the principal indulgence and that the debt has been matured; and cases of a similar character, based upon well-established legal principles. But they have failed to establish a case—indeed, we believe that none can be found—which will sustain the action of the court in sustaining the demurrers to the complaint. The judgment is therefore reversed.

and the cause remanded, with instructions to overrule the demurrers to the complaint.

SCOTT, HOYT, ANDERS, and STILES, JJ., concur.

FRAZER v. MILLER et al.

(Supreme Court of Washington. Dec. 30, 1893.)

APPLICATION OF PAYMENTS—EVIDENCE—RECORD ON APPEAL.

1. A firm, owing plaintiff for work, dissolved, and plaintiff continued to work for the remaining partner, who paid him enough to satisfy either the sum earned before or that earned after the dissolution. *Held*, in an action against the firm for the wages earned before the dissolution, that it was competent to show that plaintiff had sued the remaining partner for the amount earned after the dissolution, but that such suit had been dismissed, to show an application by plaintiff.

2. Where the record of the prior suit was excluded on the ground that it was irrelevant, the supreme court, on appeal, may consider its admissibility, though the statement of facts on appeal does not contain said records. Dunbar, C. J., and Anders, J., dissenting.

3. A debtor cannot apply to a particular debt a payment made by him, unless he does so at the time; if he does not, the creditor may make the application; and, if neither applies it, the law will credit it to the oldest account.

Appeal from supreme court, Pierce county; Frank Allyn, Judge.

Action by H. Frazer against Drew Miller and A. J. Miller. From the judgment, A. J. Miller appeals. Reversed.

W. W. Likens and Ira A. Town, for appellant. Heilig & Hartman, for respondent.

SCOTT, J. The defendants, from July 1, 1889, to March 6, 1890, were engaged in conducting a livery-stable business under the firm name of Miller & Son. The plaintiff worked for them during this time, and earned \$480. At the latter date, A. J. Miller sold out his interest in said business to his son Drew Miller, who assumed the debts of the firm, and Frazer continued to work for the son from March 6 till August 31, 1890, and earned \$352. The son was treasurer and bookkeeper for the copartnership during its existence, and made all payments of wages, and he paid plaintiff various sums of money during said time, amounting to \$193, and, after the dissolution of said firm, he made payments to him amounting to \$399. No receipts were given therefor. If the total of these payments—\$592—be applied to the partnership debt, it overpaid Frazer's claim against the firm by \$102. If the payments made by Drew Miller after the dissolution of the firm be applied to the wages earned by plaintiff while working for him individually, then this individual debt would be satisfied; and if the balance of \$47, together with the \$193 paid during the existence of the copartnership, be applied to the firm indebtedness to the plaintiff, a balance of \$250 is left, and for this amount he sues, with interest from March 6, 1890, the date of dissolution. The case was tried by a jury, who brought in a verdict for the plaintiff, and the defendant A. J. Miller appealed. Most of the facts in the case are undisputed. All the payments in question were made after the dissolution of the firm, without any application thereof by the debtor. It is contended that the plaintiff applied sufficient of the payments upon the partnership account to satisfy the same, and it is also contended that, if no application of said payments was made by the plaintiff at the time he received them, he had no right to apply the same thereafter in satisfaction of the individual indebtedness, and that the law would apply them to the older claim. The authorities cited by the appellant upon this last proposition are not directly in point, many of them applying to a case of continuing account between the same parties, and in such a case the law would apply the payments to the older claims. Plaintiff contends that he applied the payments made subsequent to the dissolution of the copartnership, at the time they were received, upon the individual indebtedness. The testimony is not very clear as to this, however, but it does appear therefrom that he asked Drew Miller to settle up the old account at one of said times, and that he said he would wait and see his father about it. There is testimony to show that, when the plaintiff quit working for Drew Miller, he asked him to make out a bill to show him what was coming to him, and that said Miller, instead of making out an itemized bill, gave him a statement of the balance, which is as follows: "Due Harry Frazer, (\$300.00,) three hundred dollars, for labor. Drew Miller." It is further contended that the plaintiff subsequently brought suit against Drew Miller for the whole of said claim, but that he afterwards discontinued it, and brought the present action.

Appellant alleges the following errors: First. That the court erred in sustaining plaintiff's objection to the defendants' offer in evidence of the papers and files in said former action. It is contended by the respondent that this question cannot be considered, because said papers were not made a part of the statement of facts, and, not being here, it would be impossible to say whether they were properly excluded. The record in relation to this matter is as follows: "Q. Look at this paper, if you please, and I will ask you if a paper of that description was served upon you, which is the summons in the case 4,573 in this court. A. Yes, sir; a paper of this description was served on me. Q. Turn it over, and see if you can tell about the date. Mr. Heilig: We will admit that such a suit has been brought and dismissed. Q. Is the claim for

edness to the plaintiff, a balance of \$250 is left, and for this amount he sues, with interest from March 6, 1890, the date of dissolution. The case was tried by a jury, who brought in a verdict for the plaintiff, and the defendant A. J. Miller appealed. Most of the facts in the case are undisputed. All the payments in question were made after the dissolution of the firm, without any application thereof by the debtor. It is contended that the plaintiff applied sufficient of the payments upon the partnership account to satisfy the same, and it is also contended that, if no application of said payments was made by the plaintiff at the time he received them, he had no right to apply the same thereafter in satisfaction of the individual indebtedness, and that the law would apply them to the older claim. The authorities cited by the appellant upon this last proposition are not directly in point, many of them applying to a case of continuing account between the same parties, and in such a case the law would apply the payments to the older claims. Plaintiff contends that he applied the payments made subsequent to the dissolution of the copartnership, at the time they were received, upon the individual indebtedness. The testimony is not very clear as to this, however, but it does appear therefrom that he asked Drew Miller to settle up the old account at one of said times, and that he said he would wait and see his father about it. There is testimony to show that, when the plaintiff quit working for Drew Miller, he asked him to make out a bill to show him what was coming to him, and that said Miller, instead of making out an itemized bill, gave him a statement of the balance, which is as follows: "Due Harry Frazer, (\$300.00,) three hundred dollars, for labor. Drew Miller." It is further contended that the plaintiff subsequently brought suit against Drew Miller for the whole of said claim, but that he afterwards discontinued it, and brought the present action.

which this action No. 4,573 was brought the same claim for which this due bill was executed by you on the 31st of August, 1890? (Objected to, as immaterial and irrelevant.) Court: Let that go in. Simply make the records show that the offer is to show that. (Objection sustained, and exception allowed.) Col. Likens: We offer to show by the witness that the obligation or the demand sued upon in the case No. 4,573, entitled 'H. Frazer against Drew Miller,' in this court, is the same demand for which this duebill, now offered in evidence as the defendants' Exhibit A, was given. (Objected to, on the ground that the plaintiff is not suing on the duebill. It is irrelevant and immaterial. Objection sustained, and exception allowed.) Col. Likens: We now offer the papers in the case No. 4573, entitled 'H. Frazer against Drew Miller,' for the purpose of showing the application of the payments, as made by the plaintiff himself, that were made after the 5th day of March, 1890. (Objected to, as immaterial and irrelevant. Objection sustained, and exception allowed.)" No authorities were cited by either party, and the only case we have found upon the subject is *Williams v. State*, 127 Ind. 471, 26 N. E. 1082, where it is held that documents offered in evidence and excluded must be made a part of the record to raise the question on appeal, and there is no doubt but that this should be the general rule. But we are of the opinion that there may be exceptions thereto. The only object of the record is to clearly show the question which was presented. A question may be raised, with the consent of the court at least, by an offer to prove, (*Haynes, New Trials & App.* § 110;) and in this case it fully appears that counsel for appellant sought to prove that respondent had previously brought suit against Drew Miller individually, upon the demand sued upon in this action; and said counsel offered the record in said action, for the purpose of showing the application by the plaintiff of the payments in question in this case. It was objected to, as immaterial and irrelevant. No question was raised over the competency or genuineness of the record or papers offered for that purpose, and we think it fully appears that they were excluded for the reason that the court deemed the proof immaterial, and that it was understood to be upon that ground by the court and the parties. The statement of facts appears to have been regularly settled, and the court certifies that it contains all the material facts. The respondent did not ask to have these papers included, and, while it was not his duty to do so to have the case properly presented upon the part of appellant, yet, under the circumstances, here, if he desired to show any different state of facts in this particular than was presented by the record as it stood, and if he had a right to present any other reason for the exclusion

of such proof than was included in the objections raised, he should have asked the papers be incorporated.

We are of the opinion that the proffered was material and relevant, although we are not prepared to say that an application of payments thus shown could not be explained by the plaintiff, and shown to have been made under a mistake or misapprehension, or that it should be taken as conclusive against him.

The second and third errors complained of are with reference to two instructions given by the court to the jury. The first follows: "But if a creditor takes a discharge or anything of the kind, and agrees to release any other claim, and looks to such bill,—if he makes that contract,—of which he is bound by it, and must stand to it. Appellant claims that this was error, but there was no question of release in this case; that it was simply a case of applying payments or credits on the accounts. We do not think this contention is borne out by the record, as it sufficiently appears from that there was a contention that the plaintiff, by taking the statement in question, which the appellant terms a "discharge," had accepted the defendant Drew Miller as his debtor for the demand, and that the effect of it was to release appellant; and under this theory of the case, the instruction was proper.

The next instruction complained of is as follows: "You are instructed that the law applicable to this proposition is that if a person be debts due from a person, and he pays money to his creditor, the debtor has a right to have the payment applied to which he pleases. But he must make the application at the time he makes the payment; he cannot make it afterwards. If no specific application be made by the debtor at the time of payment, then this right of application is the creditor's, and he may make it as he may prefer, and at any time before the account is settled between them, or before action is brought; and, if neither creditor nor debtor applies it specially, then the law applies, or credit it to the oldest account. This instruction, we think, properly states the law of the case as to the application of payments by the creditor, (and that only question raised with relation to the application, at least in the absence of any request by the debtor after payment to make an early application. The creditor was not bound to make immediately on receipt of such payments, to apply them on a particular claim. *Maxwell v. Patten*, 4 Cranch, 317; 18 Amer. & Eng. Enc. Law, pp. 241, 242, and cases cited.

The further errors claimed are on the ground that the court should have granted the defendants' motion for a new trial, and that the points raised are disposed of in what has previously been said, with the exception that it is contended that the evidence was

cient to justify the verdict. This ground is not tenable, as evidence was introduced sufficient to support plaintiff's case, if true. For the error aforesaid, in not admitting the proof offered, the judgment is reversed.

HOYT and STILES, JJ., concur.

DUNBAR, C. J., (dissenting.) I am unable to agree with the majority in the reversal of this case. I think, where an appellant asks this court to reverse a judgment for error in rejecting testimony, that the testimony should be brought here for the inspection of this court. It is true that the attorney stated that the paper rejected was offered to prove a certain thing. But the attorney may have been mistaken as to the legal effect of the proof if it had been admitted. The trial judge may have inspected the paper, and found it immaterial evidence from something that appeared on the face of the paper. The particular ground on which it was rejected does not appear in the record, and, without this court has an opportunity to inspect it, it must rely on the judgment of the party offering it, and conclude, without an inspection of it, that its legal effect, if admitted, would be to prove a certain thing, thus determining without an investigation the very question at issue.

ANDERS, J. I concur in the above opinion of the CHIEF JUSTICE.

GOULD v. STAFFORD. (No. 12,214.)

(Supreme Court of California. Jan. 4, 1894.)

WATER RIGHTS—INJUNCTION—AMENDED ANSWER—WHEN PROPER—LAW OF THE CASE—DIVERSION BY TENANTS—LIABILITY OF RIPARIAN OWNER.

1. In an action by a lower to restrain an upper riparian owner on the same stream from diverting water through a certain small flume by temporary dams, the answer averred, *inter alia*, that defendant, as such owner, and also by prescriptive right, was entitled to divert more water than such flume could carry. *Held*, that it was not an abuse of discretion, after reversal on appeal of the judgment rendered, to permit defendant to file an amended answer omitting such defense, and averring that at the time of the alleged diversion a part of his riparian land was leased to certain tenants over whom he had no control, and who were alone liable if more water was diverted through the flume than the leased land was entitled to.

2. As an amendment to a pleading may be allowed to correct certain enumerated mistakes, or "a mistake in any other respect," and "in other particulars," (Code Civil Proc. § 473,) the court may allow an amendment to an answer, though it is mainly to correct a mistake of law made by defendant's attorney.

3. The court found, on sufficient evidence, that defendant leased part of his riparian land, and by agreement constructed such flume to carry water to the leased land; that the tenants were bound to keep it in repair, and "had actual and exclusive possession and control of" it and the premises; that defendant "had nothing to do or say as to the quantity of water that was diverted into said flume;" that he did

not cause the water to flow through such flume, but that such tenants caused it to so flow; and that before suit was brought no notice was given him that there was a wrongful diversion of such water, nor any demand made to abate the alleged nuisance. *Held*, that defendant was not liable for such diversion.

4. In view of such findings, it was immaterial whether the court erred in findings as to the quantity of water to which plaintiff was entitled, the quantity of which he was deprived, and the damage done him, or in permitting defendant to cross-examine plaintiff's witness touching the diversion of water by third persons.

Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by Frederick S. Gould against O. A. Stafford for damages, and to enjoin the diversion of water. From a judgment for defendant, plaintiff appeals. Affirmed.

For prior reports, see 18 Pac. 879, and 27 Pac. 543.

Geo. H. Gould and John J. Boyce, for appellant. B. F. Thomas, for respondent.

McFARLAND, J. This action was brought by plaintiff, who is a lower riparian proprietor on a stream, to restrain the defendant, who is an upper riparian proprietor on the same stream, from diverting water therefrom. Judgment went for defendant, and plaintiff appeals. The case has been here twice before. 77 Cal. 66, 18 Pac. 879; 91 Cal. 146, 27 Pac. 543. On the first appeal a judgment in favor of defendant was reversed on account of defective finding, and it was said in the opinion that under the pleadings, as they then stood, evidence of diversions of water by third persons would be admissible only as to the amount of damages (which were waived by plaintiff); and that findings as to the acts of certain Chinamen and others were irrelevant, and against the admissions of the answer. Certain principles as to riparian rights were also stated for the guidance of the court on another trial. When the case went down to the trial court, defendant asked leave to file a certain amended answer, to which the plaintiff objected. The court allowed it to be filed, and plaintiff excepted, preserving his exception in a bill of exceptions; but on the second trial judgment was rendered for plaintiff, so that the objection to the amended answer was not presented to this court on the second appeal. Upon the second appeal the judgment for plaintiff was reversed, mostly upon points which do not arise on the present appeal. When the case went down the second time, plaintiff, in addition to the exception which he had preserved as before stated, moved the court to strike out the said amended answer, and, his motion having been denied, he again excepted.

The point most elaborately argued by appellant is that the court erred in permitting respondent to file his amended answer. It appears that the alleged wrongful diversion

was made through a small flume, into which the water was turned from time to time by temporary obstructions or dams across the stream. In the original answer it was averred, among other things, that defendant, as a riparian owner, and also by virtue of a prescriptive right, was entitled to divert more water than said flume could carry; and he thus justified the diversion. In the amended answer he omitted the defense just stated, and averred that during the time of the alleged diversion a part of his riparian land was leased to certain tenants over whom he had no control; and that if during said time more water was diverted through said flume than said leased riparian land was entitled to, said tenants alone are liable therefor to plaintiff. And it is to this difference between the two answers that plaintiff mainly objects. We cannot say that the court abused its discretion in permitting the amended answer. The rule is that courts will be liberal in allowing an amendment to a pleading when it does not seriously impair the rights of the opposite party, and particularly an amendment to an answer. A defendant can generally set up as many defenses as he may have. Appellant contends that the affidavits upon which the motion to amend was made show that it was based mainly on a mistake of law made by respondent's attorney; but, assuming that to be so, still the power of a court to allow an amendment is not limited by the character of the mistake which calls forth its exercise. The general rule that a party cannot be relieved from an ordinary contract which is in its nature final, on account of a mistake of law, does not apply to proceedings in an action at law while it is pending and undetermined. Pleadings are not necessarily final until after judgment. Section 473, Code Civil Proc., provides that the court may allow an amendment to a pleading to correct certain enumerated mistakes, or "a mistake in any other respect," and "in other particulars." The true rule is well stated in *Ward v. Clay*, 82 Cal. 502, 23 Pac. 50, 227. In the case at bar evidence of the lease was given at the first trial, and we cannot see that the amendment before the second trial put plaintiff in a position any different from that which he would have occupied if the amendment had been made before the first trial.

Appellant contends that the court erred in allowing respondent to ask, on cross-examination of Packard, a witness for appellant, certain questions touching the diversion of water by third persons, and argues that said questions were contrary to the law of the case as settled by this court on the first appeal. We think, however, that, considering the testimony of the witness in chief, the said questions were not beyond the legitimate scope of cross-examination. As to "the law of the case," it may be remarked that what the court said on the first appeal

related entirely to the attempt of the defendant, under the pleadings as they then stood, to prove diversions by third persons as a defense. It had nothing to do with the question of proper cross-examination, and, of course, nothing to do with the right of respondent, under the present answer, to show the acts of his tenants. But in fact, at that point, and all other points made by appellant except his objection to the amendment of the answer, are unimportant and immaterial. The findings of the court are to stand to the effect that if any damage was done to appellant by the alleged diversion of water, it was done, not by respondent, but by the tenants, for whose acts he is not responsible. The court found that respondent leased a portion of his riparian land to certain tenants for a term of five years, and agreed to construct, and did construct, a small flume, by which the water of the stream could be carried to the leased land, the tenants to keep the flume in repair; that respondent "had nothing to do or say as to the quantity of water that was diverted through said flume;" that during the times stated in the complaint the said tenants "had an exclusive possession and control of the premises and of the flume;" that during the time respondent did not erect any dam or obstruction across said stream, or prevent any part of its waters from flowing down the same, or cause any part thereof to be washed or carried away from appellant's riparian land; that all of the water which flowed through said flume was caused to so flow by said tenants, over whom respondent had no control; and that, prior to the commencement of this action, no notice was given to respondent that there was a wrongful diversion of water through said flume, nor was any demand made to abate the alleged nuisance. It is apparent that if these findings of fact are justified by the evidence, and constitute in law a defense, then it would be useless to inquire whether the court committed an error in arriving at the other findings of fact. If the quantity of water to which appellant was entitled, the quantity of which he was deprived, the damages done him, etc.

We do not deem it necessary to discuss here the general principle of law which applies to the question whether or not, in the particular case, a landlord is responsible for wrongful acts or nuisances done or created by his tenants. The general rule is, as is well established; but its application to the particular facts is often difficult, and there have been many decisions where the rule was invoked. Sufficient was said on the subject in the opinion of this court on the last appeal, both as to the rule and as to its application to the particular facts in the case at bar. 91 Cal. 146, 27 Pac. 543. It is enough to say here that the evidence is not insufficient to support the findings on this subject above specially stated; and that those findings justify the legal conclusion that respon-

ent was not liable, under the circumstances, for the said diversions of water by his tenants. This being so, the judgment must be affirmed. Judgment and order affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

DOUGHERTY et al. v. BARTLETT et al.
(No. 15,265.)

(Supreme Court of California. Dec. 23, 1893.)
TESTAMENTARY TRUST—EQUITABLE ACTION TO ENFORCE—WHEN MAINTAINABLE.

Beneficiaries under a will cannot maintain a suit in equity against the executors and trustees under the will as such, and also as individuals, to enforce the performance of the trust, for an accounting of the trust estate, and to declare void certain orders of the probate court in relation to such estate, before a final settlement of the accounts of such trustees, and distribution by the probate court.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Bill by Mary S. Dougherty and others against Columbus Bartlett, Martin Bacon, and Frank Barker, as trustees and executors under the will of William Walkerly, deceased, and also as individuals, to enforce the performance of the trust, for an accounting, and to declare void certain orders of the probate court relating to such estate. From a judgment sustaining a demurrer to and dismissing the bill, plaintiffs appeal. Affirmed.

The plaintiffs are nieces and nephews of the decedent, and allege in the bill, in substance, various wrongful and fraudulent acts and omissions on the part of defendants in connection with the management of the estate, resulting in loss and waste; the appropriation of trust funds to their own use; collusion with the widow of deceased, whereby she has obtained and is about to obtain more than she is entitled to under the will; and that certain orders of the probate court, setting apart certain property as a homestead for the widow, making family allowances, and appointing and compensating an attorney to represent absent or minor heirs, were void for want of jurisdiction.

B. B. Newman, (Fox & Kellogg, of counsel,) for appellants. H. C. Firebaugh, for respondents.

DE HAVEN, J. The demurrer to the complaint was properly sustained. Until distribution of the estate of William Walkerly, deceased, by the probate court, the respondents, Bartlett, Bacon and Barker, hold the property of said deceased as executors of his will, and they must account to the probate court for all property of the estate of said deceased received by them as such executors, and for their management of the same prior to its distribution under the will of deceased; and it is for the court to deter-

mine what, if any, commissions the said named respondents shall be entitled to receive for their services as executors of said will, and also to determine in the settlement of the accounts of the said executors what moneys expended by them in the discharge of their duties were properly expended, and so chargeable to the estate represented by them, and whether they have exercised ordinary care in the management of the property of said estate, or whether they have mismanaged the same, or permitted waste thereof. It was a question solely for the consideration of the probate court whether an attorney should be appointed to represent absent or minor heirs, and, if so appointed, the amount of compensation to be allowed him. The probate court also had jurisdiction to make the order setting apart a homestead for the widow of the deceased, Walkerly, and to make the order for a family allowance; and no facts are alleged in the complaint showing that such orders were fraudulently procured by the defendants, or either of them, as the result of any misrepresentation or concealment of facts; nor does it even appear from the allegations of the complaint that the court committed any error in making such orders, even if we could review the same in this action. The fact, if it be one, that the defendant Blanche M. Walkerly openly asserts that she will commence legal proceedings against the other defendants, as trustees under the will, to compel them to to pay her out of the trust estate the further sum of \$21,000, does not give to plaintiffs any cause of action against her or the other defendants. It is unnecessary to attempt any synopsis of the voluminous complaint filed in this action, or to notice more particularly its several allegations. We do not understand from the complaint that the executors, who are also the trustees under the will of the deceased, have failed "to annually distribute the residue of the rents and profits of the trust estate" among the nephews and nieces of the deceased, as directed by the will, or that this is an action to enforce this particular duty of the defendants, who are named as executors and trustees under the will; and we express no opinion upon the question whether such an action could be maintained in a court of equity prior to the distribution of the estate under the will. Judgment affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.; GAROUTTE, J.; PATERSON, J.; HARRISON, J.

COOK et al. v. FOWLER et al. (No. 19,220.)
(Supreme Court of California. Jan. 8, 1894.)

ACTION BY PARTNERSHIP—SUFFICIENCY OF COMPLAINT.

In an action by a copartnership, the failure of plaintiff to make, file, and publish a

certificate stating the names and place of residence of the copartners, as required by Civil Code, §§ 2466, 2468, is matter of defense, and compliance with such provisions need not be averred and proved by plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Neil Cook and Sterling Cook, copartners under the name of Cook Bros., against Tilman Fowler and others, on a promissory note. From a judgment for plaintiffs, defendants appeal. Affirmed.

Thomas Rhodes, for appellants. Venable & Goodchild, for respondents.

SEARLS, C. Defendants appeal from a final judgment against them and in favor of plaintiffs for \$561.75 and costs upon a promissory note made by defendants. There is no statement or bill of exceptions. There is but a single point made by appellant. It is that the complaint shows that plaintiffs were copartners under a designation not showing the names of the persons interested as partners, and that they have failed to aver or prove a compliance with the provisions of sections 2466 and 2468 of the Civil Code, by filing and publishing a certificate stating the names and place of residence of the copartners as therein provided. The point is not well taken. The failure to make, file, and publish the certificate in question is matter of defense, to be set up by defendants, and, not having been so taken, is waived. Phillips v. Goldtree, 74 Cal. 151, 13 Pac. 313, and 15 Pac. 451; Carlock v. Cagnacci, 88 Cal. 600, 26 Pac. 597. The judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

EGENER v. JUCH et al. (No. 19,155.)¹
(Supreme Court of California. Jan. 11, 1894.)

ATTACHMENT—NONRESIDENTS

Persons actually in the state, engaged in professional work, are not "nonresidents," within the meaning of Code Civil Proc. §§ 537, 538, authorizing attachment in certain cases.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by George Egener against Emma Juch and others. From an order dissolving the attachment issued, plaintiff appeals. Affirmed.

Jay E. Hunter and Creighton & Creighton, for appellant. W. E. Dunn, for respondents.

McFARLAND, J. This is an appeal by plaintiff from an order of the lower court dissolving an attachment. The validity of

¹ For opinion on rehearing, see 35 Pac. 873.

the attachment depended upon the question whether or not the respondents were "residing" or "nonresidents" of this state at the time the writ issued. Code Civil Proc. §§ 537, 538. At that time they were actually in the state engaged in their professional work, and were served personally in the state with summons. The affidavits upon which the motion conflicted as to where their legal residence was, and, considering the decision of this court in Hanson v. Hanson, 82 Cal. 631, 23 Pac. 56, to the effect that "the residence referred to by the attachment law is an actual, as contradistinguished from a constructive or legal, residence or domicile," we cannot say that the court was wrong in holding that respondents were not nonresidents, within the meaning of the sections of the Code above referred to. The order appealed from is affirmed.

We concur: DE HAVEN, J., FITZGERALD, J.

WATTERSON v. SALDUNBEHERE.
(18,172.)

(Supreme Court of California. Jan. 17, 1894.)

WATER RIGHTS—APPROPRIATION—JOINDER OF CAUSES.

1. The right to the use of water in a stream may be acquired by actual appropriation, without compliance with the provisions of Civil Code, § 1410 et seq., for acquisition of water rights.

2. One may in the same action seek damages for injury to water rights and injunctive relief.

Commissioners' decision. Department 2. Appeal from superior court, Mono county; W. H. Virden, Judge.

Action by Mark Watterson against Isaac S. Saldunbehere. Judgment for plaintiff. Defendant appealed. Affirmed.

N. D. Anderson and Chas. L. Haynes, for appellants. Richard S. Miner, for respondents.

BELCHER, C. The plaintiff brought this action to recover damages for the diversion and pollution of a stream of water in Mono county, and to obtain an injunction restraining the further diversion and pollution of the stream. The plaintiff had judgment, from which he appeals, and from an order denying a new trial. Defendant appeals.

The facts of the case may be briefly stated as follows: Prior to March 23, 1881, P. McLaughlin made application at the United States land office to purchase certain land situate in Mono county, and containing 221 55-100 acres, under the land act of March 3, 1877. On the 23d of March he received from the receiver of the land office a final receipt showing fulfillment of the land applied for. On June 18, 1887, McLaughlin, by a bargain and sale deed duly executed and recorded, conveyed to the plaintiff the said land, together with all and singular the tenements, hereditaments, and appurtenances thereto in anywise by him or his predecessors in title lawfully acquired.

ments, and appurtenances thereto belonging. On September 18, 1891, a United States patent for the said land was issued in the name of McLaughlin, and thereafter delivered to the plaintiff. Extending through the said land, for a distance of about one and a half miles, was a small, natural water course, known as "Dexter Canyon Creek," which carried, in ordinary seasons, about 150, and never more than 250, inches of water. For more than 10 years before the commencement of this action, plaintiff and his grantor had appropriated, and been using, during the spring, summer, and fall months, when not interrupted by defendant, all the waters of this stream for irrigating the said land, for watering stock, and for domestic, culinary, and other useful purposes, and all the waters of the stream were necessary for such purposes. By thus using the water to irrigate the land they had reclaimed the same, or a large part thereof, from its desert condition, and made it productive and valuable grass land. In June, 1892, plaintiff was irrigating his land, and was raising thereon a valuable crop of grass, and was also pasturing thereon, and watering from the stream, about 3,000 head of sheep. The defendant was engaged in the business of raising and grazing sheep, and was traveling about with them from place to place to find pasturage. Early in June, 1892, he drove about 6,000 head of his sheep upon the land lying along the banks of the said creek, and some two and a half miles above the plaintiff's land, and kept them there for more than a month. He allowed his sheep to pass over, into, and up and down the stream, thereby breaking down its banks, which were sandy and friable, and causing large quantities of sand and sediment to fall into the water, and to be carried down and deposited upon plaintiff's land, to its injury. The water was also made unfit to be used for the purpose of irrigating plaintiff's land or watering his sheep, and he was damaged thereby. Early in July, defendant constructed a ditch, and by means of it diverted from the stream about one-sixth of all the water flowing therein, and threatened to continue such diversion. Plaintiff commenced this action on the 21st of July, 1892, and obtained a temporary injunction, which, by the final judgment, was made perpetual.

The findings are 18 in number, and are very full and explicit. The contention of appellant is that 14 of these findings, covering all of the disputed questions in the case, were not justified by the evidence, and hence that the judgment should be reversed. It would subserve no useful purpose to review the findings separately, and state the evidence which tends to support them. After carefully going over the record, I am satisfied that there was evidence amply sufficient to justify them all, and that the judgment cannot, therefore, be reversed on this ground.

The objection that neither McLaughlin nor

the plaintiff ever made any valid appropriation of the water, for the reason that they never complied with the provisions of the Civil Code for the acquisition of water rights, (section 1410 et seq.) is without merit. The evidence clearly shows that McLaughlin and the plaintiff had actually appropriated and used the water for more than 10 years before the defendant interfered with it, and the law is now settled that, where there has been an actual appropriation of water, a right to it is acquired, without following the course laid down in the Code. *De Necochea v. Curtis*, 80 Cal. 397, 20 Pac. 563, and 22 Pac. 198; *Burrows v. Burrows*, 82 Cal. 564, 23 Pac. 146; *Wells v. Mantos*, (Cal.) 34 Pac. 324.

There was no error in overruling the demurrer to the complaint. The two causes of action were properly united, and each stated facts sufficient to entitle the plaintiff to the relief demanded.

There was no error in the refusal of the court to grant the defendant's motion for a nonsuit. The evidence clearly showed that the plaintiff had been damaged by the acts of defendant, and was entitled to relief.

There was also no error in the ruling of the court sustaining the plaintiff's objection to the following question asked the witness Juan Inda by defendant: "Did you herd and water sheep on the North fork of Dexter Canyon creek in the years 1885, '86, '87, '88, '89, '90, '91, and '92?" The objection was that the evidence sought, as to all the years other than 1892, was immaterial and incompetent, and we think it was clearly so. We advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

BROWN v. CAMPBELL et al. (No. 15,057.)
(Supreme Court of California. Dec. 30, 1893.)

ATTACHMENT—PROPERTY SUBJECT TO LEVY—LIMITATION OF ACTIONS—RES JUDICATA.

1. An attachment of property fraudulently conveyed by a judgment debtor, at the time of the attachment standing in the names of the fraudulent grantee and trustees in a trust deed of the property made by such grantee to secure a debt, is in legal effect an attachment of the surplus moneys arising from a subsequent sale of the property under the trust deed.

2. A foreign judgment does not make one a judgment creditor in California, within the rule permitting only judgment creditors to attack a conveyance for fraud; and, until a judgment is obtained in California on the foreign judgment, the statute of limitations does not begin to run.

3. Though a judgment has not been appealed from, it is not a bar to a subsequent action between the same parties, involving the same subject-matter, if the time for appeal has not expired, since the action in which such judg-

ment was rendered must be deemed still pending. Code Civil Proc. § 1049.

4. Findings will not be disturbed on appeal where there is a substantial conflict in the evidence.

In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by one Brown against Campbell and Kent, trustees in a trust deed executed by plaintiff, to recover surplus moneys left after a sale of the property under the trust deed, and payment of the debt secured thereby. One Priest, who claimed the surplus, was made a defendant, and filed an answer and cross complaint, and the Anglo-Californian Bank was permitted to intervene. From a judgment for defendant Priest, and an order denying a new trial, plaintiff and the Anglo-Californian Bank appeal. Affirmed.

James A. Waymire and Wm. T. Baggett, for appellants. T. Z. Blakeman and H. C. Campbell, for respondents.

DE HAVEN, J. This action was originally brought by the plaintiff against the defendants Campbell and Kent to recover the sum of \$2,549.50, surplus in their hands, arising upon the sale of certain real property conveyed to them in trust to secure an indebtedness of plaintiff to the San Francisco Savings Union. These defendants answered, admitting that, after the payment of plaintiff's indebtedness secured by the trust deed, there remained in their hands the sum demanded by plaintiff; but they also alleged that one Priest claimed to be entitled to recover such surplus, and they asked for an order requiring him to be brought into court as a party to the action, and that they be permitted to pay the fund in controversy into court, to be disposed of by the judgment in the action. This order was made, and thereafter Priest filed an answer, and also a cross complaint, in which he alleged, in substance, that, prior to the sale of the real property by the defendants Campbell and Kent under the deed of trust, he had levied an attachment upon such property in an action brought by him against one Joseph Brown in one of the superior courts of this state to enforce a personal demand, and in that action he recovered a judgment on April 5, 1887, for a sum exceeding \$8,000; and that he again attached the same property, prior to the sale under the trust deed, in another action brought by him in this state against Joseph Brown, and in which latter action he recovered a judgment against Brown, on January 8, 1888, for the sum of \$9,353.50. The cross complaint further alleges "that both of said judgments are for one and the same cause of action, and both were recovered against the said Joseph Brown (who was not a resident of the state of California) upon constructive service of summons." Priest further alleged in his cross complaint that the land sold under the

trust deed was the property of his debtor, Joseph Brown, and was by him conveyed to the plaintiff on October 3, 1887, for the purpose of hindering, delaying, and defrauding the creditors of such debtor. The Anglo-Californian Bank was also permitted to intervene, and claims a right to a portion of the fund in controversy by virtue of a mortgage executed by the plaintiff subsequent to the date of the deed of trust referred to. The plaintiff and the intervenor demurred to the cross complaint of the defendant Priest, upon the ground, among others, that the cause of action therein stated was barred by certain sections of the Code of Civil Procedure, prescribing the limitations for actions, and, the demurrer being overruled, they filed an answer to the cross complaint. The action was tried by the court without a jury, and, upon the findings, judgment was rendered in favor of the defendant Priest, in accordance with the findings of his cross complaint. The plaintiff and the Anglo-Californian Bank, intervenor, have appealed.

The questions arising upon this appeal are: First. Did the defendant Priest secure recovery upon the fund in controversy by reason of the attachment proceedings in either of the actions against Joseph Brown? Second. Is the cause of action stated in the cross complaint barred by the statute of limitations? Third. Is the right of Priest to the fund given him by the judgment appealed from, barred by a judgment in a former action brought by him against the plaintiff and the other defendants, and which involved substantially the same matters embraced in the cross complaint in this action? And, are the findings of the court justified by the evidence?

In an action against a nonresident to recover money, when there has been no personal service of process on the defendant within the state in which the action is brought, and no appearance therein by the defendant, no judgment can be given, other than one in the nature of, or having the effect of, a judgment in rem, against the property of the nonresident as may have been specifically attached in such action. *Person v. Goff*, 72 Cal. 65, 13 Pac. 73; *Person v. Mining Co.*, 95 Cal. 524, 30 Pac. 765; *Person v. Neff*, 95 U. S. 741; *Cooper v. Person*, 10 Wall. 308. In this latter case, in discussing the effect of a judgment in rem brought to establish a personal debt against a nonresident only constructively served with process, and in which an attachment is levied upon the property of the defendant, Mr. Justice Miller, speaking for the supreme court of the United States, said: "If the defendant appears, the cause comes mainly a suit in personam, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the

judgment of the court; but, if there is no appearance of the defendant, and no service of process upon him, the case becomes in its essential nature a proceeding in rem, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff.

* * * No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court, or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit." Such being the well-established rule of law, it follows that, inasmuch as Joseph Brown was a nonresident, and not personally served with process within this state in either of the actions of Priest v. Brown, the question whether there was made in either of those actions any valid attachment upon the property involved here is a material one; for, unless such attachment was made, the defendant Priest is not entitled to subject the fund in controversy here to the payment of either of the judgments obtained by him against Joseph Brown. It is argued by the appellant that the attachment in neither of the actions of Priest v. Brown binds the surplus which afterwards came into existence by the sale of the real property upon which the attachments were previously levied. This contention, although a plausible one upon its first statement, is, in our opinion, not sound. The attachment, at least in the second action of Priest v. Brown, was levied upon the entire interest of the judgment debtor in the land described in the trust deed. If, as the court below found, that land was originally conveyed to the plaintiff by the judgment debtor for the purpose of defrauding the creditors of the latter, and the trust deed was accepted by the San Francisco Savings Union without notice of this fact, then the interest remaining in the judgment debtor, subject to attachment and execution by his defrauded creditors, was the entire interest reserved to the fraudulent grantee by the terms of the trust deed, viz. the right to a reconveyance upon payment of the indebtedness secured by the deed, and, in case of default in its payment, and a sale of the land in accordance with the terms of the trust deed a right to the surplus which might come from the proceeds of the sale after satisfaction of the debt secured. This right so reserved constituted an equitable interest in the land, and it was this equitable interest which was attached by the defendant Priest; and, when the land was subsequently sold under the trust deed, the attachment immediately fastened upon the surplus moneys realized by the sale. The right to recover these moneys in the event of a sale of the land by the trustees was a part of the thing attached in levying upon the entire

equitable interest reserved to the fraudulent grantee by the trust deed. A conveyance by the plaintiff of all his interest in the land attached prior to its sale under the trust deed, would have vested in his grantee, without notice of the rights of the creditors of Joseph Brown, the equitable right to such surplus, (*Eddy v. Smith*, 13 Wend. 488,) and the same right would have passed to a purchaser under an execution sale of plaintiff's interest in the land (*Coats v. Stewart*, 19 Johns. 298;) and, if the right to recover such surplus follows a conveyance of the land out of which the surplus arises, and passes under an execution sale of the land itself, it would seem clear that such right would also be subject to the lien of an attachment levied upon the land, or upon such an interest therein as gives to the owner the right to demand and recover such surplus from the person in whom the legal title may have been vested in trust. "An equity of redemption in real estate is subject to the lien of a judgment. If, before the sale under a decree of foreclosure, the judgment is docketed against the defendant, it would be a lien on the surplus proceeds arising from the sale." 2 Freem. Judgm. (2d Ed.) § 349. And we think it equally true that if, before the sale of the equity of redemption, either under a decree of foreclosure or under a power, a valid attachment is levied upon the equity of redemption, such attachment is a lien upon the surplus proceeds, and they would be subject to be applied, upon execution, to the satisfaction of a judgment in favor of the attaching creditor in the action in which the attachment is issued. If it were otherwise, the lien of an attachment upon such equity of redemption could be defeated by a sale of the property out of which the equity arises, thus destroying the whole object of the attachment, and rendering it entirely barren of any beneficial results to the plaintiff procuring the issuance of the writ. Our conclusion upon this point is that the defendant Priest, by virtue of the attachment proceedings in Priest v. Brown, acquired the right to subject the surplus proceeds arising from the sale of the land attached to the satisfaction of the judgment obtained by him in that action. The attachment of the judgment debtor's interest in the land then standing in the names of his grantee and the trustees named in the trust deed, was, in legal effect, an attachment of the surplus moneys arising from the subsequent sale.

2. The cause of action stated in the cross complaint is not barred by either section 343, or subdivision 4 of section 338, of the Code of Civil Procedure. The defendant's cause of action to subject the fund in controversy, or the property from which it was derived, to the payment of the indebtedness due to him from Joseph Brown, did not accrue at the date of the alleged fraudulent conveyance, but only when he obtained a judgment against his debtor upon which an execution

would issue in this state. The general rule as to the time when a creditor acquires the right to maintain an action to set aside a fraudulent conveyance made by his debtor is thus stated at page 522, second edition, of *Bump on Fraudulent Conveyances*: "No creditor can be said to be delayed, hindered, or defrauded by any conveyance until some property out of which he has a specific right to be satisfied is withdrawn from his reach by a fraudulent conveyance. Such specific right does not exist until he has bound the property by judgment, or by judgment and execution, as the case may be, and has shown that he is defrauded by the conveyance in consequence of not being able to procure satisfaction of his debt in a due course of law. Then, and then only, he acquires a specific right to be satisfied out of the property conveyed, and shows that he is a creditor, and is delayed, hindered, and defrauded by the conveyance." In accordance with this rule, it has been held in this state that the statute of limitations does not begin to run against such an action by a creditor until he has obtained such a judgment against his debtor, because until then he has no right of action. *Forde v. Insurance Co.*, 50 Cal. 302; *Ohm v. Superior Court*, 85 Cal. 545, 26 Pac. 244. Nor would the cause of action then accrue if the creditor had not discovered the facts constituting the fraud upon his rights. *Gates v. Andrews*, 37 N. Y. 657. In construing a statute of the state of New York similar to subdivision 4 of section 338 of the Code of Civil Procedure, as applied to an action by a creditor to set aside a fraudulent conveyance of his debtor, the court of appeals in that state, in the case last cited, say: "It is urged by the counsel for the respondents that the construction of the above clause is that the action shall be deemed as accruing upon the discovery of the fraud by the party aggrieved thereby, whether his right of action is then perfect or not. I think this construction erroneous. The provision is not that the cause shall be deemed to accrue upon such discovery, but to prevent the running of the statute it shall not be deemed to have accrued before such discovery; thereby providing for a class of cases where the right of action was perfect, but became barred by the statute before the discovery of the facts upon which such right depended." The earliest of the judgments referred to in the cross complaint, and sought to be enforced against the money in controversy here, was not obtained until April, 1887, and the cross complaint in this action was filed in February, 1889, less than two years thereafter. It is true that both judgments mentioned in the cross complaint are based upon a judgment obtained in Texas by the defendant against plaintiff's grantor in the year 1884; but the existence of this Texas judgment in favor of defendant did not make the defendant Priest a judgment creditor in this state, within the meaning of the rule which permits only judg-

ment creditors to attack a conveyance by the judgment debtor to defraud his creditors. The Texas judgment created a litigation in favor of the defendant, against plaintiff's grantor, Joseph Brown. It was an obligation which could not be enforced in this state without suit; and, when the defendant recovered his judgment upon here, he occupied only the position of a creditor at large, without any right to subject specific property of his debtor within this state to the satisfaction of the obligation created by such foreign judgment. *Buck v. Marsh*, 17 Iowa, 494; *Crim v. Walker*, 10 Mo. 335; *Claffin v. McDermott*, 12 Fed. Tarbell v. Griggs, 3 Paige, 207.

3. The plaintiff and the intervenor both pleaded, in bar of the right of the defendant Priest to the relief demanded in the complaint, a judgment of the superior court of the city and county of San Francisco entered on November 24, 1888, in the action *Priest v. Brown et al.*, and the said defendant also pleaded the pendency of the cross action in abatement of this. In that action the defendant Priest was plaintiff, and the other parties hereto were defendants. The matters involved substantially the same matters as are alleged in the cross complaint; and the court therein adjudged that the conveyance made by Joseph Brown to the plaintiff in October, 1883, was not made with intent to delay, or defraud the creditors of the grantor. That judgment was not a bar to the matters alleged in the defendant's answer as to the cross complaint, nor to the same matters set out in the cross complaint, and upon which he demanded the relief given him by the court. It had not become final when the cross complaint was filed, nor yet when the action was tried; and the doctrine of *res adjudicata* applies to final judgments. The time for appeal from the judgment of November 24, 1888, had not expired when the cross complaint was filed, and, although no appeal had been taken therefrom, the action was pending within the legal meaning of the term, (Code Civil Proc. § 1049);¹ and the judgment was not a bar to a retrial of the matters alleged in the cross complaint under the rule announced by this court in *Wright v. Barnhart*, 97 Cal. 546, 32 Pac. 108; *Naftzger v. Gregg*, (Cal.) 33 Pac. 757; *Blythe's Estate*, (Cal.) 34 Pac. 108, while the judgment in *Priest v. Brown* was not, for the reason stated, a bar to the cause of action alleged in the cross complaint, still the pendency of that action would have been good ground for the continuance of this action, or would have been a sufficient ground for an order dismissing the present action upon motion of the plaintiff, notwithstanding

¹ Section 1049 provides that an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner set aside.

ing the affirmative relief demanded by the defendant Priest in his cross complaint, and the refusal of the court to have granted either of such motions would, perhaps, have been erroneous; but no such motion was made by the plaintiff, and the trial proceeded without objection, the plaintiff still insisting upon the judgment in Priest v. Brown et al. as an estoppel, and as ground for a judgment in his favor. Under these circumstances we cannot say that the court erred in proceeding to the trial, although it might well have continued the case, of its own motion, until the final determination of the former action.

4. It is claimed that the findings are not sustained by the evidence. We think, however, the case falls within the rule which does not permit us to disturb the findings of the trial court when there is a substantial conflict in the evidence relating thereto. We do not deem it necessary to particularly discuss some of the minor points made in the brief of the attorney for the appellant. We have considered them all, and find no error which would justify us in reversing the judgment and order appealed from. Judgment and order affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.; HARRISON, J.; GAROUTTE, J.

DONNELLS v. MARTIN. (No. 15,465.)
(Supreme Court of California. Jan. 19, 1894.)

Department 1. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by Donnellis against Martin. Judgment for defendant. Plaintiff appeals. Affirmed.

Craig & Meredith, for appellant. J. O. Campbell, for respondent.

PER CURIAM. The findings support the judgment, and there are no specifications of error or insufficiency of evidence. The judgment and order are therefore affirmed.

DUFF et al. v. DUFF. (No. 14,968.)
(Supreme Court of California. Jan. 2, 1894.)

PLEADING—AMENDMENT—NEW TRIAL—EVIDENCE—FINDINGS.

1. After a new trial has been granted, it is not error to refuse permission to file a new answer, which does not present any new issue or defense.

2. On motion for a new trial as to the whole case the court may grant it in part and deny it in part, thereby leaving its former determination upon a portion of the issues to remain.

3. Where the order granting a new trial states that it is ordered as to the issues whether there was a valuable consideration paid by defendant for the property, and whether he is

the owner thereof, and a consideration of the entire order shows that the concluding clause was used as the equivalent of the conclusion of law to be drawn from the finding on the issue of payment of a valuable consideration, the only triable issue is the payment of a valuable consideration.

4. On a new trial it is proper to exclude evidence on the issues formerly determined, and as to which a new trial has not been granted. Beatty, C. J., dissenting.

5. Admissions by a grantee that he held the property in trust for the grantor are admissible to show that he did not pay a valuable consideration therefor.

6. It is proper for the findings, on a trial of the issue for which a new trial has been granted, to set forth the proceedings on the former trial, the subsequent order granting the new trial, and the findings made on the former trial modified by the order, in addition to the finding on the issue tried.

In bank. Appeal from superior court, Humboldt county; Edwin A. Davis, Judge.

Action by Julia K. Duff and another against Robert P. Duff. From a judgment for plaintiffs, defendant appeals. Affirmed.

S. M. Buck, W. C. Belcher, and Horace L. Smith, for appellant. J. H. Gillett, J. G. H. Weaver, L. D. McKisick, and Wilson & Wilson, for respondents.

HARRISON, J. Upon a former trial of this action the court rendered its decision in favor of the plaintiffs for a portion of the property involved, and in favor of the defendant for another portion. Both parties moved for a new trial, and the court below denied the motion of the defendant and granted that of the plaintiffs, limiting the new trial to the determination of a single issue. From these orders, and the judgment against him, the defendant appealed, and this court affirmed the orders and judgment appealed from. 87 Cal. 104, 23 Pac. 874, and 25 Pac. 265. When the cause again came on for trial in the court below, the defendant, Robert P. Duff, asked leave to file an amended answer, which was refused by the court, and this ruling is now assigned as error. The answer which was presented, and which he asked leave to file, did not, however, present any new issue, or any defense to the action, which was not embraced in the original answer, and the court did not err in denying his request to file it.

At the trial the court excluded certain evidence offered by the appellant, and it is now urged by him that under the order for a new trial he was at liberty to offer any evidence which would tend to establish his ownership of the property as to which the new trial was ordered; while, on the part of the respondents, it is claimed that the new trial was limited to ascertaining whether the appellant had paid a valuable consideration for this property. The closing part of the order by which the new trial was granted, as shown by the record before us, is as follows: "The motion of the plaintiffs is granted, and a new trial ordered as to the issue:

Was there a valuable consideration paid for the property conveyed by deed to R. P. Duff in blocks 28 and 51, and is he the owner thereof?" It is claimed by the appellant that in the order itself the word "issue" is written "issues," and the original order has been produced in support of this claim; but, as we view the case, this variance is immaterial. The order itself is in the nature of a "speaking order," inasmuch as it contains matter which is explanatory and illustrative of the mere direction which is given by it. The cause had been tried, and all of the issues of fact found in favor of the plaintiffs, except that the court found that the appellant had paid a valuable consideration for the lands described as being in blocks 28 and 51. Upon the decision thus made the defendant moved for a new trial, alleging as the grounds that the several findings against him were unsupported by the evidence; and in the same order by which a new trial was granted to the plaintiffs as to blocks 28 and 51 his motion for a new trial was denied, and this order was affirmed by this court. It was thus definitely adjudged that William R. Duff was the owner in fee of these blocks in 1863; that Richard Duff entered into the possession thereof as his servant and agent, by virtue of the power of attorney executed to him, and that under this power of attorney he made conveyances of these blocks to Robert P. Duff; that William R. Duff did not in his lifetime, or the plaintiffs thereafter, have any knowledge or information of the said conveyances until within three years before the commencement of this action; and that the plaintiffs' cause of action was not barred by the statute of limitations. The court, in its order granting the new trial as to these blocks, expressed its satisfaction with its previous findings of fact and conclusions of law in every respect except the finding as to the payment of a valuable consideration for the property in these blocks, and expressly declared that all of the findings in relation to the statute of limitations, discovery of facts constituting the fraud, and every issue upon which it was necessary to pass showing the plaintiffs' right to maintain the action, were applicable to these blocks; but was of the opinion that it had not properly weighed the evidence that had been presented upon this question. Accordingly, it granted the motion of the plaintiffs upon the single issue which it had found against them in its decision, viz. the payment of a valuable consideration for the conveyance of these blocks. The right of a party to move for a new trial upon a single issue is well established, (*Town Co. v. Neale*, 78 Cal. 63, 20 Pac. 372;) and, if the motion be made for a new trial as to the entire action, the court may grant it in part and deny it in part, leaving its former determination upon a portion of the issues to remain. This court has frequently remanded a cause with directions to the trial court to

find upon a single issue, leaving the findings to remain as a part of the record. (*Marzlou v. Pioche*, 10 Cal. 545; *So. Dawes*, 14 Cal. 247; *Argenti v. San Francisco*, 30 Cal. 463; *Kinsey v. Green*, 51 Cal. 30; *Glascocock v. Ashman*, 52 Cal. 420; *B. v. Everett*, Id. 661; *Goodlett v. Investment Co.*, 94 Cal. 303, 29 Pac. 505; *T. Association*, 98 Cal. 285, 33 Pac. 63.) A trial court has the same right in this respect before an appeal as this court has after an appeal to limit the scope of a new trial, the affirmance by this court of such a decision establishes the correctness of the order in the individual case.

The closing part of the order, "and the owner thereof," is not to be regarded as an additional issue of fact to be also tried anew by the court. While owners' issues, sometimes called an issuable fact, it is a mere conclusion of law, dependent upon the actual facts in the case; and the circumstances under which the term was here used show that such is the interpretation to be placed upon it. If the entire question of ownership in these blocks was to be investigated, the direction for a new trial as to the payment of a valuable consideration therefor was unnecessary and meaningless, for if the appellant was to be at liberty to establish a title in himself, independent of such payment, or to show that he had become the owner through another source, by means of such payment upon the conveyance to him from Richard Duff, it was for the court to direct a new trial upon the issue. A consideration of the entire order shows that this closing clause was used by the court as an equivalent of the conclusion of law to be drawn from the finding of fact that should be made upon the evidence. It might be presented on the issue of payment of a valuable consideration.

The evidence which the appellant introduced was not only irrelevant to the issue of payment before the court, but did not tend to establish any ownership in him. The value of this property at the time of the conveyance to him, or of the plaintiff whose title was determined at the trial, as well as the fact that the plaintiff had received the benefit of certain payments not involved in the litigation, was irrelevant to any question of ownership, and could have tended to establish any ownership in the appellant. Whether William R. Duff was indebted to his father in an amount greater than the value of the property at the time it was conveyed to Robert P. Duff was also irrelevant for the purpose of establishing ownership. The statement by the appellant in his offer to make such proof of his indebtedness "still exists" was proof of the proposition that it formed no consideration for the conveyance, or that the value of this property had been applied to part payment upon that indebtedness. It did not appear that the indebtedness

valid, existing obligation against William R. Duff; and the note which was offered in proof thereof by its terms had long since been barred by the statute of limitations. The offer by the appellant to show that he had been in adverse possession of these blocks since 1869 was inconsistent with his previous testimony that he did not take such possession until after the death of his father in 1874, but a sufficient reason for excluding this testimony was that this issue of the statute of limitations had been passed upon at the former trial, and was not now open for investigation. The same observation may be made upon the offer to show that William R. Duff knew about the transfer of these blocks from his father to the appellant. The court properly excluded the offer to show this fact by the deposition of Charles Duff, for the reason that the property in question was not conveyed until after the alleged interview between him and William R. Duff.

The court did not err in receiving the deposition of Ryan. His testimony that the appellant had admitted to him that he held the property in trust tended to show that he did not pay a valuable consideration for it.

After the trial upon the issue for which the new trial had been granted, the court, in making its finding thereon, set forth the proceedings upon the former trial, and the subsequent order of the court granting a new trial, and to the findings that had been made upon the former trial, as modified by the aforesaid order, added its own finding upon the issue tried by it. There was nothing improper in this action of the court. As several of the findings upon the former trial were applicable to the property involved in the subsequent trial, and had been affirmed by both the trial court and this court, it was a matter of convenience that all the findings which related to this property should be placed together, in order that the entire record, including the judgment to be entered thereon, might be more readily examined and understood. If instead of so doing the court had merely found upon the issue upon which the new trial had been granted, the legal effect and result would have been the same, for the conclusion of law to be drawn and the judgment to be entered in the case would not depend upon such finding alone, but would find their support in the entire record. Whichever course the court should adopt would be immaterial, so far as the rights of the parties are concerned, but for the sake of convenient reference the course adopted by the court is preferable. The objection that the other findings were not supported by any evidence at the last trial is trivial, and merits no consideration, as the court expressly states that it adopts the said facts found by the judge from the testimony introduced in the action at the former trial as findings of fact herein, so far as the same are applicable to this property. See Chand-

ler v. Bank, 73 Cal. 320, 11 Pac. 791, and 14 Pac. 864. The judgment is affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; FITZGERALD, J.; PATERSON, J.

DE HAVEN, J., being disqualified, did not participate in the foregoing decision.

BEATTY, C. J., (dissenting.) With respect to most of the points discussed in the foregoing opinion I concur in the conclusions of the court, but upon one proposition I am obliged to dissent. The findings made on the former trial of the case upon the issues arising under the plea of the statute of limitations do not, as I construe them, apply to those lots (in blocks 28 and 51) as to which the judgment was in favor of defendant, and as to which a new trial was ordered; and therefore I think it was essential to make such findings on the last trial in order to sustain a judgment against the defendant as to those lots. If I am correct in this view, the trial court erred in excluding the evidence offered by the defendant relating to those issues. It is no doubt true that the evidence adduced at the former trial would have sustained findings against the plea of the statute as fully with respect to blocks 28 and 51 as with respect to the other tracts, and the terms of the order granting a new trial show very clearly that the trial judge would have made such findings applicable to all the lots if he had deemed it material. But in fact they were not so made by their terms, and I am satisfied that the judge had no power to extend their operation by his order granting a new trial. I am the more inclined to give weight to this objection because I have never been able to concur in the decision against the defendant upon the questions affecting the integrity of the original transaction out of which the litigation has arisen, and because I am convinced from reading the opinion of the judge who presided at the last trial that he decided the issue to which he confined the evidence—the question, that is to say, whether the defendant paid a valuable consideration for the lots in blocks 28 and 51—not upon his own unbiased views as to the effect of the evidence before him, but upon a mistaken view as to the effect of the judgment of this court affirming the order granting the plaintiffs a new trial. 87 Cal. 104, 23 Pac. 874, and 25 Pac. 265. He seems to have held that, because the evidence on the last trial was substantially the same as that upon which this court sustained the order for a new trial, he was therefore bound by our decision to find the issue against the defendant; but our judgment had no such effect. When a new trial has been ordered by the superior court of an issue as to which the evidence is conflicting, this court affirms the order, even though the evidence may appear

to preponderate in favor of the findings vacated by the order; and the effect in all cases is to leave the superior court free to find the fact according to its own independent view of the weight of the evidence, whether it is the same or different from that given at the former trial. The result of this erroneous view of the effect of our former judgment has been to deprive the defendant of a fair trial of the question which most directly involves the whole merits of the controversy. For these reasons I dissent from the judgment.

RANDALL v. DUFF et al. (No. 15,253.)
(Supreme Court of California. Jan. 6, 1894.)

JUDGMENT—RES JUDICATA.

An attorney in fact, without consideration, conveyed land to D., who mortgaged it. The true owners sued D. to set aside the conveyance, and filed a lis pendens. Afterwards, the mortgagee foreclosed without making such owners parties, and R. bought the land, and obtained a deed. He then sued to quiet title against such true owners, and they filed a cross bill, asking to be allowed to redeem. *Held*, that the final findings and judgment in the suit by such owners against D. were conclusive against R., though neither he nor the mortgagee was a party to it.

In bank. Appeal from superior court, Humboldt county; E. A. Davis, Judge.

Action by A. W. Randall against Julia K. Duff and Agnes Duff, heirs at law of William R. Duff, deceased, and William L. Duff, administrator, to quiet title. From a judgment for defendants, plaintiff appeals. Modified and affirmed.

S. M. Buck and W. C. Belcher, for appellant. E. W. McKinstry, Crittenden, Foote & Van Wyke, and L. D. McKisick, for respondents.

BEATTY, C. J. The opinions delivered upon a former appeal herein (see 79 Cal. 115, 19 Pac. 532, and 21 Pac. 610) contain a sufficient statement of the nature of the controversy. The facts of the case of *Duff v. Duff* (which is inseparably connected with this case) will be found fully set out in an opinion just filed disposing of the third appeal in that case, (35 Pac. 437,) and in the reports of the two former appeals, (71 Cal. 513, 12 Pac. 570, and 87 Cal. 104, 23 Pac. 874, and 25 Pac. 265.) By our former judgment herein the cause was remanded for a new trial, which has been had, resulting in a judgment for the defendants, from which the plaintiff appeals.

The last trial took place subsequent to the affirmance by this court of the judgment and orders under review on the second appeal of *Duff v. Duff*, 87 Cal. 104, 23 Pac. 874, and 25 Pac. 265, and the principal errors assigned by the plaintiff in support of his present appeal are based upon the several rulings of the superior court, to the effect that the judgment and findings given

and made on the second trial of *Duff v. Duff* and affirmed here, as above stated, were admissible in evidence and conclusive against him. It is contended that these rulings are erroneous, because this plaintiff was not a party, and is not in privity with any party to *Duff v. Duff*. It is true he was a party to that action, and equally true there was no reason for making him a party, unless, after his acquisition of R. P.'s interest, he had chosen to come in as a defendant. When the action was commenced, neither he nor the mortgagees under whom he claims had the slightest interest in the controversy, which involved nothing more than the question of ownership of the mortgaged premises, subject to their liens. There was no more interest in the result of the controversy than they would have had in a subsequent conveyance of the mortgaged premises by the mortgagor to a third party, and no more right to control or influence the issue than they would have had to prevent such conveyance. The court in that action was dealing only with the right of redemption, and, the validity of their liens being unassailed, it was no concern of the mortgagees which of the contending parties should be adjudged the owner. If that controversy had been concluded by a final judgment in favor of the plaintiffs before the foreclosure proceedings, (as it has been since,) it scarcely could have been contended that the mortgagees could have compelled the plaintiffs to bring foreclosure suits to retry in every suit all the issues which had been fully litigated and finally determined in their favor against the mortgagor. To any claim of the mortgagor to do so the obvious answer would have been that a decree for the sale of the interest of both sets of contending parties, and a proper application of the proceeds, was all the relief to which the mortgagees were entitled, so far as the mortgaged premises were concerned; and, as to the surplus proceeds of the sale, as to the right of redemption, the decree in *Duff v. Duff* was conclusive, being a determination between the only parties interested, as this would have been so in the case supposed, it must be equally so in the case it is, for, as to the right of redemption, the plaintiff claims and can claim only through Robert P. Duff, and that by title subsequent to the commencement of the action of *Duff v. Duff* and notice of lis pendens.

The doctrine upon which the plaintiff relies to carry the inception of his title beyond the commencement of the action of *Duff v. Duff*, and to the date of the mortgage, has no application to this case, may be true that the title of a purchaser at a foreclosure sale relates back to the mortgage as against the parties to the foreclosure, but it does not cut out the title of a subsequent purchaser, or the lien of a subsequent encumbrancer by recorded conveyance, has not been made a party. On the

appeal of this case we decided that these defendants held substantially the same relation to the mortgagees as a subsequent grantee by recorded conveyance, and to cut off their right of redemption it was equally essential to have made them parties to the foreclosure suits, which was not done. If they had been made parties, this long controversy need never have arisen. Their interest in the land, as well as that of Robert P. Duff, would have passed by the foreclosure sale; and, unless a redemption had been made within six months, the absolute ownership would have vested in the purchasers as of the date of the mortgages. Or, if a redemption had been made, the purchasers and the mortgagees would have had their money, with interest and costs; everything, in short, to which they or either of them had any vested right at the date of the filing of notice of lis pendens in *Duff v. Duff*; and it would have made no sort of difference to them whether the redemption was made by one or the other of the parties to the action of *Duff v. Duff*. Whoever redeemed, they would have got all they were entitled to receive. But for some reason the mortgagees of R. P. Duff omitted to make the successors of William R. Duff, of whose claim to the ownership of the mortgaged premises they had at least constructive, and therefore legally sufficient, notice, parties to their foreclosure suits; and whether this omission was due to want of actual knowledge of the matters being litigated in *Duff v. Duff*, or to a deliberate choice, founded upon whatever motives, the inconvenient consequences must fall upon those to whose fault the omission was due, and not upon innocent parties. Among the consequences of the omission to make the successors of William R. Duff parties to the foreclosure of the Ritchie and Fiebig mortgages was the necessity of prosecuting another action in some form to bar or determine their right of redemption; and the present action by the purchaser under the foreclosure proceedings, though in form an action to quiet title, is in effect nothing more nor less than a suit to foreclose the mortgages as against the plaintiffs in *Duff v. Duff*, just as their cross complaint is in effect a suit to redeem.

In the form which the litigation assumed through the mistake or choice of the plaintiff and his predecessors he was subjected to the necessity of relitigating in this action the validity and amount of the mortgage liens, but the mortgagees could not by their disregard of the regular procedure for the enforcement of their rights compel the defendants to relitigate with them or their successor, in what is practically another suit to foreclose their mortgages, the rights finally determined in the action of *Duff v. Duff*. As to all the rights involved in that action plaintiff is the successor of Robert P. Duff, with notice of lis pendens, and a judgment that binds his grantor is equally binding upon him. The

fault of his argument on this branch of the case is that it ignores the double relation in which he stands to the premises in controversy. To establish his right he must show himself the successor of the mortgagees, and also of the owner of the land, or right of redemption. As to the latter, he has nothing to rely upon except a proceeding which undoubtedly vested him with whatever interest Robert P. Duff had; but it has been determined in an action between Robert P. Duff and the defendants, of the pendency of which he and his predecessors had notice before the commencement of the proceedings under which he claims, that Robert P. Duff had no title, and that what was apparently his property was, in fact, the property of the defendants. As to the interest so litigated, the judgment and finding are necessarily conclusive, not only upon Robert P. Duff, but upon all who claim under or through him by virtue of such proceeding. We do not find anything in the decisions cited by appellant in support of his contention which is not easily reconcilable with what has been said upon the points discussed, and the propositions laid down are of such an elementary character that we do not deem it necessary to cite the authorities which support them. For the reasons given we do not think the court erred in any of its rulings upon the effect of the judgment and findings in *Duff v. Duff*, or in admitting (under the stipulation of the parties) the testimony given by R. P. Duff in that action, or the testimony of Ryan.

The second principal assignment of error relates to the rulings of the court construing and applying the order granting a new trial to the plaintiffs in *Duff v. Duff* upon a single issue. All the questions presented by this assignment have been settled by the recent decisions filed in *Duff v. Duff*, 35 Pac. 437, which involved substantially the same questions, and it must be held upon the authority of that case that the superior court did not err in any of these rulings. The same may be said of the rulings referred to in the third specification of error. Substantially the same rulings were considered and approved in *Duff v. Duff*, and can no longer be questioned.

The remaining specifications of error relate to that part of the interlocutory and final decrees in regard to the accounting. With respect to these matters we cannot say that the findings as to the various items and amounts debited to the respective parties are unsupported by the evidence, or that the charge against plaintiff for rents that he might have realized by proper management of the property after it came into his possession was unauthorized. He was not a mortgagee in possession, and was not entitled to the benefit of the rule applicable to that case. So far as relates to his possession of the property, he stood in the shoes of R. P. Duff, and is accountable to the defendants for the rents and profits to the same extent that Duff

would have been. But plaintiff was also the successor to the mortgagees, and entitled, as against the defendants, to receive all that was equitably due on the mortgages, including interest on the amount secured up to the date of payment or tender. The superior court allowed him interest on said amount, and other sums with which he is credited only up to March 15, 1885, the date of the filing of the cross bill, upon the ground that it contained a sufficient tender by defendants to stop interest. We do not think, however, that anything contained in the cross bill amounts to a sufficient tender or offer to redeem to stop interest, and therefore we think the court erred in not allowing interest to the plaintiff on the amounts credited to him down to the date fixed by the decree for computing the interest on defendant's credits; wherefore the judgment of the superior court is affirmed in all respects except as to this matter of interest, as to which the judgment is reversed, and the cause is remanded to the superior court with directions to amend its decree by allowing interest to the plaintiff down to March 1, 1892, and by reducing the judgment against him correspondingly.

We concur: HARRISON, J.; McFARLAND, J.; GAROUTTE, J.; PATERSON, J.; FITZGERALD, J.

DE HAVEN, J., being disqualified, did not participate in the foregoing decision.

PARK & LAOY CO. v. WHITE RIVER LUMBER CO. et al. (No. 18,205.)

(Supreme Court of California. Jan. 5, 1894.)

SALE OF PERSONAL PROPERTY — WHEAT CONSTITUTES — "LEASE" — REPLEVIN — WHEN MAINTAINED.

1. Where the owner of personal property delivers it to another under a writing called a "lease," whereby the title is to remain in the "lessor," and the "lessee" agrees to pay, at a time named, a certain sum as "rent," and providing that, in case of failure to pay such sum at the time specified, any sum paid shall be forfeited, and the "lessor" be entitled to take possession of the property, but that on payment of such sum the title shall pass to the "lessee," the transaction is a sale, and not a lease.

2. Where personal property is delivered to the purchaser under a conditional contract of sale, whereby the seller, on failure of the purchaser to pay the purchase price, may recover the property, an action and recovery of judgment by the seller on the purchase-money note is a confirmation of the sale, and he cannot thereafter maintain an action to recover the property.

Department 1. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by the Park & Lacy Company against the White River Lumber Company and Warren D. Parson to recover possession of certain personal property. From a judgment for plaintiff, and from an order

denying a motion for a new trial, ants appeal. Reversed.

J. A. Hannah, for appellants. BR Farnsworth and H. A. Powell, for ent.

GAROUTTE, J. This is an action to cover possession of certain personal property or its value. Defendants appeal the judgment, and order denying a for a new trial. Plaintiff, being the owner of certain personal property, consisting of certain personal property, consisting of machinery, etc., gave to defendants, the substantial portions of which are described as follows: "Lease. The Park and Lacy Company, of San Francisco, Cal., lessors, lease unto the White River Lumber Company and Warren D. Parson, of Tulare county, Cala., lessees, the following property for the period of nine months from the day of June, 1889, to wit: [Then follows description of the property.] Said property is to be used only at Arbor Vitae, Tulare county, state of California, and said lessees are to pay to said lessors, at San Francisco, for the use of said property, the sum of \$3,064, payable as follows: All on the day of March, A. D. 1890. Said lessees agree that they will pay the rent at the time in the manner aforesaid. * * * If either agreed that time is of the essence of this agreement, and, upon a failure of the lessee strictly to keep and perform the covenants or provisions hereof by him agreed to be performed, then and there, without any notice, this instrument shall be deemed to be canceled, and of no effect as against lessors, and all rights of interest of lessee in or to said property shall cease; and all rent by lessee then paid shall belong to lessors as full payment for the prior use of said property, and lessors shall be entitled to take unto the session all of said property. Said lessees further agree that, upon strict performance by lessee with all the foregoing covenants and provisions by them to be kept and performed, they shall (but not otherwise) have the right to purchase said property by prompt payment to lessors of the sum of \$3,064." During the progress of the respondent's counsel admitted that the \$3,064 referred to in the last clause of the contract was the same sum of money as was to be paid as rent, and that, upon payment of said sum, the title to the property would pass to defendants; and, it is fairly apparent from the writings that this sum of money was not paid at the time agreed upon, and subsequently the action was brought to secure possession of the property.

The nature of the judgment to be rendered in this case is determined entirely by the construction to be given the writings which we have quoted. In addition to the writing, upon the same date a mortgage was given to plaintiff by one Hilton, upon

real estate, to secure a promissory note for \$650, payable by defendants to plaintiff, and also to secure the sum of \$3,064, specified in the so-called "lease." This paper was not a lease. Calling it a lease did not establish the fact. This is peculiarly a case where there is nothing in a name, for the contents of the paper determine its true character. It is said in *Heryford v. Davis*, 102 U. S. 235: "What, then, is the true construction of the contract? The answer to this question is not to be found in any name which the parties may have given to the instrument, not alone in any particular provisions it contains disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account." That the writing is not a lease is settled beyond all dispute by the one fact that, upon the payment of the amount stated in the contract, the title was to pass irrevocably to defendants. This contract either transferred the title of the property to defendants, and thus is a sale, perfect and complete, or it is a conditional sale; and, as to the character of the judgment which should be rendered, it is immaterial which of these constructions be placed upon it. If it was an absolute sale at the time it was entered into,—and the fact that a mortgage was given to secure the amount therein specified (which was nothing less than the purchase price) is strongly indicative that such was its legal effect,—then plaintiff has no title in the property, and no right to its possession. If it was a conditional sale, the transfer of title being dependent upon a payment of the purchase price, plaintiff still is not entitled to recover, for the following reason: Several months prior to the commencement of the present action, plaintiff brought suit against these defendants and Hilton, mortgagor, to recover upon the aforesaid note, and also to recover the said sum of \$3,064, and asked that the real estate mortgaged to secure these amounts be sold, etc. That case went to trial upon issue joined, and, as appears by the opinion of the judge, while a foreclosure of the mortgage was denied, judgment was ordered against these appellants for the full amount claimed by the complaint. The course thus pursued by plaintiff defeats its rights in the present action, if the writing be construed as a conditional sale. If the money had been paid as agreed, the title would have passed to defendants; and, the money not being paid as agreed, the plaintiff could either recover the property or sue for the purchase price. But the pursuit of one remedy necessarily excluded the other. It was not entitled both to the purchase price and the property; and an action brought to recover the purchase price, as was done in this case, is a ratification of the sale. This principle is forcibly put in *Bailey v. Hervey*, 135 Mass. 174:

"They could not treat the transaction as a valid sale and an invalid one at the same time. If they reclaimed their property, it must be on the ground that they elected to treat the transaction as no sale. If they brought an action for the price, they would thereby confirm it as a sale. Two inconsistent courses being open to them, they must elect which they would pursue, and, electing one, they are debarred from the other. Reclaiming the goods would show an election to forego the right to recover the price; but, instead of reclaiming the goods in the first instance, they brought an action against Bailey for the price, made an attachment of his property by trustee process, entered their action in court, and he was defaulted. They were thereupon entitled to judgment against him. * * * They had thus made a decisive election to treat the transaction as a sale before reclaiming the goods, and under such an election the title passed to Bailey." See, also, *Butler v. Hildreth*, 5 Metc. (Mass.) 49. For the foregoing reasons, it is ordered that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: PATERSON, J.; HARRISON, J.

HOWELL v. HOWELL. (No. 18,250.)
(Supreme Court of California. Jan. 20, 1904.)

APPEAL—DISMISSAL—GROUNDS.

An appeal regularly taken should not be dismissed on respondent's motion merely because there is no bill of exceptions embodying the evidence on which the trial court acted, as the lack of a bill of exceptions is ground rather for a judgment of affirmance.

In bank. Appeal from superior court, Tehama county; E. A. Bridgford, Judge.

Action by Elizabeth Howell against J. W. Howell for divorce. Plaintiff obtained judgment by default, and thereafter filed a supplemental bill for alimony. From an order granting alimony, and from orders striking out the answer, and refusing to permit defendant's counsel to cross-examine plaintiff's witnesses, defendant appeals. Plaintiff moves to dismiss the appeal. Motion denied.

L. V. Hitchcock and A. M. McCoy, for appellant. Chas. G. Nagle, (W. Henry Jones, of counsel,) for respondent.

BEATTY, C. J. This is an action by a wife for a divorce on the ground of desertion. Defendant, being absent from the state, was not personally served with summons, but, upon substituted service and his default, judgment was given in September, 1890, dissolving the marriage, awarding to the plaintiff the custody of the minor children, and setting apart to her use all the community property in California. More than a year after the entering of this judgment,—in December, 1891,—the defendant

having come within the state, the plaintiff filed a petition in the nature of a supplemental complaint, setting forth that the defendant was possessed of a large amount of property in Idaho, the proceeds and increase of community property which he took with him at the time he deserted her, and praying for an order upon him to show cause why he should not be required to pay her permanent alimony, counsel fees, etc. Such order having been made, and served upon the defendant, he appeared and demurred to the petition, and, his demurrer being overruled, afterwards filed an answer. Pending the hearing, other orders were made by the court,—one requiring the defendant to give security for the payment of any judgment that might be recovered against him, and another directing him to appear before a notary and give his deposition. For disobedience of the latter order his answer was stricken out by one order, and by another his attorneys were debarred from cross-examining the witnesses produced by the plaintiff at the hearing of her petition. After an ex parte hearing the court made an order or decree requiring the defendant to pay to the plaintiff \$100 per month permanent alimony. From this order or decree, and also from the orders striking out his answer and debarring his attorneys from cross-examining the plaintiff's witnesses, the defendant has appealed, and the plaintiff now moves to dismiss the several appeals because there is no bill of exceptions embodying the papers and evidence upon which the superior court based its action.

When an appeal has been regularly taken from an order of the superior court, the lack of a bill of exceptions embodying and authenticating its proceedings is not a ground for dismissing the appeal, but rather for a judgment of affirmance, if, as is usually the case, there is, in the absence of such bill of exceptions, nothing in the record upon which the action of the superior court can be properly reviewed. It is true, this court has in such cases sometimes granted a motion to dismiss, the effect of the order being the same as a judgment of affirmance. This motion, however, presents an occasion for calling attention to the essential difference between a case in which the applicant has failed to take the proper steps for bringing his appeal before the court, when only the respondent has the right, under our rules, to make a motion to dismiss, and a case in which the appellant has, or is supposed to have, failed to make a record which, on being looked into, will disclose error in the judgment or order appealed from, when a motion to dismiss by the respondent is simply an effort to advance the hearing of the cause on its merits. In such cases the court has, as above stated, sometimes granted the motion when it was very apparent that the record before us was insufficient to enable us to review the errors assigned. But the present case is not of that sort. The prin-

cipal order appealed from is in form, substance, and effect a judgment, and intended by the appellant that it may be viewed, and must be reversed, upon the merits roll. The questions presented are free from difficulty, and involve the merits of the appeal. We are, therefore, inclined to consider them on this motion in advance of other cases entitled to precedence. Motion denied.

We concur: McFARLAND, J.; DE HART, J.; PATERSON, J.; HARRISON, J.

BURBANK v. DENNIS. (No. 19.)
(Supreme Court of California. Jan. 11.)
DECEIT—CORPORATIONS—LIABILITIES OF OFFICERS TO STOCKHOLDERS—EVIDENCE—TESTIMONY OF STENOGRAPHER.

1. Promoters of a corporation, who represent that the price paid by the corporation for property conveyed by them to the corporation is the cost thereof to themselves, and to the stockholders for their profits in the transaction, though the property is worth the price paid by the corporation.

2. Under Code Civil Proc. § 2047, a witness to refresh his memory as to the facts by anything written by himself at the time of the fact occurred, where a party examined before trial failed to sign his deposition, a stenographer who took the evidence may refresh his recollection from his transcript of the notes, and testify as to the statements made by such party.

Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge. Action by A. L. Burbank against John P. Sanborn, Frederick D. Sanborn, and L. W. Dennis and others. From a judgment of the superior court, plaintiff, defendant Dennis appeals. Affirmed.

Wells, Monroe & Lee and W. P. Gifford, attorneys for appellant. Wilson & Lamme, attorneys for respondent.

GAROUTTE, J. The plaintiff, as holder of the San Gabriel Valley Land & Water Company, a corporation, brought this action against L. W. Dennis, John P. Sanborn, Frederick D. Sanborn, and the San Gabriel Valley Land & Water Company to recover a large sum of money, claiming that the same was the property of the corporation, unlawfully held by defendant, and that the same was recovered for the sum of \$100,000 and interest, and this appeal is presented by defendant Dennis from the judgment of the superior court denying his motion for a new trial.

The following allegations of the complaint give a general idea of the cause of action relied upon to support the recovery: During or about the month of March, 1901, the defendants L. W. Dennis, John P. Sanborn, and Frederick D. Sanborn entered into an arrangement and agreement, as promoters, for the purpose of organizing a said defendant corporation, with a view to purchasing certain lands in the said

of Los Angeles, which said lands were to be, after the organization of said corporation, conveyed to the same for the purpose of selling the same, and in which corporation the said defendants Dennis and the Sanborns were to become interested as stockholders. That the said defendant Dennis and the said Sanborns proceeded to procure contracts of purchase, as aforesaid, of the said lands from the various owners of the same, and did so contract with Story, Stetson, and Hall for about 240 acres, with one Ames for about 200 acres, with one J. N. Clapp for about 70 acres, with L. L. Bradbury for about 200 acres, with one Gibbs for about 170 acres, with L. H. Titus for about 200 acres, and with James Ford for about 50 acres, and, according to the terms and conditions of the said various contracts, specified parts and portions of the purchase price of the same were to be paid in cash, and certain other parts and portions of such purchase price were to be deferred, and were to be paid with certain specified rates of interest. That, at all times while the said defendants were procuring the said contracts for the purchase of said lands, they represented to the plaintiff and other of the proposed stockholders of the proposed corporation that they were acting for and on behalf of all the parties interested, or to become interested, in the said venture, and who were to become stockholders of such proposed corporation, and at all times held themselves out as the agents of the said proposed stockholders, who were the parties furnishing the money necessary for the purchase of the said lands." The complaint further alleges that \$200,000 was paid to Dennis and Sanborn by the prospective stockholders of the corporation defendant, and that contracts and deeds to these various parcels of land were taken in the name of John P. Sanborn, and partial payments made thereon from the aforesaid money. It is further alleged that, after the incorporation, the lands were conveyed to said corporation defendant, and Dennis, for himself and his associates, the Sanborns, reported to said corporation that they had paid, on account of the purchase price of said lands, \$193,666.62, when in truth they had paid but \$97,666.62. Plaintiff asks judgment for the difference between the amount actually paid by said Dennis and the amount which he reported to the corporation that he had paid upon the purchase price.

As a salient point in the case, it must further be borne in mind that the contract price at which the syndicate of buyers, that was subsequently merged into the defendant corporation, was to take these various pieces of realty, was the lump sum of \$537,000; and the amount alleged to be retained by the defendants in no way affected the amount of the gross sum to be paid by the corporation for the lands, for the entire sum of \$193,666.62 was charged to Dennis upon the purchase price of \$537,000. But it is claimed

that the lands actually cost but \$442,000, and consequently the defendants (agents) retained of the corporation's money the overplus, amounting to \$95,000. The fact that partial payments, only, were made upon the various tracts, and that the deferred payments were secured by mortgage upon the land, seems to be entirely foreign to the matter under consideration, and, as to the principles of law here involved, the case as made by the complaint stands before us exactly as though it were a cash transaction throughout, the corporation, acting through its agents, buying lands and paying \$537,000 therefor, when the actual cost was only \$442,000, the agents absorbing the difference. There is no question but that the foregoing facts outline a sound cause of action, and, if the findings of the court and the evidence are in line with such theory, then plaintiffs should recover.

The findings of fact are considerably broader than the allegations of the complaint; but there is no substantial variance between the theory upon which the complaint is formulated and the theory upon which the recovery is had, as evidenced by the findings of the court. Upon inspection it is readily perceived that they rest upon the same general lines. Even conceding that the complaint relies for a judgment upon false representations as to the amounts of first payments made, and that the findings tend to indicate a recovery upon the theory of false representations as to the original cost price of the property, yet it is practically the same thing. If the corporation was bound in law to pay \$537,000 for the property, then it was bound in law to pay \$193,666.62 when it did pay it. By both complaint and findings the fraud of Sanborn and Dennis practiced upon the prospective stockholders and the corporation is the keystone of the situation. Not alone the fraud practiced is the material element in both complaint and findings, but it is fraud practiced by the defendants as the confidential agents of the parties complaining. Both complaint and findings assert a violation of confidential relations, and a betrayal of the trust reposed in defendants by the parties dealing with them. The measure of damages relied upon in the complaint and recognized by the judgment is the same, and we think that the presence of a substantial variance, as contended for by appellant's counsel, is not apparent.

We now pass to a consideration of the evidence, the findings, and the general principles of law bearing on a question of the character here presented. Frederick D. Sanborn was not served with summons, and the only appellant in this case is L. W. Dennis, with whom alone we are called upon to deal. Some embarrassment arises from the fact that these various tracts of land, during the pendency of the negotiations which led up to the formation of the corporation, were valued in entirety at the lump sum of \$537,000, and no valuation was placed upon them

in severalty; and it was not until after the formation of the corporation, and at the time when Dennis made his report to the corporation showing the application of the \$193,666.62, that any definite idea was had by the stockholders as to the valuation of this realty by parcels, and those valuations, it appears, were arbitrarily placed by Sanborn or Dennis, or both, in that report. From the general conduct of the original negotiations by the investors of this large sum of money, it is apparent that land speculation was rife in Los Angeles county in those days, and haste in the culmination of this transaction was exercised at the expense of future trouble and embarrassments, which a little care, and a little less haste, would readily have averted. We will summarize some of the facts which are beyond dispute: Dennis was a real-estate agent selling on commissions; Sanborn was a speculator in land, of moderate means. Upon March 11, 1887, Sanborn, for himself and various relatives and friends, purchased the Stillson and Hall tract of land for \$26,000, and took the deed in the name of his nephew, Frederick D. Sanborn. Upon April 4th he entered into a contract of purchase of the Clapp tract for \$20,000,—\$1,000 cash; the papers being placed in escrow to await the examination of title. Upon April 5th he entered into a contract to purchase the Ames tract for \$60,000, paying thereon \$5,000. Upon April 9th he entered into a contract of purchase of the Gibbs tract for \$51,000, and paid thereon \$5,000. At about the same time he procured either written or oral options for short periods upon the Ford and Bradbury tracts; but no contracts of purchase were entered into, no moneys paid, and the lands finally passed to the corporation at cost price; hence they are not involved here. Sanborn, about this time, also procured an oral option for 30 days upon the Titus tract for \$187,000. As to the Stillson and Hall tract and the Clapp tract, Dennis was a stranger, but at least as to some of the other tracts he was an agent of the owners in these negotiations, and probably was also working in the interest of Sanborn. Sanborn was securing these lands for speculative purposes, with the intention of interesting eastern capitalists therein; but about the 20th of April Dennis suggested that home capitalists would interest themselves in the venture. The suggestion was acceptable, and thereupon negotiations with various parties began, which culminated, on the 30th day of April, in a written agreement. In this agreement Dennis, Sanborn, and the other prospective stockholders of the corporation, in consideration of \$1 received each from the other, agreed to purchase these lands for \$537,000, and to expeditiously organize a corporation to handle them. The interest of each party in the venture was specified therein, Sanborn taking a one-fourth interest, and Dennis a one-fifth. Dennis appears to have been the mov-

ing spirit in the negotiations during times, although Sanborn was near the agreement itself being drawn up. Sanborn in his testimony claims that from the 20th day of April, Dennis was acting for these home capitalists, while Dennis insists that he was acting for all parties concerned, except for himself. About the 5th of May, Dennis determined that \$200,000 would be immediately to make first payments to keep alive Sanborn's contracts, options, and soon thereafter that amount was paid to Dennis to be applied for the purposes. The corporation was first organized upon the 20th day of May. About June the 1st, Dennis reported that he had paid \$193,666.62 to Sanborn upon the lands; and in this report the amount that had been applied upon the purchase of each tract, and also the amount of the deferred payments upon each tract when due, were separately stated. The position by Dennis of this \$193,666.62 is the present litigation.

Cook, Stock, Stockh. & Corp. Law referring to the promoters of a corporation says: "A promoter is one who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise in procuring subscriptions, and setting on foot the machinery which looks to the formation of a corporation. A promoter is considered in law as occupying a fiduciary relationship towards the corporation. This definition is approved in *Water Co. v. Stock*, 97 Cal. 610, 32 Pac. 600. As to evidence arising subsequent to April 20th, the question but that these defendants, Sanborn and Dennis, stood in the position of promoters of the corporation that was subsequently organized. That these defendants were promoters is well evidenced by the facts already stated, and numerous circumstances which it is not necessary to detail. Appellant especially fills the position of a promoter in every respect. He himself testifies that, as to all the lands done and said by him looking toward the transfer of this land, he was the agent of his codefendant Sanborn; and upon appeal we must agree with him as to this. It appears to be conceded by appellant and respondent that the litigation upon the facts of this case is governed by the opinion in *Densmore v. Co.*, 64 Pa. St. 43; and the application of the principles of law there declared to the facts of this case furnishes the legal solution to the present litigation. In that case it is said: "There are principles applicable to all partnerships and joint ventures for a common purpose of business, which appear to be well supported by reason and authority. The first is that each man or number of men, who are the

of any kind of property, real or personal, may form a partnership or association with others, and sell the property to the association at any price that may be agreed upon between them, no matter what it may have originally cost, provided there is no fraudulent misrepresentation made by the vendors to their associates. They are not bound to disclose the profit which they may realize by the transaction. * * * The second principle is that where persons form such an association, or begin or start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers, and it is not competent for any of them to purchase property for the purpose of such a company, and then sell it at an advance, without a full disclosure of the facts."

The first interrogatory that necessarily presents itself to our consideration is, was Sanborn the owner of these various tracts of land upon April 20th?—that being the date of the inception of the negotiations which terminated in the creation of the corporation, and the date from which the defendants occupied a position of trust and confidence towards those who subsequently became the stockholders of the corporation. As to the Titus tract, Sanborn was in no sense the owner of it. He had not paid a dollar towards its purchase, and had no word of writing to indicate any interest therein. It was bought with the corporation's money, and all transactions pertaining to the sale of it occurred subsequent to the said 20th day of April. The profit of \$25,000 charged to the corporation upon this tract is not justified in the law, and the corporation has been injured to that extent. It must be conceded that the Hall and Stillson tract, for the purposes of this case, was owned by Sanborn; and we also think the Clapp, Ames, and Gibbs tracts had been purchased by him, and were owned to such an extent, at least, as to establish his status as the owner thereof prior to his becoming a promoter, within the rule declared in the Densmore Oil Company Case. It may be fairly said that under his contract of purchase he was the owner of these three parcels of realty. See *Howell v. Budd*, 91 Cal. 342, 27 Pac. 747. Sanborn, being the owner of these tracts prior to the commencement of confidential relations with the complainants, had the right to dispose of his property to the corporation at any price he saw fit to ask and the corporation saw fit to pay. As the vice chancellor said in *Foss v. Harbottle*, 2 Hare, 490: "I begin the transaction at this time. I have purchased land, no matter how, or from whom, or at what price. I am willing to sell it at a certain price for a given purpose." Of course, the fraud and deceit of the vendor, practiced towards the parties contemplating the purchase, would afford grounds for relief under any circum-

stances, but the fixing of the amount of the purchase price by the vendor is a matter in which he is entitled to the widest latitude. The valuation upon the various tracts of land, as shown by Dennis' report to the corporation, does not appear to be questioned, and by such valuation the lands of Sanborn were transferred to the corporation at a profit to him of \$48,000, less \$7,500 which he paid to perfect the title to the Clapp tract. While Sanborn had the right to dispose of his land to the corporation at any figure upon which all parties concerned might agree, yet such sale must be made without any false representations upon his part. *Getty v. Devlin*, 54 N. Y. 403; *Densmore Oil Co. v. Densmore*, supra. As to false representations on the part of the defendants, the court found that, as a consideration and inducement for the prospective stockholders to enter into the venture, "defendants John P. Sanborn and L. W. Dennis represented to, and promised and agreed with, each and all of the persons above mentioned, that all of such lands as they then had, or might thereafter acquire, should be put in and conveyed to such proposed corporation at the same price and consideration as the said L. W. Dennis and John P. Sanborn had paid, or agreed to pay, therefor to the party or parties from whom they then had or might thereafter obtain the same." The evidence is entirely sufficient to support this finding. While many of the interested parties only testify generally to the understanding that all this property should pass to the corporation at cost price, and that they would not have participated in the venture if the fact had been to the contrary, yet the witnesses Sterling and Burbank testify directly to the statements of appellant, Dennis, made to them to that effect.

As to this branch of the case the conditions are these: Sanborn was the owner of several tracts of land on April 20th. At that time he and Dennis became the promoters of the defendant corporation, sold this property to the corporation, and at such sale represented that it was being sold at its original cost to them. The representation was false, and was made at a time when these parties were not dealing with each other as strangers at arm's length, but, on the contrary, at a time when they were closely allied in a joint venture, and when all the duties and responsibilities resulting from confidential relations rested upon them; and a strict performance of these duties and responsibilities is always inexorably demanded by the law. This principle is recognized in *Phosphate Co. v. Erlanger*, 5 Ch. Div. 73, and approved in *Ewell's Evans on Agency*, (page 284,*) in the following language: "A promoter is in a fiduciary relation to the company which he causes to come into existence. If he has a property which he desires to sell to the company, it is quite

open for him to do so; but upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to that property. There is no difference in this respect between a promoter and a trustee, steward, or other agent." Morawetz on Corporations (section 545) intimates that the true doctrine hardly goes to the length here stated, but still says the "promoters" are bound to exercise the highest degree of fairness in their dealings. The question of disclosure or concealment of information which should be communicated is not here involved. It is a question purely of false representations as to a substantial matter; and false representations upon the part of one party, entering into the very inception of a joint business venture, will nullify the entire transaction whenever the matter comes before a court of justice. At the time the sale was made, these parties occupied fiduciary relations, and those relations prohibited the conduct practiced by the defendants, as depicted by the finding of the court. In the eyes of the law the fact that these lands, at this time, were of the full value of the purchase price, in no way relieved appellant of the duties and responsibilities resting upon him as a fiduciary. This principle is fully illustrated in *Bentley v. Craven*, 18 Beav. 75.

It is now claimed that all parties had knowledge of the cost price of these various tracts of land prior to the conveyance to the corporation, by virtue of a personal inspection of the original contracts given by the owners to Sanborn; that they acted with their eyes open; and that it is now too late to rely upon these false representations as the basis of an action. It is probably true that such knowledge came to the officers of the corporation as to some of the tracts, but that event occurred long after the \$193,666.62 was collected, and passed to the possession of Dennis and Sanborn. Again, such knowledge by the directors would not be knowledge to the stockholders. A fraud practiced upon the stockholders could not be ratified, or even waived, by the directors. This question was directly passed upon in *Simons v. Mining Co.*, 61 Pa. St. 221.

Again, it is insisted that if the defendants practiced fraud in the sale of the lands, and thereby caused the corporation to pay more therefor than they in right should have paid, the remedy is not in the nature of the judgment here recovered, but the action should be for a rescission by reason of the fraud committed. We are not in harmony with such views. In the case of *Getty v. Devlin*, 54 N. Y. 403, a case very similar to the one at bar, in speaking as to the proper remedy, it is said: "But I think, under the complaint in this action, the four defendants may be compelled to account for the profits they made on the real estate, and which they fraudulently appropriated to the exclusion of

their associates. The court can ascertain what the land actually cost the four defendants, and hold them to account for the balance. This balance equitably belongs to those who paid the money, and the plaintiff can in this action recover their proportion thereof." The principles declared in *Co. v. Flash*, *supra*, also justify the action here sought and obtained. In an elaborate article found in 16 *American Review*, at page 671, the status, duties, and responsibilities of promoters are considered, and the true principle appertaining to them is well stated, as follows: "The substance of the law is that promoters are co-fiduciaries. Transactions with their companies wherein they deal honorably, with full disclosure, and without seeking to influence the action of the corporation, will be upheld; but transactions in which they seek to misrepresent material facts, or otherwise deceive the company, or control its action, are fraudulent, and a company may elect either wholly to set aside such transactions, or to recover the promoter's secret profits." About the 5th of May, John P. Sanborn returned home in Michigan, but prior to his departure he gave his nephew Frederick D. Sanborn power of attorney to act for him in the collection of moneys, making of contracts, deeds, etc., in furtherance, probably, of the merger of the venture then on hand into a corporation about to be formed. At this time the \$193,666.62 was paid to the corporation, and portions of it passed to the original promoters through the medium of himself, Frederick D. Sanborn; and thereupon the tracts of purchase were taken in the name of John P. Sanborn to the Ford, Bradley, and Titus tracts, and possibly new contracts were made to some of the others. The prospective stockholders becoming alarmed over the fact that they had expended such a large amount of money, and possessed no written evidence to their interest in these various projects, upon May the 18th secured from Frederick D. Sanborn, as attorney in fact of John P. Sanborn, a statement in writing to the following effect: "Know all men by these presents, that whereas, I, John P. Sanborn, have purchased, [naming the various tracts of land involved;] and whereas, a corporation is about to be formed, known as the San Gabriel Valley Land and Water Company, and whereas, the subscribers of stock in said corporation are the real purchasers of the lands, although the contracts therefor were made to me: Now, therefore, I agree that as soon as the organization is completed, I will transfer all my right, title, and interest in the said lands to the corporation." This writing was offered in evidence as the declaration of the mission of John P. Sanborn that he had purchased this property for the corporation, and under objection it was admitted for the purpose. We shall not review the soundness of the ruling of the court

regard, for, if error was committed, we think it harmless. If we look into the opinion of the court, as appellant suggests, this evidence appeared to have some weight, as tending to show an original purchase for the corporation; yet in the next succeeding clause of the opinion the judge says that there is ample evidence to support that allegation of the complaint aside from the writing. Neither does there appear to be any finding of fact that Sanborn actually purchased these lands for the corporation or the prospective stockholders, and for this reason the ruling of the court against appellant becomes immaterial. But, in addition, and as conclusive of the entire matter, we do not think any finding of fact that Sanborn purchased these lands for the contemplated corporation, or that he subsequently represented to the parties that he had so purchased them, is material to the recovery or necessary to support the judgment. As we have heretofore fully indicated, the acts of Sanborn and Dennis subsequent to the 20th of April justify the recovery had, and hence their conduct prior thereto is not an essential element of the case.

An attempt was made to take the deposition of the appellant, Dennis, prior to the trial; but after the examination was had, his testimony being taken down and transcribed by a phonographic reporter, he either neglected or declined to subscribe to the same. At the trial the reporter was placed on the witness stand, and, after refreshing his recollection from his transcription of the notes, under objection testified to the statements of Dennis made at that time. Dennis being an active party to the litigation, there can be no question but that his statements pertaining to the subject-matter of the action, whenever and whenever made, would be competent evidence against him. But the question here presented is whether the reporter, not having a definite and well-defined recollection of the statements so made, after he had refreshed his recollection as far as possible from the writing, will be allowed to read the contents of the memoranda to the court. There appears to be some difference of opinion among courts and law writers, as to the proper practice at common law; but under our statute (section 2047, Code Civil Proc.) the course here adopted is expressly allowed. In the case of *People v. Lem You*, 97 Cal. 224, 32 Pac. 11, the practice was approved as justified by the foregoing provision of the Code; and in the case of *People v. Gardner*, 98 Cal. 127, 32 Pac. 880, the identical question was presented, and this court said: "The remaining objection to the admission of the evidence of the witness Briar does not seem to be well founded, in view of the last

provision of section 2047 of the Code of Civil Procedure." Appellant's contention that the reporter's original notes are the basis from which he should have been required to refresh his recollection will not be considered, as such objection was not brought to the attention of the trial court. However, we do not intimate there is any merit in the point.

This action is brought by a dissatisfied stockholder, and a previous demand upon the corporation to commence the suit, and a refusal upon its part so to do, are made sufficiently plain from the record. There are several allegations of the complaint which have no support in the evidence, but they are immaterial, and, as a consequence, findings thereon against appellant become harmless. Appellant should be allowed a credit of \$7,500, paid to perfect the title to the Clapp tract, and should only be charged with a profit of \$25,000 upon the Titus tract. For those reasons we think the judgment should be for the sum of \$65,500, with legal interest thereon from the 4th day of June, 1887. The cause is remanded, with directions to the trial court to modify the judgment to that effect.

We concur: PATERSON, J.; HARRISON, J.

Ex parte GALLAGHER. (No. 21,079.)
(Supreme Court of California. Jan. 19, 1894.)
CONVICTION—REVERSAL—REHEARING—AFFIRMANCE—HABEAS CORPUS.

On application for writ of habeas corpus for failure to bring petitioner to trial after reversal of his conviction and granting of a new trial, orders recalling the remittitur and granting a rehearing, resulting in an affirmance of the conviction, cannot be impeached.

Application of B. F. Gallagher for writ of habeas corpus. Writ denied.

W. F. Aram, for petitioner. C. E. Snook, Dist. Atty., for respondent.

BEATTY, C. J. This is a petition for a writ of habeas corpus, which discloses the following facts: Petitioner was convicted in the superior court of Alameda county of a felony. On appeal to this court the judgment of the superior court was reversed and the cause remanded for a new trial. 33 Pac. 890. Our decision was filed August 16, 1893, and on the 25th of the same month the remittitur was issued, and on the 26th it was filed in the office of the county clerk, where it still remains. On the 28th an order was made by the superior court setting the cause down for a retrial on October 27, 1893, but on the 26th of October that court, of its own motion, dropped said cause from its calendar, and ever since said date has refused to retry said cause, restore it to the calendar, or dismiss it, notwithstanding the defendant has never consented to the delay, but has always been ready for trial, and has fre-

¹ The section provides that a witness may refresh his memory respecting a fact by anything written by himself at the time such fact occurred, but that the writing must be shown to the adverse party, who may cross-examine the witness upon it if he desires.

quently demanded a trial or a dismissal of the action. During all of said time the defendant has been and still is confined in the county jail under no other authority than a commitment based on said charge of felony, upon which he was convicted as above stated. He contends that said imprisonment, in view of the facts alleged, is illegal, and that he is entitled to be discharged from custody.

If the facts disclosed by the petition were all the material facts of the case, it might be that the petitioner would be entitled to be set at liberty. But there are other material facts, of which we can take notice, because they are disclosed by our own records of the proceedings in the action of the people against the petitioner. The remittitur in that cause was issued within 10 days after the decision was filed, solely because the attorney general consented to and requested the order, and within 30 days after the decision the remittitur was recalled upon motion of the attorney general, based upon his statement made in open court that he had been induced to consent to its issuance by a message falsely purporting to come from the district attorney of Alameda county, and requesting him to make the motion. After the remittitur was so recalled, a petition for a rehearing of said cause was filed on the part of the people, and granted by the court, whereupon counsel for the defendant (this petitioner) moved the court to set aside its orders recalling the remittitur and granting a rehearing, which motion was, after argument, denied. The cause was then resubmitted, and on December 22, 1893, a decision was filed affirming the judgment and order denying a new trial. These facts are a complete answer to those set up in the petition, which appears to be a collateral attack upon the orders recalling the remittitur and granting a rehearing. We are entirely satisfied that those orders were proper, and that they cannot be impeached in this proceeding. The writ is denied.

We concur: DE HAVEN, J.; McFARLAND, J.; PATERSON, J.

STATE v. CHAIMS.

(Supreme Court of Oregon. Jan. 15, 1894.)

ASSAULT WITH INTENT TO RAPE—INSTRUCTION—INVADING PROVINCE OF JURY.

On trial for assault with intent to rape, the court did not invade the province of the jury in charging that, "if the evidence establish the facts which usually accompany and precede the crime of rape when fully consummated, then, if such facts and circumstances have not been explained, and the assault is made out, it is fair to presume that the assault was accompanied with the intent."

Appeal from circuit court, Multnomah county; M. G. Munly, Judge.

Elias Chaims was convicted of assault with

intent to rape a female child under 14 years of age, and appeals. Affirmed.

Nellie Bower, the prosecutrix, testified that the defendant took improper liberties with her. Other witnesses testified to the place where the defendant was seen with her; and the defendant denied the charge as sworn to by the prosecutrix, and offered testimony as to her own reputation. The only exception relied upon for reversal on appeal was to the following instruction by the trial court to the jury: "If you find that the alleged assault was made as charged, then has the intent been sufficiently proven. The intent must be established from the evidence, but it may be inferred from the facts and circumstances in evidence in this case. If the evidence establish the facts which usually accompany and precede the crime of rape when consummated, then, if such facts and circumstances have not been explained, an assault is made out, it is fair to presume that the assault was accompanied with the intent."

McGinn, Sears & Simon, for appellant; Geo. E. Chamberlain, Atty. Gen., Hume, Dist. Atty., and John H. Hall, for the State.

PER CURIAM. The defendant was indicted, tried, and convicted of the crime of assault with intent to commit rape upon a female child under 14 years of age. The alleged error upon which the defendant relies for a reversal of the judgment is that certain instruction excepted to and set aside in the bill of exceptions. This instruction is a transcript of an instruction approved in *State v. Newton*, 44 Iowa, 45, where the defendant was indicted and convicted of the same offense. Upon the facts as presented in the record, we think the instruction was proper, and did not invade the province of the jury. Judgment affirmed.

SLOAN et al. v. WOODWARD et al.

(Supreme Court of Oregon. Jan. 15, 1894.)

TRUST—EVIDENCE TO ESTABLISH—SUFFICIENT—CONTRACT—REMEDY FOR BREACH.

1. Deceased, by an assignment absolute in form, transferred to defendant, his certain accounts and a note against a certain person, in consideration of \$10 cash. The defendant's note, payable "out of the first moneys collected by" the assignee from the person on such note and accounts, after paying the expenses of collection. Defendant offered judgment on the note and account bought in land of the debtor at execution, and obtained a deed therefor. In an action by the administratrix and heirs of deceased to establish a trust in the land, defendant offered in evidence the note and account, and that the transfer of the note and account to him was understood by both parties to be an absolute sale, and he was uncontradictedly unimpeached. Held, that a finding for the defendant was proper.

2. If defendant failed or refused to pay the deceased's legal representative the amount of the note, judgment for the amount of the note.

according to the terms of defendant's note, the remedy was by action on the note.

Appeal from circuit court, Multnomah county; L. B. Stearns, Judge.

Action by Ona Watson Sloan, administratrix of the estate of Andrew J. Watson, deceased, and others, against John H. Woodward and others, to obtain a decree declaring defendants trustees for plaintiffs of certain real estate. From a judgment and decree entered on the report of a referee in favor of plaintiffs, defendants appeal. Reversed.

W. M. Gregory and J. H. Woodward, for appellants. Thomas N. Strong and John T. Milner, for respondents.

BEAN, J. This is a suit to have the defendants declared to be trustees for plaintiffs of certain real property in Multnomah county, and arises out of the following facts: On June 14, 1884, A. J. Watson was owner of a promissory note for \$15,000 and sundry accounts against A. P. Ankeny, which were considered of doubtful value. On that day he assigned and transferred said note and accounts to the defendant John H. Woodward, who was then, and had been for some time, his attorney, and in consideration thereof Woodward gave him \$10 in cash and the following promissory note: "\$15,490. For value received, on demand, after recovery from Alexander P. Ankeny, I promise to pay Andrew J. Watson, or order, fifteen thousand four hundred and ninety dollars, with interest after date at ten per cent. per annum, out of the first moneys collected by me from Alexander P. Ankeny upon note and accounts this day indorsed and assigned to me by said Watson, after first paying costs and expenses of collection, including reasonable attorney's fees. John H. Woodward. Dated at Portland, June 14th, 1884." Woodward immediately commenced an action against Ankeny on the note and accounts thus assigned, which on April 24, 1886, resulted in a judgment in his favor for \$15,600. In November, 1887, Watson died, and the plaintiff Ona Watson Sloan was duly appointed as administratrix of his estate, and the firm of which the defendant Woodward is a member acted as her attorneys in the settlement thereof. On May 11, 1888, Woodward caused to be sold, under an execution issued on his judgment, Ankeny's interest in what is known in the record as the "Ankeny and Cadwell Tract of Land," which at that time was supposed to be an undivided half of 85.31 acres, bidding it in himself for \$3,000, which amount was credited upon the judgment. Prior to the sale under the Woodward judgment, the other undivided half had been sold under a decree of foreclosure against Ankeny in favor of Allen & Lewis, to which Woodward was a party, and bid in by Mr. Lewis for \$1,210, but was subsequently redeemed by Woodward from his

private funds, and for his own benefit. As soon as he received the deed from the sheriff for the land purchased under his judgment, also for that redeemed from Allen & Lewis, he informed the administratrix of the Watson estate what had been done, and that the estate had no interest in the land redeemed from Allen & Lewis, but that he had made inquiry as to the value of the land purchased by him under his judgment, and was satisfied that \$50 an acre was an outside limit; and on that basis there was \$1,000 coming to the estate, after deducting the costs and expenses of collection and \$1,000 for attorney fees, which he would pay over as soon as he could sell the land, or would deed to her so much thereof as would amount in value to \$1,000, and she could account to the estate for the money. To this last proposition she consented, and a deed for 21 acres was accordingly executed and delivered to her; she receipting as administratrix to Woodward for the \$1,000, and charging herself therewith in her account as administratrix.

It is now contended, and this suit is brought by plaintiff upon the theory, that the transfer of the note and accounts to Woodward by Watson in 1884 was for collection only, and that the judgment recovered thereon, and the land purchased thereunder, were and are held by him in trust for the estate; and this is the pivotal point in the case, for, if it was an absolute sale and purchase, the judgment and land purchased thereunder belonged to Woodward, and he only became liable to the estate on his note for the value thereof, less the costs and attorney fees, and, as a consequence, this suit must fail. If, however, he held the note and accounts for collection only, he acquired the land as trustee for the estate, and must account for it as such. The record is voluminous, but it seems to us there is no substantial controversy in the evidence upon this point. The transfer from Watson to Woodward was absolute in form, and Judge Woodward, whose testimony is frank and open, and who stands uncontradicted and unimpeached, testified that he purchased the note and accounts against Ankeny, amounting on their face to something over \$18,000, for \$15,500, of which he paid \$10 in cash at the time, and gave the note set out for the remaining \$15,490; that this transfer was intended and understood by both parties to be an absolute sale and transfer of the note and accounts; and that Watson was henceforth to look to Woodward, and not to Ankeny, for his money. The finding of the referee and court below was in accordance with this testimony, and indeed we are unable to see how any other finding could be sustained. It necessarily follows from this that if, as the court below seemed to think, Woodward has not paid over to the estate on his note the entire proceeds realized on his judgment against Ankeny, the

remedy is by an action on the note, and not by a suit to have him declared a trustee of the land purchased and acquired by him under his judgment. This suit can only be maintained on the theory that, as alleged in the complaint, the transfer of the Ankeny note and accounts to Woodward, while in form absolute, was "meant and intended by all parties to be for collection only;" and, when this allegation fails, the suit is at an end, whatever the rights of the plaintiff might be in an action against Woodward on his note. It is proper to say, however, that this decision has no reference to the disputed title acquired by Woodward in what is known in the record as the "Cadwell Tract," because in his answer he disclaims title thereto, and expresses a willingness, if its title is determined in his favor, to sell and dispose of the land, and pay the proceeds over to the estate. From what has been said, it necessarily follows that the decree of the court below must be reversed, and the complaint dismissed.

OREGON & C. R. CO. et al. v. CITY OF PORTLAND et al.

(Supreme Court of Oregon. Jan. 15, 1894.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENT OF BENEFITS—DISCRETION OF COUNCIL—WHEN REVIEWED—INJUNCTION.

1. Where the measure of assessments for street improvements in a city is limited to the amount of benefits derived, and the common council is invested with a discretion in determining that amount, (East Portland Charter, [Laws 1885, pp. 316, 320,] art. 6, §§ 5, 18,) the courts will not review the determination of the council so long as its discretion is honestly exercised, and not abused.

2. But where it appears that there is no necessity for the improvement; that, as made, it never has been used, though completed over two years, and probably never will be used; and that property assessed for benefits was not benefited, but actually damaged,—a decree enjoining the collection of such assessment is proper.

Appeal from circuit court, Multnomah county; M. G. Munly, Judge.

Action by the Oregon & California Railroad Company and the Southern Pacific Company against the city of East Portland and others, its officers and employes, to enjoin the construction of elevated roadways on certain streets of such city, and the collection of assessments on plaintiffs' property therefor. A temporary injunction was granted, but defendants gave bond, and proceeded with the work. Afterwards, East Portland and Portland were consolidated, and by order of court the latter city was substituted as defendant. From a judgment entered on the report of a referee, perpetually enjoining the collection of such assessments, defendants appeal. Affirmed.

J. V. Beach, City Atty., and McGinn, Sears & Simon, for appellants. A. H. Tanner, for respondents.

MOORE, J. This is a suit originally brought against the city of East Portland, its officers and employes, to restrain it and them from building elevated roadways on G streets, adjoining plaintiffs' property, and to enjoin the collection of the assessments therefor. A temporary injunction was granted restraining the construction of the roadways, and the collection of the assessments, but was subsequently modified by permitting the defendants to build the roadways upon giving a sufficient bond conditioned that the structures would be removed if it should be decreed that they were improperly built, and that the proceedings of the city council were insufficient to authorize their construction. After the consolidation of East Portland and Portland, the latter city was, by order of the court, substituted for the other defendants. The plaintiffs protested against the improvements when they were contemplated by the council, and, as soon as the work was commenced, began this suit; but the defendants gave the required bond, and proceeded with the work. The complaint was dismissed on the alleged errors of the city council, which it is claimed rendered its proceedings void, and, the defendants having denied its material allegations, the cause was referred to H. H. Northup, Esq., to take the testimony, and report his findings of fact, and conclusions of law thereon. The referee, after taking the testimony, reported among others, the following finding of fact: "(2) The said improvements of G streets are of no benefit to the property of the plaintiffs, described in finding of fact 6, in its present condition, nor are said improvements of any benefit to said property when used for the purposes for which purchased and intended, to wit, yard and depot purposes." The court, after approving said finding, and rendered a decree perpetually enjoining the collection of the assessment, from which the defendants appeal, and now contend that the assessment of benefits was a matter within the discretion of the city council, which the courts cannot review.

The streets of a city having been dedicated by the proprietor to the public, the state, its legislative assembly, may determine the necessity for, and character of, any improvement thereto, and what property will be benefited thereby; and whatever power the legislature possesses over the streets of a city it may delegate to its corporate authorities, to be exercised in the mode, and to the extent, prescribed in the act conferring the power. This delegation of power invests the municipal corporation with all the discretion the legislature possessed, and hence it follows that the common council, as agent of the corporation, is clothed with exclusive discretion in determining the necessity for, and character of, all street improvements, and that property will be benefited thereby, and the amount of benefits conferred. These

questions of policy with which the legislature and its creature, the municipal corporation, deal, and the courts have no right to interfere except in case of fraud or oppression, or some wrong constituting a plain abuse of such discretion. Elliott, Roads & S. 375; Cooley, Tax'n, 661. It is impossible for a council to fix with mathematic accuracy the amount of benefits that will inure to property in consequence of a local improvement, but if it appear that it has exercised an honest discretion in determining this question of policy, however much it may have erred in judgment, the remedy is at the polls in choosing a new council, and not by reviewing its proceedings in the courts. If the courts were invested with authority to review these questions of policy, but few assessments could ever be collected without an action, and the adjudication of purely legislative questions would be substituted for the discretion of a city council. The only recognized exceptions to this rule are to be found in those cases in which, under pretense of apportionment, a work of general benefit has been treated as one of merely local consequence, and the cost imposed on some local community in disregard of the general rules which control legislation in matters of taxation. Cooley, Tax'n, 450. The presumption is that the council has done its duty; but this presumption may be overcome by facts showing that the rule prescribed for the apportionment or the assessment made under it is so grossly and palpably unjust and oppressive as to give demonstration that the proper authority had never determined the case on the principle of taxation. Cooley, Tax'n, 662; Elliott, Roads & S. 410. Section 5, art. 6, of the charter of East Portland, (Sess. Laws 1885, p. 316,) under which the assessment was made, provides that "the council may proceed to ascertain and determine the probable cost of making such improvement, and assess upon each lot or part thereof liable therefor its proportionate share of such cost, and if the council shall adjudge that any such lot or part of lot would not be benefited by the improvement in the full sum of the cost of making the same upon the half of the street abutting upon such lot or part of lot, the council shall assess upon such lot or part of lot, as its proportionate share thereof, such sum only as it shall find the lot to be benefited by such improvement." And section 18 of the same article provides that "each lot or part thereof, within the limits of a proposed street improvement, shall be liable for the full cost of making the same upon the half of the street in front of and abutting upon it, and also a proportionate share of the cost of improving the intersection of two of the streets bounding the block in which said lot or part thereof is situated, unless the council shall have determined that such lot or part thereof will not be benefited by such improvement in the

full sum of such cost, in which case such lot or part thereof shall be liable for so much of said cost only as the council shall have found the same to be benefited thereby; and the further cost of making said improvement in excess of the benefits so found shall be paid from the general fund of the city." These sections of the charter clearly provide that the measure of the assessment is limited to the amount of benefits derived, and invest the council with a discretion in determining that amount; and, so long as this discretion is not abused, the courts are powerless to review its action in a collateral proceeding. Thayer, J., in speaking of the discretion of a common council in assessing benefits, said: "It exercises such authority as agent of the state, and for the public good; and, so long as it keeps within the scope of its power, the courts have no control over it, nor jurisdiction in a collateral proceeding to question its acts. If it were to assess property for the cost of constructing a sewer, so laid as to render it physically impossible to benefit the property, as in the case of *Hanscom v. City of Omaha*, 11 Neb. 37, 7 N. W. 739, it would exceed its authority, and it would be the duty of the courts to interfere, and prevent the wrong from working injury; but where the property is directly benefited by the prosecution of such an enterprise, and the common council has assessed what it deems a proportionate share of the cost upon the owner thereof, the courts are not authorized to institute an inquiry in order to ascertain whether or not the assessment exceeds the benefits." *Paulson v. Portland*, 16 Or. 450, 19 Pac. 450. This is practically holding that, if property had received any benefit from a local improvement, courts would not measure the amount, but, if it were so situated that it could not possibly receive any benefit therefrom, they would interfere to prevent the wrong.

The referee who took the testimony found that the property was so situated that it had received no benefit from the improvement, and the court gave this finding its unqualified approval in the following expressive language: "The evidence shows that these elevated roadways led from Second street to the river, where there is no wharf, warehouse, ferry, or landing, or other improvements; that it has not been traveled or used as a thoroughfare, or in fact for any purpose except for the storage of iron and materials; that there is no likelihood that it will ever be used as a traveled street; that it has not served any other cognate purpose; that it is an actual detriment to the property of the plaintiffs for the purpose for which it was purchased, to wit, yard and depot purposes. It appears, also, in the ninth and tenth findings of fact of the referee's report, that the city built these elevated roadways beyond the west end of the streets over private property,—ninety-five

feet from the west end of G street, and one hundred and thirty-nine feet from the west end of H street,—and attempted to assess the costs upon the plaintiffs' property. The alleged improvements would appear to be a foolish and wholly uncalled for undertaking, which served neither the public nor the property holders in this instance; and the attempt to charge the property of the plaintiffs with the costs thereof is, to use the words of a famous jurist in a similar instance, 'so plainly, palpably, rankly, and ruinously unjust that it must be pronounced no proper or lawful mode of taxation, but an injustice so gross as to be void against the rights of property, as protected by a bill of rights.'" The court and referee, from their knowledge of the premises and of the character of the improvement, were well qualified to make these findings, which a careful examination of the record shows were fully warranted by the evidence. "The courts," says Judge Elliott, "will interfere with reluctance, and only in clear cases, but they will not abdicate all power of review and supervision. They will not substitute their judgment for that of the local officers, but they will not permit those officers to so abuse their discretion as to do great injustice to the citizen." Elliott, *Roads & S.* 411. "We have no doubt," said the court in *Allen v. Drew*, 44 Vt. 174, "that a local assessment may so far transcend the limits of equality and reason that its exaction would cease to be a tax, or contribution to a common burden, and become extortion and confiscation. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name." The court having found that there was no necessity for the improvement, that the elevated roadway, as built, had not been, and probably never would be, used, and that the improvements were of no benefit, but an actual damage, to plaintiffs' property, and these conclusions being amply supported by the evidence, we feel bound thereby. The record shows that these roadways are from 15 to 30 feet above the surface of plaintiffs' property, extending from Second street, on G and H streets, into the Willamette river, a distance of about three blocks, and can only be approved from Second street; that they do not connect with any wharf, bridge, ferry, or landing, and, as the court substantially finds, stand out in the river as monuments of folly; that, though they have been built about two years in a populous city, teeming with life and business energy, they have only been used in a few instances by teamsters hauling away some iron pipes which had been landed thereon from the river. There could not have been much, if any, public necessity for these structures, if their actual use is to be taken as an indication of their utility. They have not been used by the public nor by the plaintiffs, and, as the court finds,

probably never will be; and yet it is sought to collect the cost of their construction from the plaintiffs upon the theory of benefit conferred. Courts rightfully hesitate to view the discretion of a city council as to consider it a delicate question; and yet there are cases in which the exercise of the power of assessment becomes such a flagrant abuse that they must interfere to prevent the confiscation of property. In this case it clearly appears that the property of the plaintiffs was in no way benefited by the alleged improvement, and hence there was no foundation for the exercise of discretion on the part of the council in the assessment of property for its cost, or any part thereof. Under such circumstances, the enforcement of the assessment would be "taking property without due process of law," and the decree must therefore be affirmed.

PATTERSON et al. v. GALLAGHER

(Supreme Court of Oregon. Jan. 15, 1900.)

MECHANIC'S LIENS — ON LEASED PREMISES — TENANT'S FIXTURES.

Hill's Code, § 3609, confines the right of a mechanic's lien to persons "performing labor upon, or furnishing material to be used in the construction, alteration, or repair, either whole or in part, of any building." *Held*, that where the owner of a building leased an apartment for a saloon, and the lessee engaged a plumber to connect his bar with the water pipes of the building and with the sewer, the plumber was not entitled to a mechanic's lien on the building.

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Action by S. Patterson and R. C. Gallagher against Martin Gallagher, W. K. Smith and George Woodward to foreclose a mechanic's lien. From a judgment for plaintiffs. Defendants appeal. Reversed.

Dolph, Mallory & Simon, for appellants; Strode & Wait, for respondents.

PER CURIAM. This is a suit to foreclose a mechanic's lien. In January, 1892, the defendant Gallagher leased of the defendants Smith and Woodward one of several apartments on the ground floor of a three-story brick building, belonging to them, in Multnomah land, for a saloon, and employed the plaintiffs, who are plumbers, to connect his bar with the water pipes of the building and with the sewer, for which they charged a sum of \$97.01, and now seek to enforce a lien against the building. Several questions are made to the validity of the lien, as we are of the opinion that the labor performed and material furnished do not give the plaintiff a lien on the building, but the mechanic's lien law, the other question need not be considered. The statute confers the right to a lien to a person "performing labor upon, or furnishing material used in, the construction, alteration,

pair, either in whole or in part, of any building," etc. Hill's Code, § 3600. Labor upon, or material used in the construction, alteration, or repair of, a building, is the test of the right to a lien, under this statute. "In other words," says Finch, J., "the work and material, both in fact and intention, must have become a part and parcel of the building itself." Ward v. Kilpatrick, 85 N. Y. 413. The right to a lien proceeds upon the theory that the work and material for which the lien is sought has increased the value of the building by becoming a part thereof; and where such labor is performed or material furnished at the request of a tenant, in order to charge the property of the landlord, it must appear, therefore, in addition to the other requisites of section 3672, that such labor and material entered into and became a part of the building, and not merely a fixture, for the mere convenience of the tenant. McMahon v. Vickery, 4 Mo. App. 225. Now, in this case it is clear the labor performed and material used by the plaintiffs did not become a part or parcel of the building, but were solely for the use and convenience of the tenant, in conducting his business, and removable by him whenever he might cease to be such. They were fixtures, like the bar to which they were attached, and were not more permanently connected with the building. It follows that the judgment of the court below must be reversed, and the complaint dismissed.

STATE ex rel. TAYLOR, Assistant Attorney General, v. SHEARMAN et al., Police Commissioners.

(Supreme Court of Kansas. Oct. 5, 1892.)

CITIES—POLICE COMMISSIONERS—DISTRICT ATTORNEY.

1. Police commissioners of a city, being appointed by the governor and empowered directly by the state, are not, as other municipal officers, removable for neglect of duty, by civil action, under Gen. St. par. 1885, or paragraph 2532, or any other statute, but only by the governor.

2. The duties of an assistant attorney general are confined to matters arising in the county for which he is appointed, and he has no authority to bring an action by the state on his relation.

Action by the state, on the relation of H. L. Taylor, assistant attorney general for Sedgwick county, to remove from office, as police commissioners of the city of Wichita, J. F. Shearman and C. A. Van Ness. Dismissed.

J. N. Ives, Atty. Gen., H. L. Taylor, Asst. Atty. Gen., and Jacob M. Balderston, for plaintiff. Stanley & Hume, for defendants.

PER CURIAM. Now comes on for decision the demurrer of the defendants to plaintiff's petition; and thereupon, after due consideration by the court, it is ordered that the

said demurrer be sustained, the court holding:

1. The members of the board of police commissioners are appointed by the governor, and their powers come directly from the state, and therefore they are not removable in a proceeding of the character pending against them, under paragraphs 2532 or 1885 of the General Statutes of 1889, or any other statute. If the members of the board, or any of them, are inefficient, negligent, or otherwise fail to perform their respective duties, the governor, under the provisions of the statutes, has plenary power to remove at any time.

2. The duties of the assistant attorney general are confined to the limits of the county in which he is appointed, and no duty is imposed upon him, by statute, to bring an action prosecuted in the name of the state on his relation.

It is further ordered that the plaintiff herein pay the costs of this proceeding, taxed at \$—, and hereof let execution issue.

STATE v. DONYES.

(Supreme Court of Montana. Jan. 22, 1894.)

ASSAULT—SUFFICIENCY OF EVIDENCE—INTENT TO KILL—PREVENTING TRESPASS—RES GESTAE—OTHER CRIMES—INTENT.

1. On trial for assault with intent to kill one W., it appeared that W. attempted to do hauling across defendant's mining claim, on a road which, though broken, was not public, and that W.'s party found defendant at work in a shaft on the road, which rendered it impassable, and began to fill up the shaft with stones. Defendant testified that he was struck by these stones; that W. and another beat him; and that, when seized by them, he fired his pistol, intending to shoot under W.'s arm. But W.'s party testified that defendant tried to fire some giant powder when they began to fill the shaft; that W. knocked the light from defendant's hand; and that defendant then threatened to kill W., and shot him when some feet away. Held, that the evidence justified a verdict of a simple assault.

2. Evidence that W.'s team could not turn out and go past the shaft which defendant was digging was admissible as a part of the res gestae to show the close and immediate surroundings.

3. Evidence that one of W.'s party went to defendant's claim, intending to cross it against the will of defendant, was inadmissible, as it did not show that W. so intended.

4. Defendant's notice of the location of his mining claim was not admissible in justification of his attempt to kill a person coming upon the claim, but it was admissible to show the intention of defendant in making the excavation.

5. It was not prejudicial error to exclude the record of an action in which the court refused to restrain defendant from felling trees across the road on his claim, since defendant, as undisputed owner, was not justified in repelling a trespass on his claim by an attempt to murder.

6. The record of the prosecution and conviction of defendant for repelling on a former occasion a bare trespass by D. on the same road by drawing a deadly weapon, and evidence of D. that defendant then threatened to kill any trespasser in the future, were admissi-

ble to show the intent of defendant in being in the road, and armed, as he was, at the time of the assault.

Appeal from district court, Deer Lodge county; Theo. Brantley, Judge.

Charles Donyes was convicted of assault, and appeals. Affirmed.

J. C. Robinson, for appellant.

DE WITT, J. On January 20, 1891, the defendant shot one James Weller. The grand jury indicted defendant for an assault with intent to commit murder. The trial jury found a verdict for a simple assault. A motion for new trial was made, and denied by the district court. The errors now complained of were presented to that court on that motion. Defendant appeals from the judgment.

The appellant contends that the evidence was insufficient to sustain the verdict. The facts may be epitomized as follows: Defendant was one of the locators and owners of the Broadhead mining claim. The claim was in a mountainous country. Weller, the deceased, had a lot of cord wood, which he was moving or endeavoring to move. This mining claim lay between Weller's depository of the wood and his proposed destination of the same. He wished to haul it over a road which passed over the mining claim of Donyes. It seems that this was not a county road or a public highway. About the most that appears is that Donyes had sold or given to one Morgan a license to make and use this road, and that Morgan or Donyes had given Weller no leave or license to use the same. On January 20th, the day of the difficulty, the road was broken; that is, it was a path over which sleighs could be drawn. James Weller, with seven sleighs, loaded with wood, with their teams and drivers, came along this road. At a narrow place they found Donyes and a hired man, named O'Rourke, at work in a shaft or hole in the road. The shaft was three or four feet deep, and extended across the road, so as to make it impassable for teams or sleighs. After some conversation, Weller and some of his assistants began to fill up the hole. Up to this point there is no conflict in the evidence, but here the accounts of the state and the defendant to some extent diverge. Defendant's story is that Weller's people began throwing rocks and clods into the hole, which struck him, the defendant; that Weller and another jumped into the shaft, and commenced beating him; that he leaped out of the shaft, and ran towards his coat, in which was his pistol, and which was at a considerable distance; that the Weller party closely pursued him; that while running he picked up his coat, and got it on; that he was seized by his enemies, and pinioned, and while in this condition he managed to get hold of his revolver, and fired the same, endeavoring to shoot under Weller's

arm. The account of Weller's party, er, is a stronger showing against defendant. They say that their people began a into the shaft; that Donyes tried to fuse attached to a stick of giant that Weller knocked the light out of hand; that then Donyes jumped out shaft, reached into his hip pocket, and a revolver, exclaiming: "You son of I'll kill you!" Weller walked towards yes, and when within eight or ten feet yes fired the shot from his pistol. evidence, somewhat connecting, as admitted, and on the indictment for a felony jury found the defendant guilty of an —a misdemeanor punishable by the penalty known in the criminal law. The jury passed upon the facts, and the ample evidence to sustain a verdict of simple assault. Even if Weller and his were guilty of a trespass against the property of Donyes, not a dwelling house, not a provocation which justified defendant in assaulting the trespasser with a deadly weapon, on, with the intent to kill him. Smith, 12 Mont. 378, 30 Pac. 679. The objection that the verdict was not sustained by the testimony was properly overruled by the district court.

The state introduced evidence to show that the Weller teams could not go out and go past the shaft which Donyes was digging, and defendant objected to this evidence. "We do not understand this objection means. If it means this evidence was an attempt by the state to justify a trespass by Weller and his party, the answer is that there is nothing in the testimony to show that the testimony was offered for such purpose; that is, nothing in the defendant's accusation of such a trespass on the part of the state. It is apparent from the narrowness of the passage, and the construction of it by the hole dug by the state, that it stopped the teams coming along the road. These facts led to the encounter between the two parties. Defendant claims that Weller party were committing a willful forcible trespass, and that he (defendant) therefore had the right to kill him. The state does not hold that it is competent to establish a trespass by showing that its construction was an advantage to the person committing it, but in a contention and encounter between the two parties, and the terrible results which occurred in the case we believe it is part of the res gestae to show the close and immediate surroundings of the actors in the tragedy. This is shown by the testimony describing the condition of the road and the shaft and the surroundings. These remarks cover several objections made in the bill of exception.

Elmer Gale, a witness for the state, testified: "We all knew that Donyes objected to going over that road." The bill of exceptions states that "we" had reference to the state and his party. On cross-examination

court refused to allow defendant to ask this question: "Then you went there for the purpose of going over whether Donyes wanted you to or not?" This is assigned as error. If the witness went to the mining claim for the purpose of going across it against the will of Donyes, that was not testimony of the intention of Weller in going to that place, even if such intention were a material inquiry. There was, therefore, no error in excluding this question.

The defendant offered in evidence the notice of location of the Broadhead mining claim, on which mining claim this difficulty occurred. The state objected to the document, on the ground that it was not a justification of the act of defendant. The objection was sustained, and error is assigned. That the ground where this difficulty happened was located as a mining claim by defendant, and, indeed, that it was owned as a mining claim by defendant, is not a justification of defendant in attempting to kill and murder a person coming upon that claim, (*State v. Smith*, 12 Mont. 378, 30 Pac. 679;) and if the notice of location were offered for that purpose it was properly excluded. The court, however, did receive it in evidence for the purpose of showing the intention of defendant in going upon the ground referred to, and in making the excavation, and his acts in connection therewith. This ruling of the court in so limiting the testimony as to the notice of location is assigned as error. We think the court was wholly right. Defendant's ownership of the claim was proper testimony as the court admitted it, but it was not testimony of a justification of an attempt to commit murder.

There are a number of objections scattered throughout the bill of exceptions to the effect that certain questions were not proper cross-examination. Perhaps some of them were not, but the court must exercise some discretion as to the order of admitting testimony, and there is no sort of showing that the defendant was in any way injured by the action of the court in this respect. There are some objections to testimony found in the bill of exceptions, but defendant, in objecting, does not point out wherein the testimony criticised is objectionable. He gave no reasons to the district court, and there is therefore nothing to show but his objections were properly overruled. *City of Helena v. Albertose*, 8 Mont. 499, 20 Pac. 817.

The court refused defendant's offer in evidence of the record of the district court in the case of *Durand v. Donyes*, in which case it appeared that the court refused to restrain the defendant from felling trees across the road where the difficulty occurred. The defendant proposed or offered to connect Weller and his party with *Durand* and the injunction case, and to show that that injunction was brought for the benefit of Weller along with *Durand*. In this connection defendant also offered a letter written by Don-

yes' attorney to him, and received by Donyes, showing that the injunction had been dissolved, and that Donyes knew of that fact. We do not think that there was any prejudicial error in excluding this testimony. The defendant was claiming ownership of the ground over which the road ran, and the record of the court offered in evidence tended to prove nothing more than that the district court on some showing—we know not what—had declined to restrain Donyes from committing certain acts upon his own premises. Even if all this were true, and even, furthermore, as noted above, if Donyes were the undisputed owner of the premises, and in possession, he was not justified in repelling a trespass upon property other than a dwelling by an attempt to murder.

The point worthy of attention in this case, we think, is the following: Over the objection of defendant, the state proved by one Dazelle that, two or three weeks prior to the Weller-Donyes difficulty, he (Dazelle) had trouble with Donyes about passing over this same road. This occurred about 200 yards from the place of the Weller trouble. The witness testified: "He [Donyes] came out there with a rifle. He pulled out the rifle, and pointed it at me that way, [illustrating how he did it.] He said to stop there. 'Don't go any further, because I hurt you.' Then, after I went to his cabin, he put the rifle across a staple, and said: 'You see that rifle? Somebody will leave his gut there before he gets through with it.'" The state, in this connection, also offered the records of the district court, showing that for this offense Donyes had been prosecuted and convicted on the charge of drawing and exhibiting a deadly weapon in a rude, angry, and threatening manner, and not in necessary self-defense. This testimony being objected to by defendant, the court admitted it for the purpose of showing the intent of defendant, and the character with which he went to the ground, and the object with which he went there.

It is held in the decisions that upon the trial of criminal charges, caution should be exercised in admitting testimony of other offenses; but, if the testimony offered is material to the case on trial, that testimony is not rendered inadmissible because it proves some other offense. The question is simply the materiality of the evidence to the charge being tried. The question of the admissibility of this testimony in this case can be clearly viewed by keeping before the mind the issue or contention which was the subject of the investigation before the district court. The situation was this: The state was contending that there was an assault with intent to murder. The defendant was urging in his defense that Weller and his party were trespassers, and that he (defendant) acted only in self-defense, and used only such force as he was justified in using, and was necessary to prevent the trespass.

But, as frequently observed in this opinion, a bare trespass against property not a dwelling house does not justify an assault with intent to kill. Now, in this case, if defendant made an assault with intent to murder, he was guilty as charged. Evidence of his intent to commit such an offense was competent; that is, it was competent to show that he intended to repel a bare trespass, not against the dwelling, by a homicidal assault. Now, the facts as to the Dazelle matter showed Donyes' intent to prevent a trespass upon the property in question by assaulting the trespasser with a deadly weapon. The testimony as to this former trouble, in our opinion, was evidence tending to show the intent and object of defendant in being upon the premises, in the road, and armed, as he was at the time of the difficulty. On the former occasion he had repelled a bare trespass by the use of a deadly weapon, and at that time he had made declarations which tended to show his intent to kill any trespasser in the future. The former difficulty was two or three weeks prior to the latter one. It occurred over the same property, and was as to the same claims of right by the defendant. See 3 Rice, Ev. c. 25, and cases cited and reviewed.

Counsel for appellant, in his brief, contends that there were errors in the instructions; but the instructions are not here in a bill of exceptions, nor are they properly authenticated for review. The judgment is affirmed, and it is ordered that it be carried into effect as adjudged by the district court.

PEMBERTON, C. J., and HARWOOD, J.,
concur.

LAY v. NIXON.

(Supreme Court of Montana. Jan. 22, 1894.)

APPEAL BOND—ACTION AGAINST SURETY — SUFFICIENCY OF DEFENSE.

In an action against a surety on an appeal bond, the answer alleged that defendant's cosurety was the real principal, that he had agreed to hold defendant harmless, and that plaintiff had compromised with said cosurety, and had released him on payment of one-half of the bond. *Held*, that such facts were insufficient to constitute a bar to the action.

Appeal from district court, Gallatin county; F. K. Armstrong, Judge.

Action by Lewis E. Lay against J. H. Nixon, as surety, on an appeal bond. Plaintiff moved for judgment on the pleadings, on the ground that the answer did not state facts sufficient to constitute a defense. Granted. Defendant appeals. Affirmed.

E. P. Cadwell, for appellant. Staats & Holloway, for respondent.

PEMBERTON, C. J. This is an action on an appeal bond executed by appellant and one Kleinschmidt in an appeal to the supreme court (28 Pac. 1001) in a case in which

the respondent recovered judgment against the Gallatin Canal Company, the said appellant and Kleinschmidt being surety on said bond. The complaint is such as is ordinarily used in such cases. The defendant, Nixon, filed his separate answer, in which he alleges substantially, among other things, that his codefendant, Kleinschmidt, after signing and executing the bond sued upon as surety with appellant, Nixon, was in fact the principal; that he (Nixon) signed the bond at the request of said Kleinschmidt, and with the assurance, and under an agreement with said Kleinschmidt, that if Kleinschmidt would hold and save him harmless (on) free and harmless from all damages, on account of his signing and executing the bond as cosurety with said Kleinschmidt, that plaintiff well knew all these facts, knowing said facts, plaintiff compromised with said Kleinschmidt by receiving payment of one-half of said bond from him, and by releasing said Kleinschmidt from his other liability on said bond. The appellant pleads these facts in bar of the plaintiff's right of action, and asks that the case be dismissed as to him, and that Kleinschmidt be adjudged the principal in said bond, so that judgment be had against him for the amount remaining due on said bond, the one-half thereof claimed to be due from Nixon. Upon the filing of this answer in the court below, the plaintiff filed a motion for judgment on the pleadings, on the ground that the answer did not state facts sufficient to constitute a defense. The court sustained this motion, and the appellant, Nixon, refusing and declining to amend his answer, judgment was rendered against him for the amount claimed. The appellant appeals from the judgment, and the order sustaining the motion for judgment on the pleadings.

The principal cause of complaint in the action of the trial court urged by appellant in his brief is that the court refused to permit him to litigate the equities alleged in his answer to exist between him and Kleinschmidt, and to have Kleinschmidt adjudged to be the principal in the bond sued upon, so that judgment in this case so state, and to issue first against him, as principal, in section 1293, p. 1005, of the Code of Statutes. But the answer to this contention is that the answer of appellant does not seek such adjudication and relief. That appellant's answer is a plea in bar to an action of recovery against him in this action, and he asks that he be dismissed with his costs, which would, in effect, leave respondent without remedy against him. In his answer he does not invoke the aid of said section 1293. In his answer appellant denies that plaintiff is entitled to any judgment against him. In his brief he admits that plaintiff is entitled to judgment against appellant. We have here only a motion in the answer, and an entirely

ent one made in the brief and argument in this court. Upon the pleadings in this case we do not see how the court could have consistently done otherwise than it did. The answer set up no sufficient defense, and sought no relief that the court was authorized to give. The appellant, upon the court's sustaining the motion for judgment on the pleadings, declined to amend his answer so as to have any equities that might exist between himself and Kleinschmidt adjudicated in this case, as provided for by said section 1293. The judgment and order of the court are affirmed.

HARWOOD, J., concurs.

DE WITT, J. The district court, upon motion of plaintiff, rendered judgment on the pleadings in his favor. The defendant appeals.

In an action in which the Gallatin Canal Company was plaintiff and Lewis E. Lay, the plaintiff herein, was defendant, said Lay obtained a judgment against the canal company for \$1,183.80. The canal company appealed to this court. Upon that appeal the judgment was affirmed. Appellant duly filed an appeal bond in the sum of \$2,270.60, staying execution on the judgment, and providing for the payment of the same if it were affirmed. The sureties on that bond were Albert Kleinschmidt and J. H. Nixon, the defendants in this action. The said Lay (now plaintiff herein) brings this action, setting forth the above facts, and alleging that his judgment against the canal company had not been paid. He demands judgment against the defendants for the amount of the judgment in the other case, and interest and costs. The defendant Nixon filed a separate answer. He alleges that his codefendant, Kleinschmidt, was the principal owner in, and manager of, the Gallatin Canal Company, and that the appeal bond mentioned was really for said Kleinschmidt; that in the matter of the indebtedness arising upon the bond, by reason of the affirmation of the judgment, Kleinschmidt was in fact principal, and Nixon surety for Kleinschmidt; that Nixon signed said bond with Kleinschmidt upon Kleinschmidt's agreement that he would protect and hold him (Nixon) free and harmless from any loss by reason of said bond, and, if said judgment were affirmed, he (Kleinschmidt) would pay the same from the funds of said canal company; that, after the affirmation of the judgment, Kleinschmidt paid one-half thereof out of the moneys of said canal company, and received from the plaintiff herein, Lay, a full release of all claims against him (Kleinschmidt) on account of the bond; furthermore, that the plaintiff thereupon agreed to dismiss this action against Kleinschmidt, and to release all claim against him. The answer states that this matter is alleged "by way of affirmative relief, and by way of

a plea in bar." The defendant asks judgment that this action may be dismissed as against him, and that Kleinschmidt may be adjudged to be the principal on said bond and indebtedness, and this defendant only the surety, and an execution issue against defendant Kleinschmidt before it issues against this defendant, Nixon. Upon the filing of this answer, the plaintiff moved for a judgment on the pleadings, as against Nixon, for one-half the amount demanded in the complaint. This motion was made upon the ground that the answer does not state any defense to the cause of action. This motion was by the court granted, and judgment was entered against defendant Nixon for one-half the amount demanded in the complaint. Defendant Nixon appeals.

Defendant's answer is to some extent inconsistent. He pleads certain matter as to the affairs and conduct of Kleinschmidt and plaintiff, which he asserts in his answer is a plea in bar, and he asks to be dismissed. At the same time he asserts in his answer that said same matter is pleaded for the purpose of affirmative relief, and he asks that it be adjudged that Kleinschmidt is the principal, and that he (Nixon) is the surety; and he further asks that execution be issued against Kleinschmidt before it is issued against him (Nixon.) He thus seems to concede that he is liable, and wishes the priority of liability settled between himself and Kleinschmidt, under the provisions of section 1293, Comp. St. While that section, in my opinion, is not applicable to the facts in the case at bar, yet it seems that the answer, if we read one part of the language, undertook to present the alleged facts for treatment by that section. For these reasons it has seemed to me appropriate to express the following views: By virtue of the statute of this state, (division 5, c. 76, Comp. St.) one joint debtor or more may make a compromise or composition with the creditor of the joint debtors, and such compromise or composition shall be a full and effectual discharge to the debtor or debtors making the same, and to them only, of all liability to the creditor. Such compromise or composition with one joint debtor or more shall not discharge the other debtor or debtors, but shall be deemed to be a payment to the creditor, equal to the proportionate interest of the joint debtor or debtors so discharged; but the provisions of that chapter do not apply to any "debtor or debtors who, by the express terms of the contract upon which the indebtedness exists or arose, was the principal debtor while the other joint debtor or debtors were sureties." Comp. St. div. 5, c. 76, § 1292. The following section then provides "that upon the rendition of any judgment in any court in this territory, if it shall be shown that one or more of the defendants against whom the judgment is to be rendered are principal debtors, and others of the said defendant are sureties of

such principal debtor or debtors, the court may order the judgment so to state, and upon the issuance of an execution upon such judgment, it shall direct the sheriff to make the amount due thereon, out of the goods and chattels, lands and tenements of the principal debtor or debtors, or if sufficient thereof cannot be found within his county to satisfy the same, then that he levy and make the same out of the property, personal or real, of the judgment debtor who was surety." Id. § 1293. In the indebtedness to Lay on the appeal bond in question, the principal debtor was the Gallatin Canal Company, and the sureties were Kleinschmidt and Nixon. All three were debtors. Lay originally sued Kleinschmidt and Nixon, sureties. It does not appear, "by the express terms of the contract upon which the indebtedness arose," (section 1292,)—that is, it does not appear by the terms of the appeal bond,—that Kleinschmidt was a principal debtor to Lay, and Nixon a surety. On the contrary, it appears, by the terms of that contract, that Kleinschmidt and Nixon stood in the same relation to Lay, and were joint debtors to him. Therefore, the provisions of chapter 76 apply to Kleinschmidt and Nixon, and one of them could make a separate compromise and composition, and take from Lay a discharge and release. This Kleinschmidt did. He paid one-half the debt, and was discharged in full. This released Kleinschmidt, and was a payment of the debt to the extent of one-half. This occurred after the commencement of the action. Plaintiff herein, therefore, cannot take any judgment against Kleinschmidt. He has released and discharged him, and has agreed to dismiss the suit against him; and this for a valuable consideration. I am therefore of opinion that section 1293 does not apply to these facts. That section refers to "one or more of the defendants against whom the judgment is to be rendered." Judgment is not to be rendered against Kleinschmidt in this action, as shown above. Therefore, he is not "a defendant against whom judgment is to be rendered." That being true, the method of rendering judgment provided in section 1293 cannot be here applied. Kleinschmidt is no longer in the case, under the facts set up in the answer, which now, on demurrer, are taken to be true. The action is now (since the discharge and release of Kleinschmidt) simply against Nixon alone, and in such action that defendant sets up the facts of an alleged claim of his against Kleinschmidt. Such facts must be litigated, and their legal effect determined, in an action in which Kleinschmidt is a party. He is not now a party in this action. Appellant cites to us cases wherein it appeared that one defendant was principal and one was surety, and judgment was entered as provided in section 1293; and he contends that such relation of principal and surety between the

defendant debtors may be shown on the record without a pleading of the facts, and notwithstanding the statute of frauds and the requirement of a contract to answer in writing, the court need not review those cases, or treat the propositions, because in none of those cases do the facts appear as herein, namely, that one debtor had been discharged and the action against him dismissed, and that the action before the court was proceeding against the undischarged debtor alone. I am of opinion that the judgment should be affirmed, with costs.

KLEINSCHMIDT v. BINZEL

(Supreme Court of Montana. Jan. 22, 1903.)

RES JUDICATA—JUDGMENT ON DEMURRER.

Where a demurrer setting up facts alleged to constitute a cause of action is sustained generally, and plaintiff, abiding by his complaint, suffers judgment, the presumption is not that each and every ground of the demurrer was held sufficient, but rather that the court would first consider the object of the demurrer, and, finding them well taken, would not go further; so that one pleading such facts as an estoppel to said plaintiff's action on the same facts has the burden of showing that the demurrer was sustained on that ground.

Appeal from district court, Lewis and Clark county; William H. Hunt, Judge.

Ejectment by Albert Kleinschmidt and Belthaser Binzel. Judgment for plaintiff. Defendant appeals. Reversed.

Statement of the case by HARWOOD.

There is but one question involved in this appeal, namely, what effect ought to be given to plaintiff's plea of former adjudication in bar of defendant's cross complaint interposed in this action? Respondent contends that by order of the court sustaining the demurrer to a complaint in an action formerly instituted by this defendant, the further proceedings having been taken to avoid or reverse such ruling, the rights and equities claimed by defendant in and to the property in controversy, set forth in his complaint in this action, have been ascertained and determined against him, and he is thereby estopped from now asserting the same in defense of the present action. And, respondent's position having been sustained by the trial court, appellant, by this appeal, seeks to controvert the correctness of that ruling. We will narrate the facts briefly as consistent with clearness, and the proceedings which gave rise to this action, as shown by the record:

This is an action in the nature of an ejectment, whereby plaintiff seeks to recover possession of a certain described lot of land situate in Helena, Lewis and Clark county, alleging in his complaint ownership thereof since April 9, 1889, and that since that time he has been entitled to possession thereof.

that defendant, Binzel, on that date, wrongfully entered and took possession, and has ever since withheld possession from plaintiff, and refused to deliver the same, although demanded. The value of the rents and profits during the time of the wrongful detention is also alleged. Upon which allegations, plaintiff demands judgment for restitution of possession, and for recovery of the value of the rents and profits. Defendant made answer to this complaint, specifically denying all its allegations, and in addition to such denial, by way of further defense and cross complaint, alleges that on June 5, 1880, and for a long time prior thereto, defendant was in the quiet and lawful possession of a certain tract of land, which is particularly described, and "which said lot embraced, and now embraces, and includes within its exterior boundaries, all the land referred to in plaintiff's complaint," and which said lot defendant held in quiet, peaceable, and lawful possession on June 5, 1880, by virtue of a contract whereby Deborah M. Hoyt and her husband, E. M. Hoyt, agreed to convey said land to this defendant, a copy of which contract is annexed to and made a part of the answer and cross complaint, as Exhibit A. This contract, mentioned as "Exhibit A," purports to have been executed and acknowledged by said Deborah M. and E. M. Hoyt, as the parties of the first part, and said Binzel, as party of the second part, and sets forth that the parties of the first part, for a certain consideration mentioned, to be paid at any time within two years from the 1st day of May, 1878, with interest, etc., covenant and agree with Binzel to convey to him, or his heirs or assigns, by good and sufficient deed, the tract of land mentioned, and defendant Binzel, on his part, covenants to well and truly pay for said land as stipulated in the contract; and it was further agreed between said parties that the party of the second part was to have possession of said premises until default of such payment for 60 days, when he was subject to ouster. Having introduced said contract, the answer and cross complaint proceeds to allege that by mutual agreement between Deborah M. and E. M. Hoyt, the owners, and this defendant, the said contract to purchase and convey "was in full force and virtue on June 5, 1880, and for a long time thereafter;" that prior to said date defendant had caused to be placed on said land, "including the land described in plaintiff's complaint," divers permanent buildings and improvements, of the value of \$6,000, which were thereon June 5, 1880; that, by reason of such improvements, defendant became, and was on that date, financially embarrassed, and unable to pay the unpaid purchase price then due on said lot to said Hoyts, together with a balance due and unpaid on the cost of erecting the buildings and improvements on said lot, all aggregating \$4,000; that, to procure a loan of \$4,000 to make such payments, de-

fendant entered into an agreement with William H. Welmer and Carl Kleinschmidt, "of which said agreement plaintiff had full notice on and after June 5, 1880," by the terms of which agreement Welmer and Carl Kleinschmidt were to pay off and discharge half of said \$4,000 indebtedness, for an undivided half interest in the ownership of said lot, "and they further agreed to pay, as a loan to defendant, the remainder of said \$4,000 indebtedness, to wit, \$2,000, and thus procure, without delay, the title to said lot, under defendant's aforesaid contract to purchase the same from Deborah M. and E. M. Hoyt;" that on June 5, 1880, pursuant to that agreement, "defendant conveyed to said Welmer and Carl Kleinschmidt the whole of said lot K,—one undivided one-half thereof absolutely,—in consideration of their agreement to pay one-half of said \$4,000 indebtedness, and to advance as a loan to defendant \$2,000, to pay the other half of said indebtedness, and the remaining undivided half of said property was conveyed to said Welmer and Carl Kleinschmidt, to be by them held as security for said sum of \$2,000 to be advanced by them as a loan to defendant, wherewith to pay and discharge the remaining half of said \$4,000 indebtedness; that said Welmer and Carl Kleinschmidt did, on receipt of said deed from defendant, execute and deliver to him their agreement in writing to reconvey to defendant an undivided half interest and ownership in and to said lot K, and all buildings and improvements thereon, at any time within three years from said June 5, 1880, on payment by defendant of said \$2,000 to be by them advanced as a loan as aforesaid," a copy of which last-mentioned agreement is annexed to this answer and cross complaint, as a part thereof, marked "Exhibit B."

Turning to Exhibit B, it is found to disclose an instrument, in form a bond for deed, purporting to have been executed and acknowledged by William H. Welmer and Carl Kleinschmidt, whereby they firmly bind themselves in the sum of \$2,000, lawful money of the United States, unto Belthaser Binzel, conditioned as follows: "The conditions of the above obligations are such that at any time within three years from the date of this obligation, that is to say, on or before the fifth day of June, A. D. 1883, that the said B. Binzel shall pay or cause to be paid the sum equal to one-half the indebtedness against that certain property known as the 'Penobscot Brewery,' viz. one-half of four thousand dollars, said sum to be paid out of the profits of said brewery, from the date of this instrument, or at any time previous to that date heretofore mentioned that the profits shall exceed the indebtedness. We bind ourselves to make and deliver to said B. Binzel a good and sufficient deed, for the consideration of one dollar, in and to the undivided one-half interest in and to that certain property known

as the 'Penobscot Brewery,' and also one frame dwelling house, one frame ice house, one log cooper shop, one malt kiln, also one-half interest in a certain bill of sale of personal property, dated this date, from B. Binzel to said first parties; all of the above-described property being situated on lot K in section 30, township 10 north, range 3 west, according to the plat of lot No. 2, as it is recorded in Book U. S., pages 88 and 89, Lewis and Clarke County, Montana Territory, Records. In case said B. Binzel fails to make such payment in the time above specified, this obligation to be null and void; otherwise, to remain in full force and virtue."

Returning to the answer and cross complaint, it proceeds, after introducing Exhibit B, to allege that plaintiff had "due notice and knowledge" of said contract, shown in Exhibit B, "at and long prior to the time of his purchase of said lot K, or any interest therein, from William Welmer and Carl Kleinschmidt;" that Welmer and Carl Kleinschmidt wholly failed and refused to advance to, or on behalf of, defendant, or cause the same to be done, said \$2,000, or any part thereof, agreed by them to be advanced to defendant, and to secure payment whereof defendant conveyed to them an undivided one-half interest in said lot K as security, as aforesaid; that pursuant to their agreement with this defendant, which was duly transferred to said Welmer and Carl Kleinschmidt, the said Deborah M. and E. M. Hoyt conveyed unto said Welmer and Carl Kleinschmidt the whole of said lot K, by sufficient deed, dated June 12, 1880, which deed was received by them under and subject to their contract with this defendant, of which plaintiff well knew, and of which he had due notice long prior to his purchase of any interest in said lot, or any part thereof; that whatever right, title, interest, or claim plaintiff has acquired in lot K is subsequent and subject to, and with due notice of, all the right, interest, claims, and equities of this defendant in and to said lot, including all the land and premises described in plaintiff's complaint; that plaintiff acquired all such interest as he may own in said premises, from said Welmer and Carl Kleinschmidt, with due notice of their contract relating thereto with defendant, and with full knowledge that they had wholly failed and refused to pay, advance, or account for the \$2,000 which they agreed to advance as a loan to defendant, and to secure which they acquired and held an undivided one-half interest in said lot K, including the land described in plaintiff's complaint; that before June 5, 1883, to wit, June 4, 1883, "defendant, desiring to purchase his peace and avoid litigation, did duly tender unto plaintiff the sum of \$2,000, lawful money of the United States, under and in conformity with the terms and conditions of said contract," marked "Exhibit

B," and with such tender demanded that the execution of a deed of conveyance to him an undivided one-half interest in said lot K, including the land described in the complaint, but plaintiff refused to accept said tender, or execute such deed to defendant, and has ever since such refusal and neglect; that, on such tender, defendant has been, is, ready and willing to pay to plaintiff the sum of \$2,000, or such sum as may determine to be due on defendant's contract, and he now tenders the same to plaintiff, in court, and continues his action for a conveyance of an undivided one-half interest in said property according to the terms of said contract marked "Exhibit B." Plaintiff avers he has fulfilled, and so far as prevented from so doing by the wrongful acts of plaintiff and said Welmer and Carl Kleinschmidt. Defendant avers that prior to all the dates and times mentioned in plaintiff's complaint, to all the dates and times mentioned in answer and cross complaint, defendant and is now, in the quiet and peaceable possession of the whole of said lot K, including the lands and premises described in plaintiff's complaint, as tenant in common and co-owner, with said Welmer and Carl Kleinschmidt and plaintiff," which relation is jointly and as tenant in common with plaintiff. Wherefore, defendant prays judgment quieting his joint ownership in said half interest in said premises; that he and said Welmer and Carl Kleinschmidt, plaintiff, ascertaining the amount due by them and the amount due plaintiff pursuant to said contract, and that, on the day thereof, plaintiff be required to pay to defendant an undivided one-half interest in said lot K, and to said premises in controversy.

Plaintiff replied to this answer and cross complaint, alleging that on June 22, 1883, defendant, Binzel, commenced an action by filing in this court his complaint, which complaint is fully set forth in the reply of plaintiff, and appears from that complaint that plaintiff, on June 22, 1883, commenced an action against Carl Kleinschmidt, H. Kleinschmidt, James M. Ryan, Jacobl, William H. Welmer, and Carl Kleinschmidt, as defendants, alleging that the complaint substantially all the facts and circumstances in the cross complaint in the case of plaintiff vs. Binzel, with the same exhibits attached to the complaint of June 22, 1883, as are attached to Exhibits A and B to the cross complaint in this case, and thereon demanded judgment for the same relief on behalf of Binzel as he now seeks through his cross complaint in the present case. The only substantial difference between the complaint of plaintiff of June 22, 1883, and the cross complaint as a defense in the case of Binzel is that in the former action the complaint further, and in addition to the contents

denced by Exhibits A and B, and the facts alleged in relation thereto, the complaint of June 22, 1883, set forth a copartnership compact alleged to have been entered into between Binzel and said Welmer and Carl Kleinschmidt, whereby they agreed, on certain terms and conditions, to engage in and carry on the business of brewing in the Penobscot Brewery, situate on the property in question, evidenced by a contract which was attached to said complaint of June 22, 1883, as Exhibit C, and that complaint alleged certain violations of the terms of said copartnership agreement, and injuries to certain partnership property, and also the destruction of said brewing business, resulting from alleged wrongful acts of said Welmer and Carl Kleinschmidt, alleged and set forth in said complaint, whereby plaintiff, Binzel, claimed to have been damaged in a large sum, for which he demanded judgment, along with the relief which he demanded upon the agreements evidenced by Exhibits A and B, and the facts alleged in reference thereto. There was also a further exhibit annexed to the complaint of June 22, 1883, which purports to be an assignment by Binzel to defendants Welmer and Carl Kleinschmidt of the contract between Binzel and said Hoyts for the sale and purchase of said land; and in reference to that exhibit it was alleged that, through such assignment, Welmer and Carl Kleinschmidt were enabled to obtain the conveyance of the title of said tract of land to them from said Hoyts. As to the other defendants named in said complaint of June 22, 1883, namely, Reinhold H. Kleinschmidt, James M. Ryan, Michael Jacobi, and Albert Kleinschmidt, it was alleged that they claimed some interest in said premises by way of pretended conveyances from, or as tenants of, said defendants Welmer and Carl Kleinschmidt, but that such conveyances or tenancy were acquired with full notice and knowledge of the rights of Binzel in said premises. Having set forth that complaint which Binzel filed in his action of June 22, 1883, respecting the subject of this controversy, the plaintiff further alleges, in his reply to the cross complaint in this action, that said complaint was demurred to by defendants therein, by filing their demurrer February 5, 1884; that such demurrer was sustained by the court, and plaintiff Binzel's bill dismissed, and judgment entered in favor of defendants in said action. That plaintiff in the case at bar "is successor to the aforesaid parties in and to the said property therein described, and is now the lawful owner thereof, and is entitled to the possession of the same, as set forth and alleged in his complaint." And upon that showing, as a reply to defendant's cross complaint, plaintiff asserts "that by reason of the premises the said right, title, and equity of said Binzel has been adjudicated and determined, and by reason whereof he is estopped from asserting his pretended claim to said property," wherefore plaintiff demands

judgment as in his complaint. And thereupon plaintiff moved the court for judgment on the pleadings, which motion, after hearing, and examination of the record of 1883, and the alleged damage for wrongful withholding of possession having been waived, was sustained by the court, and judgment rendered for plaintiff's recovery according to the prayer of his complaint. It appears from the record in the action of 1883 that two demurrers to said complaint were filed. The first was overruled, as the record shows. Thereafter, another demurrer, of February 25, 1884, was interposed by defendant Carl Kleinschmidt, on the following alleged grounds: "First. Said complaint does not state facts sufficient to constitute a cause of action. Second. Said complaint shows that the cause of action against this defendant for damages, if any existed, is, and was at the time of the commencement thereof, barred by section —, c. —, entitled, 'Limitations of the Revised Statutes of the Territory of Montana.' Third. The three causes of action set out in said complaint are not separately stated, as required by the statute. Fourth. There is a misjoinder of parties—Reinhold Kleinschmidt, James M. Ryan, and Michael Jacobi—as defendants herein. Fifth. There is a misjoinder of causes of action, in this: an action for specific performance and damages. Sixth. The complaint shows that the parties interested in the real property are not interested in the damage suit. Seventh. Said complaint shows that the parties against whom damages are claimed have no legal or equitable title to the real property in controversy. Eighth. No cause of action for specific performance is shown in said complaint." This demurrer was sustained, as shown by the following record entry of March 10, 1884: "This cause having been heard upon defendant's motion to strike out, and demurrers, it is by the court ordered that the said motion to strike out, and demurrers, be sustained, to which plaintiff duly excepted. Plaintiff has leave to amend the complaint herein." Following that record entry is another of November 12, 1884, that: "In this action, plaintiff abiding his complaint, judgment is rendered in favor of defendants." And afterwards, of December 4, 1886, another entry, that: "In this action, it is ordered that the judgment be entered nunc pro tunc the entry thereof made in the journals of said court November 15, 1884." No formal judgment was found in the records of the court; but in the register of actions it is noted, of date December 4, 1886, that judgment was entered "for defendant for costs; amount, \$17.20."

McConnell and Clayberg & Gunn, for appellant. Toole & Wallace, for respondent.

HARWOOD, J., (after stating the case supra.) Defendant having alleged in his cross complaint those contracts and transactions concerning the land in controversy shown in

the above statement of the case, demanding affirmative relief, plaintiff set up in bar thereof the complaint of defendant in an action which he commenced in 1883, wherein he alleged substantially the same facts and demanded substantially the same relief as in his cross complaint in the present action, to which complaint, in the defendant's action of 1883, demurrer was interposed and sustained, and no further action was taken therein. And the plaintiff here, who was one of the defendants in the action of 1883, avers that he has succeeded to the rights of all the other defendants in that action, wherefore he insists that by said proceedings in the former action the right, title, and equity claimed by Binzel, defendant here, in and to the property in controversy, has "been adjudicated and determined, by reason whereof he is estopped from asserting his pretended claim to said property." In this position, plaintiff was sustained by the ruling of the trial court. Appellant has made some attempt to point out differences or distinctions between the complaint of Binzel in the action of 1883, and his cross complaint in the present action. But a careful comparison of these pleadings, we think, discloses a substantial similarity in the facts alleged and relief sought, with this exception: that the complaint of 1883 went further than the cross complaint in this action, and contained allegations in reference to an alleged co-partnership compact engaged in between Binzel and certain of those defendants, and a violation thereof, and other grievances, for which he demanded a large amount of damages. As to those matters the cross complaint in the present action is silent. But, in so far as it goes in alleging the contracts and facts on which Binzel claims rights of ownership and possession in and to the tract of land in controversy, the cross complaint to this action is substantially the same as his complaint of 1883 on that branch of the case.

The authorities support the proposition urged by respondent,—that if the alleged cause of action is submitted on the merits by demurrer admitting the facts alleged, but placing over against them, in the judicial scale, the proposition of law that the facts pleaded and thus admitted are insufficient to warrant judgment in favor of the pleader, and upon due weighing of the law and the facts those facts are adjudged insufficient, by sustaining the demurrer, and this ruling is allowed to stand, those facts thereby pass under the rule of "things adjudicated," and the party against whom such adjudication proceeds, as well as his privies and representatives, is thereby barred from again asserting the same facts in another action pertaining to the subject, as effectually as though such facts were found from the proof, or admitted *ore tenus*, in the course of the trial. Such appears to be the rule deducible from the authorities, without much conflict. *Gould v. Railroad Co.*, 91 U. S. 526; *Bissell v.*

Spring Val. Tp., 124 U. S. 225, 8 S. 495; *Griffin v. Seymour*, 15 Iowa, 30; *Inson v. Howard*, 5 Cal. 429; *Bouché v. Dias*, 3 Denio, 238; *People v. Stephens*, 10 How. Pr. 235. But this rule should be stated and applied with due regard to some modifying conditions, which it is not permitted to violate. Thus, when the party has submitted to the ruling of the court on demurrer against the sufficiency of the cause of action or defense as stated, nothing would not bar him, or those in privity with him, from again asserting the same facts, accompanied by additional allegations which complete the statement of the cause of action or defense. *Gould v. Railroad Co.*, supra. Nor where an action commenced to effectuate a certain purpose as specific performance, or to obtain judgment, and demurrer is interposed and sustained on the ground that the complaint does not show facts sufficient for such a purpose, that is, to invoke such relief,—such demurrer would be no bar to an action for the same remedy. It being pointed out in the case of *Griffin v. Seymour*, that the interposition of such demurrer that although the complaint, for instance, alleges an agreement for the sale and purchase of a piece of property, and payment of part or even the purchase price, and the breach of the agreement by the vendor, still, if no facts in support of the claim are shown, and equities were shown, the court would not sustain the complaint, while good for damages, is indeed insufficient to support a decree for specific performance, (*Milling Co. v. Ham*, 12 Mont. 11, 29 Pac. 277,) and therefore sustain the demurrer. It is not said this would be on the ground of want of jurisdiction. But that arises because the complaint is insufficient to show facts sufficient showing of facts to support the relief asked. The pleader would have taken his remedy, and under a system of separate courts of law and equity were separated, demurrer in such cases would prevent the party be remitted to the proper court of law for action for redress. And under our united jurisprudence, where equitable and legal remedies are administered in the same court frequently in the same action, the demurrer in such a case as instanced, would not prevent the relief asked from being granted, because the relief asked is not to be granted on the facts stated; though the court might have jurisdiction under our united system, to grant other relief, it would probably not be forced to grant the plaintiff until he had shaped his case to that end; but, when he came into court with his suit for damages, it would be too late that he pleaded the same transaction, breach, whereby he would allege himself damaged in a certain sum, for which he would ask judgment. Likewise, if the action was commenced prematurely, as appears to be the face of the complaint, it would be insufficient on demurrer, for that reason. *Sheldon v. Edwards*, 35 N. Y. 286. If the facts were held, in such cases, that the order sustaining the demurrer devitalized the first pleaded, it would prevent setting

those facts in another action at the proper time, or in the proper form, and for available relief. So it is said by eminent authority, in considering these conditions: "If the first suit was dismissed for defect of the pleadings or parties, or a misconception of the form of proceedings, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment will prove no bar to another suit." *Hughes v. U. S.*, 4 Wall. 232.

It is clear, however, that defendant's cross complaint falls within the rule, and not the exception. He has, in the case at bar, reasserted substantially the same facts as in complaint of 1883, with no additional matter, and he asks substantially the same character of relief. Demurrer was sustained to his complaint, and that ruling stands in force. Therefore, if we had no further point for consideration, we should, without hesitation, affirm the ruling of the trial court that the matter pleaded in the cross complaint is *res adjudicata*, and therefore barred. But, before proceeding to that conclusion, it must be inquired whether it is shown that the demurrer to Binzel's complaint of 1883 was sustained on consideration of the merits; for the authorities harmoniously concur in the proposition that it must clearly appear from the record in the former case, or be proved by competent extraneous evidence, that the matter as to which the rule of *res adjudicata* is invoked as a bar was in fact adjudicated in the former action. Upon this point it is said by Mr. Justice Nelson in *Packet Co. v. Sickles*, 5 Wall. 592: "As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*, it must appear by the record of the prior suit that the particular controversy sought to be concluded was necessarily tried and determined,—that is if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence aliunde consistent with the record may be received to prove the fact. But even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded." And again, in the case of *Russell v. Place*, 94 U. S. 608, Mr. Justice Field, in referring to the opinion of the court, observes: "It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is con-

clusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible. Thus, in the case of *Steam-Packet Co. v. Sickles*, reported in 24 How. 333, a verdict and judgment for the plaintiff in a prior action against the same defendant on a declaration containing a special count on a contract, and the common counts, was held by this court not to be conclusive of the existence and validity of the contract set forth in the special count, because the verdict might have been rendered without reference to that count, and only upon the common counts. Extrinsic evidence showing the fact to have been otherwise was necessary to render the judgment an estoppel upon those points. When the same case was before this court the second time, *Packet Co. v. Sickles*, 5 Wall. 580, the general rule with respect to the conclusiveness of a verdict and judgment in a former suit between the same parties, when the judgment is used in pleading as an estoppel, or is relied upon as evidence, was stated to be substantially this: That, to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined,—that is, that the verdict in the suit could not have been rendered without deciding that matter,—or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter." Announcements to the same effect could be drawn from many other cases of undoubted authority. See *Hughes v. U. S.*, *supra*; *Lessee of Lore v. Truman*, 10 Ohio St. 53; *Estep v. Larsh*, 21 Ind. 196; *Keller v. Stolzenbach*, 20 Fed. 47; *Woodland v. Newhall's Adm'r*, 31 Fed. 434; *Dygert v. Dygert*, (Ind. App.) 29 N. E. 490.

Now, it appears that the demurrer in the former action specified eight objections to the complaint, but the same may be properly consolidated into three statutory grounds of demurrer, namely: (1) Want of sufficient facts alleged to constitute a cause of action; (2) misjoinder of causes of action; (3) mis-

joinder of parties defendant. The other nominal objections are merely specifications of particulars in which the complaint is wanting or defective on some of those grounds. The record does not disclose the particular ground upon which the court sustained the demurrer. As to that ruling, it is recorded that the demurrer was sustained by the court. But respondent's counsel insists that from the general order sustaining the demurrer the presumption follows that it was sustained on all the grounds alleged against the complaint in the demurrer. This view, although urged by an admirable argument contained in respondent's brief, and sought to be supported by citations of authority, we think cannot be maintained, because it is contrary to reason and the rule of law upon this subject sustained by the great weight of authority. The case of *People v. Stephens*, 51 How. Pr. 235, among others cited by respondent in support of the presumption which he contends for, is nearest in point. It is a New York decision, not of the last resort, but of the supreme court, general term. The demurrer under consideration in that case went to three grounds,—defect of parties, improper joinder of causes, and want of sufficient facts alleged to constitute a cause of action. The demurrer was sustained by a general order, not showing whether upon one or more of the alleged grounds of objection to the complaint. When this judgment was pleaded in bar of setting up the same facts in another action, it was insisted that the demurrer in the former action was sustained upon all the grounds of the objection stated therein. In considering that proposition, the court said: "It was, according to the order and judgment, 'the demurrer,' which came on for argument at the special term, and it was 'upon the demurrer' that the judgment in favor of defendant was given. It was sustained, not in part, but as a whole, and that could only be done by reaching a conclusion unfavorable to the plaintiffs upon every issue which it presented." With due deference, we are unable to adopt or follow that holding. It seems to us a moment's reflection suffices to show that the conclusion there stated contradicts the real state of the law, as well as the constant practice of the courts. It is well known that, if either ground of the demurrer is sustained, that is sufficient to support the order sustaining the demurrer. How, then, could it be affirmed that the demurrer could only be sustained "by reaching a conclusion unfavorable to the plaintiffs upon every issue which it presented." That untenable conclusion is reached by arbitrarily declaring that the demurrer was sustained as a whole, when the same order could have been made on finding only one objection well founded. It would seem as proper to presume from the fact that several shots were fired by one person at another, either of which, taking effect in a vital spot, would produce death, and death ensued, that every

shot hit the mark with fatal effect, and hold, without any further showing. This is a presumption following a judgment upon those things were adjudicated, and upon which the judgment could not have been rendered. This proposition is frequently asserted in the authorities, and is well founded because it is an inherent implication of those things were considered and determined, without which the ultimate decision would not have been announced. The implication shows that the court, in sustaining the demurrer, held some one of the grounds fatal to the complaint, stated in the demurrer, well founded; for without finding the ultimate conclusion that the demurrer be sustained would not have been announced by the court. But this is not sufficient to maintain respondent's position. To support that position the presumption must go further, and cover the broad proposition that, by a ruling sustaining a demurrer which attacks the complaint by several objections, it must be presumed that the court adjudicated and held good all the grounds which the demurrer set forth. This proposition proves too much, and thereby weakens the proposition so that it falls of its own tenable weight. Because from that presumption it follows that where the complaint is demurred to on several grounds, such as misjoinder of causes and also misjoinder of parties, and want of sufficient facts to constitute a cause of action, as in the case of the demurrer to Binzel's complaint of 1891, the court adjudicated and determined the ground unfavorable to the plaintiff, it follows that the court, while holding that the complaint was not in court in proper form of action, but contained a misjoinder of causes and also a misjoinder of parties defendant, contrary to the provisions of law, nevertheless, being aware that the case was not properly before it, the court determined to pass upon the case fast in its grasp, and pass upon the merits. Such is the inevitable effect of assuming, from the order merely sustaining such a demurrer, that the court passed upon and sustained all the grounds the demurrer alleged. The impropriety of such a presumption seems plain, and we therefore think the current of presumption is the other way. It is directly held by the supreme court of Iowa in *Griffin v. Seymour*, 15 Iowa, 30, which was held that in such a case it would be presumed that the court, having found no formal defect, by reason of which the case was not properly in court, would not proceed to consider and pass upon the merits. This is also in accord with the rule in cases, (some of which have been cited) that it must be clearly shown that the matter as to which the bar of res adjudicata is invoked was adjudicated and determined on the merits in the former action; that it is not enough that such matter was attempted to be drawn in question, if the same

cision could have been rendered without its adjudication. That is, if its adjudication is not inherently implied in the judgment, it will not be held barred, unless the record is supplemented by extraneous proof to the effect that such matter was adjudicated. The very rule that such evidence may be introduced, in its tendency, contradicts the idea that the uncertainty will be covered by presumption.

The application of the presumption contended for by respondent would, we think, frequently contradict or suppress the real fact, with unjust consequences. Suppose a complaint is filed, which is subject to the objection of misjoinder or defect of parties, or improper joinder of causes of action, and a demurrer, having stated those grounds, also alleges the untenable ground of insufficient facts to constitute a cause of action. Now, the court, in considering the demurrer, would find one of the first-mentioned objections well founded. But, as to the latter objection, the court would either not consider it at all, because the case was not properly in court, or, if the court did consider that objection, it would be found untenable. But for the other defects the demurrer would be sustained. Thereupon, an order would be entered to the effect that the demurrer is sustained. The defect fully supports that order, and we venture that in a great majority of cases in our practice, where the demurrer is used with great frequency, no more specific order would be entered. In such a case, if the plaintiff and his counsel, who attended the argument, concluded the court was right in its ruling on the demurrer, because there was a misjoinder or defect of parties, or an improper union of causes, they would not appeal, for the appeal would be unavailing. Now, if the presumption for which respondent contends be established, the plaintiff in such a case would be barred from setting up those facts in another action against the same parties or their privies, free from the former defects, while, as a matter of fact, the former ruling did not touch the merits. It is said that in such a case it is the plaintiff's duty to see that the entry in the record specifies the ground on which the former ruling was made, or that it was made without prejudice to another action, and a case is cited in support of that view. *Foote v. Gibbs*, 1 Gray, 412. It may well be answered that the time has come when it is not considered altogether amiss to claim some duties as due from the court towards litigants; and one should be to so shape the entry of court rulings in its record as not to raise unjust and untrue implications against the suitor, of which he is not the author, to burden or defeat his effort to obtain justice. Of course, no such thing would be done knowingly, but it would arise in many cases where demurrers are sustained by general order. If the presumption contended for prevailed. And, in the multi-

tude of rulings which the trial judge is called upon to make, he does not always expound the grounds thereof, nor, if expounded, would they be noted in the record. In the case last above cited, it was held that where a cause was dismissed, and the entry of the order showed no qualification, as that it was dismissed "without prejudice," it would be presumed to have been dismissed on the merits. This ruling, however, would hardly apply, under our Code. Comp. St. div. 1, § 242. Moreover, in a later case (*Foster v. The Richard Busted*, 100 Mass. 412) the supreme court of Massachusetts cites, but does not follow, *Foote v. Gibbs*, supra, as correctly announcing the rule of procedure applicable to the conditions mentioned therein; and likewise did Judge Brewer, in *Smith v. Auld*, 31 Kan. 262, 1 Pac. 626. See, also, to the same effect, the case of *Lantern Co. v. Meyrose*, 27 Fed. 213.

It is further insisted that section 243 of the Code of Civil Procedure makes it obligatory to render judgment on the merits in all other cases than those stated in the five subdivisions of the preceding section. The context—the whole chapter, of which that section is a part—shows that section 243 relates to the case at a stage beyond the formation of the pleadings, where it stands for consideration and judgment on the merits, unless it is dismissed or nonsuited. The interpretation and application of that section according to respondent's contention would make a judgment or order on demurrer conclude the merits, even if the demurrer stated no ground which went to the merits, because such a case would be "other than those mentioned in section 242." We think it clear that the provisions of section 243 do not apply to this consideration.

It follows that the order sustaining the demurrer to Binzel's complaint of 1883 might have been based upon defects not touching the merits; and, it not having been shown that such judgment proceeded upon a consideration of the merits, the ruling of the trial court holding that the facts set up in the cross complaint were adjudicated in the proceedings of 1883 cannot be sustained. The judgment in this action is therefore reversed, and the cause remanded, to be proceeded with in conformity to the views herein expressed.

PEMBERTON, C. J., and DE WITT, J., concur.

DAVIS v. BOARD OF COM'RS OF SWEET-WATER COUNTY.

(Supreme Court of Wyoming. Jan. 16, 1894.)

JUSTICES OF THE PEACE—SALARIES—FEES—INCREASING EMOLUMENT.

1. *Sess. Laws 1890-91, c. 55*, providing fees for justices of the peace in precincts having less than 1,500 population, and salaries in precincts having a larger population, declares that

the population shall be ascertained from the last census, and that where this cannot be done the presumption shall be, till overcome by evidence satisfactory to the county commissioners, that the population is less than 1,500. *Held*, that the determination of commissioners, from the last census and the registration of voters, that a precinct contained 1,500 population, would not be disturbed, in the absence of proof that it erred.

2. Though it is determined, after the election of a justice, that the population of the precinct at the time of his election was 1,500, and it is voted that he have a salary from a certain time during his term, which amounts to more than the fees which he would have received, his emoluments are not increased after election, in violation of Const. art. 3, § 32, as the population at the time of his election entitled him to the salary.

Error to district court, Sweetwater county; Jesse Knight, Judge.

Action by Thomas E. Davis to enjoin the board of county commissioners from paying one Robert Smith a salary, instead of fees, as justice of the peace in Sweetwater county. Judgment for defendant. Plaintiff brings error. Affirmed.

John F. Mall and E. E. Enterline, for plaintiff in error. Louis J. Palmer and Clarence C. Hamlin, for defendant in error.

GROESBECK, C. J. Robert Smith was elected one of the justices of the peace for Sweetwater county, Wyo., in one of the justice's and constable's precincts of said county, also designated as "Election District No. 3," which comprised two election or polling precincts. The justice's precinct was established by order of the county commissioners on the 6th day of October, 1892, and the election was held November 8, 1892. Said Smith qualified as such justice of the peace on or about the 4th day of January, 1893, and on the 7th day of February, 1893, the board of county commissioners of the county adopted the following order: "On motion made by Thos. Sutton, and seconded by E. P. Maxon, Rock Springs justice precinct No. 1 and 2—district number three—are hereby made a salaried precinct from Feb. 1st, 1893." At the same meeting, the county board audited and allowed the bill of said Robert Smith, the justice of the peace of said precinct, for the sum of \$15, for office rent for the month of February, 1893. The action brought by the plaintiff in error was, in effect, to enjoin the board from making the precinct a salaried precinct, and from making any further payment of office rent to said justice of the peace. The district court gave judgment for the plaintiff in error upon the pleadings, as to the second cause of action of his petition, containing this allegation of the unlawful allowance for office rent, and enjoined the board of county commissioners from auditing and allowing any bill presented by the said Robert Smith, justice of the peace, for office rent, but overruled the motion for judgment on the pleadings as to the first cause of action, seeking an injunction against any

future action of the board in acting upon order making the precinct a salaried precinct. The court also overruled the demurrer of the plaintiff in error to the answer of the defendant in error. Upon trial on the issue joined as to said first cause of action of the petition, the court found for the defendant in error, and the plaintiff in error seeks a reversal of that judgment.

The action of the court below in disposing of the motion for judgment on the first cause of action for the plaintiff, and in overruling his demurrer to the answer of the defendant, may be reviewed with the evidence, as matter of law the questions of law involved in the case were passed upon by the trial court in the disposition of the preliminary questions, the facts alleged in the pleadings are substantially those proven on the trial. It appears that the dispute in this case is as to the effect of the order of the board of county commissioners, and also its validity. Plaintiff insisted that the order of the board was an attempt to increase the emoluments of said Robert Smith as a public officer after election and appointment, in violation of inhibition contained in section 32 of article 3 of the constitution, to that effect, and the case of Board v. Burns, 3 Wyo. 691, 29 Pac. 415, and 30 Pac. 415, is invoked as decisive of the case at bar. It is further maintained that the order of the board was retroactive and indefinite, and void for uncertainty. Where the order of the board of commissioners declaring the precinct a salaried precinct is not precise or exact in its terms, as it does not state the population of the precinct, to determine the amount of the salary of Smith as justice of the peace, the subsequent action of the board determines that. His salary was evidently allowed at the rate of \$750 per annum, the lowest amount fixed by statute as a salary in any precinct. Under the terms of the constitution, justices of the peace must be paid fixed and definite salaries in precincts having a population of 1,500 or more, but in precincts containing less than that population they are to receive fees. Where a salary is received by a public officer, he must account for, and pay to the county treasury of the proper county the fees received by him in the discharge of his official duties. Const. Wyo. art. 14, §§ 11, 12. The statute enacted to carry into effect the constitutional provision provides that justices of the peace in precincts containing less than 1,500 population, and salaries of such officers in precincts containing more than that number of people, and these salaries are graded according to population: those in precincts containing between 1,000 and 3,000 people being fixed at \$750 per annum, and those in precincts containing more than 3,000 people at \$1,200 per annum. See Laws 1890-91, c. 55, §§ 11, 12. As a guide for ascertaining the population of a precinct this statute declares, in section 14 thereof, that: "Number of inhabitants or popula-

of a precinct for the purpose of this chapter shall be ascertained by a reference to the census thereof by the United States or the state of Wyoming, whichever shall have been last taken. In precincts in which the official records of the census as aforesaid, do not show the population, or the population cannot be ascertained therefrom, the presumption shall be, until overcome by satisfactory evidence to the board of county commissioners, that the population thereof is less than fifteen hundred."

The "evidence satisfactory to the board" is that of two of its members. One of them was registry agent of the election district, which was the same in territorial extent as a justice's precinct, and which contained two polling or voting precincts. He was a resident of Rock Springs, and stated to the board that the registration of voters in the election district for the two voting precincts thereof at the election of 1892, in which Smith was elected justice of the peace, which was coextensive with the limits of the election district, and which is called the "South Side Justice's Precinct," was 751. This of itself, applying the ordinary rules of computing the total population from the voting population, would seem to indicate that the election district or justice's precinct contained a population of over 1,500, even taking into account the fact that the elective franchise was exercised by women as well as men. But the reason for the action of the board is based upon the further fact that according to the decennial federal census of 1890, the last official census, whether state or national, that was taken, the town of Rock Springs contained a population of 3,300, and that two-thirds of this population was to be found in the south side justice's precinct, established on October 6, 1892. This fact, with the additional one that the town has largely increased since the census of 1890, would seem to be decisive of the matter, and to show that the justice's precinct of the south side of Rock Springs contained a population largely in excess of 1,500 at the time of the general election of 1892, when Robert Smith was elected justice of the peace of said precinct or election district. This evidence adduced before the board, coupled with the intimate knowledge of a majority of the county board of the population of the town of Rock Springs, would seem to be "satisfactory evidence." It is tolerably clear, under the statute, that the population of the election district and justice's precinct could be ascertained from the census of 1890, as the whole population of the town was shown to be 3,300, while that of the justice's precinct was two-thirds of that, or 2,200, taking into consideration the fact that there had been no decrease of the population of this flourishing community between the time of taking the census and the election of 1892. No effort was made on the part of the plaintiff in error to show that the com-

missioners erred in the determination of the fact that the justice's precinct contained over 1,500 population at the election of 1892, when Smith was elected a justice of the peace. The complaint is made that the board did not proceed upon satisfactory evidence. It is not claimed that the precinct contained a population of less than 1,500 at the time of Smith's election. In the absence of proof showing that the board erred in its determination of the fact, we think that its action ought not to be set aside. The evidence was deemed satisfactory to the board. True, it might not have been deemed sufficient in a court of justice, in an original action therein; but it is clear that the board acted honestly, with authority derived from the statute, and with sufficient knowledge to determine the matter. Until the determination of the board on the matter, upon evidence satisfactory to it, the presumption was that the precinct contained less than the required population for a salaried precinct, but this presumption could be rebutted at any time. The ascertainment of the fact of the population of the precinct was as it existed at the time of the election of Smith as justice of the peace, not of the date of the order of the board, or as of February 1, 1893, when it was directed to take effect. There was no increase of the salary or emoluments of the official after his election or appointment. The salary was based upon the existence of the requisite population at the time of the election to make the precinct one where a salary could be paid to the precinct officers, instead of fees. It is shown that the salary was larger than the fees would have been. But as the precinct was entitled to be made a salaried one at the time of the election of Smith, and subsequent action of competent authority declared it to be so, notwithstanding the order of the board recites that it was to take effect from the 1st of February, 1893, instead of at the time of the commencement of his official term, on the 4th of January preceding, we do not think that there was an increase of the emoluments of the official after his election and appointment, as the order of the board must be construed as taking effect from the commencement of the term. The whole matter is to be determined by the existence of a fact occurring at or immediately before the election of the official, not a fact existing at the time of making the order; and in this respect the case is clearly distinguishable from that of *Board v. Burns*, supra, where it was held that a fact occurring after the election of the officer, and during his official term,—that is, the increase of the assessed valuation in the property of the county,—could not serve to increase the salary of the officer, which was determined by the assessed valuation of the county as it existed at the time of his election. *Monroe v. County of Luzerne*, 103 Pa. St. 278; *Apple v. Crawford Co.*, 105 Pa. St. 303, cited in *Board v. Burns*, supra. The order of the

board, so far as Smith is concerned, making the office a salaried one from February 1, 1893, about a month after the beginning of Smith's official term, may have been caused by the fact, which appears in the evidence, that Smith was absent from his precinct from the date of his qualification for the remainder of the month of January, 1893, and made no claim for his fees or salary for that month.

We are constrained to hold that the order of the board was based upon the population of the precinct at the time of the election of Smith, and not as of February 1, 1893, and that it should be so considered, and that Smith was and is entitled to a salary instead of fees, as in fact his precinct, but recently established, contained, at the time of his election, sufficient population to entitle its officers to a salary in lieu of fees, and that the determination of this fact, made within a reasonable time by competent authority, was required by the law and the constitution itself, and is not to be considered as an attempt to increase, or as increasing, the emoluments of the officer after his election. The judgment of the district court of Sweetwater county for the defendant in error must be affirmed.

CONAWAY and CLARK, JJ., concur.

FOSTER v. RINCKER.

(Supreme Court of Wyoming. Jan. 16, 1894.)

BANKS AND BANKING—INSOLVENCY—COLLECTIONS
HELD IN TRUST.

A national bank collected a note for plaintiff by accepting a draft for the amount on another party, which it forwarded to its correspondent for collection, and at the same time sent plaintiff a draft on the same correspondent as a remittance of the proceeds of his note. The correspondent received the money on the draft sent it for collection, but before plaintiff's draft was paid by the correspondent the bank failed. *Held*, that the bank was only agent for plaintiff, and that the money derived from his note was a trust fund, which did not become a part of the bank's assets.

Error to district court, Laramie county; R. H. Scott, Judge.

Action by Herman C. Rincker against Joel Ware Foster, receiver of the Cheyenne National Bank, to recover an amount alleged to be held by defendant in trust for plaintiff. Decree for plaintiff, and defendant brings error. Affirmed.

B. F. Fowler and Baird & Churchill, for plaintiff in error. Potter & Burke and W. H. Fanning, for defendant in error.

CLARK, J. This is an action brought in the court below by defendant in error, in which he sought a decree declaring certain funds which came into the possession of plaintiff in error trust funds, and ordering that they be paid over by plaintiff in error to him, with interest. To the petition of

plaintiff below, the defendant thereupon posed a general demurrer. The decree was overruled, and, defendant below moving to stand by his demurrer, proofs were offered sustaining the allegations of the petition, findings of fact made by the court, and a decree entered as follows: "Therefore considered, ordered, adjudged, decreed that of the sum of sixteen hundred and thirty-five dollars collected by the Cheyenne National Bank for the plaintiff as said, sixteen hundred and thirty-four dollars thereof is a trust fund, and that the defendant, as receiver of the Cheyenne National Bank, be, and he is hereby, directed to order to pay to the plaintiff, out of the moneys in his hands, or, should there be no sufficient funds in his hands at this time, then out of the first moneys received by him as such receiver, the full sum of sixteen hundred and fourteen and forty-six hundredths dollars, (\$1,214.46,) and the clerk of this court the costs of this action taxed at \$6.50." Thereafter, motion for a new trial was filed, and upon hearing the same was overruled. Exceptions were duly reserved by defendant below to all the rulings, findings of fact, and decree of the trial court, and the same came here upon the record, setting aside the petition, demurrer, and ruling thereon, and the findings of fact, decree, motion for a new trial, and ruling thereon. Without further ado, forth in haec verba the petition or finding of fact made by the court below, the same as disclosed by the record are substantially as follows: On the 11th day of November, 1891, the Cheyenne National Bank was for some time prior thereto had been a banking corporation organized under the territorial banking laws of the United States, and was located at, and carrying on its business of banking at, Cheyenne, Wyo., and continued until it ceased to do business on the 13th day of November, 1891, as hereinafter stated. On the first-named day, November 11, 1891, it held for collection from plaintiff below the note of one Charles Coffee, payable to the order of said plaintiff, and upon which there was due on said day the sum of \$1,635. The note was received by the bank solely for collection, and was, at all times until paid, the property of the plaintiff below. On said day, November 11, 1891, Coffee paid to the bank the amount due upon the note, to-wit: \$1,635, giving to the bank in payment thereof a draft drawn by the Commercial National Bank of Harrison, Neb., upon the United States National Bank of Omaha, Neb., for said sum. On the same day the Cheyenne National Bank remitted the draft to the First National Bank of Omaha, Neb., with instructions to collect and to the account of the Cheyenne National Bank, and at the same time it (the Cheyenne National Bank) forwarded by mail to the plaintiff below at Crawford, Neb., its draft upon the First National Bank of Omaha for the

of \$1,634, being the net proceeds of the collection. While it is not so stated in the pleadings or in the findings of fact, it is evident from the facts which are stated, and was admitted upon the argument, that the difference, viz. one dollar, between the amount collected and the amount remitted to plaintiff below, was the charge made by the Cheyenne National Bank for the collection and remittance. At the time of drawing the said draft for \$1,634, the Cheyenne National Bank had to its credit with the First National Bank of Omaha a sum of money largely in excess of the amount of said draft, and such continued to be the case until the funds to the credit of the Cheyenne National Bank were paid over to the receiver, the plaintiff in error, by the Omaha Bank, as hereinafter stated. On the 13th day of November, 1891, the draft for \$1,635 which the Cheyenne National Bank accepted in payment of said note was collected by the First National Bank of Omaha, and the amount so collected was by it placed to the credit of the Cheyenne National Bank on said date, and said amount (quoting from the petition) "so received and credited by the First National Bank of Omaha remained with it until on or about the 15th day of February, 1892, when the same, with other funds also standing to the credit of the Cheyenne National Bank, were turned over to the defendant as receiver of the said Cheyenne National Bank." The draft for \$1,634 sent by mail to the plaintiff below by the Cheyenne National Bank in discharge of the collection was received by him at Crawford, Neb., on the 13th day of November, 1891, and at once forwarded by him to Omaha, Neb., for collection. It was presented by the First National Bank of Omaha, and payment demanded, on the 17th day of November, 1891; and although at that time that bank held to the credit of the Cheyenne National Bank a sum largely in excess of the amount of the draft, of which sum the proceeds of the draft given in payment of the note was a part, payment was refused, and the draft was duly protested. On the 13th day of November, 1891, the Cheyenne National Bank failed, closed its doors, and ceased to do business. On the 5th day of December, 1891, the defendant below was duly appointed receiver of the Cheyenne National Bank; and on December 15, 1891, he duly qualified as such receiver, and has ever since been, and now is, such receiver. On the 15th day of February, 1892, the said receiver demanded and received from the First National Bank of Omaha the sum of \$8,727.40, being the amount on deposit in said bank to the credit of the Cheyenne National Bank, which said sum included the money, \$1,635, collected upon the draft given the Cheyenne National Bank in payment of the note, as before stated. On the 3d day of March, 1892, the receiver paid to plaintiff below, on account of his demand, the

sum of \$409.13, and on the 29th day of December, 1892, the further sum of \$245.47, leaving the balance sued for. Under these facts, it is contended on the one hand that the receiver received the money from the Omaha National Bank charged with a trust in favor of plaintiff below, and that, therefore, the latter is entitled to be paid in full out of the funds in his hands as such receiver. On the other hand, it is contended that the plaintiff below is simply a general creditor of the bank, and must prorate with all the other general creditors in the distribution of its assets.

It may be observed, at the outset, that it would be hard to conceive of a case in which the proceeds of a collection could be more completely and thoroughly traced into the hands of the receiver of an insolvent bank than is done in this case. The note was paid by a draft. That draft was sent by the collecting agent to a bank at Omaha. That bank collected the draft on the day that the collecting agent failed. It placed the proceeds to the credit of the collecting agent, the insolvent bank, and afterwards turned those proceeds over to the receiver, the plaintiff in error here. Such are the facts disclosed by the petition; such are the facts expressly found by the court; and I am utterly unable to understand how, under any of the authorities, the judgment of the court below could have been at all different from what it was. It is evident from the fact that, as soon as the bank collected the note, it, on the same day, attempted to remit the proceeds to the owner thereof, that there was no sort of understanding between him and the bank that the bank should, for any length of time, have the right to use the proceeds, or that there should be any other relation between them than simply that of owner and collecting agent. When the bank consented to act as the collecting agent, and charged for the collection, it assumed precisely the same duties and obligations towards the owner of the note, its principal, as an individual acting in the same capacity would have done. The relation existing between the parties was that of principal and agent; and, this being so, the proceeds of the note collected by the agent were just as much the property of the principal as the note itself was. The title thereto never vested in the agent,—never passed from the principal,—and, upon making the collection, it at once became the duty of the agent to send the proceeds thereof to its principal. Whether, within the limits of its agency, it was authorized to make the remittance by means of its own draft drawn upon its correspondent at Omaha, is a matter concerning which there is some conflict of opinion among the authorities, and as to this particular matter we express no opinion. It is not necessary to do so, because, however this question may be decided, we are very clear that the bank did not, by the

acts of drawing and mailing this draft, thereby discharge its duty and its obligation to its principal. That could only be done by the actual payment of the draft, because until it was paid the title to the proceeds remained in the owner of the note, and the transaction would not amount to a remittance. To hold otherwise would be tantamount to saying that the title to these proceeds might pass from the owner without his consent or knowledge. It does not appear that any particular mode of making the remittance was mentioned between the parties, but this does not alter the case. The bank could not by its own act, unauthorized by the owner of the note, transform the relation of principal and agent, existing between it and the owner of the note, into the relation of debtor and creditor, and thus change its duty, obligation, and liability to the owner, and at the same time change and modify the rights and remedies of the principal, naturally growing out of the true relation actually existing between the parties. *People v. Bank of Dansville*, 39 Hun, 187; *Bolles, Banks*, §§ 66, 475; *Nurse v. Satterlee*, (Iowa,) 48 N. W. 1102; *Libby v. Hopkins*, 104 U. S. 309; *Dime Savings Inst. v. Allentown Bank*, 65 Pa. St. 116. It follows from what has been said that the bank was merely the bailee for hire of Mr. Rincker's funds, (*Bolles, Banks*, p. 487; *Association v. Clayton*, 56 Fed. 759;) and, this being so, he (the plaintiff below) can follow them, certainly, into the hands of the receiver, who acquired no better title to the money than the bank had; and this is so for the simple reason that it is his money, the title to which has never passed from him. The relationship of principal and agent, which existed between these parties, was certainly one of trust and confidence. In other words, it was a fiduciary relationship. And, this being so, it was one in which, if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the cestui que trust; and it follows that whenever such relationship exists, and money coming from the trust lies in the hands of persons standing in that relationship, it can be followed, and separated from any money of their own. *National Bank v. Insurance Co.*, 104 U. S. 68. It cannot be denied that equity will follow a fund through any number of transmutations, and preserve it for the beneficial owner, so long as it can be identified. In this case there is no kind of difficulty whatever about the identification of the fund. The proceeds of the collection are directly traced into the hands of the receiver. It is true that when these proceeds came into his hands they came along with other funds, the whole amount received by him from the First National Bank of Omaha being \$8,727.40; but this fact does not affect the case, because equity will follow the money, even if put into a

bag or an undistinguishable mass, bringing out the same quantity. *National v. Insurance Co.*, 104 U. S. 55; *Bank v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. 533; *v. Bain*, 10 Sup. Ct. 361; *McLeod v. (Wis.)* 23 N. W. 173; *Francis v. Evans*, 33 N. W. 93; *Bowers v. Evans*, (N. W.) 629; *Ellicott v. Barnes*, (Kan.) 767; *Peak v. Ellicott*, Id. 501; *Board*, (Kan.) 32 Pac. 661; *Bank v. (Colo. Sup.)* 23 Pac. 986; *Nurse v. Satterlee*, (Iowa,) 48 N. W. 1102; *Chase*, (Neb.) 54 N. W. 572; *Bank v. (Tex. Sup.)* 6 S. W. 802; *Thompson v. (N. J. Ch.)* 8 Atl. 97; *City Bank of Rochester*, 96 N. Y. 31; *Le Blanc*, 14 Hun, 8; *McColl v. (Hun)* 40 Hun, 112; *Libby v. Hopkins*, 104 U. S. 309; *Bank v. Armstrong*, 33 Fed. 405; *Bank v. (Pa. St.)* 57 Pa. St. 202.

At the argument it was urged upon section 5242, Rev. St. U. S. prohibiting disposition of the assets of a nation after an act of insolvency, with a view to prevent the application of its assets in the manner provided by the United States, controls this case. We do not assent to this proposition, because, in our view, the proceeds of the collection of the funds were never at any time the property of the bank, and consequently not a portion of its assets, and hence wholly unaffected by the statute. The decree of the district court of Laramie county is, in all respects, affirmed.

GROESBECK, C. J., and CONAHER, J., concur.

CLEMENTS v. TOWN OF OASIS.
(Supreme Court of Wyoming. Jan. 1907.)
CONSTITUTIONAL LAW — INTERSTATE COMMERCE — CITY ORDINANCE — TRAVELING SALES-
MENSEN.

1. A town ordinance prohibiting a traveling salesman from nonresidents of the state from soliciting and taking orders for goods of their principals, to be delivered in the town without first procuring a license, but providing that the ordinance shall not apply to one who sell exclusively to regular merchants of such town, is in conflict with the provisions of the constitution of the United States conferring on congress power to regulate commerce among the states.

2. It is also void as discriminating against nonresidents of the state.

Error to district court. Natrona County. John W. Blake, Judge.

O. E. Clements was convicted of violation of an ordinance of the town of Oasis, per requiring certain salesmen, agents and peddlers to procure a license to do business in such town, and he brings error reversed.

C. O. Wright, for plaintiff in error. T. Butler, for defendant in error.

GROESBECK, C. J. The plaintiff in error was arrested and tried before a police justice of the town of Casper for the violation of an ordinance of said town concerning peddlers. He was convicted, and appealed to the district court of the county, wherein he was tried by the court, and convicted. He brings error here, attacking the town ordinance as unconstitutional and void, as in contravention of the provisions of the constitution of the United States conferring power upon congress to regulate commerce among the several states, as in violation of a further provision of the federal constitution that the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states, and as demanding an unreasonable license fee. The ordinance of the town was introduced in evidence in the court below, and the material portions of it read as follows: "An Ordinance Concerning Peddlers. Be it ordained by the town council of the town of Casper: Section 1. It shall not be lawful for any person or persons to hawk or peddle any goods, wares, merchandise or any other valuable article or things within the corporate limits of the town of Casper without first having obtained a license so to do as hereinafter provided. Sec. 2. No person, persons, company or corporation, being nonresident shall in person or by employee, travelling or local agent, drummer or salesman, sell by samples or otherwise in this town any goods, wares or merchandise, either foreign or domestic, without first obtaining a license as hereinafter provided. Sec. 3. Every person selling goods, wares or merchandise by samples or otherwise to be delivered in the future through a storekeeper or merchant of this town is a peddler. Sec. 4. This ordinance shall not apply to travelling agents and drummers who sell exclusively by sample or otherwise to regular merchants doing business in the town, nor to persons selling fruits, vegetables and farm products. Sec. 5. Every person wishing to obtain a license as a peddler shall apply to the town clerk or town marshal stating in what manner, in what articles and for what time he wishes thus to trade. And upon his paying license fee of \$25.00 in advance for each 24 hours he shall be permitted to trade as a peddler. No license shall be issued for less than 24 hours." The other sections of the ordinance relate to the penalties prescribed for its violation, the issuance of the license, and the time when the ordinance shall take effect, and need not be considered. An attempt is clearly made by the ordinance to distinguish between commercial travelers selling exclusively by sample or otherwise to merchants doing business in the town, and to agents selling generally to the inhabitants of the town by sample, without regard to their vocation. The evidence offered discloses that the plaintiff in error was a traveling agent of Wilder Bros., located

at Lawrence, Kan., and that he sold by samples shirts, muslins, woollens, silks, hosiery, and other articles, to be forwarded by his commercial house to the parties purchasing. The goods sold at Casper were forwarded by express to the purchasers, and were not delivered "in the future through a storekeeper or merchant" of the town. The case falls within the principles announced by the supreme court of the United States in the case of *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, and *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380; but the facts of the case as presented by the evidence are more akin to those in the case of *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, where the plaintiff in error was a resident of the state of Louisiana, and was engaged in the business of soliciting trade by the use of samples for the house for which he worked as drummer, which was located in the city of New Orleans, in said state. His territory of operations was in the city of Houston, in Harris county, Tex., and his business was soliciting orders or trade for his employers, who were manufacturers of rubber stamps and stencils. While so engaged he was arrested, and fined for the alleged offense of pursuing the occupation of drummer without a license, contrary to a provision of the Penal Code of the state of Texas. Upon habeas corpus proceedings before the court of appeals of that state the conviction was sustained, and the petitioner remanded to the custody of the sheriff, and to review such judgment of the state court writ of error was brought in the federal supreme court. It was held by that tribunal that there was no distinction between the case and that of *Robbins v. Taxing Dist.*, supra, and the judgment of the court of appeals of Texas was reversed, and the case remanded, with instructions to discharge the prisoner.

The distinction made by the ordinance of the town of Casper, under consideration, between agents and drummers selling exclusively by sample or otherwise to regular merchants of the town and those selling to the public generally cannot alter the situation. The constitution of the United States having given to congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation; and when congress has failed to make express regulations of the commerce among the states this indicates its will that the subject shall be left free from any restrictions or impositions, and any regulation of the subject by the state is repugnant to such freedom, except in matters of local concern only, where the state, by virtue of its police power, and its jurisdiction of persons and property within its limits, provides for the security of the lives, limbs, health,

and comfort of persons and the protection of property; or when the state does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; or by the passage of inspection laws seeks to secure the due quality and measure of products and commodities; or by the passage of laws regulates or restricts the sale of articles deemed injurious to the health or morals of the community; or imposes taxes upon persons residing within the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some business or employment exercised under authority of federal, constitutional, or statutory law; or imposes taxes upon all property within the state, mingled with and forming the great mass of property therein. But the state, in making such necessary police and revenue regulations which are permissible, cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not yet become part of the common mass of property therein. No discrimination can be made by any such regulations adversely to the persons or property of other states; and no regulation can be made directly affecting interstate commerce, as such taxation or regulation would be an unauthorized interference with the power given to congress. One of the reasons for the adoption of the federal constitution, "in order to form a more perfect Union," was to prevent a number of systems of the regulation of commerce among the states, only limited to their number, and which was deemed a great evil under the articles of confederation. "In the matter of interstate commerce, the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by congress, is so firmly established that it is unnecessary to enlarge further upon the subject. * * * It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers,—those of Tennessee and those of other states,—that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state." *Robbins v. Taxing Dist.*, supra; *City of Ft. Scott v. Pelton*, 39 Kan. 764, 18 Pac. 954. It makes no difference whether the articles imported into a state to be sold are farm products or manufactured articles or any kind of merchandise. The power of the state and

its municipalities is exhausted as to resident dealers and agents, and to every person within its jurisdiction, unless the sale of the property is for the health or health of the people are in danger, or the foreign commerce introduced by the property is such as to cross the borders, or unless the property has been mingled and merged into the great mass of property within the state. If the state does not, through its statute, interfere with interstate commerce, surely it cannot deprive the power to one of its municipalities. If a statute would be void imposing such restrictions as the ordinance of the municipality imposes, the ordinance is invalid. As the matter is wholly within the jurisdiction of congress, and, where not regulated by a department of government, no individual or municipality can control, whether imported into the state, or by any of its municipalities for governmental purposes. The "peddler" and "hawker" have a settled right to sell independently of statutory definition. The former is an itinerant trader, a person who sells small wares, which he carries about with him in traveling about from place to place; the latter is also a trader who goes from place to place, or along the streets of a city, selling the goods which he carries about with him, although it is generally understood that a hawker also seeks for customers, either by outcry, as the derivation of the word would seem to indicate, or by calling out notice and attention to them, or by holding them for sale by actual exposure or exhibition, or by them by placards or labels or by any other conventional signal or noise. Of such persons the state has control, and under the authority derived from the general taxing power, an act of the state, under which the city of Casper was incorporated, "to license, regulate, suppress and prohibit peddlers," etc., (Rev. St. § 468, subd. 1), the town has a right to enact ordinances regulating such occupations, and regulating the manner of selling, taxing, or prohibiting them. But the ordinance goes further than this, and attempts to do what has been unsuccessfully attempted time and again, for the benefit of the advantage of domestic dealers, to exclude the agents of dealers from other states; and cannot be done, as the property of the dealer for sale is not under the jurisdiction of the municipality, subject to, regulation by the state or its municipalities, and is not carried about from place to place, and exhibited for sale. The ordinance of a peddler in section 3 of the ordinance is not the generally accepted definition of the term, under the evidence adduced in the case, the plaintiff in error was not one, as the evidence showed he sold were delivered in the future, and was not an express agent. It may be that the ordinance is not an exclusive one, but may be considered as an enlargement of the usual definition of the term, but the evidence plainly shows that the plaintiff was not a peddler in the usual meaning of the term, nor in the legal definition of the ordinance, as he never carried about his goods from place to place.

in the town, nor sold and delivered them simultaneously, nor made future delivery of them through a storekeeper or merchant of the town. Even where a commercial traveler or agent, usually denominated a "drummer," simply exhibits samples of goods kept for sale by his principal, and takes orders from purchasers for the goods, which are afterwards to be delivered by the principal to the purchasers, and payment for the goods is to be made to the principal by the purchasers on such delivery, such agent is neither a peddler nor merchant; nor even will a single sale or delivery of goods by such agent, or by any other person, out of the samples exhibited, or out of any other lot of goods, constitute such person or other person a peddler or merchant. *City of Kansas v. Collins*, 84 Kan. 434, 8 Pac. 865, and cases cited; *Com. v. Farnum*, 114 Mass. 267. While the regulation of commercial travelers by license or otherwise may be deemed a great necessity by local dealers and others, particularly where orders are taken from the people generally, instead of from regular merchants and dealers, this authority can only be exercised by congress, and state laws and municipal ordinances are alike futile in any attempted control of the commerce between the states, except as herein indicated. The ordinance is void, as it is within the ban of the federal constitution as interpreted by the supreme court of the United States, both as an unlawful and unconstitutional interference with interstate commerce, and as an attempted discrimination adverse to nonresidents of the state. It appears to us that the license fee of \$25 for each 24 hours—which undoubtedly means a day—is excessive and unreasonable, but it is unnecessary to consider that question, as the ordinance is void for the reasons assigned. The judgment of the district court of Natrona county is reversed, and the cause remanded, with the direction to dismiss the complaint.

CONAWAY and CLARK, JJ., concur.

**FRANK v. HICKS. HICKS v. CHEYENNE
LAND & LIVE-STOCK CO. et al.
SAME v. BADGETTE.**

(Supreme Court of Wyoming. Jan. 16, 1894.)

**EQUITABLE MORTGAGE — JUDGMENT — PRIORITY —
MORTGAGE OF SUBSEQUENTLY ACQUIRED PROP-
ERTY — CONSTRUCTION — AUTHORITY TO EXECUTE
— RATIFICATION — APPURTENANCES — WATER
RIGHTS.**

1. A corporation gave a trust deed, to which there were no subscribing witnesses, as required by statute, and which was executed and acknowledged by the president only, instead of by both president and secretary, as authorized by resolution of the board of directors. *Held*, that the trust deed, though not entitled to record, was effective, as between the parties, as an equitable mortgage.

2. A judgment creditor, before sale of the mortgaged premises under an execution issued

on his judgment, is not a subsequent purchaser in good faith for value, within the meaning of Rev. St. § 18, protecting such a purchaser against a prior unrecorded conveyance.

3. A trust deed purported to convey the "entire property" of a land and live-stock company,—describing the land, giving the number of the animals of each class, and mentioning the more important ranch and farming implements; "also, all property of like kind and character to that hereinbefore described, which shall hereafter be acquired by said first party." *Held*, that the trust deed covered all property, both real and personal, then owned and subsequently acquired, and appropriate to the business of a land and live-stock company.

4. Each of the bonds which the trust deed secured construed the trust deed for the company as covering all property then owned or subsequently to be acquired, since each stated that payment was secured by said "first mortgage or trust deed covering all property now or hereafter acquired by said company, as specified by said mortgage."

5. Whether or not the president of the corporation was authorized to execute a trust deed covering subsequently acquired property, its execution was ratified by the issuance of the bonds; and both the execution of the trust deed and the issue of bonds were ratified by long acquiescence, and by the acceptance and retention of resulting benefits.

6. The fact that the corporation made five semiannual payments of interest on the bonds shows that it received value for the bonds, in the absence of evidence to the contrary.

7. The right to the use of water for the irrigation of land, together with the ditch making such right available, becomes so attached to the land, as part and parcel thereof, as to pass by a conveyance of the land without mentioning the water right, and to be subject to the liens and liabilities which attach to the land, and entitled to the same exemptions as the land.

Error to district court, Laramie county; Richard H. Scott, Judge.

Bill by Truman B. Hicks, as trustee for the benefit of the bondholders of the Cheyenne Land & Live-Stock Company, against said company, to foreclose a deed of trust; against Elise Frank, a judgment creditor of said company, to enjoin an execution sale of lands of the company; and against Charles A. Badgette, a judgment creditor of the company, to enjoin an execution sale of water rights of the company. From a decree enjoining defendant Frank from selling a part of the land, said defendant and complainant bring error. Modified. From a decree for defendant Badgette, complainant brings error. Reversed.

The other facts fully appear in the following statement by CONAWAY, J.:

Action by Truman B. Hicks, as trustee, against the Cheyenne Land & Live-Stock Company and Elise Frank, for the foreclosure of a trust deed executed by said company, conveying a large amount of real and personal property to said trustee, upon certain trusts therein specified, and for an injunction restraining Elise Frank, a judgment creditor of said company, from selling, upon execution against said company, any portion of such real estate. After the commencement of this action in the district court, Charles A. Badgette obtained a judg-

ment in that court against the Cheyenne Land & Live-Stock Company, and caused an execution to be issued upon such judgment, and levied upon certain water rights, and the irrigating ditches making such water rights available, as the property of said company. The trustee claims these water rights and irrigating ditches as incident or appurtenant to portions of the land conveyed to the trustee by said trust deed. By supplemental petition the trustee made said Badgette a party defendant to the action, and asked for an injunction perpetually restraining the sale of these water rights and irrigating ditches by virtue of this execution. This injunction was denied. The injunction prayed for against Elise Frank was also denied, as to certain portions of the property levied upon under her execution. To the portions of the decree denying the injunction against Charles A. Badgette, and against Elise Frank as to certain portions of the property levied upon by virtue of her execution, the trustee duly excepted, and brings his petition in error in this court to review the same. The injunction against Elise Frank was granted, and made perpetual, as to other portions of the property levied upon by virtue of her execution. To this portion of the decree, Elise Frank duly excepted, and brings her petition in error in this court to review the same. Decree modified.

Baird & Churchill, for complainant. Potter & Burke, for defendant Frank. A. C. Campbell, for defendant Badgette.

CONAWAY, J. On October 22, 1886, the Cheyenne Land & Live-Stock Company, a corporation, made its deed purporting to convey to William W. Corlett and Truman B. Hicks "and their successors, in trust, forever," 15,285 49-100 acres of land, described by section, township, and range, without using the word "appurtenances" or "appurtenant," or "appendant," and without mentioning any water, water right, or irrigating ditch, and a large amount of personal property, consisting of live stock of the bovine and horse species, and ranch implements, farm utensils, blacksmith tools, etc., all being property appropriate to the business of a land and live-stock company. The description of the property conveyed concluded with the following words: "Also, all property of like kind and character to that hereinbefore described, which shall hereafter be acquired by said first party, together with all the corporate privileges, liberties, and franchises of said party of the first part." This property was conveyed in trust for the equal, pro rata benefit and security of certain first-mortgage bonds, not exceeding the limit of \$150,000, which said company proposed to issue, and did thereafter issue, "without any preference or priority of any one bond over another by

reason of any priority of the title or negotiation thereof, or other copy of one of these bonds is made, and bears date of September 1, 1886, and would seem that the bonds had been issued, and were ready for issue at the time of the execution of the trust deed, and were not actually issued, within the time of the deed, until afterwards. The said bonds become due and payable at the office of the Farmers' Loan & Trust Company, in the city of New York, on the 1st of September, 1896, and interest of 6 per cent. per annum, on the 1st of March and September in each year. The trust deed provides that in case of default in the payment of the principal of the bonds, or any interest, when the same shall become due, and within 90 days after, the entire principal sum due becomes due and payable for the option of the holder or holders of said bonds, and the trustees at the request of the holder of said bonds, sell the trust property, the proceeds to the payment of the principal of the bonds, after paying the expenses of keeping the property, and the expenses of sale; paying the balance, if any there be, to the party of the first part in the trust deed. William W. Corlett, prior to the commencement of the trust deed, Truman B. Hicks, as provided in the trust deed, is acting as sole trustee. The trust deed was filed for record on the 1st of October, 1886, and was duly recorded.

The trial court finds, as a matter of fact, and the evidence in the record supports the finding,—that the trustees named in the trust deed, the Cheyenne Land & Live-Stock Company, failed to pay three semiannual payments of interest upon the bonds falling due respectively, on the 1st day of March, 1887, the 1st day of September, 1889, and the 1st day of March, 1891, and that Truman B. Hicks is the holder for value, and in full faith, of 44 of the bonds mentioned in the trust deed, that upon said defaults in said payments of interest he made a written demand for the foreclosure of said trust deed, and declared the whole principal indebtedness due and payable; and that thereupon Truman B. Hicks, as surviving trustee, brought this suit for the foreclosure of the trust deed, and for an injunction restraining the sale of property on execution against Elise Frank. After the execution of the trust deed, and before the commencement of this action in the district court, the Cheyenne Land & Live-Stock Company, grantor of the trust deed, acquired considerable property in lands, and also received the proceeds of the nominal consideration of the water rights and irrigating ditches, in controversy between Truman

as trustee, and Charles A. Badgette, who seeks to sell them on his execution as the property of said company, and as not subject to the lien of said trust deed. On June 27, 1889, Elise Frank obtained her judgment against the Cheyenne Land & Live-Stock Company in the sum of \$15,096, and on July 1, 1889, caused execution to issue thereon, and on July 3, 1889, caused such execution to be levied upon all the lands described in the trust deed, and all the lands acquired by the Cheyenne Land & Live-Stock Company after the execution of the trust deed, except 120 acres. The sheriff of the county was proceeding to advertise and sell the lands so levied upon, when, on August 15, 1891, this action was begun, and a temporary order of injunction sued out, restraining such sale. On final hearing the district court made this order perpetual as to the lands described in the trust deed, but dissolved the injunction as to the lands acquired by the Cheyenne Land & Live-Stock Company after the execution of the trust deed. On August 24, 1891, Charles A. Badgette obtained his judgment against the Cheyenne Land & Live-Stock Company for the sum of \$1,760.40. On August 31st he caused execution to issue. On September 3, 1891, the sheriff of the county levied the execution upon the water rights and irrigating ditches in controversy. He was proceeding to advertise and sell them, when, on September 23, 1891, by supplemental petition of Truman B. Hicks as trustee, a temporary order of injunction was sued out, restraining such sale. On final hearing the district court dissolved this injunction.

The trust deed in question was defectively executed, and was not entitled to record. Although recorded, the record was not constructive notice to any one of its contents. It is not a legal mortgage, but is effective between the parties as an equitable mortgage. The informality in the execution of the trust deed in question is that there is no subscribing witness, as required by statute, and that the acknowledgment is by the president alone, whereas the acknowledgment of the secretary is also necessary, as one of the parties authorized by the resolution of the board of trustees of the company to execute the trust deed, and as the party having custody of the corporate seal. As between the parties, the following seems to be a correct and comprehensive statement of the law applicable to such cases: "A mortgage or trust deed which cannot be enforced by a sale under the power, or by a judgment of foreclosure, on account of some informality in a matter requisite to a complete mortgage or deed of trust, will nevertheless be regarded as an equitable mortgage, and the same will be enforced by special proceedings in equity. The attempt to create a security in legal form upon specific property having failed, effect is given to the intention of the

parties, and the lien enforced as an equitable mortgage. Any agreement between the parties in interest that shows an intention to create a lien may be, in equity, a mortgage. As stated by Judge Story, 'If a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is, in equity, a mortgage. Effect has been given in this way to a deed of trust in which the name of the trustee was accidentally omitted; to one from which a seal was omitted by mistake; to one sealed in fact, but not expressed to be sealed; to one imperfectly acknowledged, or not acknowledged at all, or not witnessed as a deed of real estate is required to be. But it seems effect will not be given to a mortgage witnessed, acknowledged, and recorded, but not signed by the mortgagor.'" Jones, Mortg. § 168.

Numerous authorities are cited on behalf of the trustee to the effect that the lien of a judgment creditor attaches only to the actual interest of the mortgagor, subject to all equities existing against such interest in his hands, and that this is all that can be taken and sold on execution. Freeman states the rule thus: "In the absence of a statutory provision giving it some greater effect, an execution lien, like that of a judgment, attaches to the real, rather than to the apparent, interest of the defendant. If the title held by him is subject to equities of third persons, the execution lien is also subject to such equities." This rule has been discussed so often and so thoroughly by different courts, and is so well established, that another discussion of it would not be profitable. For a full discussion, with a voluminous citation of authorities, see case of Snyder v. Martin, 17 W. Va. 276. Some cases are cited by counsel for the judgment creditors as sustaining a different rule. Most of these cases have arisen under statutes different from ours, and which change the rule. In Butler v. Maury, 10 Humph. 420, the lien of a judgment creditor was preferred to an unregistered title bond. The statute provided that all instruments not registered in conformity thereto should be "null and void as to existing or subsequent creditors or bona fide purchasers without notice." Some Ohio cases are cited. The statute under which these decisions were made provided that mortgages should take effect from the time of their filing for record. The courts at first gave this language its literal meaning, and held that mortgages took effect, even as between the parties thereto, only from the filing of the mortgages for record. Afterwards, this view was overruled, and mortgages held to take effect, as to the parties, without filing or recording, but not as to any one else until filed. Association v. Clark, 43 Ohio St. 427, 2 N. E. 846. Under such a statute a judgment lien would, of course, take precedence of an unfiled and unrecorded mortgage. Some Ar-

kansas cases are cited. In that state the statute provides that: "Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the mortgage is filed in the recorder's office for record, and not before." Mansf. Dig. § 4743. Under this statute, judgment liens have precedence of unfilled mortgages. The latter are not liens. *Main v. Alexander*, 9 Ark. 112; *Dodd v. Parker*, 40 Ark. 536; *Hawkins v. Files*, 51 Ark. 417, 11 S. W. 681. The case of *Davidson v. Beard*, 2 Hawks, 520, is cited. The statute of North Carolina under which this case was decided was that every mortgage of lands, tenements, goods, or chattels, which shall be first registered, shall be taken and held to be a first mortgage, any former or other mortgage, not before registered, notwithstanding, unless such prior mortgage be registered within 50 days after the date. Under this statute the court considered a subsequent purchaser or a subsequent incumbrancer, including a judgment creditor, as a subsequent mortgagee, and gave preference to the lien of a judgment creditor, accordingly. If the court was right in holding that a judgment creditor is to be regarded as a mortgagee, this decision is right. It follows from the premise stated. But in so holding the court seems to stand alone. A judgment creditor is not to be regarded as a mortgagee, in the absence of a statutory provision to that effect. Jones, in discussing judgment liens, states the law correctly, according to the almost uniform current of authority. He says: "The recording acts do not change the common law in this respect. They have not interposed generally to protect a judgment lien; and, where they have not, it stands, as at common law, subject to the prior conveyance. If there be an existing mortgage at the time the judgment was rendered, that will bind only the equity of redemption, whether the mortgage be recorded or not, or whether the judgment creditor had or had not actual notice of the mortgage when he obtained the judgment." Jones, *Mortg.* § 460. Again: "An unrecorded mortgage is preferred to a judgment, where the judgment creditor is not considered a purchaser, within the recording acts; for a judgment lien or attachment is not protected by them, and a mortgage, being valid, without being recorded, for all purposes except that of preserving its lien against bona fide purchasers or mortgagees, is valid against a judgment lien." *Id.* § 462. A number of cases cited, in which the preferred liens were not judgment liens, are not in point. It should not be forgotten that a secret sale or incumbrance of real estate was valid at common law, even against subsequent purchasers or incumbrancers without notice. To prevent fraud effected by such secret sales and incumbrances, registration was invented, and has become common. Persons whom the recording acts pro-

tect in these matters are protected; persons whom the recording acts do not protect are not protected. What persons are protected by our statute? It must be ascertained from the statute itself: "Every conveyance of real estate in this territory hereafter made, whether for or against any subsequent purchaser or purchasers in good faith and for a valuable consideration of the same real estate, whose conveyance shall be first duly recorded." Rev. Stat. § 18. A judgment creditor, before he can acquire a lien on real estate by virtue of an execution upon his judgment, is not and cannot be considered a purchaser in virtue of such judgment and execution. A subsequent purchaser in good faith and for a valuable consideration, of the same real estate, whose conveyance shall be first duly recorded, is not a purchaser. He is not a purchaser, and he cannot acquire a lien on real estate, whose conveyance shall be first duly recorded. It seems that the defectively executed trust deed, properly admitted in evidence, and an equitable mortgage, binding between the parties, and having precedence of an execution lien acquired after the execution of the trust deed.

The deed of trust purports to convey to the trustees the "entire property" of the Land & Live-Stock Company, particularly described as lands, live stock, and ranching implements, etc., described by section, township, and range, giving the number of animals of different classes, and mentioning the important of the ranch and farm implements; "also, all property of like character to that hereinbefore described which shall hereafter be acquired by the first party, together with all the privileges, liberties, and franchises of the said party of the first part." The personal property involved in the deed. If this clause does not suffice to cover after-acquired real estate, then the trust deed makes no claim on it, and the judgment creditor may take it. The description of the property, if it comes first, then the description of the personal property, then the clause last mentioned. It is urged that this clause referred to immediately antecedent description of real property, which is a description of the property, and that it therefore included personal property, meaning and operation only personal property of like kind and character to that described, and does not so include real property. In support of this view, it is urged that on behalf of the judgment creditor personal property is not of a like character with real estate, and that consequently the language purporting to cover after-acquired property cannot include personal property and realty, but that it is only to property of the kind and character described, of which is immediately antecedent to the language; that is, to personal property. This view is supposed to be strengthened by the consideration

authorize and provide for the execution of a mortgage or deed of trust to take after-acquired personal property, with no such provision as to real estate, that it is to be presumed that the deed is in the statute in view, and intended to comply with it, when the trust deed was executed. This last consideration seems, to me, of this opinion, to be rather spontaneous than convincing. It does not seem that the company, in executing the deed, did follow the statute. It might be that the deed in its present form in compliance of any such statute. Under the statute, the company might have reserved important rights which it has not reserved. It has inserted a power to sell and dispositions of the property in the course of its business, and to replace it with property of another kind and character. It has inserted a provision. And such privilege is given as enabling the company to carry on its business in somewhat the usual manner to make it profitable. The authority of the corporation to convey its property, real and personal, by mortgage or deed to take effect on property acquired after the execution of such mortgage or deed without statutory authority and in violation of statutory restriction, is too easily established to be questioned, or to require discussion. That seems to be all that the company has attempted to do in the present deed. It does not appear that any authority has been invoked or exercised under statutory privilege has been exercised. It also seems that the construction of the application of the words "all property of like kind and character to that hereinbefore described" to the description immediately antecedent, is very narrow, and that the words "hereinbefore described" naturally include descriptions in any instrument preceding the words. The property described is declared to be the property of the grantor, and, as it is all property appropriate to the business of a land and live-stock company. In respect, it is all property of like kind and character.

However, a question as to the intention of the company in making the trust deed in the form and language in which it is, if the language is to be considered as intended, which is the most that can be said on behalf of the judgment creditor, may resort to extrinsic evidence, to contradict it or to enlarge its meaning, to explain it and ascertain its true meaning. The bond, which is in evidence by the company, is practically a contemporaneous instrument. Whether contemporaneous refers to the deed of trust, and may be explained it. The bond is really a single business transaction for the loan of money, of which transaction the deed is another part. On the face of the deed appear the following words:

"This bond is one of a series of first-mortgage bonds issued for the purpose of raising a part of the purchase money to pay for property purchased by said company, and to pay for property which may be hereafter purchased by said company, each of the denomination of one thousand dollars, numbered from one upwards. The payment of the principal and interest of each is secured by a first mortgage or trust deed bearing date the first day of September, A. D. 1886, conveying to W. W. Corlett and T. B. Hicks, of the city of Cheyenne, county of Laramie, territory of Wyoming, in trust for the holders of said bonds, all of the property, rights, liberties, corporate privileges and franchises, now or hereafter acquired by said company, as specified in said mortgage." Here is the company's own construction of its deed, to the effect that it covers all property acquired by the company, at the time of making the deed or thereafter.

Another question is raised as to the authority of the president and secretary of the company to execute a deed of trust to take effect on property acquired after the execution of the deed. It is not necessary to incumber this record with a discussion of the question of the authority possessed by the president and secretary of the company to convey its property by deed of trust under the resolutions of the board of trustees of the company conferring their authority. It is not a question as to an act in excess of the corporate powers. A subsequent ratification of such an act is equivalent to a precedent authority. The execution of the deed of trust in the form in which it appears, and the issue of the bonds, have been ratified by the company by long acquiescence, and by accepting and retaining the resulting benefits. The issuing of a bond containing the language above quoted is also an act ratifying the execution of the trust deed mentioned in it as securing its payment.

It was claimed in argument that there was no evidence showing that the Cheyenne Land & Live-Stock Company received any of the benefits resulting from the execution of the trust deed, or from the issue of the bonds. It was in evidence, and not questioned or denied by any other evidence, that the company paid interest on the bonds to the extent of five semiannual payments. If this can be explained on any other hypothesis than that the company had received value for the bonds, no such explanation was attempted, and no evidence appears upon which such explanation can be based. The conclusion seems unavoidable that the lien of the trust deed, considered as an equitable mortgage, attaches to the lands acquired by the Cheyenne Land & Live-Stock Company after the execution of the trust deed, and that such lien has precedence of the judgment lien of Ellse Frank.

The water rights and irrigating ditches in controversy require a separate consideration.

There are 11 of them: Horse Creek ditch Nos. 1, 2, 3, 4, 5, 7, 8, and 9, and Timberline ditch, Latham ditch, and South Horse Creek ditch. No mention of water, water right, or irrigating ditch is made in the deed of trust of the Cheyenne Land & Live-Stock Company. This company acquired title to the lands described in its trust deed, and conveyed thereby to the trustees by three several deeds of the same date with the deed of trust. Two of these deeds were executed by A. H. Swan and Hiram B. Kelley, conveying to the company 560 acres of the land. The other deed was executed by the Horse Creek Land & Cattle Company, conveying to the Cheyenne Land & Live-Stock Company the balance of the 15,285 49-100 acres described in the trust deed. No mention of water, water right, or irrigating ditch is made in either of these deeds. The record title to all of these water rights at the time of the execution of these deeds was in the Horse Creek Land & Cattle Company, by the filing of claims of water rights, as upon original appropriation, on the 1st day of September, A. D. 1886. By deed of date April 20, 1887, stating the consideration of one dollar, the Horse Creek Land & Cattle Company conveyed all these water rights and ditches to the Cheyenne Land & Live-Stock Company. The trial court finds—and these findings are supported by the evidence—that all of these ditches and water rights have been used for the irrigation of portions of the land described in the trust deed in question, or upon lands acquired by the Cheyenne Land & Live-Stock Company after the execution of the trust deed, or upon both, except Horse Creek ditch No. 7. As to this ditch there is no finding. The evidence shows that the water from this ditch was used partly upon land of the Cheyenne Land & Live-Stock Company, and partly upon other land, the ownership of which is not shown. No other use of any of the water supplied by any of the water rights and ditches is shown or claimed. Upon these facts the trial court finds “that the ditches and water appropriations were not appurtenances to the land at the time the said trust deed was executed, nor have they, nor any of them, become appurtenant to any of said lands at any time since the same was executed;” and, further, “that the lien of said defendant, Charles A. Badgette, under his execution and the levy thereof, is prior to any right of said plaintiff herein upon the ditches and water rights levied upon by said Badgette.” Upon the question whether a right to the use of water for the purpose of irrigation, together with the necessary conduit for conducting the water to the place where it is used, is appurtenant to the land irrigated or not, the courts of the states and territories in which irrigation is practiced are not in entire harmony. But this statement of the question is too narrow to meet the conditions of the case at bar.

The discussion should not be confined to the meaning or proper use of the word “appurtenant” or “appurtenance.” The question is one of vastly more importance than a mere question of the proper use of words. It is, substantially, whether the right to the use of water for the irrigation of the land, together with the ditch making the water right available, becomes in any way attached to the land irrigated as to a conveyance of the land without the ditch, or the water right, and to become a lien and liabilities which attach to the land, and entitled to the extent which the land is entitled. The question involved is one of first impression in this state, and its importance cannot be overestimated. To present the matter understandingly requires a discussion, at some length, of some or more representative cases from the states and territories in which the question, in any form, has been raised and decided in a court of last resort:

In the case of *Bloom v. West*, 32 Colo. 1 (decided by the Colorado court of appeals, March, 1893,) the parties on both sides claimed title to both lands and water from the same source.—Michael B. Bloom conveyed the lands of Bashor and West, and each of the parties to the case owned a portion of them. The litigation was as to the division of the water between the parties. The trial court decreed to each party a portion of the land and a right to use of a portion of the water “as appurtenant to said land.” The court affirmed the decree as to the division of the water, but directed the district court to strike out of the decree that portion relating to the water with the land as appurtenant. Both parties claiming the same source, and there being no claimant, the land, the extent, number of acres irrigated, etc., were “regarded as immaterial to the question of water which an equitable division of the water could be based.” In the course of the discussion of the case, the court observed, after citing common-law authorities, that the effect of a thing corporeal cannot be appurtenant to a thing corporeal, but that appurtenance must be a thing incorporeal. It says: “And this legal fact is recognized by the present day. According to the legal decisions, a party who owns the right to use water from an ditch or canal, has two separate and distinct rights of property, either of which could pass by assignment or conveyance, regardless of the other.” If this means that the owner of land, and of the right from which the land is irrigated, sell the water right without selling the land, it is in harmony with the decisions of the courts. But, if it means that the right would not pass by a sale of the land without mention of the water right, it is in conflict with the decisions of other courts in the ar-

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The flow of water in a stream was at common law considered part and parcel of the realty, and a corporeal thing, and part of the property of the riparian proprietor. But the right to take water from the land of another, and conduct it, by pipes or other conduit, to another place, and to use it there, was always considered as an incorporeal hereditament, and as an easement appurtenant to the estate upon which the water was used, when the right was created in favor of a particular estate. But the right might be an easement in gross belonging to an individual person, who could, in that case, use the water where he chose, and might change the place of its use. Washb. Easem. (3d Ed.) pp. 11, 12, 276, 277, with numerous authorities cited. And, where the right to take and use water was an easement appurtenant to an estate, both the water right and the conduit for the water would pass by a deed of the estate. Wood, Nuis. (2d Ed.) § 410. And a water right in this country is an incorporeal hereditament. Pom. Water Rights, § 97. But a thing corporeal, at common law, might become attached to another thing corporeal; not, indeed, technically, as an appurtenance, though the distinction is very fine, but so as to pass by deed of the principal thing. "In *Archer v. Bennett*, 1 Lev. 131, there was a mill, and a kiln designed for the use of the mill, but separate buildings. A grant of the mill, with the appurtenances, was made, and the question was if the kiln passed. It was held that the kiln did not pass as an appurtenant to the mill, being in itself land. But, if it was necessary to the use and enjoyment of the mill, it passed as part of the mill, 'as, by grant of a messuage, the conduits and water pipes pass as parcel, though remote.'" Land necessary and used for the lumber yard of a sawmill would pass by a deed of the mill. The water right, dam, and mill race necessary for the operation of a mill run by water power would pass by a deed of the mill; also, a sluiceway for carrying off the water, if that was necessary. Now, there is no question that the kiln might be sold separate from the mill, and the mill, or what was left of it, sold to another purchaser without the kiln. The land used for the lumber yard of a sawmill might be sold separate

from the mill, and the mill itself sold to another purchaser, who might use the mill for some other purpose, or procure another lumber yard. The water right and dam necessary to the running of a mill run by water power might be sold separate from the mill, and the power might be used for another purpose. Whoever grants a thing grants, by implication, that which is necessary to the beneficial use and enjoyment of the thing granted. To take away the water right by which agricultural land is irrigated in the arid region leaves the land more nearly useless and valueless than a mill without a kiln, or a sawmill without a lumber yard, or a water mill without a dam. The water mill may be moved and used elsewhere. The land cannot be. Another kiln or lumber yard might be provided at comparatively small expense. In most of the arid region, water rights furnishing sufficient water for the irrigation of farms have become quite valuable, and difficult to obtain, in many localities, at any reasonable expense. The pipes used to conduct water to a dwelling house would pass at common law by a conveyance of the house, because necessary to the use and enjoyment of the house in the usual manner, though they extend far beyond the premises granted, and might be replaced at small expense. The water right also passes. Whatever is necessary to the beneficial use and enjoyment of the thing granted, whether corporeal or incorporeal, passes, at common law, as incident or "quasi appendant" to the thing granted; but we must not call them appurtenances, if they are corporeal things. They then pass as part and parcel of the grant.

This doctrine of the common law has been very generally, if not universally, approved in the United States. The extent to which it has been carried is well illustrated by the case of *Donnell v. Humphreys*, 1 Mont. 518. In that case there was a grant of ditches, described in the conveyance as "the ditches known as the 'Silver Bow Ditch Company's Ditches,' said ditches carrying water from Silver Bow Creek to Butte City and the placer mines in that vicinity, and more particularly known as the 'Humphreys and Allison Ditches.'" There were two ditches, known as the "Upper and Lower Ditches," which were known as the "Silver Bow Ditch Company's Ditches," and which carried water from Silver Bow creek to Butte City and the placer mines in that vicinity, and which were more particularly known as the "Humphreys and Allison Ditches." As to these ditches, there was no controversy. But there was a ditch known as the "Park Ditch," which conveyed water from a branch of Boulder creek to Silver Bow creek, at a point on the stream above the heads of the upper and lower ditches, which carried water from Silver Bow creek to Butte City and vicinity. The grantees, the plaintiffs in the action, offered

evidence to prove that the Park ditch was a feeder of the upper and lower ditches, and that the three were known as the Silver Bow Creek Ditch Company Ditches, and more particularly known as the Humphreys and Allison Ditches." The defendant, with some other evidence, attempted to establish plaintiffs' claim to the Park ditch. This was rejected by the district court in its trial of the case. The supreme court, by a majority of its members,—one dissenting,—that this evidence should be received, and that if plaintiffs could prove that the Park ditch furnished the water carried by the upper and lower ditches, that those ditches, without the Park ditch, would be useless and valueless, the plaintiffs would take the Park ditch, as appurtenant to the upper and lower ditches, but as necessary to their beneficial use as part and parcel of the grant.

So far in this decision, the writer of this opinion has purposely avoided any discussion of the meaning and proper use of the words "appurtenant" or "appurtenance;" but it seems that this and similar cases must be decided upon principles already established without any reference to either of these words. But the words constantly occur in the reports of cases arising in the arid region, and involving water rights, and are to be found continually occurring in the cases from which we must derive our principal assistance in endeavoring to arrive at a correct solution of the questions presented in the case at bar. It is important to ascertain, if we can, whether the words are applicable, and to which we must of necessity resort, use these important words correctly. This is a consideration very material in affecting the weight of such decisions as authority. So far as we are at present advised, no court has said that water rights are not to be appurtenant to land. But it appears to be the opinion of the Colorado court of appeals, from its decision of the case of *Bloom v. West*, supra. At common law, it might be, and quite generally were, appurtenant, excepting the rights of riparian proprietors to water as part and parcel of their land. The doctrine of the Colorado court of appeals seems to be that a water right cannot be appurtenant to the land on which the water is used, because the water right is, if not a corporeal thing, at least a separate and distinct property right, and may pass by assignment or conveyance regardless of the land. The conclusion does not seem necessarily to follow from this premise. A water right appurtenant to land as an easement at common law always passes with the land, and a separate and distinct property right, if it might pass by assignment or conveyance regardless of the land. It is true the author of the dominant estate, to which a water right was appurtenant, to convey the water right separate from the land was limited. But he might sell and

urate from the land, to the owner of
 servient estate, or he and the owner of
 servient estate together might sell and
 it to any one else. "Appurtenant"
 not mean, and never meant, "insepara-
 Suppose, under the common law, A. to
 owner of land containing several rivu-
 Suppose B. to be the owner of adjoin-
 and, and that he receives by grant from
 right to divert and conduct to his
 land, and use on that land, the water
 one of these rivulets, and does so.
 B.'s water right is a property right
 te and distinct in its origin from his
 ty right in his land. But by common
 has become an easement appurtenant
 t land. Suppose, further, that B. aft-
 is finds that he does not need the wa-
 d desires to sell the water right. A.
 ot purchase it, because he has abun-
 of water without it, and would prefer
 e the water diverted from his land.
 has land on the opposite side of B.'s
 from A.'s, and wants the water. What
 prevent B., with the consent and co-
 on of A., from selling to C. the water
 together with the right of way for a
 t for the water across his own land?
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 of the owner of the servient estate. It
 ot because the easement was not a prop-
 erty, nor because it was inseparable from
 ate to which it was appurtenant. But
 easements lay in grant, and, the owner
 servient estate having granted an ease-
 for the benefit of any other estate, the
 of the grant could not be changed by
 e, except himself or those succeeding
 rights. Under our system there arises
 sion of servient and dominant estates.
 rights are obtained by appropriation
 e for a beneficial purpose from the
 waters of the United States or this
 under statutes authorizing such appro-

priation. By such appropriation the appro-
 priator acquires, not an absolute ownership in
 the water itself, but a right to its use which
 is considered as property, and may be sold
 and conveyed as such. Strickler v. City of
 Colorado Springs, (Colo. Sup.) 26 Pac. 313,
 and authorities there cited. And there is no
 servient estate in question, in such matter.
 But, so far as we are at present advised, the
 case of Bloom v. West, supra, is the only au-
 thority for the proposition that a water
 right is a corporeal thing, or the further
 proposition that a water right may not be-
 come appurtenant to land. We will not at-
 tempt to exhaust the authorities to the con-
 trary, but will cite a few cases, mostly re-
 cent, showing the prevailing views of the
 courts in the states of the arid region:

In the case of Cave v. Crafts, 53 Cal. 135,
 certain parties had purchased lands, and re-
 ceived a conveyance, which was silent as to
 water rights, and did not contain the word
 "appurtenances." At the time of the pur-
 chase the lands were irrigated, and had been
 for a long time prior thereto. The court
 says: "The use of the waters, to the extent,
 at least, to which they had been previously
 employed, may have been, and, it is fair to
 presume, was, the chief—perhaps the only—
 inducement to the purchase by the plain-
 tiffs and their grantors. To authorize, ju-
 dicially, a diversion and material reduction
 of the waters, would be a violation of the
 principle that they took with all the ap-
 parent benefits and easements belonging to
 their purchase. * * * The word 'appur-
 tenances' is not necessary to the convey-
 ance of the easement. The general rule of
 law is that, when a party grants a thing,
 he, by implication, grants whatever is in-
 cident to it, and necessary to its beneficial
 enjoyment." The case of Farmer v. Water
 Co., 56 Cal. 11, arose upon the facts follow-
 ing: One Lamar was the owner of a house
 and about four acres of land, upon which
 he used water acquired by purchase of a
 certain water right from defendant. He
 sold the house and land with the appur-
 tenances, not mentioning water or water
 right. He afterwards sold, or attempted to
 sell, the water right. Held, that the water
 right passed by the sale and conveyance of
 the house and land. The recent case of
 Clyne v. Water Co., 34 Pac. 714, (Cal., de-
 cided Nov. 10, 1893,) is to the same effect.
 Eliza D. Nichols owned a house and lands
 upon Paddy Ranch creek. On July 5, 1883,
 she mortgaged the land. On November 5,
 1883, by contract with the defendant com-
 pany, she gave up her right to the flow of
 water in Paddy Ranch creek, and procured
 from said defendant a water right for do-
 mestic use and the irrigation of a portion
 of the land. On April 20, 1889, the land
 was sold under foreclosure of the mortgage
 to plaintiff. Afterwards, the company de-
 nied the plaintiff's right to the water, and

refused to furnish it. The amount of water was what would flow through a one-inch tap placed in the company's main pipe. The court says: "The water was used on the Nichols ranch for more than five years. We must presume that such an amount of water was conducted to the ranch in some kind of a channel or pipe. Whichever it was, it would constitute an appurtenance to the Nichols ranch, and the right to it, including the flow of water from the main, passed under the conveyance to plaintiff." In Montana it was held that, where parties having a possessory right only to land "conveyed their possession of the land, with its appurtenances, they also conveyed their interest in the ditch and water right, which was necessary to the use, cultivation, and enjoyment of the land, just as certainly and as fully as if they had described it in express terms in the deed itself." *Tucker v. Jones*, 4 Mont. 225, 19 Pac. 571. The same view is held in Washington, even where the purchase was of possessory rights only, and was not by deed, (*Geddis v. Parrish*, 1 Wash. St. 387, 21 Pac. 314,) and in Oregon, where the water right is considered as part of the improvements, (*Hindman v. Rizer*, 27 Pac. 13,) and as an appurtenance to the land, (*Coventon v. Seufert*, [Or.] 32 Pac. 508.)

Thus it seems that the doctrine is very general, in the states of the arid region, that a water right becomes appurtenant to the land upon which the water is used, and the ditch, water pipe, or other conduit for the water becomes attached to the land, either as appurtenant or incident to the land, and necessary to its beneficial enjoyment, and therefore becomes part and parcel of the realty. We have seen that the doctrine of the common law is substantially the same, and really there appear to be vastly more weighty reasons, under conditions existing in this region, for holding that a water right is appurtenant to the land upon which the water is used, than under conditions existing where the rules of the common law were developed. The disastrous results of separating the land and water are immensely greater here, and, from considerations strictly legal and technical, the water rights seem to be more thoroughly appurtenant to the land here than there. At common law the easement of a water right was not lost by nonuser, and it might be an easement in gross not connected with land, or any particular beneficial use. Under our system there is no such thing as a water right in gross. The application of the water to some beneficial purpose is absolutely requisite. And a water right for purposes of irrigation can no more exist, where there is no land to be irrigated, than can an easement for the passage of light to ancient windows exist where there never were any windows. And this would seem to be of the very essence of appurtenances. Where one thing

depends upon another for its existence, it would seem entirely proper to call it a tenant to that thing upon which it depends.

It was assumed in argument, on behalf of the defendant Badgette, that the mortgagor's possession might transfer the water right separate from the mortgaged land, and that which the water was used, and that the mortgagor had power in the Cheyenne Land & Livestock Company, as mortgagor in possession, to convey the water right consistent with the doctrine that the water rights were appurtenant to the land upon which the water was used. The court might legitimately follow, if the premises were true. But it is not. The mortgagor in possession, like a tenant for years, may not commit waste, but he cannot be restrained by injunction, and he cannot tempt it. Waste is anything that impairs the security in the other. The few things which are adapted to agriculture in both of these results to so great an extent as the deprivation of agricultural water in the arid region of the water necessitates its irrigation. It is true that by all authorities the water right is separable from the land to which it is appurtenant, and may be sold separate from the land, and may be a place of diversion and place of use, and may be changed. But this is only when the change is not injurious to the rights of others. See *Kidd v. Laird*, 15 Cal. 162; *Strickler v. Colorado Springs*, (Colo. Sup.) 28 Pac. 100.

The water rights used upon the land were acquired by the Cheyenne Land & Livestock Company after the execution of the deed became subject to the lien of the mortgage to the same extent as the land. The water right is subject to the same conditions as the principal thing, subject to its limitations and entitled to its exemptions. This is illustrated by the case of *Clyne v. W. W. W. Co.*, supra. The water right in controversy in that case was acquired after the execution of a mortgage on the land where the water right was applied. But the water right was subject to the mortgage, and passed with the land on foreclosure of the mortgage. See *Fitzell v. Leaky*, 72 Cal. 477, 14 Pac. 100. An action to enjoin the defendant, after the sale from selling on execution plaintiff's interest in a water right and irrigating ditch, was dismissed on judgment on which the execution was obtained against the plaintiff in a former action, by his co-owner in the ditch, for his portion of the expense of construction of the same, for which he was liable, but who had failed to pay. During the pendency of the former action, after the findings of fact in the former action had been filed, but before the judgment, the plaintiff in the former action was defendant in the former action, who was defendant in the former action, and a homestead claim upon the land was filed in possession upon which his share of the water was used. It was held that the

the plaintiff in the ditch and water was tenant to, and part of, his homestead, is such exempt from sale by virtue of execution.

case at bar seemed, at first blush, to be free from difficulty, presenting some questions of very grave importance, and questions of first impression in Wyoming. The apparent difficulties vanish on being reached. There is no difficulty in holding that the lien of the trust deed in question attached to the lands acquired by the grantee under the trust deed, after the execution of the deed, and to all the interest of said grantee in the water rights in controversy, inasmuch as that such lien has precedence of the judgment and execution lien of Elise Frank, and of the judgment and execution lien of James A. Badgette. The authorities admit of no other conclusion. The decree of the district court will be modified accordingly, and the case will be remanded, with directions to the district court to so modify its decree.

DESBECK, C. J., and BLAKE, J., con-

Ex rel. HAYES v. GALLAGHER
et al., County Commissioners.

Supreme Court of Nevada. Jan. 31, 1894.)

CERTIORARI TO REVIEW PROCEEDINGS OF COUNTY BOARD—JURISDICTION TO ALLOW CLAIMS AGAINST COUNTY.

On certiorari by a taxpayer to review the proceedings of the county board in issuing a certificate of indebtedness against the county, by respondent to file, and make part of record, papers not presented or made part of proceedings, should be denied.

Under St. 1893, p. 121, providing that a taxpayer may file with the board written objections to the allowance of a claim against the county, and that the board shall table such objections for at least 10 days, after which it may consider the claim, unless proceedings have been instituted in court to determine its validity, such board has no jurisdiction to act on such claim after objections have been filed, and proceedings instituted in court to determine its validity.

Certiorari by the state of Nevada, at the instance of William Hayes, to review the action of W. C. Gallagher, Abe Travis, and James Scott, county commissioners of White Pine county, in issuing a certificate of indebtedness against the county to W. L. Davis, and in making an order directing the county auditor to draw his warrant against the general fund in the county treasury for the payment of the claim. Order set aside.

Thomas Wren and F. X. Murphy, for respondent.
Rives & Judg, for respondent.

MURPHY, C. J. This is an original proceeding or certiorari in this court. The affidavit sets forth, among other things: That the relator was, and has been for more than two years, a resident and taxpayer within the

county of White Pine. That since the first Monday of January, 1893, the respondents were, and are, the duly elected, qualified, and acting board of county commissioners in and for the county of White Pine. That on or about the 13th day of May, 1875, the then board of county commissioners allowed a claim of one M. W. Henry for the sum of \$3,421.35. That on the same day the county auditor audited said claim, and issued a certificate of indebtedness against said county for the amount, and delivered the said certificate to M. W. Henry. That on or about the 7th day of November, 1883, the relator, for a valuable consideration, became the owner and holder of said certificate of indebtedness, and is now the legal owner thereof. That the relator has been informed and believes that the said certificate has been lost or destroyed. That on the 4th day of December, 1893, one W. L. Davis filed a claim and demand with the board of county commissioners, claiming to be the owner of said certificate of indebtedness, and alleging that said certificate had been lost, and demanding that the board of county commissioners make an order authorizing, commanding, and directing the auditor of said county to issue to the said Davis a certificate of indebtedness in lieu of the one alleged to have been lost or destroyed. That the relator appeared before the board, and objected to the issuance of the certificate to the said W. L. Davis, which objections were reduced to writing, and filed with the proceedings of the board; and the board of county commissioners adjourned its said meeting from the 4th until the 16th day of December, 1893. On the 14th day of December, 1893, the relator commenced an action in the district court of the state of Nevada, in and for the county of White Pine, against the said W. L. Davis and the board of county commissioners, to determine the validity and ownership of said certificate of indebtedness. That on the 16th day of December, 1893, the board met in special session, and notwithstanding the filing of the objections to the making of any order by the board, and the commencement of the said action in the district court, the said board made and had entered an order on its proceedings authorizing and directing the county auditor to issue a new certificate of indebtedness to W. L. Davis in lieu of the one alleged to have been lost or destroyed, and the said certificate has been issued to the said W. L. Davis by the said county auditor. The relator contends that the board of county commissioners had no jurisdiction to make the order entered upon its minutes on the 16th day of December, 1893.

The record of the proceedings of the board of county commissioners sent up to this court by way of return to the writ substantiates the above facts, except as to the ownership of the certificate of indebtedness; but on the argument of the case the counsel for

respondents asked permission to file a paper, and make it a part of the record in the case, which he claims is an agreement entered into by and between the relator and W. L. Davis, in which he claims it is shown that the relator hypothecated to Davis the certificate of indebtedness as security for the payment of money. The affidavit and agreement were not presented to, nor made a part of the proceedings of, the board; and this court cannot receive and examine papers in a proceeding of this nature, which are neither a part of the record nor of the proceedings of the board. The request to file the papers and make them a part of the record must be denied.

On the 16th day of November, 1893, two of the members of the board of county commissioners met in the clerk's office, and signed an order calling a special meeting of the board to meet on the 4th day of December, 1893. The notice was served on the absent members, and a copy thereof published in the White Pine News, a newspaper printed and published at the county seat of White Pine county. On the 4th day of December, 1893, the board met at the office of its clerk, all members being present. W. L. Davis, in person and by his attorney, was present, and filed a petition asking that a certificate of indebtedness against White Pine county for the sum of \$3,421.35 be issued to him, the said Davis, in lieu of the one that had been lost or destroyed. The relator, William Hayes, in person and by attorney, was also there, and objected to the board making any order or considering said petition, and asked the board to lay the claim or demand of W. L. Davis on the table for 10 days or more, to give the relator an opportunity to institute proceedings in a court, of competent jurisdiction to determine the validity of such claim or demand of the said Davis. The board did adjourn until the 16th day of December, 1893. Such adjournment appears to have been taken under the provisions of an act of the legislature of 1893 (St. 1893, p. 121) amending sections 16 and 22 of the act of March 8, 1865, "creating a board of county commissioners in the several counties of this state and defining their duties." St. 1865, p. 257, § 22, as amended, reads as follows: "Any person being a resident and taxpayer of the county may appear before and file with the board of county commissioners of the county wherein he resides written objections to the allowance of any claim or claims, demand or demands against the county. Such objection in writing shall properly describe the claims or demands objected to, and the board of county commissioners shall file the same and embody such objections in the record of their proceedings, and lay such claims or demands on the table for a definite period of time, not less than 10 days, at the expiration of which time they may proceed to consider the claims or demands so objected to, together

with the objections, unless proceedings been instituted in a court of competent jurisdiction to determine the validity of claims or demands." On the 14th December, 1893, the relator, William Hayes, did commence an action in the district court in White Pine county, by the filing of a complaint and the issuance of a summons thereon, against the said W. L. Davis, a member of the board was made a party defendant; and the said summons was served on the said Davis and each member of the board on the 15th day of December, 1893. On the 16th day of December, 1893, the board of commissioners met pursuant to an order of adjournment made on the 4th day of December, 1893, notwithstanding the filing of the objection and the commencement of the action in court, by the relator, the board of county commissioners proceeded to consider and allow the claim of the said Davis. On that day did order, the auditor of White Pine county to draw his warrant against the general fund in the county treasury for the sum of \$3,421.35, in favor of W. L. Davis. Under the statute referred to, it was their bound to have stayed further action until the question of ownership of the certificate of indebtedness should have been determined by the district court. Although the constitution has provided that the "legislature shall provide by law for the election of a board of county commissioners in each county," and so provides that such commissioners shall jointly and individually perform such duties as may be prescribed by law. It is a tribunal with limited jurisdiction, and is possessed only of quasi judicial powers, and cannot proceed except in strict accordance with the mode provided by statute. It has no right or authority to adopt any other mode than that provided for and pointed out by the statute. It possesses no common-law jurisdiction or powers. The statute is its rule, and a strict adherence to it is essential. The authorities are to this effect, and there can be no safety in any other rule. It were to hold that the board could entertain the claim or demand under consideration, after the objections had been filed, and the action commenced in the district court, it would defeat the object of the law; and the taxpayer would have no protection whatsoever against the arbitrary action of the board. Leave, when once given, to go outside of the statute, and make rules and regulations to govern cases such as the one under consideration, would be dangerous, not to the letter but the spirit of the law.

In reply to the argument of counsel for the respondent, the board has no power to consider the sufficiency of the pleadings at the moment objections were filed with them. As to the allowance of the claim or demand against the county, the board should have discontinued the hearing of the subject, and the further consideration of the claim or demand must be postponed until at least 10 days. At the expiration of

may proceed to act upon the claim and, unless suit has been commenced; suit has been commenced, and the has been notified of that fact, it can proceed to act on the claim until the end of the court is filed in its office. The statute is too plain to be misconstrued. The board has no discretion in the matter, either. If the contention of the counsel prevails, what would be the result? The taxpayer appears before it, and files his objections to the board taking action on a claim or demand then under consideration. The board asks that the matter be postponed for 10 days, to give him an opportunity to test the validity or ownership of the claim or demand in a court of competent jurisdiction. The board adjourns for 12 days. At the expiration of 10 days a summons is issued out of the district court and served on the commissioners, to which suit the members of the board are made parties defendant. After the board reads the complaint, one of its members makes a motion, the tenor of which is, that the action be disregarded because the complaint does not state facts sufficient to constitute a cause of action against the defendants; and the motion prevails, and the board proceeds, and acts on the claim or demand.

Thus, we have the anomaly of a board of county commissioners passing upon the efficiency of pleadings in a case to which it was a party defendant. It was the order of the board, when it met on the 16th of December, 1893, to have continued the further hearing of the matter then under consideration until the final determination of the controversy by the court. There is no provision of the statute pointing out the proper course. Nor can we concede to the request of the counsel, and pass upon the efficiency of the complaint ourselves. That is the duty of the judge who presides over the court in which the complaint is filed; and our liberal form of practice, if the case is before whom the case is to be tried is to take the opinion that the complaint is insufficient and will allow it to be amended. We cannot take the right of an individual taxpayer to commence and maintain an action to determine the legality or ownership of a claim or demand presented against the county, we cannot entertain the remotest doubt. Upon the subject the supreme court of the United States, in the case of *Crampton v. Zabriskie*, 108 U. S. 609, said: "Of the right of residents to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the creation of a debt, which they, in common with other property holders of the county, may otherwise be compelled to pay, there is, at this day, no serious question. The right has been recognized by the state in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity of prompt action to pre-

vent irremediable injury, it would seem eminently proper for courts of equity to interfere, upon the application of the taxpayer of a county, to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property holders." For authorities on this subject, see *Dill. Mun. Corp.* (3d Ed.) § 914 et seq. Prior to the enactment of the statute of 1893, under and by virtue of section 1962, Gen. St., any taxpayer of the county might appear before the board of county commissioners, and oppose the allowance of any claim or demand against the county, but the act did not stay the proceedings of the board. It might entertain the objections, or disregard them, as to it might seem fit. There was no appeal from its decision, and the taxpayer was without a remedy, except by filing a bill in equity and asking for a restraining order, which, in the majority of cases, on account of the absence of the judge from the county, could not be done until after the mischief complained of had been consummated. The act of 1893 was passed with a view to remedy the defect in the law, and when objections are filed to the allowance of a claim or demand the board must discontinue the further consideration of the claim or demand for at least 10 days. If at the end of 10 days no suit has been commenced, the board may proceed and pass upon the claim or demand; but if a suit has been commenced the board is divested of all jurisdiction, and cannot act until the final determination of the controversy by the court, for its duties are definitely prescribed by the act, and it cannot exceed the powers therein conferred upon it. It therefore follows that the board of county commissioners of White Pine county had no jurisdiction over the subject-matter on the 16th day of December, 1893; and the order made and entered on its minutes on that day, authorizing and directing the auditor of White Pine county to draw his warrant against the general fund in the county treasury, in favor of W. L. Davis, for the sum of \$3,421.35, was absolutely null and void, and must be set aside, and it is so ordered.

BIGELOW and BELKNAP, JJ., concur.

PARAGOONAH FIELD & CANAL CO. et al. v. EDWARDS.

(Supreme Court of Utah. Jan. 29, 1894.)

APPEAL—REVIEW—MODIFICATION OF JUDGMENT.

1. Where the statement on motion for a new trial contains no specification of errors, as required by Comp. Laws, § 3402, subsec. 3, and no affidavits are used on the motion, the order denying the new trial will not be reviewed on appeal.

2. The fact that a decree is uncertain and ambiguous in some particulars is no ground for reversal on appeal, where all the papers are

before the supreme court, and the decree may be modified by it without injustice to any of the parties.

Appeal from district court, second district; T. J. Anderson, Justice.

Action by the Paragoonah Field & Canal Company and others against William Edwards to enjoin defendant from interfering with the water in Red creek. From a judgment for plaintiffs, defendant appeals. Modified.

Barlow Ferguson and S. A. Kenner, for appellant. Presley Denny and John W. Judd, for respondents.

SMITH, J. In this case there is an appeal from the judgment and from an order denying defendant's motion for new trial. The appeal from the order denying a new trial must be disregarded. The statement on motion for new trial was settled and signed by the judge, and the motion for a new trial was founded on it. The statement contains no specifications of insufficiency of the evidence, or of errors of law. There were no affidavits used on the motion. Section 3402, subsec. 3, of the Compiled Laws, provides, among other things: "If no specifications be made, the statement shall be disregarded on the hearing of the motion." It results therefrom that the statement must be disregarded here, and without it there is nothing to be considered on the appeal from the order denying the new trial.

This leaves nothing to be considered except the appeal from the judgment, and as to whether the judgment is right must be determined from the judgment roll. We will not undertake an analysis of the pleadings, findings, and decree, which constitute the judgment roll. One point only is made, which we deem it necessary to consider, and that is that the decree is uncertain and ambiguous in certain particulars. We think this objection is well taken, but, as all the papers are before us, we deem it best we should direct a modification of the decree, as we may do without injustice to any of the parties concerned. We therefore direct that the cause be remanded to the court below, with directions to enter the following, instead of the decree appealed from, to wit:

"Decree.

"Decree of Court, Enjoining Maintenance of Dam.

"This cause having been regularly called and tried by the court, and the findings of fact and conclusions of law, and the decision thereon, in writing, having been rendered, wherein judgment in favor of plaintiffs and against defendant, and for costs, on motion of attorney for plaintiffs it is ordered, adjudged, and decreed that plaintiffs have judgment as prayed for in this complaint; that defendant, his servants, agents, and employes, be perpetually enjoined

and restrained from diverting or using water from the regular channel of Red Iron county, Utah, except as ordered said company plaintiff, or from diverting said waters from running by the ditches of the other plaintiffs, or the ditches run by said dwellings, except by order of plaintiff corporation, but that the same be allowed to flow as heretofore, prior to diversion complained of, under the direction of said corporation; that defendant be required to remove from the ditches run to the Paragoonah field, and by the direction of the other plaintiffs herein, all dams, obstructions preventing the water from flowing at all times as heretofore by said ditches and down to said field, and as directed by said company, or the directors thereof, and restrained from placing in said ditches any obstructions preventing the water from flowing as heretofore and at the time of organization of the said company, and onto new lands not included in said field, and that plaintiffs have judgment for costs, taxed ——— dollars."

It is further ordered that each party pay their own costs on this appeal; each to pay one-half of the costs of the cause on this court.

MINER and BARTCH, JJ., concur.

WILSON v. KIESEL et al.

WILSON v. CANNON et al.

(Supreme Court of Utah. Jan. 29, 1911.)

CORPORATIONS — STOCKHOLDER'S LIABILITY — FRAUDULENT JUDGMENT — ASSIGNMENT — REAL PARTY IN INTEREST — AMENDMENT.

1. A stockholder, though he is himself delinquent on his subscription, may maintain an action against other delinquent stockholders to enforce payment of a judgment obtained against the corporation, but he must co-defend with the other stockholders to the extent of the amount due him.

2. A judgment against a corporation for an amount largely in excess of plaintiff's claim, entered by consent of its president, who himself acquired an interest therein, is not binding on the stockholders in an action against them to enforce liability on their subscriptions; and they may, in such case, contest the claim on which the judgment was founded.

3. A delivery of an assignment of property in suit to a person jointly interested in the property, and the purchase of the property by the assignee named in the assignment must be deemed to have been assigned by the assignee, where he subsequently makes payments to the assignor in accordance with the provisions, and hence the assignor's title is extinguished by the assignment.

4. A plaintiff in a pending suit, who has acquired an interest in the claim before obtaining judgment against defendant, cannot maintain an action in his own name on the judgment, but must sue as the real party in interest, within the time prescribed by Laws 1888, § 3169.

5. A complaint in an action not brought by the real party in interest cannot be amended by the substitution of the proper party, whether wholly new or different issue would be presented by reason of the change of plaintiffs.

Rehearing denied.

from district court, Weber county; J. Miner, Justice.

by Peter Wilson against F. J. Kiesel to enforce defendants' liability on paid subscriptions to the stock of a corporation. There was a judgment in favor of plaintiff against defendants F. J. Carnahan, and against him as to defendants Kiesel and others. Plaintiff appeals from part of the judgment in favor of defendants Kiesel and others, and defendants Carnahan and others appeal from that part of the judgment in favor of plaintiff.

Macmillan and Ogden Hiles, (Sutherland-Howat, of counsel,) for plaintiff. A. Wood, for defendants.

Opinion of the Court. This is an action by plaintiff, who claims to be a judgment creditor of the Ogden Power Company, against the defendants, who are alleged to be delinquent subscribers to the capital stock of that company. Plaintiff alleges that the Ogden Power Company is insolvent, and is insolvent; that plaintiff's claim is unpaid; that this action is brought on behalf of plaintiff and the other judgment creditors of the corporation. Defendants answered, denying the allegations of the complaint, and by way of affirmative defense that they were not delinquent subscribers to the stock of the Ogden Power Company. Carnahan, and Anderson also pleaded in defense of their subscription; and by way of affirmative defense defendants alleged, in answer to that plaintiff's judgment, on which this action was founded, was fraudulently obtained by collusion with the president of the Ogden Power Company, who, with one who had purchased the claim on which judgment was rendered, and who conducted the judgment fraudulently. It was alleged that no more than \$2,000 was paid on the claim sued on, and that the judgment was rendered for \$22,405.15. Defendants asked that plaintiff's judgment be canceled, and that he take nothing from the judgment. The case was tried by a referee, who rendered findings of fact and conclusions of law, in which judgment was entered dismissing the cross complaint, and giving judgment for plaintiff against all of the defendants except Kiesel, Carnahan, and Anderson, and as to these three the judgment was entered in favor of plaintiff, on the ground that they had not paid their subscription. Plaintiff appeals from the judgment in favor of Kiesel, Carnahan, and Anderson, and defendants Carnahan and Anderson appeal from the judgment against them.

The history of the transactions out of which this action arose, as disclosed by the record in brief is as follows: The Ogden Power Company was incorporated on April

On March 1, 1890, Wilson had entered into three contracts to construct certain

works, which were intended for the benefit of this corporation, subsequently organized. Work was commenced by Wilson, March 14, 1890, and he ceased work on May 13, 1890. On May 15, 1890, plaintiff began an action against the Ogden Power Company to recover \$22,405.15. On June 1, 1890, H. H. Henderson became president of the Ogden Power Company, and shortly afterwards the corporation filed answer, denying Wilson's claim, and this answer was verified by Henderson. On September 22, 1890, Wilson sold, assigned, transferred, and made over to Joseph Brinker all his right, property, claim, and interest in and to all claims and demands against the Ogden Power Company. This assignment was for a sufficient consideration, was in writing, and was placed in the safe of Henderson in an office occupied by Brinker, Henderson, and Wilson's attorney. This assignment was negotiated for and obtained by Henderson for the joint benefit of Brinker, Henderson, and Mr. Garretson, of Sioux City, Iowa, and Mr. Bigelow, of Ogden. On October 25, 1890, Kimball & Allison, attorneys for the Ogden Power Company in the suit of Peter Wilson against it, appeared in open court, and consented to a judgment in favor of Wilson for the full amount claimed by Wilson. This is the judgment on which this suit is founded. Kimball & Allison consented to this judgment under the instruction and direction of Henderson, president of the company. The board of directors of the power company had no knowledge of such instructions being given. On June 17, 1892, execution issued on this judgment, and on June 22, 1892, it was returned wholly unsatisfied. On June 23, 1892, this action was commenced. Referring again to the organization of the corporation, Kiesel, Carnahan, and Anderson each severally subscribed to the capital stock of the Ogden Power Company the sum of \$5,000, and the plaintiff, Wilson, subscribed \$2,500 to such capital stock. Wilson has paid \$250 on his subscription, and no more. On April 26, 1890, Kiesel, Carnahan, and Anderson conveyed to the Ogden Power Company land necessary for its use, of the value of more than \$40,000, and accepted in payment therefor \$15,000 in paid-up stock in the company and \$25,000 in notes of the company, secured by mortgage on the land conveyed. This mortgage has been foreclosed, and Kiesel, Carnahan, and Anderson have purchased the land under the foreclosure sale. At the time plaintiff commenced this suit he had in his possession the following property, belonging to the Ogden Power Company: Personal property of the value of \$2,740. At the time the judgment in favor of Wilson was rendered he had received money and property on his claim that should have been credited, and was not, to the amount of \$6,589.50. The total amount due Wilson, allowing none of the above credits, on June 1, 1890, according to his own claim, (which is, on its face,

in one or two particulars, erroneous in his favor,) is \$18,332.41. That at the date the judgment in his favor was rendered, if he be charged with his own unpaid subscription, and with the credits he admits to be correct, and with the property of the power company which he had in his possession, the amount due him could have been no greater sum than \$6,752.91.

The questions raised on the appeal of Cannon and others from the judgment in favor of plaintiff and against them, are as follows: (1) Can plaintiff, while a delinquent subscriber himself, maintain this action in equity against other delinquent subscribers? (2) Was the judgment at law in Wilson's favor, taken by consent, October 25, 1890, for \$22,405.15, fraudulent and void? (3) If that judgment is valid, can plaintiff maintain an action on it? Is he the real party in interest? The question on plaintiff's appeal is: Did Kiesel, Carnahan, and Anderson pay their subscriptions to the corporate capital by the conveyance of land made April 26, 1890?

Upon the first question the defendants insist that plaintiff cannot ask equity to give him relief against them unless he himself first do equity by paying up his own delinquent subscription. While the question is argued at considerable length in the briefs for both plaintiff and defendant, neither side cites any authority on the point. We have, however, examined the matter as fully as our time and facilities permit. The case of *Bissitt v. Navigation Co.*, 15 Fed. 353, holds squarely that such delinquent stockholder can maintain such action. To the same effect is note 2, p. 215, of *Cook on Stock and Stockholders*. On the contrary, the supreme court of Maryland, in the case of *Weber v. Fickey*, 47 Md. 199, holds that he cannot maintain such action. We are inclined to adopt the rule declared in *Bissitt v. Navigation Co.*, to wit, that he may maintain the action, but that he must contribute *pari passu* with the other stockholders to the payment of the amount due him, if any.

The second question on defendants' appeal, to wit, was Wilson's judgment fraudulent? presents many intricate and difficult questions of fact. In the first place, as shown by the statement of facts already made, it is apparent that, according to the facts found, and shown in the record, this judgment was for a grossly exorbitant sum. It was reduced some \$6,500, with the consent of plaintiff on the trial of this case in the court below; but it should have been reduced for a very much larger sum, to wit, \$4,426.79, which has accrued as interest, etc., since the date of the judgment; also the amount of his unpaid subscription, \$2,250; and in equity he ought also to be charged with the property in his hands, of the value of \$2,740. So that, in addition to the credit on the judgment made by the court below, it would appear from the record before us that the amount of the judgment ought to have been reduced

by the further sum of \$9,396.79. We intend to adjudicate the question of the amount due plaintiff in this opinion, and expressly disclaim any intention to make adjudication. But the above facts from the record before us, and are to in this connection upon the question whether or not the judgment sued on or action is fraudulent or not. In addition to the fact that the judgment is apparently too large a sum, is the further fact that on September 22, 1890, this claim on which judgment is founded was assigned, and has been seen, to Brinker, who was at the time jointly interested with Henderson in the chase; and the judgment was consented to on October 25, 1890, at the instance of the authority of Henderson, without the knowledge or consent of the board of directors of the power company. In other words, it appears that Henderson was interested in obtaining this judgment against the company, and yet, as president of the company, he consented to its entry, or directed the company's attorneys to obtain which they did. Is such a judgment entered, conclusive on the stockholders? We think not. In the language of Judge in *Bissitt v. Navigation Co.*, supra: "I am satisfied that the complainant's judgment put it mildly, was unfairly obtained, and an amount greatly in excess of that due." Now, in this suit is the first time the stockholders have had to inquire into the validity of plaintiff's claim against the corporation, and, all other matters as to judgment in plaintiff's favor would be reversed, in order to afford the stockholders an opportunity to contest this claim before a master or the court below. To the course taken in the *Bissitt* Case, as referred to, and seems to be abundantly supported by authority. In the absence of error or mistake in obtaining judgment against the corporation, of course the judgment is conclusive on the stockholders, (*H. Railway Co.*, 17 Ohio, 187; *Donw. Coolbaugh*, 5 Iowa, 300; *Came v. B.*, 39 Me. 35;) but if the judgment against the corporation was obtained by fraud through collusion with the company's stockholders they may obtain relief in equitable proceedings, (*Mor. Priv.*, 619;) and the judgment may be impeached for fraud or collusion by cross bill introduced upon it, (*Conway v. Duncan*, 28 102; *Bank v. Stevens*, 1 Ohio St. 233.)

There is, however, another question which appears to call for an absolute reversal of the judgment in favor of plaintiff, an affirmation of that in favor of Carnahan, and Anderson. On September 1890, the plaintiff, Peter Wilson, made and executed the following paper: "I, Peter Wilson, of Ogden, Utah, for and in consideration of the sum of five thousand (\$5,000) dollars, to me paid and to be paid, hereinafter ex-

thousand dollars in stock or bonds delivered to me as hereinafter provided: their value and equivalent in money; to say: Two thousand (\$2,000) dollars interest thereon from the 23rd of A. D. 1890, paid at the date hereof; and dollars, to be paid thirty days after date hereof; one thousand dollars, to be paid sixty days from date hereof; one thousand dollars, to be paid ninety days after date hereof; also five thousand dollars of stock or bonds of the Ogden Power Co., a corporation, to be delivered as stock or bonds thereof on or before the date of the last payment of money provided, however, that the assignee named, or his assigns, may pay the value of such stock or bonds, at his option of such stock or bonds,—I have assigned, transferred, and made over, and hereby sell, assign, transfer, and convey, unto Joseph Brinker, all my property, claim, and interest in and to the same and demand against the Ogden Power Co. in suit in the first judicial court, Utah territory, for work and materials furnished for said suit, upon the several contracts mentioned out in the complaint in said suit, and said Brinker may be substituted for plaintiff in the said suit. It is further ordered that the stock so as aforesaid tendered to me shall be taken to include twenty-five shares, the same hereunto subscribed for by me, on which I heretofore paid two hundred and fifty dollars, which latter sum is to be paid in addition to the five thousand dollars before provided to be paid as part consideration of this assignment. Witness my hand and seal this 22nd day of January, 1890. [Signed] Peter Wilson."

It is expressly found by the forty-ninth finding of fact that this paper was made and signed at the instance and request and in pursuance of negotiations conducted by Henderson with Wilson; that Henderson acted in the interest of himself, Brinker, Garrett, Bigelow, and the assignment was made by all of them, although it was taken in the name of Brinker alone. By the forty-ninth finding it is shown that Henderson and Brinker occupied a single room as an office and in this office there was a single desk which was the property of Henderson; after the execution of the written assignment, it was delivered by Wilson to Henderson, who put it in the safe, and kept it until January, 1893, when he delivered it to Hiles, Esq., who was attorney for Henderson and also for Brinker and Henderson. The fiftieth finding it is shown that Henderson paid \$3,000 to Wilson on the commission named in the assignment before the date of the 25th, 1890. The court below found that these facts constituted no delivery of the stock, and hence that Wilson's title to the stock did not pass. We cannot concur

in that view. We hold that the delivery of this writing to the partner or joint owner of the obligee named in it for the joint use and benefit of the person to whom it was delivered and the obligee named is a good delivery. Even a delivery to a disinterested third person for the obligee is a good delivery if assented to by the obligee. See 5 Amer. & Eng. Enc. Law, p. 448, and cases cited in note. It must be assumed that Brinker knew of the delivery to Henderson, and assented to it, because it is expressly found that he subsequently made the first two payments (\$3,000) in accordance with its provisions. Notwithstanding Wilson by this assignment parted with his title to the demand he had sued on, still his assignee had the right to prosecute that action at law against the corporation to judgment in the name of Wilson. We so held at the last term of the court in the case of Bank v. Hapgood, 33 Pac. 241. But here another suit founded on that judgment and against other parties is brought in the name of Wilson. Can it be maintained? This precise question was before the supreme court of California in the case of Dubbers v. Goux, 51 Cal. 153, and was decided in the negative, and in the same case it is held that the complaint cannot be amended by the substitution of the real party in interest. The statute of Utah (2 Comp. Laws 1888, § 3169) declares that every action must be prosecuted in the name of the real party in interest, except certain cases, which do not in any wise affect the question at bar. This language does not admit of doubt as to its meaning. The real party in interest at the beginning of the action must prosecute it in his own name. It is not necessary to enlarge upon the reasons for this rule, or to cite decisions under it; it is sufficient for us to know what the law is, and it is our duty to enforce it.

We are also of opinion that the complaint cannot be amended in this respect. The reasoning of the supreme court of California in Dubbers v. Goux, supra, on this point, seems to us to be conclusive. It is sufficient for us to say that in the present case an action by the assignee on this judgment would present a wholly different issue to that tendered in the present action; it would, in fact, be a new and different action by the simple change of plaintiffs. As the nominal plaintiff, Wilson, had no judgment or other cause of action against these defendants when he brought them into court, it is quite apparent that he cannot, in justice, complain if his action is dismissed at his cost, and the assignee cannot complain, because he has never sought any judgments against the defendants. The apparently close relations between Wilson and his assignees does not in any way affect this conclusion, except to emphasize the justice of it, and to add strength and color to the claim made at the bar that this action was not prosecuted in good faith.

We are of the opinion that the exceptions of defendants Cannon and others to the master's report of facts, and the assignment of error here that on the facts found the judgment below is against law, are both well taken, and that on this appeal the cause should be reversed, and remanded to the court below, with directions to dismiss the action. This conclusion renders it unnecessary to pass on the question raised on plaintiff's appeal as to whether or not Kiesel, Carnahan, and Anderson had paid their subscription to the capital of the Ogden Power Company.

BARTCH, J., concurs.

SOCIETE ANONYME DES MINES DE LEXINGTON v. OLD JORDAN MINING & MILLING CO.

(Supreme Court of Utah. Jan. 12, 1894.)

CONTRACTS—WHAT ARE—MODIFICATION.

1. Plaintiff's agent wrote a letter to defendant, its cotenant in a water ditch, suggesting that repairs were necessary, and that thereafter the ditch be kept in good condition, each party paying one-half the expense. Defendant answered that the suggestion was right, and stated that it would direct its manager to co-operate with plaintiff, and examine the property, and report what repairs were necessary. *Held*, that such correspondence constituted a contract binding each party to pay one-half of the expenses thereafter necessarily incurred in keeping the ditch in repair.

2. Subsequent letters to plaintiff by defendant, indicating a desire on its part to modify the contract so that plaintiff should pay for all repairs while using the water, and that it should reimburse plaintiff for one-half when it begins to use the water, are not binding on plaintiff, which regularly and continuously demanded of defendant one-half the expenses incurred in making the repairs.

Appeal from district court, Salt Lake county; C. S. Zane, Justice.

Action by the Societe Anonyme des Mines de Lexington, a corporation, against the Old Jordan Mining & Milling Company, for one-half the moneys expended by plaintiff in keeping in repair a water ditch owned jointly by both parties. From a judgment for plaintiff, defendant appeals. Affirmed.

Bennett, Marshall & Bradley and Williams & Van Cott, for appellant. Marshall & Royle, for respondent.

SMITH, J. This is an action by the plaintiff against the defendant to recover the sum of \$4,675.98, with interest thereon from the 6th day of July, 1888, until paid, the same being one-half of certain moneys paid out, and expenses incurred, by the plaintiff in keeping in repair a certain water ditch or canal owned jointly by the plaintiff and defendant. The plaintiff claims that this money was paid out by it under and pursuant to a written contract whereby the defendant was to pay one-half of such ex-

penses. The allegation of the complaint shown in the abstract in relation to the tract, is as follows: That between the 1st of October 22 and November 5, 1883, plaintiff and defendant, being tenants in common, as aforesaid, agreed and contracted together, one with the other, that they would once make the necessary repairs to the canal, and thereafter keep the same in good order, make the necessary repairs and protect the same from decay, and that each of them should pay one-half of the expense thereof. Then follows the allegation that during the years 1883, 1886, and 1887 plaintiff expended \$4,675.98 in making such repairs, and that the defendant has paid no part thereof except of \$496.96, paid December 31, 1884.

The only assignment of error in the complaint is urged here is that there is no proof of this contract as alleged; in other words, that whatever proof was admitted in support of the contract was variant from the facts. The particular writings relied on by the plaintiff to establish the contract consist of two letters, "A" and "B," omitting the address and signature of the substance, as follows: The first, written by plaintiff's agent to defendant's agent, is as follows: "During my present visit to this city for the purpose of investigating the condition of the water ditch, inspecting our different pieces of property in this territory, my attention was particularly called to the bad state of the Jordan water ditch, which your and our companies own jointly. Considering that it is for our mutual interest to see that this property should be kept in proper shape, I beg you, in behalf of your company, if you do not judge it would be advisable, while I am here, to make an understanding regarding this matter, to suggest that the necessary repairs should be made at once, and that hereafter the ditch should be kept in good condition, by both companies paying their share of the necessary expenses. Will you please be kind enough to give this matter your prompt attention, and favor us with an immediate reply," etc. The letter is dated October 24, 1883. On November 30, 1883, the defendant, by its manager, replied as follows to plaintiff: "Your letter of the 24th instant in regard to the necessary repairs to the Jordan water ditch, is being referred into some arrangement for preserving the Jordan water canal in good order by your company and by one I represent. I agree with you that it is for our mutual interest that this property should be kept in good order, and I shall be pleased to join you in a reasonable arrangement for the purpose of protecting the property from decay, and I am very glad to find a gentleman willing to co-operate in a business arrangement for the protection of our mutual interests. I suggest that the needed repairs should be done at once, and that each company should pay its share of the expense, and that caring for the future, is right, and I am, I trust, Mr. Van Deusen, our engineer,

you, or any one you may delegate, to manage the property, and report what may be necessary and the cost of same. I think you are a very trustworthy and a capable man, and I think that you will find it for our advantage to get his judgment, and make the repairs. As neither of us uses the water at present, I would prefer to expend only so much as is necessary to prevent loss, and then when we begin to use the water, then we make the improvements. If you do not wish to go into details before you leave, please leave the matter in the hands of the one who will co-operate with me, Mr. Van Deusen, unless you are willing to let him do it, each company paying one-half the expense. I make this suggestion to you, and think Mr. Van Deusen can do the matter satisfactory to both," etc. These two companies then instituted the contract between the two companies, if one was made, but should be considered in the light of the subsequent correspondence between the parties, and the oral testimony given in relation thereto. On September 24, 1884, the plaintiff by letter to Van Deusen, reported the amount of the expense incurred in repairing the canal up to that date. On December 4, 1884, plaintiff wrote to Holden, manager of the defendant, stating that, according to the amount of money expended on the canal would still carry no water. Plaintiff further expenditures had been amounting to \$993.93. In this letter, plaintiff asked the co-operation of the defendant—First, towards making such repairs upon the canal; second, towards prosecuting trespassers on the canal. That on the 31st day of December, 1884, defendant paid one-half of the expense, \$496.96, that had been incurred up to that time. On August 27, 1885, plaintiff again wrote the defendant to that in the spring its manager, in connection with Van Deusen, had examined the canal to see what repairs were indicated and that also, when the season was favorable for work, the repairs were made in the most economical way; that the defendant for 1885, up to that time, ran up to the amount of \$1,000. In this letter the agent of the plaintiff asks the defendant to define, in plain language, how far it, the defendant, "would be French company by." On September 1, 1885, plaintiff transmitted to the defendant a statement of the expenses for the year up to that date, amounting to \$2,400, and stating that in a few days \$500 would be required to pay for repairing the canal. On September 2, 1885, the defendant's manager replied to the plaintiff by letter: "Mr. Holden states that the agent of the Old Jordan Mining and Milling Company are expected in Salt Lake City this month; that he will have them examine the canal, in connection with the agent, and decide the matter, both

for the present and future expenditures. He further says that if he was using the water he would not hesitate to credit the account at once; also, that as tenants in common it is best to agree upon a line of policy by which either party would be allowed to expend money on the property, and thus bind the other to payments. He then proceeds to state that it was his intention in his letter of October 30, 1883, to limit the expenditures, while not using the water, to such sums as would be necessary to preserve the property, and says, 'I do not know that you have gone outside that line.'" On November 19, 1885, the defendant's manager again writes to the plaintiff, to the effect that he had not been able to examine the canal before going east; that, upon his return within three or four weeks, he will examine it the first thing that he does. He asks for a complete statement of expenditures made by the plaintiff during that year, and that it be sent to Cleveland, Ohio, in order that he may submit it to the directors of the defendant company. He then suggests that, inasmuch as the plaintiff is having the entire use of the water, the plaintiff make the necessary repairs while it has such use, and that, when the defendant is ready to use the water, then it make the improvements and repairs; and closes by saying that some such arrangement as that just suggested will no doubt be suggested by the defendant company. On February 10, 1886, the plaintiff, pursuant to the request of the defendant, forwarded a detailed statement of the expenses for 1885, amounting to \$4,025 to Cleveland, Ohio. On February 16th the defendant replied, acknowledging the receipt of the statement, which it characterizes as fair and candid. The letter continues, and promises to submit the estimate to the board of directors of defendant, and also a repetition of the suggestion contained in the defendant's previous letter,—that the plaintiff should keep up the repairs upon the canal as long as it uses the water, and that, in case the defendant desired to use the water, it should expend for the benefit of the canal a like amount, or that, if it found the canal in good repair, it should then pay one-half of the amount plaintiff had expended in repairing the canal. The letter closed as follows: "But the whole matter will be submitted to the management, and their action on the matter reported to you. I have been delayed in returning to Utah beyond my expectations, and shall not be able to reach there until the middle of March." The next letter is dated July 30, 1887, and contains a statement of expenditures by plaintiff upon the canal during 1886 and the first part of 1887; also a full statement of all of the expenses up to July 30, 1887, paid out by the plaintiff. This letter also requests of the defendant that it pay one-half of the expenses. The next letter is from the plaintiff to the defendant, containing the further statement of expenditures amounting to \$500. On Feb-

ruary 11, 1888, the defendant replied to the plaintiff, acknowledging receipt of the letter of February 6th; also asking for a complete statement of the account of plaintiff against the defendant. On February 14th plaintiff replied to the defendant, giving an itemized account of all the expenditures upon the canal. This completes the correspondence.

It will be seen that the subsequent letters do not modify in any way the Exhibits A and B set out at length above. The vital portion of those letters is the following: In the letter of plaintiff to defendant of October 24th, the following language occurs: "I suggest that the necessary repairs should be done at once, and that hereafter the ditch should be kept in good condition, both companies paying their share of the incurred expenses." The answer is from defendant to plaintiff: "Your suggestion that the needed repairs should be done at once, and that each company pay its share of the expenses, and also for caring for the future, is right, and I will direct Mr. Van Deusen, our engineer, to co-operate with you, or any one you may delegate, to examine the property, and report what repairs are necessary." The subsequent letters of the defendant to the plaintiff indicate a desire on the part of the defendant to change this bargain so that the plaintiff may pay for all the repairs while it is using the water, and the defendant to pay its portion, or to reimburse the plaintiff for one-half, when the defendant begins to use the water. There is nothing in the testimony to indicate that the plaintiff ever agreed to this proposition in any way; on the contrary, the letters above cited, and all the evidence in the case, show that the plaintiff regularly and continuously demanded of the defendant one-half of the expenses incurred by it in making these repairs. There is nothing in the oral testimony to change this. It is true, there is a direct conflict as to whether or not the defendant ever terminated this contract by an oral notice to the plaintiff. The court charged the jury that the plaintiff could only recover, and the defendant was only liable for, one-half of the reasonable and necessary expenses upon the canal. The jury found in favor of the plaintiff for the amount claimed. It must be taken that this finding is equivalent to finding that the repairs made were reasonable and necessary. The court also charged the jury upon the same subject, as follows: "If you believe, from the preponderance of the evidence, that the contract was made as alleged, as I have stated it to you, and that the plaintiff made the repairs during the time specified, and that the repairs were necessary to the preservation and protection of the property, and that the defendant has been requested to pay, and has refused to pay, then you should find for the plaintiff the amount of one-half of such expenditures." In view of this instruction and of the contract, there can be no question but

that the jury found that the expenses were necessary to the protection of the property. This is a contract which either parties could perhaps have terminated by verbal notice. It is claimed upon one side and denied upon the other, that such a contract was given. This was a question peculiarly for the jury, and, the jury having found for the defendant, it is not proper for us to disturb it.

There is no question in the case as to the amount of money expended by the plaintiff, or as to the correctness of the verdict. We provided the contract sued upon was established. We think, from the evidence above, that the contract was established and established in the very terms in which it was alleged, to wit, that it was a contract made between the 22d day of October and the 5th day of November, 1888. There was nothing in the conduct of the defendant, so far as is evidenced by the testimony, that it intended to repudiate the contract at any time. The defendant desired a modification of it, which the plaintiff did not agree to; but, without such modification being made, it was not claimed but that the defendant was bound by the contract in the letters or correspondence put in evidence. Upon the record before us, we hold that the verdict and judgment were right, and the judgment should be, and is, affirmed.

MINER and BARTCH, JJ., concur.

GARY et al. v. YORK MIN. CO. (Supreme Court of Utah. Jan. 15,

STOCK—ASSESSMENTS BY DIRECTORS.
Stock set apart by the articles of incorporation as a fund from which to derive working capital is "exhausted" when the directors are unable to sell it, within the means provided in the articles prohibiting the stock from levying an assessment on the stock until the reserved stock has been "exhausted," and hence the directors may assess the stock in an amount not exceeding 10% of its par value, though it has been fully paid up, under Comp. Laws, §§ 2374, 2375, giving them authority to levy such an assessment on paid-up stock for working expenses.

Appeal from district court, Salt Lake City; G. W. Bartch, Justice.

Action by James M. Gary, C. S. Varian and C. F. Loofbourrow against the York Mining Company and others to set aside the assessment levied by the directors of the company. From a judgment for defendants. Plaintiffs appeal. Affirmed.

Chas. S. Varian and C. F. Loofbourrow for appellants. S. McDowell, for defendants.

ZONE, C. J. It appears from the record in this case that the plaintiffs were the owners of 2,415 shares of paid-up stock in the defendant the York Mining Company.

its capital stock consisted of 200,000 shares, of the par value of \$5 each; that, by the articles of incorporation, 50,000 shares were set apart to be used in developing its mine; that all the rest was subscribed; that the articles also provided that no assessment should be levied on any of the stock, for any purpose, until the stock so set apart should be exhausted. It also appears that the indebtedness of the company due for working and developing the mine was \$1,300, and that there was no money in the treasury to pay it; that the directors failed to sell any of the stock upon reasonable effort to do so; that they made an assessment of 1½ cents per share upon all the subscribed stock; that the plaintiffs failed to pay the assessment on theirs; that the directors ordered the collection thereof; that upon due notice the plaintiffs' stock was sold to pay such assessment; and that the company became the purchaser. From the decree of the court below, declaring the company to be the legal holder of the stock so purchased, the plaintiffs prosecute this appeal, and assign as error the giving of this decree.

The question arises, had the company the right, under the statutes of Utah relating to private corporations, to assess the stock, and to sell it upon failure of the plaintiffs to pay the assessment? The statutes bearing on the question are as follows: Sec. 2374. "The directors of any corporation existing under the laws of this territory, after one-fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business or paying debts, levy and collect assessments upon the subscribed capital stock thereof in the manner and form and to the extent hereinafter provided." Sec. 2375. "No assessment shall exceed the ten per cent. of the amount of the capital stock named in the articles of incorporation except in the cases in this section otherwise provided for, as follows: (1) If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its obligations or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon its capital stock, or if a less amount be sufficient, then it may be for such a percentage as will raise that amount." Sec. 2393. "Any person who is the holder of full paid up capital stock, shall not be liable for any assessments or for any indebtedness of the corporation otherwise than by sale of his or her stock, as herein provided, unless distinctly provided for in the articles of incorporation, which articles, of incorporation, shall not be changed in this respect without the consent of all the stockholders in writing." 2 Comp. Laws Utah, 1888. After one-fourth of the stock was subscribed, the section first quoted gave the directors the right to make and collect assessments on the stock to pay expenses, to conduct business, and to pay the debts of the corporation. The next section limits the as-

essment, when the capital stock has been paid up, to 10 per cent. of it; and the last section quoted declares that the holder of paid-up stock "shall not be liable for any assessment or for any indebtedness of the corporation otherwise than by its sale unless provided for in the articles of incorporation." It follows that the York Mining Company had the legal right to make the assessment and sale which the plaintiffs complain of.

The plaintiffs insist that the assessment and sale of their stock was invalid because the 50,000 shares of stock set apart for working capital had not been sold. The articles did provide that no assessment should be made until the working capital should be exhausted. We incline to the opinion that this provision was binding on the directors. But the evidence in the record shows that they were unable to sell the stock so reserved; that they were unable to convert it into money, and apply it to the payment of the debts of the corporation. When the means by which the stock could be applied to the payment of debts were exhausted, the stock itself, as a means of paying indebtedness, was also exhausted.

We find no error in this record. The judgment of the court below is affirmed.

SMITH and MINER, JJ., concur.

HENDERSON v. TURNIGREN et al.¹

(Supreme Court of Utah. Jan. 16, 1894.)

PLEADING—OBJECTIONS WAIVED—STOCKHOLDERS' LIABILITY—ENFORCEMENT—STOCK SUBSCRIPTION—PAYMENT.

1. An exception to the overruling of a demurrer to the complaint for failure to state a cause of action is not waived by answering over, since 2 Comp. Laws, § 3652, permits a review on appeal from a judgment of any intermediate order properly excepted to.

2. An objection for defect of parties defendant is waived if not raised by demurrer or answer.

3. An action to enforce the stockholders' liability to creditors of the corporation as to their unpaid subscriptions is properly founded on the judgment against the corporation, and not on the indebtedness itself, since the stockholders' liability is secondary, and arises only on the failure of the corporation to pay the judgment.

4. In such an action, allegations that the corporation is insolvent, and has no property to pay the judgment, that payment of the judgment has been demanded of the stockholders, and refused, and that the directors refuse to collect the unpaid subscriptions to the capital stock, sufficiently show that the judgment is unpaid.

5. Stock for which a corporation has received nothing but quitclaim deeds to land in which the grantors had no interest whatever may be treated by the corporate creditors as unpaid stock in enforcing the stockholders' liability for corporate debts.

Appeal from district court, Salt Lake county; C. S. Zane, Justice.

Action by Wilbur S. Henderson against

¹ Rehearing denied.

Daniel Turngren and others to enforce defendants' liability, as stockholders, for the debts of the Wasatch Stone Company. From a judgment for plaintiff, defendants appeal. Affirmed.

W. G. Van Horn and Goodwin & Van Pelt, for appellants. Frank Pierce, for respondent.

SMITH, J. The plaintiff is a judgment creditor of the Wasatch Stone Company, an insolvent corporation. The defendants are the incorporators of said Wasatch Stone Company. This is an action in equity to recover of defendants unpaid subscriptions to the capital stock of the company; it being alleged, among other things, "that none of said defendants have ever paid into said incorporation any portion of the capital stock subscribed by them." The defendants demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled. Defendants answered, admitting they were incorporators of the Wasatch Stone Company, and denying they had not paid their subscriptions, but alleged that they, and each of them, had paid their subscriptions by conveying to the company certain mining locations owned by them. The articles of incorporation introduced in evidence contain the following, among other, provisions: "That in consideration of the amount of capital stock of this incorporation, consisting of the aggregate valuation of the following described mining claims and properties, to wit, [here follows a description of certain lands,] all of said mining claims situated in Salt Lake county, Utah, for the working, development, management, and use of which this incorporation is formed, and which is to become the property of this corporation, the foregoing stock is hereby declared fully paid." The lands described in this article were at the time of the incorporation held in fee by strangers to the defendants, under patents from the United States; and the defendants have never in any way connected themselves with this title, and they had not then, and have never had, any interest in the land. At the time of the incorporation defendants supposed the lands were public lands of the United States, and defendants neither at that time nor ever since have had any interest in these lands. At the time of incorporation, defendants, by quitclaim deeds, conveyed their pretended interest in these lands to the corporation. Judgment below was for the plaintiff. A motion for new trial was made and overruled. From the judgment and order denying a new trial, defendants prosecute this appeal.

The first question presented is raised by respondent as to the right of appellants to be heard on their exception to the ruling on demurrer. It is claimed by respondent

that this exception is waived by the defendants, filed subsequently to filing on demurrer. This objection cannot be sustained. Our statute expressly reserves to a party an exception to a ruling on demurrer made against him. 2 Comp. Laws, § 3400. A new trial may be granted for error of law occurring at the trial, and excepted to by the party making the application. § 3400. Upon an appeal from a judgment of the court may review the verdict or any intermediate order, if excepted to. Id. § 3652. We have seen that the objection on demurrer is always deemed excepted to. Section 3393, supra. The cases of *Spanish Fork City v. Hopper*, 7 Utah, 237, 293, and *Brown v. Southern Pac. Co.*, 292, 26 Pac. 579, are not in line with this view. The case of *Young v. Utah*, 3 Utah, 484, 24 Pac. 909, was decided in 1867, and long before the Code of Civil Procedure was adopted, and is not applicable. In *Spanish Fork City v. Hopper* an answer was filed first. A demurrer, filed subsequently, was overruled. The court, in that case, it is true, says that the exception to this ruling was waived by answering. It would have been strictly correct to say that the right to demur was waived by answering first. The nature of the defense is not shown, but all objections to the complaint, except for sufficiency of facts to sustain the jurisdiction of the court, unless by answer or demurrer, are waived. 2 Comp. Laws, § 3225. In *Brown v. Southern Pac. Co.* no demurrer was interposed. The case is not in point at all. We do not think the opinion that the ruling on demurrer is subject to review, and we so held, in the case of *Darger v. Le Sieur*, 33 Pac. 100 (at the last term of this court.)

It is insisted that the complaint is defective for three reasons: (1) That the complaint is not made a party defendant; (2) That the action should have been upon the indebtedness, and not upon the judgment; (3) That the complaint fails to allege that the judgment is unpaid. The first objection is not raised by the demurrer. It is an objection on account of nonjoinder of a party defendant. This objection is waived by answering. It is not raised by demurrer or answer. See 2 Comp. Laws Utah, § 3225. The second objection is not well taken. Before a party can obtain a court of equity to ask relief against the stockholders of an insolvent corporation, he must first establish his claim by judgment against the corporation itself. Under the statutes of some states, stockholders are primarily liable for a pro rata share of the debts of the corporation. In such a case it has been held that the action against the stockholders should be upon the original indebtedness, and not upon the judgment against the corporation. Such authority is not applicable in Utah, where, as in the case of the private property of stockholders, they are liable for the debts of the corporation.

of defendants in this case was second and arose only in the event of the failure of the corporation. We think this judgment was properly founded on the judgment against the corporation. Cook, Stock, & Corp. Law, 200. We also think the objection is not well taken. The complaint alleges a recovery of judgment; the execution thereon; a return of the writ. The corporation was insolvent, had no property to pay said judgment. The execution of the judgment had been defeated by the defendants, which had been recalled by the directors of the company to collect the unpaid subscriptions to the capital stock made by defendants. This cannot be mistaken. While it does not use language equivalent to that of the writ. No particular form of words is required under our procedure. It is sufficient that the fact is alleged in such form that it is readily understood.

It brings us to the main question in the writ, did the defendants pay their subscriptions to the capital stock by the deeds to the mining locations above mentioned? It must be borne in mind that the defendants had no shadow of right or interest in the land embraced in these mining deeds. The land was not public land. It was private property, held in fee, when the deeds were made. In other words, the defendants conveyed absolutely nothing by their mining deeds. Can the subscribed capital stock of a corporation be paid in such a manner as to conveyances? The case does not present the question of overvaluation of the thing conveyed, but presents a case of the thing conveyed in payment of no value. The subscribers to the capital stock of a corporation must pay for the stock either money or money's worth. Cook, Stock, Stockh. & Corp. Law, § 427: "The public, in dealing with a corporation, has the right to assume that its capital is in money or money's worth, and to its capital stock which it purchases, unless it has been impaired by losses." To the same effect, and to the same point, is Sawyer v. Hoag, 17 Mo. Priv. Corp. § 427, says: "The fact that shares cannot lawfully be paid up unless their par value has been contributed to the company's capital, and the equities existing between the members of the company, and also upon the rights of outside parties who have invested in the company on the faith of the charter indicated by its charter." And again the writer says, at section 428: "It is therefore, that property cannot be paid in payment for more than it is worth;" citing, for the last proposition, Cook v. Chapin, 6 Cush. 50; Oliphant & Co., 63 Iowa, 332, 19 N. W. 212. It is this rule sound, both on principle and authority. It was suggested on the ar-

gument that such a conclusion would be against sound public policy, as it would retard the formation of corporations. We do not believe any public good is promoted by the formation or operation of corporations founded, as this one was, upon absolutely nothing of value, and which are a cheat upon every one who deals with them and extends to them the smallest credit. If the question of public policy is involved in this decision, we believe it will be best promoted by holding to a strict account all those who engage in the very questionable business of creating business corporations that are insolvent from their very inception. We are of opinion that the court below rightfully held the defendants responsible to plaintiff in this action. The judgment of the court below is affirmed.

MINER and BARTON, JJ., concur.

VAN WAGONER et al. v. BARBEN.

(Supreme Court of Utah. Jan. 18, 1894.)

APPEAL—REQUISITES—PAYMENT OF DOCKET AND JURY FEE.

An appeal from the commissioner's court to the district court is properly dismissed, where appellant fails to pay the docket and jury fee within 30 days after the receipt of the appeal papers in the district court, as required by a rule of court; and the fact that the last of the 30 days is a Sunday, and that the next is a holiday, is no ground for refusing to dismiss, where appellant did not make payment the following day.

Appeal from district court, Utah county; H. W. Smith, Justice.

Action by D. Van Wagoner and A. Hatch, partners as the Midway Co-op, against Fred Barben, brought in commissioner's court. From a judgment for plaintiffs, defendant appealed to the district court. His appeal was dismissed, and he again appeals. Affirmed.

Saxey & Edwards, for appellant. Warner & Kenward, for respondents.

MINER, J. It appears from the abstract in this case that judgment was rendered in favor of the plaintiffs in commissioner's court, and that the appellant appealed to the district court; that such appeal papers were deposited with the clerk of the district court on the 23d day of June, 1893, without paying the docket and jury fee; that on July 25, 1893, the respondents paid the docket and jury fee, and had the case docketed, and then entered their motion to dismiss the appeal, under a rule of said court. Said rule required the appellant to pay such docket and jury fee within 30 days after the receipt of such appeal papers in the district court, and, in case of his neglect so to do, the respondent is authorized by said rule to pay such fee, without notice to the appellant, and have such appeal dismissed. The appellant claims that the motion to dis-

miss was prematurely filed, for the reason that the 23d day of July was Sunday, and that the 24th of July was a legal holiday, and that, therefore, the appellant was entitled to all of the 25th of July in which to make such payment. He also claims that he was necessarily out of the county from the time of the appeal to the 25th of July, and was therefore excusable from complying with the rule. On the 26th day of July,—the day following the entry of the motion to dismiss,—the appellant tendered the docket and jury fee to the clerk, which he declined to receive. Thereupon, the motion to dismiss the appeal under the rule of court was granted. From this order of dismissal this appeal is taken.

This question has been passed upon by this court in *Salt Lake City v. Redwine*, 6 Utah, 335, 23 Pac. 756; *Henderson v. Hlgins*, 9 Utah, —, 34 Pac. 61; *Legg v. Larson*, 7 Utah, 110, 25 Pac. 731; *Hyndman v. Stowe*, 9 Utah, —, 33 Pac. 227. We adhere to the rule laid down in these cases, and hold that the appeal was properly dismissed. The order and judgment of the trial court is affirmed, with costs.

ZANE, C. J., and BARTCH, J., concur.

PEOPLE v. BERLIN.

(Supreme Court of Utah. Jan. 23, 1894.)

LARCENY—WHAT IS—INSTRUCTIONS.

1. If, by means of any trick or artifice, the owner of property is induced to part with the possession only, still meaning to retain the right of property, the taking by such means will amount to larceny; but if the owner part with not only the possession of the goods, but the right of property in them also, the offense of the party obtaining them will not be larceny, but obtaining goods by false pretenses.

2. On a trial for larceny, defendant testified that she had been hired by the prosecuting witness to poison a third person, and that the money had been paid to her in reliance on her false representation that the murder had been accomplished. *Held*, that an instruction that defendant was guilty of larceny if the money was paid over to her in reliance on her fraudulent representations and pretenses was not misleading where it was followed by a statement that if the money was delivered in pursuance of a previous agreement, or if it was voluntarily delivered to defendant, the owner intending to part with the possession and title, then there was no larceny, even if fraud was established in obtaining it.

Smith, J., dissenting.

Appeal from district court, Weber county; James A. Miner, Justice.

Nellie Berlin was convicted of grand larceny, and appeals. Affirmed.

Lessenger & Beckwith, for appellant. The United States Attorney, for the People.

ZANE, C. J. The defendant was convicted of grand larceny. On the trial the prosecution introduced evidence tending to prove that she stole \$100 from Lena Wright, and

the defendant introduced evidence to prove that she entered into a contract with Lena Wright to kill one Mrs. Wright for the consideration of \$100, and that caused a false statement to be put in a newspaper to the effect that Mrs. Wright had died of heart disease, which she told Mrs. Wright, who relied upon the statement, and paid her the \$100 alleged to have been stolen. The prosecution introduced evidence tending to rebut this.

The defendant excepted to the charge of the court, and assigns the giving of the charge as error. The jurors might have understood from one part of the charge, without the qualification that followed, that they were to find the defendant guilty of larceny if Mrs. Wright paid her the \$100 intended to be transferred both the possession and the title to such transfer was induced by her fraudulent representation and pretenses. The question was: "But if the money was delivered to the defendant by the owner's consent in pursuance of a previous agreement, and if it was voluntarily delivered to defendant by the owner intending to part with the possession and title to it, then there was no larceny, even if fraud was established in obtaining it." We understand this to be a statement of the rule applicable to transactions, however the ingenuity of the defendant may vary the facts in particular cases. If the owner of personal property is induced by fraudulent representations to part with its possession, intending also to part with the title, the transaction cannot be larceny. If the person receiving the possession of the property out the title has at the time a secret intention of converting it permanently to his own use, and does so, without the consent of the owner, he commits the crime of larceny. After a review of the cases, Russell says the law is as follows: "The correct description in cases of this description seems to be that if, by means of any trick or artifice, the owner of property is induced to part with the possession only, still meaning to retain the right of property, the taking by such means will amount to larceny; but if the owner part with not only the possession of the goods, but the right of property in them also, the offense of the party obtaining them will not be larceny, but the offense of obtaining goods by false pretenses." 2 Russ. (9th Ed.) 200. To the same effect are *People v. Smith*, 15 Serg. & R. 98; *Com. v. Berger*, 119 Pa. St. 254, 13 Atl. 422; *Crim. Law*, § 813; *People v. Shaw*, 30 Cal. 403, 24 N. W. 121. Though a part of the charge, considered alone, might mislead the jury, that will not be reversible error when the whole is considered, and the case is stated with sufficient clarity and clearness. We do not believe the jury was misled as to the law of larceny by the charge of the court.

A number of requests to charge were

by the defendant, but the law applicable to the case, so far as it was necessary to state it to the jury, was embraced in the charge of the court. Therefore the refusal of the requests was not error. The judgment of the court below is affirmed.

BARTCH, J., concurs.

(Jan. 29, 1894.)

SMITH, J. I do not concur in the opinion of a majority of the court in this case, and, as it seems to me that the opinion of the majority evades, rather than decides, the questions raised, I am constrained to express my views. The defendant was convicted of grand larceny. There was evidence for the prosecution tending to show that defendant stole \$100 from the possession of Lena Wright on or about February 19, 1893. Defendant introduced evidence tending to show that on and prior to February 19, 1893, Lena Wright entered into an agreement with defendant and one Gilson, whereby Gilson and defendant were to poison one Mrs. Morris, for which Lena Wright was to pay to Gilson and defendant \$100 when the killing was done. On February 19, 1893, for the purpose of deceiving Mrs. Wright, and obtaining the \$100, defendant and Gilson caused a notice to be published in the morning paper in Ogden that Mrs. Morris had died the previous night of heart failure; that defendant took the paper to Mrs. Wright, called her attention to the notice of death of Mrs. Morris, giving her to understand that defendant had poisoned her, and that Mrs. Wright, believing Mrs. Morris had been poisoned, paid defendant the \$100, as promised. Defendant's testimony also tended to show that Lena Wright and the husband of Mrs. Morris were criminally intimate, and that Mrs. Wright was desirous on that account of getting Mrs. Morris put out of the way.

The defendant offered testimony to show that Mrs. Wright, the prosecuting witness, tried to hire another party, named Terrell, to poison Mrs. Morris, at about the time of the alleged agreement with defendant, and had offered Terrell \$100 for the service. This testimony was objected to by the prosecution, and the objection was sustained, to which defendant excepted. This ruling is assigned here as error. The court instructed the jury as follows, omitting the mere formal parts: "If the jury find that the defendant entered into an unlawful combination and conspiracy with Gilson to fraudulently obtain the one hundred dollars from Mrs. Wright in question, and that in pursuance of such conspiracy—which was unknown to Mrs. Wright—Mrs. Wright was led to believe that Gilson or defendant or both would take the life of Mrs. Morris in consideration of the payment of one hundred dollars to Gilson or to the defendant by Mrs. Wright, such sum to be paid when such killing had taken place, and you find that the defendant

induced Mrs. Wright to believe that such killing had taken place, and that, therefore, the one hundred dollars was due to be paid to Gilson from her, and you find that the one hundred dollars was obtained by the defendant in reliance upon the fact that defendant or Gilson or both had killed Mrs. Morris, and that the killing in fact had not taken place, and you further find that the one hundred dollars was obtained from Mrs. Wright by defendant by this fraud, deceit, and trickery in pursuance of such previous conspiracy, with intention on the part of defendant at the time to steal the same, and appropriate it to her own use or the use of Gilson, and to deprive Mrs. Wright wholly of the possession and ownership thereof without her consent, then these facts are sufficient to constitute the crime of larceny. The fraud in obtaining the possession of the money in such a case, if shown, takes the place of trespass, which is necessary to be shown; and, if all the facts justify a felonious intent on the part of the defendant, the conversion of the money to defendant's own use is felonious. But if the money was delivered to the defendant by the owner's consent, in pursuance of a previous agreement, or if it was voluntarily delivered to defendant, the owner intending to part with possession and title to it, then there is no larceny, even if fraud is established in obtaining it. You will note the distinction made in the instruction, consider all the facts and the evidence in this case, peculiar as it may be." The defendant excepted to the giving of this charge, on account of its misleading character, and assigns the giving of it as error. There is no other portion of the charge that has any bearing on this question. In the opinion of the majority of the court no notice is taken of the exception to the ruling as to the admissibility of the testimony showing that the prosecuting witness had, at about the time of the alleged agreement with defendant, tried to hire one Terrell to kill Mrs. Morris. This fact was attempted to be shown by Terrell himself, and the objection was wholly on the ground of materiality. As to the charge of the court, it will be seen from the recitation of it at length above that in the opinion of the majority three or four lines are selected out from the conclusion of it, and because they embody a substantially correct statement of a legal proposition it is said that the jury was not misled. I may be exceedingly obtuse, and do not profess to possess any unusual powers of perception, and this may account for my failure to understand what rule the court below intended to lay down for the guidance of the jury. But true it is that if I were called upon to say from the instruction quoted what rule was declared, I confess at once that I could not do it. And I am constrained to believe that no member of this bar or of this court, with all due respect to the other members of it, can tell

what the court below intended to tell the jury was the rule of law in this case; and yet we are told that it must not be supposed that a jury of laymen not learned in the law were misled by this instruction. As I understand it, the opinion of the majority of the court concedes that the charge was in a large part erroneous, but they hold that it was not misleading. Let us see. The jury are first told, in effect, that if Gilson and defendant conspired to cheat Mrs. Wright by pretending to accept employment to kill Mrs. Morris; that they caused the death of Mrs. Morris to be announced, and falsely pretended they had killed her, and claimed the payment of the \$100 promised, and Mrs. Wright, relying on this false representation that Mrs. Morris was dead, when in fact she was not, paid defendant the \$100; and that defendant received it, intending to appropriate it to her own use,—then this was larceny. In the same breath they were told that if the owner of the money delivered it to defendant pursuant to a previous agreement, intending to part with the possession and title to it, then there is no larceny. This is the substance of the instruction, stripped of all needless verbiage, and if it is not contradictory I am unable to understand the English language. It was not contradictory in some mere formal or immaterial part. The substance is in absolute conflict, and cannot be reconciled. I think it must be admitted by all that if the jury followed the first rule declared in the instruction, they must have found against defendant under any circumstances, because it mattered not whether the testimony given on the defense was true or false, she was guilty anyhow. I am clearly of the opinion that if the jury believed the testimony offered in behalf of defendant she was entitled to an acquittal upon this charge. In other words, if Mrs. Wright gave the money to defendant in payment for a supposed service, the taking of it could never be larceny; and defendant was entitled to have the jury pass on the question as to whether her version of the affair was true or not. I am quite positive that under the instructions as given no man can tell whether this has ever been done or not. If because the court correctly stated a legal proposition in a few lines of an instruction, while it elaborated an erroneous one at great length, it must be held that the entire instruction fairly states the law, and is not misleading, I do not see how a case can ever be reversed for error in the charge of the court; because it would be an extreme case, indeed, where we might not pick out a few lines somewhere in the charge that stated a legal proposition correctly. The rule that when a charge is erroneous in one part, and injurious to a defendant, the mere stating of a correct rule in another part does not cure it, is established by every authority that is entitled to respect. *Brown v. McAllister*, 39 Cal. 577; *Aguirre v. Alexander*, 58 Cal.

21; *Frederick v. Allgaier*, 88 Mo. 602; *ton v. Fritz*, 5 Ill. App. 217; *Railroad v. Monroe*, 47 Mich. 152, 10 N. W. 179; *v. Jamieson*, 51 Mich. 153, 16 N. W. 31; *ray v. Com.*, 79 Pa. St. 311; *Thomp.* 2326. In this case the error was emphasized, if possible, by the fact that the jury doubt as to what the court had declared the law to be, and, after being out some time, they returned into court, and at their return the objectionable instruction was again read over to them. In view of all this, a reversal of this court cannot believe, and do not believe, the jury were misled. If they were not, then I do not see how a jury could be misled by an erroneous charge of the court. I think the only safe and proper rule is to reverse where the charge is erroneous in a material part, by which the testimony of a party is necessarily limited in its effect, to the detriment of such party. If such error is prejudicial, and demands a reversal of the cause, without regard to the fact that the court in some other part of the charge stated the law correctly. This is stated in *Thompson on Trials*, at 2326, as follows: "Instructions should be so framed as to be capable of only one interpretation,—one correct in point of law, or in relation to the facts, and the other incorrect. Such instructions are well calculated to mislead the jury. The giving of instructions which are inconsistent with each other is error, and the reason that the jury will be as likely to be misled by the bad as the good; and it cannot be known which they have followed, and in any way soever they go, the judgment must be reversed. Therefore an erroneous instruction is not cured by another instruction on the same subject which is correct." *so, Mackey v. People*, 2 Colo. 18; *Olin*, 79 Pa. St. 391.

There is one feature of the instruction given that, were it not so serious, would be ludicrous. The court told the jury: "And if you find that the one hundred dollars was obtained by the defendant's reliance upon the fact that defendant and son or both had killed Mrs. Morris, and that the killing in fact had not taken place, and you further find that the one hundred dollars was obtained from Mrs. Wright by defendant by this fraud, deceit, and..." * * * The fraud in obtaining the money in such case, if it takes the place of trespass, which is necessary to be shown," etc. It will be seen that the fraud, deceit, and trickery referred to was the false representation of defendant that she had murdered Mrs. Morris. The jury were then told that this fraud should supply the place of the trespass, and that it must be shown to complete the crime of larceny. In other words, Mrs. Wright, by paying over this blood money, was induced, in that she was induced to and deceived that it had been earned, whereas

not. If the court, as indicated by this instruction, wanted to give to the bargain between defendant and Mrs. Wright the dignity of a contract, the violation of which would be a wrong or constitute any element of crime, inasmuch as Mrs. Morris was still alive, and it was not shown to be beyond the power of defendant to perform the bargain, it would have been more in accord with ordinary judicial procedure to have given judgment for specific performance of the contract to kill, instead of convicting defendant of a crime that to my mind was not involved either in the performance or breach of the contract. I think, for error in the charge of the court, the judgment below should have been reversed, and a new trial granted. I do not deem it necessary to enlarge upon the exceptions to the rejection of Terrell's testimony. It was admissible if the proper foundation was laid by asking Mrs. Wright whether she had made such offer to Terrell as he was produced to prove.

MARTE v. OGDEN CITY ST. RY. CO.

(Supreme Court of Utah. Jan. 18, 1894.)

TERRITORIES—FEE BILL—WITNESS FEES.

1. Rev. St. U. S. § 823, which prescribes the fees and costs to be taxed "in the several states and territories," refers solely to the discharge of duties imposed by the laws of the United States, and is not applicable to cases in the territorial courts in which the United States is not a party, or of which the federal courts would not have exclusive jurisdiction if the territory were a state; and officers, jurors, and witnesses, when discharging duties and services under United States laws, should be compensated according to the federal fee bill, and, when discharging duties and services under the territorial laws, they should be compensated according to the territorial fee bill.

2. The federal fee bill is not made applicable to officers, jurors, or witnesses employed and discharging duties under the territorial laws, by Act Cong. June 23, 1874, which provides that the act regulating fees and costs to be allowed clerks, marshals, and attorneys of the federal courts, and for other purposes, "is extended over and shall apply to the fees of like officers in Utah."

3. The provision of the territorial fee bill which disallows fees to witnesses who do not attend before the clerk within two days after the trial, and claim their attendance, is valid, but does not prevent a successful party, who has paid his witnesses, and duly filed an itemized bill of costs within the required time, from having the amount included in his judgment, though the witnesses may not have appeared before the clerk.

Appeal from district court, Weber county; James A. Miner, Justice.

Action by Samuel Marte against the Ogden City Street Railway Company. Plaintiff recovered judgment, but appeals from the taxation of costs. Affirmed.

Maloney & Perkins, for appellant. Evans & Rogers, for respondent.

ZANE, C. J. This is an appeal by the plaintiff from a judgment of the court be-

low against the defendant on a verdict for \$50 and for \$60 costs. On motion of the defendant, the court taxed the costs according to the fee bill enacted by the territorial legislature, and disallowed the fees of four witnesses, amounting to \$17.70, because they had not appeared before the clerk within two days after the trial, and claimed their attendance. To this ruling of the court the plaintiff excepted, and he assigns the same as error.

The plaintiff claims that the court erred in taxing the costs under the territorial statute; that they should have been taxed according to the fee bill of the United States; and, further, that the court erred in disallowing the fees of the witnesses who did not claim them within two days, though they should have been taxed under the territorial law. The federal law does not require the witnesses to claim their fees within two days after the trial, while the territorial law, in terms, does. The legislative authority of the territory extends to all rightful subjects of legislation consistent with the constitution of the United States, and with United States laws relating to the territory. The compensation of officers and witnesses for services performed is a rightful subject of legislation; and the laws of the territory designating the fees of officers, jurors, and witnesses for duties or services rendered under laws enacted by the territorial legislature are consistent with the constitution of the United States. Are they in conflict with the laws of the United States? Stating the proposition more definitely, has congress applied the United States fee bill to the compensation of such officers and witnesses when executing process or serving in cases to which the United States is not a party, or of which it would not have exclusive jurisdiction if the territory was a state? Section 823, Rev. St. U. S., declares that "the following and no other compensation shall be taxed and allowed to attorneys, solicitors and proctors in the courts of the United States, district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors and printers in the several states and territories." This language refers to attorneys and solicitors practicing in the courts of the United States, and to the officers mentioned when discharging duties imposed by the laws of the United States, and to jurors serving in and attending upon its courts. It has no application to the compensation of state officers, or to attorneys or solicitors, or to jurors or witnesses, attending upon or practicing or serving therein. The lines separating national and state powers are drawn by the national constitution and laws and by state constitutions and laws. The right of the United States to acquire territory carries with it the power to govern the people found upon it. The federal government, however, has employed this right directly to govern the people of the organized

territories but little further than it was authorized under the constitution and laws of the United States to make and apply its laws to the people of the United States in the various states, or, in other words, to the people of the states. The national government has made provision for a territorial government in Utah, and has delegated to it a very large portion of powers similar to those exercised by state governments over their people. While this territorial organization is not a sovereignty, its authority to make laws, as we have stated, extends to all rightful subjects of legislation consistent with the federal constitution and the laws of the national legislature; and the will of the people of the territory, expressed by their legislature in laws, has the same effect upon the people that the will of the people of a state, expressed through its legislature, has upon its people by similar laws. National laws emanate from the people of the United States, and are expressed by congress, while territorial laws proceed from the people of the territory, and are expressed by their legislature. The federal government prescribes duties and requires the services of its citizens as officers, jurors, and witnesses, and in its fee bill fixed their compensation, and the territorial government prescribes duties and requires the services of its residents as officers, jurors, or witnesses, and in the territorial fee bill in question has fixed their compensation. But the United States marshals and prosecuting attorneys and clerks of the supreme and district courts in the territories discharge duties under the laws of the United States and under the territorial government as well, and the courts of the latter have jurisdiction of and try cases under both federal and territorial laws. It would appear that such officers, jurors, and witnesses, when discharging duties and services under United States laws, should be compensated according to the United States fee bill, and, when discharging duties and services under territorial laws, they should be compensated according to the territorial fee bill. It is claimed, however, that the federal fee bill is made applicable to both classes of service—that is to say, when such officers, jurors, or witnesses are employed under the territorial laws as well as when employed under those of the United States—by the following provision of section 7 of an act of congress in force June 23, 1874: "The act of the congress of the United States entitled 'An act to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the circuit and district courts of the United States, and for other purposes,' approved February twenty-sixth, eighteen hundred and fifty-three, is extended over and shall apply to the fees of like officers in said territory of Utah." 1 Comp. Laws Utah 1888, § 7, p. 107; Supp. Rev. St. U. S. § 7, c. 469. The language is that the act of congress regulating the fees of United States

officers, and of jurors and witnesses in federal courts, "is extended over and shall apply to the fees of like officers in said territory." Does this language evince an intention to apply the act of congress meeting to the compensation of the officers mentioned when discharging duties under the territory, and to the compensation of attorneys and solicitors, and jurors and witnesses when practicing or serving or attending cases under territorial laws? It is reasonable to assume that, in extending the law of congress establishing fees, the intention was that it have like effect therein as in the states, so that the expression "fees of like officers for like services. No mention is made of compensation for duties discharged or services rendered, under the territorial law, or of the fee bill thereof then in force. It is held that the federal fee bill should be applied in its application to the compensation of United States officers for services discharged under United States laws, and not to officers discharged under territorial laws, and the compensation of attorneys, solicitors, and witnesses when practicing, or attending in cases in which the United States is a party, and to such as the United States courts in the states have exclusive jurisdiction of, and that their services and attendance in all other cases should be compensated according to the territorial law.

As to the second error assigned, we affirm the opinion that the provision of the territorial fee bill which disallows fees for witnesses who do not attend before the trial within two days after the trial, and for their attendance, is valid, and that the court did not err in so holding. In this we wish to be understood as holding that the successful party who pays his witnesses includes the amount paid in his itemization of costs, duly verified, and files it, as required by the statute, within the time prescribed, may not have it included in his judgment, though the witnesses may not have appeared before the clerk within two days after the trial, and may not have demanded fees. The case of *Grant v. Railway*, 270, 21 Pac. 993, is approved, and we find no error in this record. Judgment affirmed.

BARTCH and SMITH, JJ., concur.

ANDERSON v. YOSEMITE MINING & MILLING CO. et al.

(Supreme Court of Utah. Jan. 29, 1900.)

ACTION ON NOTE—WHO MAY BRING.

Where the owner of a note authorized the assignee to sue thereon, and the assignee, in a subsequent session, though the owner retained it in session, he cannot maintain an action without a reassignment to him.

Appeal from district court, Salt Lake county; George W. Barch, Justice.

Action by James Anderson against the Yosemite Mining & Milling Company and others to recover on a note. There was judgment for defendants, and plaintiff appeals. Affirmed.

Chas. S. Varian, for appellant. Arthur Brown and W. O. Hall, for respondents.

MINER, J. On May 14, 1888, the defendants made and delivered to the plaintiff their promissory note for \$3,500, with interest, payable to the order of the plaintiff. On January 5, 1890, James Anderson and Scott & Anderson made and delivered the following assignment to George M. Scott and William H. Remington: "For value received, we hereby sell, assign, transfer, and make over to George M. Scott and William H. Remington our several demands, accounts, and claims against the Yosemite Mining and Milling Company, a corporation; said demands being for the sum of thirty-six hundred and forty dollars (\$3,640) and seventy-two and thirty-five one-hundredths, (\$72.35,) with interest, and they are authorized to sue for and collect same from said company. [Signed] James Anderson. Scott & Anderson." In May, 1892, the plaintiff, James Anderson, commenced suit against the defendant upon said note, claiming no part had been paid except \$500. The Yosemite Mining & Milling Company answered separately, and set up the above assignment, claiming that Scott and Remington were the owners of said note, and that plaintiff was not such owner; and that they, in connection with Joseph E. Galligher as trustee for them, commenced suit against said company upon several matters, including the note in question, and afterwards, on December 17, 1891, recovered judgment against said company in the third district court upon said note and other demands; and that said judgment is of record in said court, and unreversed. Glendinning and Egan answered separately, denying plaintiff's ownership of the note, and also set up the same defense as this company defendant. The case was tried before the court without a jury, and the court found the facts set up in the several answers of the defendants to be true, and that plaintiffs had been paid \$500 by Glendinning on April 22, 1890. The court further found that the assignment and transfer of said note to Scott and Remington was made for the purpose of enabling them to comply with a certain agreement between them and the defendant the Yosemite Mining & Milling Company, whereby Scott and Remington had agreed to take up and procure the assignment and transfer to them of said note and indebtedness, among others, so as to allow Scott and Remington to foreclose, and recover judgment for this indebtedness. Plaintiff claims the court erred in

admitting the assignment by plaintiff to Scott and Remington; that the court erred in admitting evidence of the defendant as to the same against the company, and the assignment of it; and that the court erred in admitting in evidence the record and judgment roll in the suit of Galligher et al. v. The Yosemite Mining & Milling Co.; and that the evidence was insufficient to justify the findings, etc.

Upon an examination of the record, we find that the contention of the appellant cannot be sustained. It appears from the testimony of the plaintiff that, at the time of the assignment in question, plaintiff held no other claim against the defendant than the note in question. It also appears that plaintiff authorized the suit to be commenced thereon. The fact that plaintiff still retained the note in his possession would not deprive the assignee of the right to sue thereon in accordance with the contract between the parties. Having authority to sue, Scott and Remington could sue one or all of the makers. The assignment carried with it the note and debt evidenced thereby. Scott and Remington were the real parties in interest, and entitled to sue. The fact that they chose to sue but one of the three makers of the note, and did not make the sureties parties to their action, was within their discretionary power as owners of the note. The plaintiff could not maintain an action on the note he had assigned, without a reassignment to him. Under the authority given, the defendants would be protected in a payment of the note, or by a recovery of a judgment thereon by the assignee, as against a suit or claim by the assignor against them. *Wines v. Railway Co.*, 9 Utah, —, 33 Pac. 1042; *Pom. Rem. & Rem. Rights*, (2d Ed.) § 132; *Davis v. Railway Co.*, 25 Fed. 786; *Anderson v. Beardon*, (Minn.) 48 N. W. 777; *Sheridan v. Mayor*, etc., 68 N. Y. 31; *Tuller v. Arnold*, 98 Cal. 522, 33 Pac. 445; 2 Comp. Laws, §§ 3185, 3212, 3662. We think the evidence objected to was properly admitted, and that the evidence justified the findings given. Finding no error in the record, the judgment of the trial court is affirmed, with costs.

SMITH, J., concurs.

THOMAS et ux. v. SPRINGVILLE CITY.¹

(Supreme Court of Utah. Jan. 29, 1894.)

DEFECTIVE BRIDGES — ACTION FOR PERSONAL INJURIES — EVIDENCE — INSTRUCTIONS.

1. While driving over defendant city's bridge, plaintiff's horse became frightened at a hole, partially covered by a plank, and backed off the bridge, whereby plaintiff was injured. The plank over the hole left a hole on either side, through which the water could be seen below, and the end of the bridge where the buggy went off the approach to it was not protected by any guard rail. Held to justify a verdict for plaintiff.

¹ Rehearing denied.

2. Evidence that other horses became frightened at the hole in the bridge was competent to show notice to defendant, and to show that such hole was likely to frighten horses.

3. A charge requested by defendant, that if the hole was repaired in a reasonable manner, so as to cause no obstruction to the ordinary use of the bridge, and if the horse shied without sufficient cause, defendant would not be liable, was properly refused, as it was not broad enough to cover other features of alleged negligence in evidence.

Appeal from district court, Utah county; John W. Blackburn, Justice.

Action by Perry A. Thomas and wife against Springville City. There was judgment for plaintiffs, and defendant appeals. Affirmed.

Rawlins & Critchlow and D. C. Johnson, for appellant. Williams, Van Cott & Sutherland and S. R. Thurman, for respondents.

MINER, J. This action is brought to recover damages claimed to have been sustained by Lavinia M. Thomas, and occasioned by a fall from a bridge over a stream within the corporate limits of the defendant. The plaintiff was driving a horse attached to a carriage across this bridge, when the horse became frightened at a hole in the bridge, which had been partly covered by a plank, and backed off the bridge, causing the plaintiff to fall about 10 feet, into the water below. Plaintiff claims damages on account of the unsafe and negligent condition in which the bridge was left. The floor of the bridge had become worn out in places, and had been repaired before the accident. The hole in the bridge was estimated by several witnesses to be from three to eleven inches wide and two to three feet in length. This hole had been repaired by defendant by placing plank over it in such a manner as to leave a crack on either side, estimated by various witnesses at from one to three inches in width, through which the water could be seen below. That for about four feet at each end of the bridge where the buggy went off the approaches to it were not protected by any railing or guard rail, to prevent vehicles from going over. The horse driven by plaintiff was gentle, and it appears plaintiff was accustomed to driving horses. The plaintiff drove upon the bridge from the east, when the horse became frightened at the plank or crack in the covering, and, notwithstanding the efforts of the plaintiff by the use of the whip to urge the horse over the plank, the horse backed the carriage and the occupants over the unprotected end of the bridge, precipitating the plaintiff and others into the channel of the stream, about 10 feet below. The testimony shows that plaintiff received some injuries. Within a short time after the accident she was prematurely delivered of a dead child; and that some three or four months thereafter she suffered a miscarriage, all of which, it is claimed, was occasioned by the injury received at the

time. It also appears that, had a been placed at the approach to the bridge, the accident might have been avoided. The testimony was conflicting. Upon the testimony the jury rendered a verdict in favor of plaintiff for \$2,300. Upon the motion for a new trial the court struck out the verdict for \$1,000, leaving a judgment for the plaintiff of \$1,300.

The appellant contends that there is no negligence in the record showing negligence on the part of the city. Upon an examination of the record and of the authorities bearing upon the question we are satisfied that there was no negligent evidence before the jury upon the question of negligence by the city in not providing a suitable railing to the approach to the bridge, and upon the question of negligence and want of proper care on the part of the city in failing to make a reasonably complete repair of the defect in the floor of the bridge. These matters were within the special province of the jury to pass upon under the evidence given, and their verdict should not be disturbed. *Houfe v. Town of Fulton*, 9 Amer. Rep. 568; *Hey v. Philadelphia*, 22 Amer. Rep. 733; *Kennedy v. Mayor of New York*, 73 N. Y. 365; *Ring v. City of Columbia*, 17 N. Y. 83; *City of Sterling v. Thomas*, 106 Ill. 264; *Black, Proof & Pl. § 85*; *Leakway Co., (Utah),* 33 Pac. 1045.

It is also contended that the court erred in allowing witness Storrs to testify that he had seen two or three horses shy at this place in the bridge in question. While this testimony was properly admitted for the purpose of showing notice to the city, it was also as tending to show that this crack and crack in the bridge was an object to frighten horses. The authorities are to the effect that the evidence should be practically uniform on this subject. *Westmoreland v. Railroad Co.*, 13 Amer. Rep. 604; *Chicago v. Powers*, 42 Ill. 169; *City of Philadelphia v. Lowery*, (Ind.) 39 Amer. Rep. 10; *Augusta v. Hafers*, (Ga.) 34 Amer. Rep. 10; *Pomfrey v. Village of Saratoga Springs*, 11 N. Y. 459, 11 N. E. 43; *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. 100.

Exception is taken to the refusal of the court to give defendant's first and third requests. In the first request the court was asked to direct a verdict for the defendant. This, as we have seen, was properly refused. In the third request the court was asked to charge the jury, in substance, that if the hole in the bridge was repaired in a reasonable and ordinary manner, so as to cause no obstruction to the reasonable and ordinary use of the bridge, and that the horse shied at the board used in its repair, without sufficient cause or excuse, and backed off the bridge, then the defendant would be liable. The court did not give its charge in the language used, but told the jury, in substance, that in determining that matter they should consider the whole condition of the bridge. That the city was liable if

not use reasonable care in making its roadways and approaches to, and the bridge itself, reasonably safe. That ordinary negligence was the want of reasonable care. If the city was negligent in the manner of keeping the bridge in repair, and the negligent condition of the bridge caused the injury complained of, then the city was liable. That if it was left in such a condition that a horse would become frightened and unmanageable, and very easily back off the bridge, and cause injury, then it was the duty of the jury to determine whether it was negligence or not. That if the injury occurred in any other manner than as stated by the court, they must find for the defendant, etc. We can see no objection to the third request as offered, except that it was not broad enough to cover other features of the alleged negligence presented by the testimony. The whole charge, taken together, fairly presented the law of the case to the jury.

Many other errors were assigned in the record, but we have examined all that were discussed in the appellant's brief, and not waived at the hearing. Upon the whole record we find no reversible error. The judgment of the district court is affirmed, with costs.

BARTCH and SMITH, JJ., concur.

JEFFS v. RIO GRANDE WESTERN RY. CO.

(Supreme Court of Utah. Jan. 29, 1894.)

RAILROAD COMPANIES — INJURIES TO CATTLE — PROXIMATE CAUSE—QUESTION FOR JURY.

Plaintiff's cow was being driven along a street intersecting defendant's railroad track, and, when within 60 yards from the crossing, a dog chased her, and she ran onto the track, and was killed. No bell was rung, and the engine was running 20 miles an hour, instead of the rate prescribed by ordinance. Held a question for the jury whether defendant's negligence was the proximate cause of the injury.

Appeal from district court, Salt Lake county; C. S. Zane, Justice.

Action by E. A. Jeffs against the Rio Grande Western Railway Company. There was judgment for plaintiff, and defendant appeals. Affirmed.

Bennett, Marshall & Bradley, for appellant. Barlow Ferguson and John M. Connor, for respondent.

SMITH, J. In this action the plaintiff recovered judgment below for the value of a milch cow, killed by a switch engine of defendant on a public street in Salt Lake City. The defendant appeals.

One error alone is assigned here, to wit, that the evidence is insufficient to justify the verdict. In appellant's brief and in the oral argument it is admitted that defendant failed to ring the engine bell, as required by stat-

ute, and was running in excess of the speed allowed by the city ordinance of Salt Lake City. From these admitted facts the negligence of defendant may be inferred. See *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679; *Smith v. Railway Co.*, (Utah,) 33 Pac. 626. The defendant's counsel admits this legal conclusion to be correct, as we understand, but claims that upon the other admitted facts it is shown that defendant's neglect was not the proximate cause of plaintiff's injury. The facts shown in the record, in brief, are as follows: Defendant's engine was going north on a street, and the cow of plaintiff was traveling east on a street intersecting defendant's track at right angles. At a point 60 yards from the crossing, a dog of some third person took after the cow, and chased her easterly along the street. The cow was being driven, in connection with other cows, quite leisurely along the street, up to the time the dog began chasing her. The boy in charge of the cows tried to stop the dog. Up to this point there is no conflict in the evidence, but as to what occurred afterwards there is a very material conflict. The witnesses Bouck, Ernsshaw, and Olsen swear that the cow was chased almost squarely across the track, and in crossing she was struck. Bouck swears she was struck by the buffer beam of the engine on the right side, just back of the shoulder. No witness disputes this last statement. The witnesses Morgan, Richards, Dingwall, and Fisher testify that when the cow came to intersection of the two streets she turned north on the west side of defendant's track, and began running parallel to it; that the dog ran round her, headed her off, and turned her to the east and south, and onto defendant's track; and that she ran directly into the front of the engine. It will be readily seen that these two claims are materially different. Take the state of facts as proven by plaintiff's witnesses. The cow running, as testified to, across defendant's track, would occupy but the shortest space of time in actually crossing the point of danger, to wit, the track itself. Now, under such circumstances, had defendant's engine been running at the legal rate of speed, 8 miles an hour, instead of that proved, viz. 20 miles an hour, it will be seen that the accident could scarcely have occurred, as the engine would have been under control, and, had the cow been seen a very short distance ahead of it, its speed could have been so slackened that the cow could have escaped, while, with the engine running 20 miles an hour, her danger would have been proportionately increased, and the opportunity for escape in like ratio lessened. In such case, therefore, the failure to give warning by ringing the bell, and the unlawful speed of the train, may be well considered as elements proximately contributing to the injury; and under such circumstances, if the jury found that the negligent acts of de-

fendant in the particulars proven contributed proximately to the killing of the cow, the defendant is liable, although the action of the dog in the premises may have contributed to the result. See 16 Amer. & Eng. Enc. Law, 440, and cases cited. It may be conceded that, if the facts were admitted to be as claimed by defendant's witnesses, defendant would not be liable, for it may be well said that, if the cow were turned upon the track, and driven directly upon the engine, she would have been killed anyhow, no matter whether the engine was running 8 or 20 miles an hour, and no matter whether the bell was being rung or not. But, as we have seen, the testimony was conflicting as to just what did occur immediately before and at the moment of the accident. The jury had the right to believe the witnesses for plaintiff, and, if they did, they could legitimately come to the conclusion that the negligence of defendant was a proximate cause of the injury. We think we need not again say that we will not reverse a case for insufficiency of the evidence when in a material matter it is conflicting, and a jury and trial court, having the witnesses before them, have passed upon and decided the question of fact. The judgment appealed from is affirmed.

MINER and BARTCH, JJ., concur.

FARR et al. v. GRIFFITH.

(Supreme Court of Utah. Jan. 29, 1894.)

REVIEW ON APPEAL — CONFLICTING EVIDENCE — MEASURE OF DAMAGES — BREACH OF CONTRACT.

1. Where the evidence is conflicting, the verdict will not be disturbed.

2. Where a person who has leased a pond for the purpose of harvesting ice fails to supply it with a sufficient quantity of water according to agreement, the measure of the lessee's damages is the value of the ice he failed to put up because the lessor did not supply sufficient water, less the cost of putting it up.

Appeal from district court, Weber county; John W. Blackburn, Justice.

Action by John Farr and another against George G. Griffith for damages for breach of contract. There was judgment for plaintiffs, and defendant appeals. Affirmed.

E. T. Hulaniski, for appellant. Kimball & Allison, for respondents.

BARTCH, J. The defendant leased to the plaintiffs, for a period of four years from June 20, 1890, certain ice ponds and ice houses, for the purpose of putting up and storing ice, and granted them other privileges. He also agreed to supply the ponds with the usual water supply during the ice-making season of each year during the term, with such supply as the ponds had usually theretofore had. In consideration therefor the plaintiffs agreed to pay him \$8,500. The plaintiffs claim that during the season of

1891 and 1892 the defendant failed to supply for the ponds, and brought suit to recover damages in the sum of \$10,000. The defendant's motion for a new trial was denied, he appeals to this court, assigning as error insufficiency of evidence to sustain or justify the verdict, and also certain rulings of the court in favor of the cause.

Under the provisions of the lease the duty of the defendant to keep the ponds filled with water in the customary manner—that is, in the same way in which they were filled during the ice-making season, beginning at the commencement of the term of the lease. It appears from the evidence that it was customary in the autumn of 1890 to have the water flow into the ponds to keep them full until the weather became cold as to prevent its flow by fresh water being carried by means of a ditch. It also appears that, when the ponds were filled in this manner, there would remain sufficient water in the ponds, during the remainder of the season, to harvest and store the ice. The evidence on the part of the plaintiffs tends to show that during the season in question the water in the ponds was much lower than in previous seasons; some witnesses stating that it was only four feet lower; that this was due to the neglect and failure of the defendant to fill them in the usual way when the cold weather set in; that a portion of the ice which did form lay on the ground in the bottom of the ponds, and was not harvested; and that this occasioned a loss to the plaintiffs of more than \$10,000 of ice. On the part of the defendant the evidence tends to show that the ponds were filled in the manner usual in the season; that the water was little lower than in previous seasons; and that, if it was lower, it was not due to the neglect or failure on the part of the defendant. An examination of the evidence reveals a substantial conflict in the evidence at the point of a breach of contract by the defendant. This question was properly submitted to the jury, and they found in favor of the plaintiffs. A breach of contract was committed by the defendant, as indicated by the evidence in the record, indicating that the finding was not from prejudice, partiality, or caprice, and the court and jury, having had the witnesses before them, and having had the opportunity to observe their manner of testifying, are more able to judge of the weight which ought to be given to their testimony than an appellate court could do, in the evidence only as it is shown in the record. The rule is well established that, where, in a civil action, the evidence is conflicting, an appellate court will not reverse the verdict, unless it is so manifestly wrong as to show the preponderance thereof that

will not hesitate to declare that the evidence is clearly insufficient to support it, or that the jury have acted from passion or prejudice. In this case the record warrants no such inference, and the question raised cannot avail the defendant. *Haynes, New Trials & App.* § 288; *2 Thomp. Trials*, § 2273; *Harrington v. Chambers*, 3 Utah, 94, 1 Pac. 362.

The next point of contention is the measure of damages. Counsel for appellant insists that the court erred in its charge to the jury. The portion complained of reads as follows: "If you find for the plaintiffs, gentlemen, the measure of damages will be the value of the ice that the plaintiffs might by reasonable diligence have put up in the ice houses,—the value of the ice in the ice houses that they failed to put up on account of the failure of the defendant to supply the usual amount of water,—less the cost of putting such ice in the ice houses; the value of the ice in the ice houses, less the cost of putting it there." *ages*; and *Handforth v. Maynard*, 154 Mass. It is contended that the value of the ice on the ponds should be the measure of damages, 28 N. E. 348, is cited in support of this position. That was an action for damages for the loss of ice occasioned by the defendants draining the water from a pond; and the court held that "the true measure of his damages was the value of his right to harvest the ice upon the pond, and so make it his property, at the time when the ice was destroyed, and the plaintiff's right made worthless, by the defendants' acts." The rule thus stated would not appear to differ materially in its application from the one stated in the instruction complained of. The plaintiffs, as appears from the record, were entitled to the market value of that portion of the ice formed on the ponds which they could have harvested and stored in the ice houses but for the failure of the defendant to supply the water as provided in the lease, less the expense of harvesting and storing. We think the law as stated in the charge of the court as to the measure of damages, under the circumstances shown in this case, was substantially correct. *Suth. Dam. p. 130*; *Dana v. Fiedler*, 12 N. Y. 40; *Hale v. Trout*, 35 Cal. 229.

On the question of the quantum of damages, of which counsel for appellant complains, the record reveals a substantial conflict in the evidence, and no sufficient reason appears to disturb the verdict on the ground of being excessive. This is always a question for the jury, subject to the power of the court to set aside their verdict in cases where the damages are so great or so little as to make it apparent that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case. *2 Thomp. Trials*, § 2060; *Worster v. Canal Bridge*, 16 Pick. 541. Neither do we think the newly-discovered evidence, as appears from the record, was sufficient to warrant the granting of a

new trial. The record reveals no reversible error. The judgment is affirmed.

MINER, J., concurs.

WIMMER et al. v. SIMON et al.¹

(Supreme Court of Utah. Jan. 29, 1894.)

REVIEW ON APPEAL—OBJECTIONS NOT RAISED BELOW—NEWLY-DISCOVERED EVIDENCE.

In an action for conversion of goods, where defendants set up as a counterclaim an indebtedness on notes, defendants cannot raise the question for the first time on appeal that plaintiffs, by not objecting to the counterclaim, waived the tort, and could only recover the value of the goods.

Appeal from district court, Salt Lake county; O. S. Zane, Justice.

Action by Ella Wimmer and another against Louis Simon and another. There was judgment for plaintiffs and defendants appeal. Affirmed.

Frank Pierce, for appellants. Kellogg & Corfman and Chas. Baldwin, for respondents.

BARTCH, J. In this action the plaintiffs seek to recover damages for the wrongful taking and conversion of a certain stock of millinery goods. The jury rendered a verdict in their favor for \$359.58, and the defendants appealed from the order denying a new trial, assigning various errors.

It is alleged in the complaint that the defendants converted the goods to their own use, to the damage of the plaintiffs in the sum of \$1,000, and that because of the conversion the plaintiffs were broken up in business, and injured in credit, to their further damage in the sum of \$2,000. In their answer the defendants set up a counterclaim consisting of an indebtedness represented by four promissory notes of \$100 each. The action having been brought for a tort, counsel for the defendants claim that plaintiffs waived the tort by failing to object to the counterclaim, and therefore can recover only for the value of the property, less the counterclaim. The indebtedness set up in the counterclaim was created through the purchase of the goods in question from the defendants. The plaintiffs recognized it as a valid claim for which suit could be maintained, and both parties appeared to be willing to have all their matters in controversy settled in one suit. This they could do, in the absence of objection at the trial. The defendants having proceeded to try the case on the issues thus joined without objection, and without raising this question before the trial court, are not in position to raise it for the first time in this court. We are of the opinion that they waived their right to raise it here, and that plaintiffs did not waive the tort. *Western Pac. R. Co. v. U. S.*, 108 U. S. 510, 2 Sup. Ct. 802. We do not consider it necessary to decide the question as to

¹ Rehearing denied.

whether the counterclaim should have been stricken out under objection.

Counsel insist that the judgment was erroneous as to Louis Simon, and that the evidence shows that he was not one of the Simon brothers. The evidence shows him to be a joint tortfeasor, and, as such, is jointly liable with the other defendant for the wrongful acts; the jury having so found under the evidence. There is evidence which tends to show that he was a member of the firm of Simon Bros.

The remaining point on which the defendants seek to have the judgment set aside is that of newly-discovered evidence, which evidence is to the effect that Miss Wimmer, one of the plaintiffs, stated to Samuel Welle, as appears from his affidavit, that she could not pay Simon Bros., and that it would be necessary for them to protect themselves, or take the property. This statement, as shown by the defendants, having been made on the same day on which the plaintiffs moved from Spanish Fork to Payson, with the knowledge and consent of Simon Bros., for the purpose of carrying on the business at Payson, could have no material effect on the merits of the case, in the light of the testimony introduced on the trial, and was therefore not sufficient ground for a new trial. There appears to be no error in the record. The judgment is affirmed.

SMITH and MINER, JJ., concur.

HADRA v. UTAH NAT. BANK.

(Supreme Court of Utah. Jan. 29, 1894.)

REVIEW ON APPEAL—OBJECTIONS WAIVED—DEPOSITIONS—ADMISSIBILITY.

1. Assignments of error for refusal of the trial court to give instructions as requested will not be considered on appeal, where both abstract and transcript fail to show that appellant excepted to the refusal or to the instructions given.

2. In an action against a bank for damages for wrongfully causing plaintiff's check to be protested, the deposition of a witness for plaintiff was properly refused where such witness testified that he was the manager of Bradstreet's local agency, and had received information of the protest of the check and of the circumstances, but refused to answer, when asked, on cross-examination, who gave him such information, and gave no reason for such refusal.

Appeal from district court, Salt Lake county; George W. Bartch, Justice.

Action by Fred S. Hadra against the Utah National Bank for wrongfully causing his check to be protested. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Loofbourrow, Montgomery & Kahn, for appellant. Williams & Van Cott, for respondent.

SMITH, J. This is an action for damages by plaintiff against defendant for wrongfully

causing a check of plaintiff to be protested. Plaintiff claimed damages in the sum of \$10,000. The answer puts all matters in issue. The jury rendered a verdict for plaintiff, and the court ordered a new trial. The judgment was overruled, and the plaintiff appealed. The judgment and order denying a new trial are affirmed.

The facts, in brief, are as follows: Plaintiff drew a check in favor of A. L. Jones, who was cashier of defendant. C. L. Hawley was teller of defendant. Hadra indorsed the name of Jones on the check, and also the name of defendant bank. The check, in this condition it was presented to the Utah National Bank, and payment was refused because Jones had not indorsed his name on it. The American National Bank was informed that Hawley had authorized the check with the name of Jones. It communicated the facts to plaintiff by telephone, and plaintiff forbade the bank of the check without Jones would protest it. Defendant then caused the check to be protested for nonpayment. It appeared that plaintiff notified Dunham & Co., Mercantile Agency of the protest, and the circumstances attending it; and it appeared from a deposition rejected by the court that one George P. Clark, at the time these transactions occurred, was manager of Bradstreet's Agency in Salt Lake City, heard of it. How he heard of it does not appear, for the reason that when the question was taken he refused to answer and told him.

Plaintiff, on the trial, requested the court to give certain instructions to the jury, and the refusal to give them as requested was assigned here for error. An examination of both the abstract and transcript shows that the fact that no exception was ever taken either at the trial or afterwards, and the court's refusal to give these instructions, was there any exception ever taken to the charge as given. It is very clear that we cannot consider these matters. This rule is so well established that it requires no citation of authorities to sustain it.

The only error assigned which is assigned for consideration arises on plaintiff's exception to the ruling of the court on the deposition of George P. Clark. The deposition was taken at Portland, Oregon, months before the trial. The objection was based on the following facts: Plaintiff testified that at the date the check was protested he was manager of Bradstreet's Agency in Salt Lake City, and that he received information that the check had been protested, and of the circumstances. On cross-examination he was asked who gave him this information. He, without reason or excuse, refused to answer. On the trial, defendant objected to the reception of this deposition. The objection was sustained, and plaintiff excepted, and assigned this ruling as error. We think the court

was right. The objection to this deposition went to the substance of the evidence. It was no formal or technical objection for want of form, or for some irregularity or omission of the officer taking the deposition, which might be cured by the party taking it, if timely action calling attention to it be taken by the adverse party. In this case, had the witness been in court, and had he contumaciously refused to answer the question that he did refuse to answer in this case, it would have been the duty of the court to strike out his entire testimony, and withdraw it wholly from the consideration of the jury. This view does not conflict with the opinion of this court in the case of *American Pub. Co. v. C. E. Mayne Co.*, 34 Pac. 247, (decided at the last term of this court.) In the present case, if the plaintiff suffered any damage at all, under the evidence we think the jury were warranted in finding that he was the author of his own injury. It seems he forbade the payment of the check, and, so far as shown, no person outside of the two banks interested ever heard of it, except from the plaintiff himself. We find no error in the record, and the case is affirmed.

MINER, J., concurs in the result reached.

NAYLOR v. MOUNTAIN STONE CO. et al.¹
(Supreme Court of Utah. Jan. 29, 1894.)

DEFECTIVE STREETS—NOTICE.

Where a contractor building a cross-walk leaves a pile of stones in the street for a period of three to twelve days after completing his job, a presumption arises that the city had notice of the fact.

Appeal from district court, Salt Lake county; C. S. Zane, Justice.

Action by George Naylor against the Mountain Stone Company, Salt Lake City, and the Salt Lake City Railway Company, for personal injuries sustained through a defective street. From a judgment for plaintiff against the city, the city appeals. Affirmed.

E. D. Hoge, for appellant. Powers & Hiles, for respondent.

MINER, J. This action was brought by the plaintiff against the defendant for damages sustained by him through the alleged negligence of the defendant in permitting obstruction and stone piles to remain in one of the streets of Salt Lake City without being properly guarded and lighted. It appears that the plaintiff was driving his horse and cart along one of the most populous business streets in the center of the city on the night of December 7, 1891, at a moderate pace, when the wheels of the cart ran upon a stone pile placed within a few feet of the city railway track, which overturned the cart, and threw it against a passing car, which dragged him a distance of 10 feet, and

injured him. There was no guard around the stone pile, and no light upon it, but a large electric light was burning a short distance away, which lighted the street. The Mountain Stone Company had a contract with Salt Lake City to build the cross walk across the street, and with the City Railway Company to build its cross walk between the rails of its track, at the place where the accident occurred. Stone were delivered at the place in question, and there left for the completion of the work for the city and the company. The testimony is conflicting as to when and for whom the stone were delivered, and how long they had remained upon the ground; but it sufficiently appears that if the cross walk had been completed at the time of the accident, yet a pile of unused stone still remained upon the ground in the street where the accident occurred. These stone were the remnant of those left, and they had been upon a conspicuous part of the street for a time varying from three to twelve days before the accident, and additions had been made to them from time to time by the Mountain Stone Company to build these walks in accordance with their contract. After the plaintiff had rested his case, a nonsuit was granted as against the Salt Lake City Railway Company. The jury found a verdict in favor of the plaintiff against the city of Salt Lake for \$2,000, and found in favor of the Mountain Stone Company. The motion for new trial was overruled, and the city appealed from the judgment, assigning many errors.

The appellant contends that, if any liability exists for the injury complained of, it must rest upon the railway company, and not with the city, and claims that under *Sess. Laws 1890, p. 59, § 2*, it was the duty of the railway company to keep their tracks in repair, and that under such section the city is not liable. There is no testimony tending to show that the railway track was out of repair, or that there was any obstruction upon it at the time of the accident. The stone in question were more than two feet from the track in the traveled part of the street, over which the city had control and supervision. The whole question of negligence on the part of the city and the company was submitted to the jury under proper instructions from the court, and the jury found the issues in favor of the railway company, and against the city.

We also find that no objection or exception was taken to the granting of the nonsuit as to the Salt Lake City Railway Company, nor was any error assigned upon the making of such order granting a nonsuit.

We are also satisfied that the evidence shows that the obstruction had been in the street a sufficient length of time before the accident to justify the presumption that the city had, or should have had, by the use of reasonable care and foresight, notice of such obstruction a sufficient length of time before

¹ Rehearing denied.

the accident to have properly guarded or removed the same. The charge of the court upon this subject was accurate and complete, and the jury found for the plaintiff thereon.

It is also claimed that the court refused to allow counsel for the appellant to cross-examine the witnesses, claiming that there were three parties defendant, who were represented by separate counsel. With reference to this objection, the record is incomplete, and does not fully show what the ruling was. If such ruling was made, no exception was taken to it, so far as appears by the record; consequently, we cannot consider this question here.

Exceptions are taken to the refusal of the court to instruct the jury as requested, and to the instructions as given. We find, upon inspection, that the abstract does not contain material parts of the charge covering the exception taken. Upon examination of the whole charge as given by the court, we think it fairly covered all the legal questions involved in the case and that there was no error in the refusal of the court to give the requests offered by the appellant.

The jury found a verdict for the plaintiff in the sum of \$2,000, and appellant alleges this sum excessive, and that it was given under the influence of passion or prejudice. We have examined the testimony bearing upon the injury received by the plaintiff, and are satisfied that while a smaller sum might have been sufficient to satisfy the damages sustained by the plaintiff, yet it is not so clearly excessive as to justify this court in reducing it. This matter having been passed upon by the jury and by the trial court, we do not think it proper to disturb it now. Upon the whole record we find no error. The judgment of the trial court is affirmed, with costs.

BARTCH and SMITH, JJ., concur.

OGDEN CLAY CO. v. HARVEY.

(Supreme Court of Utah. Jan. 29, 1894.)

DE FACTO CORPORATIONS — STOCKHOLDERS — LIABILITY FOR UNPAID SUBSCRIPTION — ESTOPPEL.

1. In an action to recover an unpaid subscription to the capital stock of a corporation, defendant cannot contend that the articles of incorporation are inadmissible, owing to irregularities in the organization of the corporation, where it appears that he was present at the subscribers' meeting, helped in the organization, made no objection thereto for several months, paid several installments on his subscription, and signed the receipt for his stock.

2. Comp. Laws 1888, §§ 2268, 2276, require corporations to call in subscriptions to the capital stock in the manner provided by contract or by-laws. At a meeting of organization the subscribers passed a resolution, which was regularly entered in the minute book of the company, "that 1 per cent. of the paid-up capital stock be levied and payable at once, and 10 per cent. be payable April 1, 1890, and not to exceed 25 per cent. be levied monthly thereafter." Held, that a subscriber who paid three

installments in answer to calls made in accordance with such resolution could not assail its validity, since, as to him, it had the same force as a by-law.

3. One who, by his acts and admissions, recognized a company as a de facto corporation, is liable for his unpaid subscription to the capital stock, though it is not a de jure corporation by reason of irregularities in its formation.

Appeal from district court, Weber county, James A. Miner, Justice.

Action by the Ogden Clay Company against W. H. Harvey to recover unpaid subscriptions to plaintiff's capital stock. From a judgment for plaintiff, and denying a new trial, defendant appeals. Affirmed.

Dey & Street, for appellant. Ogden & Street, for respondent.

BARTCH, J. The plaintiff brought this action to recover unpaid subscriptions to its capital stock. The jury returned a verdict in its favor for \$729.60, and judgment was rendered accordingly. The defendant appeals from the judgment, and asks the court to order denying a new trial, assigning the following errors.

Counsel for appellant contend that the court erred in admitting in evidence the articles of incorporation, claiming that the document showed on its face that it was not valid; that the signature of the defendant was not thereon, but only on a separate distinct paper; and that the form of the statute in relation to corporations was not complied with. It appears from the record that the document contained the names of 46 subscribers, among them the name of the defendant; that it contained the usual articles relative to the organization of the company, the amount of capital stock, etc.; and that the attesting clause was followed by an agreement, in which the subscribers agree to pay the several installments opposite their names, and reference is made to the objects of the company, the business thereof; and the defendant admits that he signed this agreement subscribed to \$1,000 of the capital stock. Then follows the acknowledgment of the receipt of three of the subscribers in usual form. It is apparent that there were irregularities and informalities in the organization of the company, but the evidence tends to show that the defendant was present at the meeting of the subscribers, and assisted in the organization of the corporation; that he made no objection thereto for several months; and that he paid several installments on his subscription and signed the receipt for his stock. Under the circumstances as they appear from the record, we are of the opinion that these informalities were waived by the subsequent acts of the defendant, and the articles of incorporation were valid.

Exception is taken to the refusal

court to charge the jury as follows: "The court instructs the jury that they must find for the defendant, Harvey, if they find at the commencement of this action there was no provision in the articles of incorporation or in the by-laws of the company providing the time and manner of paying subscriptions to the capital stock." This request assumes that there was no way provided to call in the unpaid subscriptions, and that no way could be provided, except in the articles of incorporation or by by-laws; and further assumes that the time to make such provision was limited to the commencement of this action. Section 2263, Comp. Laws Utah, contains a proviso as follows: "Provided further, that this section shall not be so construed as to prohibit the stockholders of any corporation from regulating the mode of making subscriptions to its capital stock, and calling in the same by by-laws or express contract." And section 2276, Id., provides: "The corporation shall collect of the stockholders the amount of stock by them subscribed, in such installments and at such times as shall be settled by the agreement or by-laws." These provisions make it the duty of corporations to call in the subscriptions to the capital stock in the manner provided by contract or by-laws. The law does not limit the time of making the contract or by-laws; nor does it direct how or when they shall be made; but it is evident that the corporation must provide a way in the manner indicated before it can call in its subscriptions. In the case at bar the subscribers to the stock, at a meeting held on the 28th day of February, 1890, made provision to call in the unpaid stock, by adopting a resolution, as follows: "Resolved, that one per cent. of the paid-up stock be levied and payable at once, and ten per cent. be payable April 1, 1890, and not to exceed twenty-five per cent. be levied monthly thereafter." It appears that this resolution was passed at the meeting of organization, and regularly entered in the minute book of the company. There may be some doubt under the evidence as to whether the defendant was present at the meeting while it was being passed, but it is clearly shown that he paid three installments in answer to calls made in accordance therewith; and thus having acted under and recognized it, after the organization of the corporation, he cannot now be heard to assail its validity. The resolution must be held to have the same force and effect as a by-law, at least upon all subscribers to stock who assented to it and acted in obedience to its terms. It became one of the constituting instruments of the corporation, and was binding on its members, although it may not have been adopted with the same formality as a by-law. Wood's Field, Corp. § 38; Green's Brice, Ultra Vires, 40. Under these circumstances the request under consideration failed to state correctly the law applicable

to this case, and was therefore properly refused.

The defendant also excepted to the admission in evidence of the testimony of the witness Stevens in regard to the subscribers' meeting held February 28, 1890, and to the minutes thereof, including the resolutions passed relating to the calling in of the unpaid capital stock, and also to the introduction in evidence of the receipt of the defendant upon the stub of the stock book for his stock. We do not think these exceptions well taken. Nor do we think the court erred in rejecting the evidence of the defendant offered to show that the subscribers to the preliminary agreement never signed the articles of incorporation. There is no issue on this point in the pleadings. The defendant admits in his answer that he signed the paper, which became a part of the articles. Nor did the court err in refusing to charge the jury, as requested by the defendant, regarding the resolutions adopted at the meeting of the subscribers held on February 28, 1890, and regarding the receipt and acceptance of the certificate of stock by the defendant. These requests were erroneous, as applied to the facts and circumstances revealed by the record. Nor do we consider the newly-discovered evidence a sufficient ground for the granting of a new trial.

Counsel for appellant further objects to a certain portion of the charge relating to the agreement signed by the subscribers to the capital stock, and attached to the articles of incorporation. Upon an examination of the entire charge, and construing it as a whole, it appears to contain no reversible error.

The next question for consideration is that of waiver. The defendant claims that his signature was attached only to a preliminary agreement; that it contained no authority or direction to attach it to the articles of incorporation; that he never gave his consent to have it so attached; that the capital stock in this agreement was fixed at \$50,000, and in the articles of incorporation, without his knowledge, at \$100,000. These are matters which would be of avail to him if he had taken advantage of the situation in time, and repudiated the organization of the corporation. The question is, can he do so now, or is he estopped because of his ratification of the acts of the company after it came into being as a de facto, if not a de jure, corporation? The statute of this territory requires certain formalities which are requisites of a strictly legal corporation. Among these is the provision that "they shall enter into an agreement in writing, signed by each of them,"—that is, by each of the incorporators or subscribers to the capital stock,—and then further provides what this agreement shall contain, and how it shall be acknowledged, etc. 2 Comp. Laws Utah 1888, § 2263. If these requirements are not complied with, a stockholder unquestionably has

a right to object to the acts of the corporation, and to refuse to have anything to do with it, or to recognize it; but he must make his objection at a seasonable, and within a reasonable, time. He cannot assist in its organization, participate in its meetings, pay installments of subscriptions to stock, and generally acquiesce in the acts and affairs of the concern for months, while there is a hope of a prosperous business, and then, when such hope begins to fade, and a call for the subscribers to pay in the balance of their unpaid subscriptions to its capital stock to liquidate accumulated debts is made, insist that he ought not to be bound to pay, because the corporation has no legal existence. Nor can he sleep on his rights, and take the chances of a favorable turn of affairs. The formalities required by our statute are useful as a protection to stockholders and others, but they may not be turned into instruments of dishonesty or fraud, either against or on behalf of a corporation. On this question of waiver there appears to be a substantial conflict in the evidence, but, after the verdict of the jury, it must be assumed that he ratified the acts of, and participated in carrying out the objects of, the corporation; for the question was properly submitted to them, with the result of a finding against the appellant, and no improper conduct on their part will be presumed. By his acts and assent he recognized the company as a de facto corporation. He must therefore be held to have waived his legal rights in the premises, and to be estopped from denying its rightful existence. In *Sanger v. Upton*, 91 U. S. 56, the court said: "Where there are defects in the organization of a corporation which might be fatal on a writ of quo warranto, a stockholder who has participated in its acts as a corporation de facto is estopped to deny its rightful existence." *Cook, Stock, Stockh. & Corp. Law*, § 52; *Publishing Co. v. Jack*, (Mont.) 6 Pac. 20; *Music Hall v. Carey*, 116 Mass. 471; *Ogilvie v. Insurance Co.*, 22 How. 380.

We are of the opinion that the defendant is a stockholder of the plaintiff corporation, and is therefore liable for his unpaid subscription to the capital stock. Where the capital stock of a corporation remains in part unpaid at the time of its organization, such unpaid stock becomes a trust fund for the payment of its liabilities, and may be called in by the directors, who in law are the trustees of the fund, at such times and in such amounts as may be provided by the by-laws or agreement of the corporation. This fund is to be managed by the trustees for the benefit of the stockholders while the corporation remains solvent, and for the benefit of the creditors if it becomes insolvent. When a person becomes a stockholder, his liability is complete, and he cannot relieve himself except by payment. There is, in law, an implied promise on his part that he will pay the calls made for unpaid subscriptions

so long as he shall own the stock. *Stock, Stockh. & Corp. Law*, § 189; *Tribblecock*, 91 U. S. 45; *Railway Co. v. Ler*, 60 Pa. St. 124; *Wood v. Du*, *Mason*, 306; *Webster v. Upton*, 91 U. S. 56; *Sawyer v. Hoag*, 17 Wall. 610. There is to be no reversible error in the record. Judgment is affirmed.

SMITH, J., concurs.

DUKE v. GRIFFITH.

(Supreme Court of Utah. Jan. 23.)

EJECTMENT—EQUITABLE ESTOPPEL.

1. In Utah, an equitable estoppel defense in ejectment.

2. A landowner executed a writ of ejectment, agreeing, at the expiration of 10 years, to give defendant a deed of land occupied by defendant, and to sell him the necessary rights of way, or to sell him the land, including the reservoirs, at an appraised value. *Held*, that after the defendant had made his election by putting the land in possession of the 10-acre tract, and defendant had accepted it, and had erected improvements under a claim of title, in virtue of the agreement, the landowner's subsequent grantees with notice were to assert that the landowner had the right to convey only the portion occupied by the defendant, and that defendant had no right in possession of the 10-acre tract.

Appeal from district court, Weber County. James A. Miner, Justice.

Ejectment by Harry T. Duke and George G. Griffith. From a judgment in favor of plaintiff, defendant appeals. Reversed.

E. T. Hulaniski, for appellant. & Allison, for respondent.

BARTCH, J. This is an action of ejectment, brought by the plaintiff to recover possession of a certain parcel of land. In the trial he introduced in evidence certain documents showing that he derived his title to the land by mesne conveyances from one E. T. Duke. The defendant then offered in evidence an agreement in writing from said E. T. Duke, under which he claimed title and possession to the land in dispute; also other offers of parol testimony to show that he was rightfully in possession. This agreement and the parol testimony offered by the defendant were, upon the objections of counsel for plaintiff, held inadmissible, as incompetent, immaterial and irrelevant. The defendant offered no testimony, and under the instructions of the court the jury returned a verdict in favor of the plaintiff. His motion for a new trial was denied, the defendant appealed to this court, assigning various errors, and asking for the rulings above mentioned. The only material question contained in the assignment of error is the rejection of the evidence offered by the defendant. While the evidence offered is strictly in accord with the facts, and the answer, we are of the opinion

departure is not a fatal variance. There is an attempt to set up an equitable estoppel, which is permitted under our system of pleading. The facts offered to be proven by the defendant indicate a meritorious defense, and, if the answer is insufficient, an opportunity ought to be given to amend, and the case tried on its merits.

The agreement offered in evidence, among others, contained a provision as follows: "Said E. H. Orth hereby agrees that he will, at the end of said term of ten years, either give to said Geo. G. Griffith, for the sum of one dollar, a deed for the land occupied by said reservoirs and banks and fifty feet wide along the west side of said reservoirs, also the right of way from said Griffith's land to said reservoirs, or that he will sell to said Griffith a plat of land ten acres in extent, to include said reservoirs, at one-half the appraised value of said land in an unimproved condition." By the terms of the agreement the parties were to construct a reservoir or reservoirs of about two acres' area on plaintiff's land, for certain purposes, specified therein, and to bear expenses equally; which are the reservoirs mentioned in the provision above quoted. Counsel for respondent contends that the option in the provision mentioned could only be exercised by the plaintiff; that the agreement itself granted no right of possession to the land in question, and is therefore inadmissible in evidence. It is not deemed necessary to the decision of this case to determine who had the right to exercise the option referred to, and it may be admitted, for the purposes of determining the question under consideration, that the agreement, if offered alone, would be inadmissible. The real question is, was its rejection, in connection with the other evidence offered, prejudicial to the right of the defendant? In addition thereto, the defendant offered testimony as follows: "That on the 9th day of October, 1884, while said E. H. Orth was in possession of the lands described in the complaint, and of other lands adjoining the same, including the ten-acre tract described in the answer, the agreement was made between said Orth and the defendant, to wit, the agreement in writing copied hereinabove, and that then said Orth on said day put defendant in possession of the premises described in said complaint, and in possession of the whole of said ten acres, and that defendant has held possession thereof ever since; that the plaintiff, and all his grantors back to and including said Orth, had at all times since said 9th day of October, 1884, notice and knowledge of said agreement in writing and of said possession of defendant; that said ten acres of ground includes the ground described in plaintiff's complaint; that defendant had fully performed his part of said agreement in writing with said Orth in every particular; that this defendant, long prior to the beginning of this suit, and before the plaintiff herein

became the owner of said premises, had made, erected, and constructed upon the whole of said ten acres, including the land described in the complaint, valuable and lasting improvements, consisting of a dwelling house, orchards, barns, stables, reservoirs, ice houses, and other structures, all of the aggregate value of \$20,000, \$15,000 of which were on the premises described in the complaint; and that the improvements on the part of said ten acres described in the complaint were put there subsequent to November 26, 1888, and the rest of the improvements prior thereto, with the knowledge and consent of said E. H. Orth; and that said improvements were made with the full knowledge and consent of the plaintiff." If the defendant can prove what is contained in this offer, the evidence will show that both parties to the agreement have made their election under the option,—Orth by putting the defendant into the possession of the 10 acres, which includes the land in question, and the defendant by accepting such possession; that such election was made on the same day, and immediately after the execution of the agreement; that the defendant has remained in possession ever since; that he erected valuable improvements on the land, with the knowledge and consent of Orth and of his grantees, including the plaintiff, who were aware that he did so under claim of a valid title to the land; that the plaintiff stood by and suffered him to thus expend money on the land without making known his own claim, until he had made improvements thereon, aggregating in value \$20,000. If these facts be established, the plaintiff will not, in equity and conscience, be entitled to disturb the possession of the defendant. Where a person seeks to recover on a legal title to the possession, such title must be paramount to the legal or equitable title of the defendant, and the defendant has a right to set up in his answer and prove any facts which will constitute an equitable estoppel. *Kahn v. Mining Co.*, 2 Utah, 174; *Poynter v. Chipman*, 8 Utah, 442, 32 Pac. 690. It is a settled rule of law that one cannot stand passively by, without making known his own claim, and see another purchase land, expend money, and make valuable improvements thereon, in good faith, under claim of valid title, and then, when such improvements have been made, insist upon his legal right against such person. In *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344, Chancellor Kent says: "There is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man knowingly, though he does it passively, by looking on, suffer another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal rights against such person. It would

be an act of fraud and injustice, and his conscience is bound by this equitable estoppel." *Dickerson v. Colgrove*, 100 U. S. 578; *Kirk v. Hamilton*, 102 U. S. 68; *Truesdall v. Ward*, 24 Mich. 117. The defendant should also be permitted to show, as was indicated by his offer, that he was in actual possession of the land when the plaintiff purchased it, for such possession was notice and evidence of ownership sufficient to put the plaintiff on inquiry. *Toland v. Corey*, 6 Utah, 392, 24 Pac. 190. The appellant's case is not well presented in the record. We think, however, that sufficient appears to show that his rights have been prejudiced by the rejection of the evidence offered, and that he ought to have an opportunity to amend his pleading, and try the case on its merits. For these reasons the judgment is reversed, and the cause remanded to the district court, with directions to grant a new trial, and permit the parties to amend their pleadings.

ZANE, C. J., concurs.

PREZEAU v. SPOONER. (No. 1,394.)
(Supreme Court of Nevada. Feb. 6, 1894.)
SUMMONS—SUFFICIENCY.

A summons stated that the action was to obtain judgment for \$5,000, balance due on a note described, and \$1,000 on an unpaid check drawn by defendant, and that, if he failed to answer, plaintiff would take judgment against him according to the prayer of the complaint. The prayer of the complaint was full and explicit. *Held*, that the summons complied with Gen. St. § 3048, providing that in an action on contract for money the summons shall contain a notice that plaintiff will take judgment for a sum specified therein if defendant fail to answer. *Higley v. Pollock*, 27 Pac. 895, 21 Nev. 198, followed.

Appeal from district court, Ormsby county; Richard Rising, Judge.

Action by Godfrois Prezeau against M. B. Spooner on a promissory note and an unpaid draft drawn by defendant. From a judgment entered by default in favor of plaintiff, defendant appeals. Affirmed.

James R. Judge, for appellant. R. M. Clark, for respondent.

BIGELOW, J. Appeal from a judgment by default. The only point involved is the sufficiency of the summons, which was duly served upon the defendant in the county where the action was pending, together with a copy of the complaint. It was stated in the summons that the action was brought to obtain a judgment against the defendant for the sum of \$5,000, balance due upon a promissory note, describing it, and \$1,000 upon an unpaid check drawn by defendant; and this statement was followed by the following notification: "And you are hereby notified that if you fail to answer the complaint the said plaintiff will

take judgment against you according to the prayer of the complaint." The prayer of the complaint was full and correct. The objection is that the notice does not comply with section 26 of the practice act, in that it does not specify the point at which the plaintiff will take judgment. This point was fully considered, and it was held, adversely to the appellant, in the case of *v. Pollock*, 21 Nev. 198, 27 Pac. 895. The court are fully satisfied with the law as laid down. No substantial right of the appellant can possibly be affected by the error as occurred here, and, such being the case, both law and common sense require that the objection be disregarded. Gen. St. § 3093. The judgment is affirmed.

MURPHY, C. J., and BELKNAP, J., concur.

HAGGIN v. SAILE et ux.
(Supreme Court of Montana. Jan. 1894.)
APPEAL—REVIEW—DISCRETION OF TRIAL COURT.

The issue being of fact, the error does not reverse an order granting a new trial, unless the proof shows an abuse of discretion.

Appeal from district court, Deer Lodge county; D. M. Durfee, Judge.

Action by James B. Haggin against Mary Saile to enjoin interference with a water right. Verdict and judgment for defendants. From an order granting plaintiff a new trial, defendants appeal. Affirmed.

Forbis & Forbis, for appellants. Patrick, for respondent.

PEMBERTON, C. J. This case involves a dispute as to priority of right to the water flowing through Glover canyon, situated in Deer Lodge county. Plaintiff seeks to enjoin defendants from interfering with his alleged prior right to the use of the water. The case was tried to the jury. The jury returned a special verdict in favor of defendants, which finding the court adopted, and rendered judgment accordingly, to the effect that defendants were entitled to all of the water in question to the claim of plaintiff. Plaintiff moved the court, upon a statement of facts, for a new trial, which motion the court granted. From that order defendants prosecute this appeal.

Plaintiff claims title to said water.

¹ Practice Act, § 26, (Gen. St. § 3048) provides as follows: "There shall also be included in the summons a notice in substance as follows: First—In an action arising on contract for the recovery only of money or other thing of value, that the plaintiff will take judgment specified therein if the defendant fail to answer the complaint. Second—In other actions, if defendant fail to answer the complaint, the plaintiff will apply to the court for judgment therein."

tue of the appropriation thereof by one Alexander Glover in 1872, and use thereof continuously until 1883, when he sold and conveyed the same, together with a parcel of land, to plaintiff, and further use of said water by plaintiff. Defendants concede that said Alexander Glover had a valid appropriation of said water, and conveyed the same to plaintiff as aforesaid. But defendants contend that plaintiff had abandoned and neglected to use said water, and that defendants had appropriated said water and used the same continuously, for the period of more than five years, adversely to the claim of plaintiff. A review of the record discloses the fact that defendants' claim to the prior right to the use of said water depends upon the alleged fact of abandonment thereof by plaintiff, and the adverse use and enjoyment thereof by defendants during the period of five years' limitation, and further discloses that if the use made of such water after purchase by plaintiff, upon his lands, in the operation of making brick, carried on by one Campbell under contract, was a use by or on behalf of plaintiff, then the claim of adverse possession set up by defendants fails. Appellants admit that the case, as here presented, on the question whether the court was justified, or abused its discretion, in granting a new trial, depends upon a review and construction of the testimony of said Campbell, who was engaged in manufacturing brick upon the land of plaintiff, and by the use of said water thereon, under contract. The very situation under which we must review this case, if it is to be returned for another trial, precludes a discussion as to the force of the evidence upon the vital points in the case. We therefore refrain from such discussion. We have carefully considered the evidence and assignments set forth in the record, and cannot find therefrom that the evidence upon the important points in the case is so clear as to warrant us in reversing the order of the trial court granting a new trial. In order to justify us in reversing the order of the trial court granting a new trial, it must appear that there was an abuse of judicial discretion on the part of the trial court in granting such motion. This we do not find. The order appealed from will therefore be affirmed.

HARWOOD, J., concurs.

RYAN et al. v. MAXEY et al.

(Supreme Court of Montana. Jan. 29, 1894.)

ATTACHMENT—PARTNERSHIP PROPERTY—CREDITOR'S BILL.

1. An attachment lien is not waived by proceeding to judgment and execution sale of the attached goods pending appeal, with supersedeas, from an order dissolving the attachment.

2. The 1889 amendment to Prob. Pr. Act. § 229, (Sess. Laws 1889, p. 146,) requiring all partnership assets to be applied to payment of

the firm creditors "alike, and giving no preference," except to lienholders, is not retroactive as to attachments levied before its passage.

3. Where the property is ascertained, and the claims of its possessors understood, a creditor's bill need not be preceded by proceedings supplemental to execution, these being merely intended as a summary process to discover property concealed and withheld without substantial claim of right.

Appeal from district court, Gallatin county; F. K. Armstrong, Judge.

Creditor's bill by Annie Ryan and others against Daniel Maxey and others on judgments against Jacob F. Speith, survivor of the firm of Speith & Krug. Judgment for defendants. Plaintiffs appeal. Affirmed.

H. P. Cadwell, for appellants. Luce & Luce, for respondents.

HARWOOD, J. Through this action, in the nature of creditor's bill, plaintiffs seek to establish and enforce judgment liens claimed by them upon certain property held and claimed to be owned by defendants. These conflicting claims arose in this wise: Plaintiffs are the owners of certain judgments rendered against Jacob F. Speith, as the surviving partner of the firm of Speith & Krug, aggregating in amount about \$20,000, which judgments were rendered in 1888, and are unsatisfied. Defendants are also judgment creditors of the same character; that is, they own judgments recovered against said Jacob F. Speith as surviving partner of Speith & Krug. It appears, however, that these defendants, in the commencement of their actions against said surviving partner, levied attachments upon all of the property of said firm available for payment of its debts, and thereafter said property was sold on executions issued to enforce the judgments and attachment liens acquired by defendants through said actions; and by virtue of such judicial sales these defendants claim title to the property in controversy in this action. Plaintiffs in this action, who obtained or succeeded to judgments against said surviving partner, but who failed to get any of the proceeds of the property of said firm in satisfaction of their judgments, now, through this action, undertake to establish what they claim to be liens on said property arising from their judgments. They maintain that said attachments, forerunning those judgments of defendants in this action, were, for certain reasons to be hereafter considered, void processes.

The processes of attachment levied upon said property in said actions of defendants against Speith, surviving partner, etc., were contested by motion to dissolve the same, which motion prevailed in the trial court; but that ruling was reversed on appeal to the supreme court, wherein it was held that such attachments would lie. See *Krueger v. Speith*, 8 Mont. 432, 20 Pac. 664; *Cobb v. Speith*, 8 Mont. 494, 20 Pac. 806; *Maxey v. Speith*, Id.; *Bank v. Speith*, 8 Mont. 495, 20

Pac. 806. So it appears that those attachments were upheld, and in due course the title now held by these defendants was acquired by sale of the attached property on execution issued upon the judgments obtained in those attachment suits.

One of the minor points urged by appellants is that those attachment liens were waived or became void because the plaintiffs in those attachment suits proceeded, after obtaining judgment, to sell the attached property under execution while the appeals from the respective orders dissolving said attachments were pending, undetermined. No authorities are cited to support this proposition, and we fail to perceive any force in it, either from analogy to other rules of waiver, or upon principle or reason. The proposition assumes that those attaching creditors, by appealing, and superseding or holding in abeyance the order of the trial court dissolving their attachments, and then prosecuting their appeals to the effect of reversing those orders, waived the rights and liens acquired through those attachments, because they proceeded to take judgment and execution in the same actions, as the law provides. It is not surprising that appellants have failed to cite any cases, or text of commentator, in support of this position.

After the decision upholding the attachment liens, cited *supra*, the legislature of Montana enacted an amendment to section 229 of the probate practice act, (Sess. Laws 1889, p. 146.) Appellants contended that the provisions of said statute, as amended, require that all of said partnership estate be applied to the payment of the partnership creditors "alike, and giving no preference to any, except such as are made so by mortgage pledge or lien," and that, this provision having been enacted prior to the sale of the partnership property under execution in the cases above referred to, it had the effect of so changing the law relating to those cases, while in progress, as to annul the attachment liens acquired and existing prior to the passage of that amendment, and that the sale of said property under execution was void as in contravention of that statute. We do not think appellants' view can be maintained. It would give the statute under consideration the retroactive effect of abrogating the liens lawfully acquired by attachment, and existing when the present statute was enacted. In our opinion, the ruling of the trial court in refusing to so construe the statute was correct. *Gunn v. Barry*, 15 Wall. 610; *Eastman v. Clackamas Co.*, 32 Fed. 24. In order to sustain plaintiffs' action, it was necessary to give the statute such retroactive effect. We think the demurrer was properly sustained.

Respondents raise a question of practice, insisting that this action, in the nature of a creditor's bill, is improper procedure; that such action has been superseded by the statute providing for proceedings supplementary

to execution, which proceedings, respondents contend, should have been invoked for relief sought by appellants. In support of this view, several cases are cited, the last of which is *Sperling v. Calfee*, 7 Mont. Pac. 204, wherein it is remarked that the provisions of our Code (chapter 2, Code Civil Proc.) for proceedings supplementary to execution have to a great extent, if not wholly, superseded the equitable proceedings known as the "creditor's bill." Similar observations have been made in many cases, and we in no manner question the correctness; for in many respects the procedure formerly achieved through the creditor's bill is now afforded with less expense, delay, and with equal certainty, through the summary proceedings supplementary to execution authorized by the Code. But it is hardly to be concluded, either from those observations or the provisions of the statute authorizing supplementary proceedings, that the same were intended to abolish equitable proceedings to set aside fraudulent conveyances, assignments for the benefit of creditors, and the like, to enable the creditor to reach equitable assets put beyond the reach of ordinary legal process by the fraudulent device of the judgment creditor's remedies which supplemental proceedings are inadequate to accomplish, preserving for disputants the ordinary method of asserting and touching property rights. Indeed, the statute contemplating the development of summary proceedings, in the course of supplemental proceedings, which cannot be adjudicated there, therefore the statute directs that proceedings be ordered by the court to adjudicate and terminate the same, (section 356, Code Civil Proc.) *Teitig v. Boesman*, 12 Mont. Pac. 371. It seems to have been the intention of the framers of that statute to provide a summary process for the discovery and application to the judgment, of property subject to execution, concealed and withheld by the debtor, or others in collusion with him, without pretending, when it came to the test under oath, to assert any such ground therefor. But where the property is alleged to belong to the judgment debtor, claimed by others, either by way of purchase, title or pledge or mortgage, or otherwise claimed to be owing to the judgment debtor, are disputed by his alleged debtor, the claims of ownership, lien, or denial of indebtedness cannot be adjudicated and determined summarily, and the property cannot be applied to the judgment, with none of the usual formalities of forming issues and having them guaranteed as applicable to the determination of property rights. While it may be proper enough to turn the search light of summary supplemental proceedings onto the subject to discover the attitude of parties toward the property or fund in question, and to determine that proceeding obtain an order for the disposition thereof, still many cases may arise where that proceeding alone can

accomplish all that may be necessary to cut off adverse claims, and avail the judgment creditor of the assets in controversy. On the other hand, it may be that the attitude of the parties to the subject of controversy is fully known, as in the case at bar, where it seems proceedings supplemental to execution could neither accomplish nor aid the relief sought. And in our opinion, in such cases, the appropriate action to test the claims or defenses which parties may assert in opposition to taking the property or fund for application on the judgment should not fail because supplemental proceedings did not precede it. This appears to be the view taken by the courts where these distinctions have been considered,—especially in the New York courts, where the statute for proceedings supplemental to execution originated,—as shown by Mr. Freeman in his work on Executions, (section 394.) *Gere v. Dibble*, 17 How. Pr. 31; *Goodyear v. Betts*, 7 How. Pr. 187; *Davis v. Turner*, 4 How. Pr. 190; *Bartlett v. Drew*, 4 Lans. 444; *Phelps v. Platt*, 50 Barb. 430; *Hammond v. Machine Co.*, 20 Barb. 378; *Burt v. Hoettinger*, 28 Ind. 214; *Parsons v. Meyburg*, 1 Duv. 206. For the foregoing reasons the judgment of the trial court will be affirmed.

PEMBERTON, C. J., concurs.

PEOPLE ex rel. RICHARDSON v. HENDERSON.

(Supreme Court of Wyoming. Jan. 16, 1894.)

STATE EXAMINER—APPOINTMENT BY GOVERNOR—VACANCY

Sess. Laws 1890-91, c. 84, provides for a state examiner, to be appointed by the governor with the consent of the senate, who shall hold office for four years, and till his successor is appointed and qualified, and that in case of a vacancy the governor shall fill it by appointment till the next meeting of the legislature. Const. art. 6, § 16, provides that any person holding civil office under the state (with exceptions not including the state examiner) shall, unless removed according to law, exercise the duties of such office till his successor is qualified. *Held*, that the governor not having appointed, with the consent of the senate, a person to fill the office, at the next meeting of the legislature after a vacancy had been filled by the governor, no vacancy in the office arose, so as to bring into operation Const. art. 4, § 7, authorizing the governor to fill a vacancy where no other mode of filling it is provided.

Quo warranto on the relation of Warren Richardson, Sr., against Harry B. Henderson, to try the title to the office of state examiner. Judgment for defendant.

W. R. Stoll, for relator. Lacey & Van Devanter and R. W. Breckons, for respondent.

GROESBECK, C. J. This proceeding is instituted in this court to determine the title to the office of state examiner, and the cause is submitted on an agreed statement of facts; the original jurisdiction of this court, under the constitution, in quo warranto as to state

officers, being invoked. The relator and respondent have each all the legal qualifications required of an incumbent of the office. Shortly previous to the 20th day of December, 1892, Joel Ware Foster was the duly appointed, constituted, qualified, and acting state examiner, and had resigned the office, and ceased to exercise its duties. On that day, Amos W. Barber, then the acting governor of the state, executed and delivered to Harry B. Henderson a commission to fill the vacancy in said office occasioned by the resignation of said Foster, to hold the office until the next meeting of the legislature of the state; and under such appointment and commission said Henderson duly and regularly qualified as such officer, and has discharged the duties of said office ever since, and has received and used the emoluments pertaining thereto. The next session of the legislature occurring after the appointment of the defendant convened January 10, 1893, and adjourned sine die February 18, 1893, and during the session of the legislature the senate thereof, while in session, on the 10th day of January, 1893, adopted the following resolution: "Whereas, Harry B. Henderson, was duly appointed and commissioned on December 20, 1892, by Amos W. Barber, the then acting governor of the state of Wyoming, as state examiner, to fill the vacancy occasioned by the resignation of Joel Ware Foster: Now, therefore, be it resolved by the senate that the said appointment of the said Harry B. Henderson to the office of state examiner be and the same is hereby advised, consented to, and confirmed." On February 1, 1893, during the session of the legislature, John E. Osborne, the governor of the state, transmitted to the senate, which was then in session, his nomination of John Stone for the office of state examiner; and on February 18, 1893, the senate adjourned sine die, without having taken any final action on said nomination, without confirming the same, and without either giving or refusing to give its advice and consent to the appointment of said Stone to the office. On March 8, 1893, after the adjournment of the legislature, and during the interval between the regular sessions thereof, (the next ensuing regular session being in 1895,) Gov. Osborne executed and delivered a commission to said John Stone, attempting to appoint him to the office of state examiner "vice Harry B. Henderson, term expired," to hold the office until the next meeting of the legislature. This commission was not attested by the secretary of state, nor was the great seal of the state affixed thereto. Stone never qualified or attempted to qualify as state examiner, and never entered upon or attempted to discharge the duties of the office, but thereafter, and on March 23, 1893, he resigned said office, or attempted to resign the same. On August 22, 1893, and during the time intervening between the regular sessions of the legislature, Gov. Osborne executed and delivered to the

relator, Warren Richardson, Sr., a commission purporting to appoint the relator to the office of state examiner "for the unexpired term of Harry B. Henderson, whose said office of state examiner became vacant on the 10th day of January, A. D. 1893." The words quoted are recited in the commission, which contains the further recital that said Richardson, the relator, was appointed from the date of the commission; that is, "from the 22nd day of August A. D. 1893, until the next meeting of the legislature of the state of Wyoming." This commission was not attested by the secretary of state under the great seal of the state. The senate never gave its advice and consent to the appointment of the relator as state examiner, and no nomination of relator for said office was ever made by the governor to the senate, and no nomination or appointment of the relator to said office was ever confirmed by the senate. Upon receipt of the commission, the relator accepted the same, and has ever since been willing and desires to enter upon the duties of the office of state examiner, but has never qualified and has never given any bond as such officer. The defendant, Henderson, has at all times refused, and still refuses, to recognize any right of the relator to the office of state examiner, and claims the right to hold said office, and excludes the relator from the rights, privileges, and emoluments thereof. There has been no session of the legislature of the state since the adjournment on February 18, 1893. The term of office of Amos W. Barber as acting governor expired on the 2d day of January, 1893, and the term of John E. Osborne as governor commenced on said 2d day of January, 1893, at which time he entered upon the discharge of his duties as such governor, and has ever since that date been the legally elected, qualified, and acting governor of the state.

The foregoing statement is a sufficient review of the submitted facts for the determination of the questions involved. Counsel for defendant insist that, as the relator has never qualified, he is not entitled to the office, and has no standing in this court, and is not entitled to any relief, and that, as no reason or excuse is shown for the absence of the attestation of the secretary of state and the great seal of the state from the commission of the governor to relator, the commission is not fully executed, and would not be a sufficient warrant or authority for the assumption of the office by the relator, even if he were otherwise legally entitled to the same. These questions we do not care to pass upon at this time, as it is manifest that, if we should hold that these positions were well taken by the respondent, the greater questions of public interest involved in the case would be postponed. We prefer to decide the main questions involved,—the right of Henderson, the respondent, to hold over beyond the next meeting of the legislature ensuing after his appointment, and the authori-

ty of the governor to appoint his successor during the recess of the senate.

Provision is made for the office of state examiner in section 14 of article 4 of the constitution of this state: "The legislature shall provide for a state examiner, who shall be appointed by the governor and confirmed by the senate. His duty shall be to examine the accounts of state treasurer, supreme court clerks, district court clerks, county treasurers, and treasurers of other public institutions as the law may require and (he) shall perform such other duties as the legislature may prescribe. He shall report at least once a year, and, if required, to such officers as are designated by the legislature. His compensation shall be fixed by law." This mandate to the legislature was promptly obeyed by the enactment of a statute by the first state legislature entitled "An act providing for the office of state examiner, defining his powers and duties, prescribing his bond and fixing his compensation," approved January 10, 1890, Sess. Laws 1890-91, c. 84. The following sections of the act are quoted as applicable to the case at bar: "Section 1. The office of state examiner is hereby created. Such examiner shall be appointed by the governor by and with the consent of the senate. He shall hold his office for four years or until his successor in office is appointed and shall have qualified." "Sec. 6. In case of the death, removal or otherwise, the governor shall fill the same by appointment until the next meeting of the legislature. The appointee to fill such vacancy shall execute the same bond and take the same oath as the incumbent, and shall have the same powers and duties as a state examiner appointed by the governor by and with the advice and consent of the senate."

Much space in the brief of counsel for the relator is devoted to the discussion of the rule of the common law as to the removal of an incumbent of an office to hold over beyond his term, and until the qualification of his successor. It attacks the position recently taken in *Throop on Public C* (at section 325,) that the common-law rule or the rule in the absence of any constitutional or statutory provision, according to the weight of American cases, is that public officers hold over until the choice and qualification of their successors. The authorities cited in support of the proposition are cited at length, particularly the position affirmed in *People v. Oulton*, 28 Cal. 44, which is condemned in the brief of counsel for relator as against the current of authority. A. 562, 19 Amer. & Eng. Enc. Law, the case is treated of in the following language: "though there is authority for the proposition that an officer's functions cease immediately upon the expiration of his term of office, the doctrine supported by the preponderant opinion is that, in the absence of any c-

or implied prohibition, an officer holds over after the expiration of his term, until a successor is duly chosen and qualified. To this general rule some of the authorities make an exception in the case of judicial officers, and possibly, also, of members of the legislature, and the executive. In most of the states, all doubt is removed by constitutional or statutory provisions that when an officer is elected or appointed for a fixed term the office shall not, on the expiration of the term, become vacant, but the incumbent shall continue to hold until his successor is elected and qualified. In these jurisdictions, consequently, the governor cannot, on the expiration of a term of office, appoint a new officer, but the former incumbent is entitled to hold over until a duly-qualified successor presents himself." The supreme court of the United States seems to be of a contrary opinion, as it says in the case of *Badger v. U. S.*, 93 U. S. 601: "By the common law, as well as by the statutes of the United States and the laws of most of the states, when the term of office to which one is elected or appointed expires his power to perform its duties cease." It was held in that case that the constitution and laws of Illinois prescribed a different rule, or, as is said in the opinion, "The system of the state of Illinois seems to be organized upon a different principle;" and the court accordingly held that a certain township officer in Illinois continued in office, and was not relieved from his duties and responsibilities as a member of the board of auditors of the township by his resignation, which had been tendered to and accepted by the proper authority, until his successor was chosen and qualified. Counsel for relator sums up his position in the case in his brief as follows: "There is nothing in the Wyoming constitution or statutes authorizing Henderson [the respondent] to hold over after the expiration of his term, and until his successor is nominated by the governor and confirmed by the senate. On the authorities, there is no common-law rule authorizing him to do so."

It is unnecessary to ascertain or apply the common-law rule in the case at bar, as our constitution regulates the matter generally in a sweeping provision embodied in article 6, which counsel for relator seems to overlook. Section 16 of the article reads as follows: "Every person holding any civil office under the state, or any municipality therein shall, unless removed according to law, exercise the duties of such office, until his successor is qualified, but this shall not apply to members of the legislature, nor to members of any board of (or) assembly, two or more of whom are elected at the same time. The legislature may by law provide for suspending any officer in his functions, pending impeachment or prosecution for misconduct in office." This provision of the fundamental law is applicable to appointive as well as elective officers. It applies to the respondent, Hen-

derson, as he undoubtedly held a "civil office under the state," and was not one of the excepted officers mentioned,—a member of the legislature or a member of any board or assembly,—unless some other provision of equal dignity can be found, that will modify the section quoted, or make it inapplicable to him.

It may be contended that upon the expiration of his term to fill the vacancy resulting from the resignation of Foster, his predecessor in the office,—that is, upon the meeting of the legislature which occurred some 20 days after his appointment,—his right to hold the office or fill the vacancy expired by limitation of the statute, and then the governor had the right to appoint for the remainder of the unexpired term of Foster, the original incumbent, under the provision of section 7 of article 4 of the state constitution: "When any office from any cause becomes vacant, and no mode is provided by the constitution or law for filling such vacancy, the governor shall have power to fill the vacancy by appointment." The statute creating the office of state examiner, *supra*, makes no express provision as to how the vacancy, if it can be termed a vacancy, shall be filled after the legislature meets, either by the governor or by the governor and the senate acting concurrently by appointment and confirmation. It is also silent as to the term of the successor of the appointee of the governor to fill the vacancy in the recess of the legislature. Is this one of the cases where the governor may appoint to fill a vacancy in the office? Did the temporary and provisional appointment of Henderson, the respondent, continue only until the legislature met? And did his right to the office terminate then, or was he continued in office by virtue of the constitutional provision providing that any person holding a civil office under the state, not being a member of the legislature or a member of a board or assembly, two or more of whom are elected at the same time, shall exercise the duties of such office until his successor has qualified? If the office of state examiner became vacant upon the expiration of the limited period or term of Henderson, the appointee to fill the vacancy temporarily, then he had no right to exercise the duties of the office, and, in the absence of any constitutional or statutory provision for filling the vacancy thus occurring, the governor could appoint under the authority conferred upon him by section 7 of article 4 of the constitution. The legislature has the right to determine what shall constitute a vacancy, whether the office be filled by an incumbent or not. This is frequently done by statutes providing for special elections where an officer elect dies or refuses to qualify or resigns before the commencement of his official term, and some statutes may be found empowering some officer or board to fill the vacancy thus created by law. *Johnson v. Mann*, 77 Va. 265. With-

out some statutory regulation of the matter, a vacancy can only exist in an office where there is no lawful incumbent occupying it. An office cannot be said to be vacant while any person is authorized to act in it, and does so act. *People v. Van Horne*, 18 Wend. 518; *Tappan v. Gray*, 9 Paige, 507. In the recent case of *State v. Murphy*, (Fla.) 13 South. 705, it was held that where county commissioners are appointed by the governor by and with the advice and consent of the senate, and their term of office fixed at two years, and the governor recommended to the senate certain persons as county commissioners, but the senate adjourned sine die without taking action on these nominations, the governor had the power to fill the offices by appointment, as vacancies existed then, notwithstanding a constitutional provision similar to ours, which was considered only to prevent an hiatus in the office until the appointing power acted. The opinion seems to be based upon certain constitutional and statutory provisions, modifying or neutralizing a general provision of the constitution of Florida that "all state, county and municipal officers shall continue in office after the expiration of their official terms until their successors are duly qualified." This decision is certainly the most favorable one that can be cited on behalf of the relator, but we are not satisfied with the reasoning of the majority opinion. Upon principle and reasoning, the dissenting opinion of Mr. Justice Mabry seems to be the better view, and the one in consonance with the greater number of authorities. Under our constitution, the governor is not clothed with an absolute power of appointment of state officers. Nearly all of such officers are to be elected by the people, but some of them the constitution expressly requires to be appointed by the governor with the consent of the senate, such as geologist, engineer, trustees of the university, and the state examiner. The legislature may provide for such other state officers not enumerated in the constitution as are deemed necessary, (article 4, § 11,) and it seems that in the creation of such officers the governor may be vested by law with the sole power of appointing them, dispensing with the consent of the senate. Such, however, has not been the habit of the state or territorial legislatures in creating new offices, as such officials are generally required by the statutes to be appointed by the governor by and with the advice and consent of the senate, except only in cases of vacancies. The power lodged with the governor to fill vacancies in any office is restricted to cases where the constitution and statutes are silent as to the mode of filling them, and is not a plenary power. The executive is not vested with the sole appointing power, except as to a few offices, and certainly he does not have any inherent power of appointment, as such power, in the states of the Union, is not essentially executive. The sovereign power is in

the people, and not in their rulers. The power of the executive and judicial departments is a grant, not a limitation, while that of the legislative department is absolute, except as restricted and limited by the constitution which the people have adopted. *State v. Boucher*, (N. D.) 56 N. D. 1. This is elementary, and too familiar to require elaboration, that, while the judiciary and executive have only enumerated powers, the power of the legislative department is supreme, except as controlled by the restrictions imposed by the organic law. The power of the governor to appoint to office is not spring from some constitutional grant, but from some legislative grant not forbidden by the constitution, and the power bestowed by the constitution upon the executive to fill vacancies in public offices is one only to be exercised where there is no constitutional or statutory provision for filling the vacancy. Although the act before us is silent as to filling the office after the expiration of the time allotted to the appointee to fill a vacancy in the office of state examiner, the constitution is not. He holds a civil office in the state, and continues to exercise its duties until his successor is qualified. His successor must be one appointed by the governor, or authority of law, and not in the discretion of it. There would be no sense in the constitution that a vacancy could be created by the attempt to fill a vacancy, nor in the constitution that one appointee to fill a vacancy could be succeeded by another to fill the vacancy, where the provisional appointment is made from the same source. The vacancy is already filled by the governor's appointment, and there is no reason why the appointee should be displaced by one appointed by a succeeding governor. Such a provision in office is not contemplated by the constitution or by the statute. In the case under consideration, it is plainly to be seen that the object in limiting the power of appointment to fill a vacancy in the office of state examiner to the next meeting of the legislature was intended to confer the power to fill it upon that time upon the executive, but it was evidently intended that the successor appointed by provisional appointment should be appointed by the original source of appointing such officers, the governor and the senate acting jointly and in harmony with each other in construing the act reasonably, the purpose of limiting the tenure of office of the appointee to fill the vacancy until the assembly of the legislature was to have the office of the vacancy, filled by the governor and the senate. There is no provision for filling an office for the unexpired term of the appointee, and regularly appointed incumbent, in the absence of such a provision the power of appointment by the governor, with the advice and consent of the senate, it seems, would hold him for the full term, and not for the unexpired term. *Throop*, Pub. Off. §§ 320, 321. Cases there cited.

The appointment of the relator by the governor, as disclosed by his commission, was "for the unexpired term of Harry B. Henderson, whose said office became vacant on the 10th day of January, 1893." This recital in the commission is of no weight in determining the question before us, but it illustrates the difficulties in the way of determining a vacancy in an office filled by an incumbent. If the office became vacant on the 10th day of January, 1893, the first day of the session of the second state legislature, and the first day of the next meeting of the legislature ensuing after the appointment of Henderson by Acting Governor Barber, the vacancy occurred for no other reason than the expiration of Henderson's term, and if his term expired on that day there was no portion of his unexpired term to fill. There is no provision of our constitution and no provision of statute declaring when a vacancy occurs in any office, except in the general election law of the state, (chapter 80, Sess. Laws 1890,) which declares at section 45, when elective offices become vacant, "on the happening of either of the following events to the incumbent before the end of his term of office, namely: his death, his resignation, his becoming insane or non compos mentis, his ceasing to be an inhabitant of the territory, [state,] or, if the office is local, his ceasing to be an inhabitant of the district, town, ward or precinct for which he was elected; his conviction of an infamous crime or of any offense involving a violation of official oath, his removal from office, his refusal or neglect to take his oath of office, or to give or renew his official bond, or to deposit or file such oath or bond within the time prescribed by law, and the decision of a competent tribunal declaring his election void." These provisions are confined to vacancies in elective offices, but even if we could enlarge their scope, and include appointive offices, which is doubtful, there is nothing in them which would aid the relator here. It seems that no provision is made for special elections to fill vacancies in elective offices, except where there has been no choice at a general election of any officer, not a precinct officer, or when the rights of a person elected to the office of member of the council (senate) or member of the house of representatives shall cease, by death or otherwise, before the commencement of or during the term for which he shall have been elected. Sess. Laws 1890, c. 80, § 3. As to vacancies occurring in other elective offices, by statute, the board of county commissioners have power to appoint, as to county and precinct offices, and the governor, as to state offices, either by force of some statute, or under the provisions of section 7 of article 4 of the constitution. Our statutes are not only barren of any provision determining that a vacancy shall exist in a public office when the term of office ends, but we have an express con-

stitutional provision, applying to all civil offices under the state, and of any municipality therein, except members of the legislature and certain boards or assemblies, continuing the incumbent of an office in the discharge of his duties until the qualification of his successor, and this provision must control any statutory provision. The official may not evade the responsibilities thrust upon him by this constitutional provision, even by resignation. His successor must present himself, duly qualified, before the incumbent can release himself from the inexorable requirements of the constitution that he has sworn to support. Such cases may indeed be rare, but they may occur. The mandate of the constitution precludes an interregnum in the office, and was doubtless intended to prevent inconvenience in the public service, by keeping filled all the public offices for the dispatch of the public business. The successor who is competent to relieve the incumbent must have the right to the office, and be the proper and legal successor of the incumbent. He must be elected or appointed at the proper time by the proper authority, either by the people themselves, or by some one or more of their duly appointed and accredited agents; otherwise, he cannot oust the incumbent. Under the Utah statutes, where an election was not held at the time prescribed by law for county collector, an election at another time was held invalid, and the incumbent was held entitled to hold over until the election or appointment and qualification of his successor; and Paine on Elections (section 227) was quoted with approval in the opinion: "That if there was a vacancy, in any just sense, after the expiration of the term, and before the election and qualification of a successor, the statute itself fills the vacancy, by providing that the incumbent shall hold until the election and qualification of a successor, and that a failure to elect a successor to an office at the expiration of its term does not create a vacancy to be filled by appointment. * * * The incumbent holds over for an indefinite period, if no successor is elected and qualified." *People v. Hardy*, 29 Pac. 1118. In *People v. Lord*, 9 Mich. 227, the incumbent of the office of probate judge died after his re-election, and before his qualification. Under the provisions of the constitution of Michigan, the governor is to appoint a person to fill the vacancy in that office to continue until a successor is elected and qualified, who is to hold his office for the unexpired term. The governor appointed one to fill the vacancy for the old term, and at the expiration of such term appointed another to fill the vacancy for the new term. The court held the first appointment valid, and that it continued until the vacancy was filled by a special election called pursuant to law, and that the second appointment for the vacancy occurring in the new term was invalid, as prohibited by the constitution, the

first appointee evidently holding until a successor was elected and qualified. The rule in this case was followed in a later Michigan case, (*Lawrence v. Hanley*, 47 N. W. 753,) where a county auditor elect died before he had qualified and entered upon the duties of his office, and the governor appointed one to fill the vacancy. It was held, as to this office, that the governor had no power to appoint, and that the incumbent held over until his successor was elected at a special election provided by law. In Indiana, one elected a township trustee at the regular election for township officers died before the vote was announced. An attempt was made to elect his successor at a succeeding general election, without authority of law to do so, and also to appoint a successor by the county board. The election and appointment were held void, as there was no authority of law for either, and the incumbent of the office was continued in office; there being no vacancy until the qualification of a successor elected by the same electoral body or constituency which elected the incumbent, at a time authorized by law. *Kimberlin v. State*, 29 N. E. 772. In *State v. Harrison*, 113 Ind. 434, 16 N. E. 384, a president of the several boards of trustees of the benevolent institutions of the state was elected by the legislature for a term of four years. The act provided that, if a vacancy should occur in the office when the legislature was not in session, the governor should appoint, the appointment to hold good until the next session. The term of the officer first elected expired during the session of a legislature held four years after his election, but that body adjourned without electing a successor to the incumbent. The governor, being of the opinion that the failure of the legislature to elect a successor "produced a vacancy" in the office, appointed another to fill the office. In a contest for the position by the incumbent and the governor's appointee, the court held that the incumbent held over, under the provisions of the Indiana constitution, and that there was no vacancy, as the incumbent held his office by virtue of the constitutional provision continuing him in office until his successor should be elected and qualified. In this case it was held that the constitutional provision applied as well to officers elected by the legislature as to those chosen by the people. It was further said in the opinion that: "The word 'vacancy,' as applied to an office, has no technical meaning. An office is not vacant so long as it is supplied in the manner provided by the constitution or law with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it; and, conversely, it is vacant, in the eye of the law, whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event." The cases cited are: *Stocking v.*

State, 7 Ind. 326; *Collins v. State*, 344; *Akers v. State*, Id. 484; *Stamenderfer*, 96 Ind. 374; *Gosman v. State*, Ind. 203, 6 N. E. 349; *Butler v. State*, 169; *People v. Tilton*, 37 Cal. 614; *Hanley*, 9 Pa. St. 513; *Johnston v. V. N. H.* 202. The court further said, of course, it is not to be understood that an office cannot become vacant, as respecting appointing power, so long as it retains the actual physical occupancy of some one who asserts a claim thereto. An office is legally vacant unless the occupant has an unexpired right or title, founded in the constitution or law, precisely as a house is vacant of a lawful tenant in case the tenant dies without any provision authorizing the tenant to hold over, refuses to surrender at the expiration of his term." The California cases are much in point. Although the earlier cases held to the contrary, the law in this state is now settled, by repeated decisions, that the incumbent holds over until his successor is appointed and qualified in the manner provided by law, and that the expiration of his term does not in itself create a vacancy. *People v. Tyrrell*, 87 Cal. 475, 25 P. 614, approving *People v. Tilton*, 37 Cal. 614; *People v. Bissell*, 49 Cal. 407. Some cases in that state are based upon a misinterpretation of the Political Code which provides that: "Every officer must continue to discharge the duties of his office, although his term has expired, until his successor is appointed and qualified." In the case of *People v. Rhodes*, supra, the court held that an incumbent of an office held until his successor is appointed to fill the office, inspector of gas meters, was appointed by the governor and confirmed by the senate, and that Parkinson, appointed by the governor alone, without the assent of the senate, was not his successor. *Watts v. State*, J., says in his opinion: "So long as an officer continues to discharge the duties of his office pursuant to the requirements of section 879 of the Code, even though his term of office has expired, there is no vacancy in the office, in the absolute sense of the word, in any sense which would authorize the governor to appoint another person to fill it without consent of the senate." Such a vacancy would be caused by the resignation or death of the incumbent, or some other event by which the duties of the office were no longer being discharged at all, in which case, and to prevent a failure of public service, the governor might appoint during a recess of the senate." Rhodes, J., concurring, said that by virtue of the section of the Code the incumbent would continue to discharge the duties of his office until his successor is appointed and qualified, and that "it results from the fact that there was no vacancy in the office, when the governor was authorized to fill by appointment." In the case of *People v. Tilton*, supra, Cal. at page 624, the court says, after viewing at length the California case law, therefore, provides in express terms

filling the office by the old incumbent from the date of the expiration of the term until a successor is elected and qualified in the mode provided by law." And again: "But till a successor is elected the office is temporarily filled by the party designated by the law, and there is no vacancy, within the meaning of the constitution, and no occasion for calling into exercise the extraordinary power of the governor, which was only given by the constitution in order that the public interest might not suffer for want of a party authorized to discharge the duties pertaining to a public office. If a vacancy occurs, then, by the lapse of the term, the law provides how it shall be filled till a successor is elected and qualified; and that is by the old incumbent, and not by an appointment by the governor." Other cases lay down the same doctrine. They have gone over the same ground, and it is not necessary to review them. Among them are *Smoot v. Somerville*, 59 Md. 84; *State v. Rareshide*, 32 La. Ann. 934; *Brady v. Howe*, 50 Miss. 607; *State v. Fagan*, 42 Conn. 32; *Stilsing v. Davis*, 45 N. J. Law, 390; *State v. Bryson*, 44 Ohio St. 457, 8 N. E. 470; *State v. Howe*, 25 Ohio, 588; *Borton v. Buck*, 8 Kan. 207; *People v. Osborne*, 7 Colo. 605, 4 Pac. 1074; and the recent and well-considered case of *State v. Boucher*, (N. D.) 56 N. W. 142.

The case of *State v. Lusk*, 18 Mo. 333, has been much cited, even since it was overruled by the more recent cases of *State v. Seay*, 64 Mo. 89, and *State v. Thomas*, 102 Mo. 85, 14 S. W. 108. In *State v. Seay* the statute regulated the matter of the vacancy by providing for the qualification of an officer elect before the commencement of his term. The officer elect died two days before his term began, but after he had qualified, and it was decided that this created a vacancy which the governor might fill by appointment. The decision was based upon the peculiar provision of the Missouri statute, and upon the fact that upon the expiration of the incumbent's term his successor had been elected and qualified. In *State v. Thomas* it is said, in the course of the opinion: "The fact that the incumbent remains clothed with official authority, in furtherance of a wise provision of public policy and of public law, cannot enlarge the boundaries of his official term, or arrest the operation of the power of appointment or election. Of course, these remarks are subject to the conditions that the law has provided for filling the office in one of the modes mentioned, and that, therefore, the election or appointment cannot be classed as voluntary."

A careful reading of the numerous decisions of the American courts on the question is convincing that the doctrine is too well entrenched, to be dislodged at this time, at least where a constitutional or statutory provision exists, permitting or commanding an incumbent of an office to continue in the dis-

charge of his duties until his successor is qualified, it must be construed as controlling, and the expiration of the official term cannot be deemed a vacancy, unless there is some legal successor appointed or elected by some competent authority to take the place of the incumbent. His holding over may be a mere prolongation of the term, (*Carr v. Wilson*, 32 W. Va. 419, 9 S. E. 31,) or be considered a contingent extension, (*People v. Whitman*, 10 Cal. 38,) or as adding an additional, contingent, and defeasible term to the original fixed term, (*State v. Harrison*, 113 Ind. 441, 16 N. E. 384.) It excludes the possibility of a vacancy, and consequently the power of appointment, except in case of death, resignation, ineligibility, or the like. *Gosman v. State*, 106 Ind. 203, 6 N. E. 349, and cases cited.

Frequent reference is had to the case of *Johnston v. Wilson*, 2 N. H. 202, by courts entertaining opposite views. The usual quotation from the opinion is the following language: "It must be obvious, also, that, when once accepted, no vacancy can be said to exist in the office till the term of service expire, or till the death, removal, or resignation of the person appointed." No one can seriously question the correctness of this statement, but it seems it has been warped, in many instances, from its true meaning. Of course, no vacancy can occur in an office filled by an incumbent "till the term of service expire," but the question that has been a prolific source of inquiry is whether or not a vacancy exists after the term of service expires. It may not be amiss to see what the decision was in this leading case: Johnston was appointed collector at the annual March meeting of the town of Hillsborough, and signified his acceptance of the office, but did not take the oath of office. Nothing further was done upon the subject until the ensuing month of May, when the tax list of the town was presented to Johnston for collection. He declined receiving it unless the selectmen would furnish him an indemnity bond for the non-resident taxes, it then being so late as to endanger the legal recovery of them. This indemnity was refused, and the selectmen, under the impression that the conduct of Johnston amounted either to a resignation or nonacceptance of the office, proceeded to appoint another collector, who was Wilson, one of their own number. The oath was administered to him, and he commenced the collection of taxes. As some doubts arose concerning the legality of Wilson's appointment, the town, at a meeting in November, of the same year, called for other purposes, passed a vote to ratify the doings of the selectmen in respect to Wilson's appointment. No new warrant was given to him, and no new oath was administered. He seized and sold thereafter certain property of Johnston as a distress for the payment of his taxes for the year. The court held that

under the statute the selectmen could only fill a vacancy where the town had neglected or refused to choose a collector, and such collector could only collect the county and state taxes, not the town taxes. The town had not neglected to fill the office. It was also held that the appointment of the selectmen, as it was void, could not be ratified by the town at the November meeting, because the meeting was called for a different purpose, and the town was not legally "warned," in the quaint language of the law, and, further, that Wilson had never taken the oath after this November meeting. At the close of the opinion, however, it seems to be clearly intimated that the old incumbent of the office of collector would hold over, as Johnston had not been sworn, and as Wilson had not been legally appointed and sworn. The court say: "It is therefore manifest that those town officers, once chosen and sworn, are the only ones qualified to perform official duties until new ones are sworn, as well as 'chosen in their room.' The town is thus never destitute of officers duly qualified; and it cannot be reasonable or necessary that, while the offices are already filled by persons duly qualified, others, not duly qualified, should be enabled to perform the duties of them."

In the case of *In re Board of Com'rs of Johnson County*, 32 Pac. 854, this court held that "an old office is vacated by death, resignation, or removal. An office newly created becomes ipso facto vacant in its creation." In that case the statute creating the office of judge of the fourth judicial district provided for a temporary appointment by the governor to fill the office. The syllabus to the case, which was not prepared by the court, is misleading. The statute conferred, in express terms, the authority upon the governor to fill the office provisionally by appointment; and as the legislature is untrammelled as to that office, in this respect, by any constitutional provision, the power conferred upon the governor was by the act itself, which was held constitutional, and not by the terms of the constitutional provision requiring the governor to fill a vacancy in a public office where no mode is provided by the constitution or the law for filling the same. The vacancy in an office, which may be filled by the governor, under the constitution, arises in cases of emergency, where there is no person in an office, of lawful capacity to act therein,—such an occasion as resignation, disqualification, death, or the like, and where there is no provision either in the constitution or in any statute for filling the same. It would seem to apply where there was no officer in the position, or, it may be, where he is disqualified to act, and does not act, and there is no method pointed out by law to fill the place. It has no reference to the case of an incumbent in an office, whose term, however limited, has expired, and who

is awaiting his successor, for his office has not terminated and cannot terminate under the constitution until a successor appears, endowed with necessary qualifications that shall entitle it, chief among which must be his appointment by competent authority at the proper time. Until that event happens, the office is filled by an incumbent who exercises the duties of the office under constitutional authority, and there is no vacancy.

It appears that the senate disapproved upon the nomination of Stone by the governor, possibly because it desired Henderson continue in the office. It is shown by the action of the senate that it was necessary to appoint a person in his place. This was ineffectual, and the appointment of Acting Governor Benson was not made to the senate, but until the senate met. At that time, a new appointment was necessary and proper, and such appointment could have been made only by Gov. Oakes, and with the advice of the senate. The conclusions are that the respondent is duly and constitutionally authorized to perform the duties of the office of state auditor, and that there has been no vacancy in the office, which the governor could not appoint without the consent of the senate. The finding and judgment are affirmed for the defendant.

CONAWAY and CLARK, JJ., concur.

In re WHITMORE.¹

(Supreme Court of Utah. Jan. 1, 1906.)

CHANGE OF VENUE—CRIMINAL CODE.

1. Under the statute authorizing a court to change the place of trial to another court, on its own motion, if the parties agree, an entry that the court, on its own motion, orders the case transferred to another court, not the nearest, raises a presumption that the parties did not agree, and that the court knew of good cause for transferring the case as he did.

2. Where no appeal is taken from a judgment changing place of trial to another court, any motion to transfer made in the last term of the court, after trial, decree, or judgment, is a nullity, and a party cannot, after trial, decree, or judgment, move for a new trial, question said court's judgment, or set aside the same.

3. Comp. Laws 1888, §§ 3026, 3027, 3028, 3029, 3030, 3031, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3039, 3040, 3041, 3042, 3043, 3044, 3045, 3046, 3047, 3048, 3049, 3050, 3051, 3052, 3053, 3054, 3055, 3056, 3057, 3058, 3059, 3060, 3061, 3062, 3063, 3064, 3065, 3066, 3067, 3068, 3069, 3070, 3071, 3072, 3073, 3074, 3075, 3076, 3077, 3078, 3079, 3080, 3081, 3082, 3083, 3084, 3085, 3086, 3087, 3088, 3089, 3090, 3091, 3092, 3093, 3094, 3095, 3096, 3097, 3098, 3099, 3100, 3101, 3102, 3103, 3104, 3105, 3106, 3107, 3108, 3109, 3110, 3111, 3112, 3113, 3114, 3115, 3116, 3117, 3118, 3119, 3120, 3121, 3122, 3123, 3124, 3125, 3126, 3127, 3128, 3129, 3130, 3131, 3132, 3133, 3134, 3135, 3136, 3137, 3138, 3139, 3140, 3141, 3142, 3143, 3144, 3145, 3146, 3147, 3148, 3149, 3150, 3151, 3152, 3153, 3154, 3155, 3156, 3157, 3158, 3159, 3160, 3161, 3162, 3163, 3164, 3165, 3166, 3167, 3168, 3169, 3170, 3171, 3172, 3173, 3174, 3175, 3176, 3177, 3178, 3179, 3180, 3181, 3182, 3183, 3184, 3185, 3186, 3187, 3188, 3189, 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4. When the court, in allowing a judgment to stand, has expressly refused to grant an injunction, and the party appeals from the judgment, the appeal is a breach of said injunction pending the appeal.

5. Breach of an injunction by defendant.

¹ Rehearing denied.

measuring box and diverting the water is a criminal contempt, punishable criminally, under Comp. Laws 1888, §§ 3026, 3830, by fine and imprisonment; and the fine being payable to the territory, and no direct relief or remedy being afforded the adverse party there can be no appeal from a conviction for such contempt.

Smith, J., dissenting.

George C. Whitmore, imprisoned in execution of a sentence of fine and imprisonment for contempt of court, prays habeas corpus. Writ refused.

Brown & Henderson, for petitioner. Chas. S. Varian and Zane & Putnam, for respondent.

MINER, J. The petitioner, George O. Whitmore, was adjudged guilty of a specific and willful contempt of the authority of the third district court, in violating an injunction contained in a final decree in a case wherein one L. A. Scott Elliot was plaintiff and said George O. Whitmore was defendant. Having been found guilty of such contempt by the third district court, he was sentenced to pay to the people of the territory of Utah a fine of \$25 and the cost of the proceedings, taxed at \$159.80, and, in default of the payment of said fine and costs, that he be committed to the custody of the sheriff of Salt Lake county, and be imprisoned in the county jail of said county one day for each dollar of fine, unless sooner discharged in due course of law. Whitmore refused to pay the fine and costs, but filed a bond securing payment of the fine and costs, with a motion of appeal from the conviction and judgment of contempt, and now brings his writ of habeas corpus, and asks to be released from imprisonment under such conviction; the principal grounds being: First, that his appeal supercedes the judgment and conviction; second, that said court had no jurisdiction to render the decree or punish for contempt because the said cause was first pending in the first district court, and that said court, upon its own motion, transferred said cause to the third district court, without any authority therefor; third, that costs were illegally imposed as a penalty, without authority of the statute.

We will first consider the question raised as to the jurisdiction of the court. If the court had jurisdiction of the person of the defendant, and of the subject-matter out of which the alleged contempt arose, then the door for release by means of a writ of habeas corpus is closed, except it may be in cases where excess of jurisdiction is clearly apparent. *Ex parte Whetstone*, (not reported; Utah, June term, 1893; *Rap. Contempt*, §§ 155-157; *Ex parte Terry*, 128 U. S. 306, 9 Sup. Ct. 77; *In re Tyler*, 149 U. S. 180, 13 Sup. Ct. 785; *Ex parte Kearney*, 7 Wheat. 45; *Ex parte Frederick*, 149 U. S. 70, 13 Sup. Ct. 793. It appears that the first district court, at Provo, made an order in this case, December 27, 1892, which reads as follows: "In this case the court, on its own

motion, orders that this case be transferred to the third district court, at Salt Lake City, for further proceedings." On February 13, 1893, the third district court, by consent of the attorneys for the respective parties, ordered that the case be referred to J. H. Harris, as sole referee, to try all issues in the case, and report findings of fact and conclusions of law to the third district court. In pursuance of such order, testimony was taken before such referee by the respective parties, and a decree was rendered upon such testimony, and report so taken and filed. A motion for new trial was also made by the defendant, and at no time was any objection made to the jurisdiction of the court, or any of such proceedings. Our statute authorizes the court to change the place of trial upon its own motion, if the parties do not agree. but in that case the cause must be transferred to the nearest court. The presumption follows that the parties did not agree, and that there was good cause known to the judge for transferring the cause to the third district court. Comp. Laws 1888, § 3199; *Emery v. Hardee*, 94 N. C. 787; *Cartright v. Town of Belmont*, 58 Wis. 370, 17 N. W. 237; *Table Mountain G. & S. Min. Co. v. Waller's Defeat Silver Min. Co.*, 4 Nev. 222. It does not appear that any motion was made in the third district court to transfer the case. That court was not bound, of its own motion, to change the place of trial, and the right of either party to try the case in the first district court was a right that they could waive. *Table Mountain G. & S. Min. Co. v. Waller's Defeat Silver Min. Co.*, 4 Nev. 222; *Watts v. White*, 13 Cal. 321-324; Comp. Laws 1888, § 3197; *Vaughn v. Hixon*, (Kan.) 32 Pac. 358; *Solomon v. Norton*, (Ariz.) 11 Pac. 106; *Railway Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982. The order changing the place of trial from the first district court was an appealable order, and, if erroneous, an appeal was the proper remedy to correct it. Comp. Laws 1888, §§ 3635, 3652; *Clarke v. Lyon Co.*, 8 Nev. 181; *Machine Co. v. Cole*, 62 Cal. 311; *Gage v. Downey*, 79 Cal. 140, 21 Pac. 527, 855. We think the third district court had jurisdiction over the subject-matter of the suit, and over the parties thereto.

It is also contended that the imposition of costs as a part of the punishment was illegal, and that the court exceeded its jurisdiction in this respect, and that the imprisonment is indefinite. Section 5113, Comp. Laws 1888, provides that a judgment that a defendant pay a fine may also provide that he be imprisoned until the fine is satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every one dollar of fine. Sections 5258-5260, 5344, *Id.*, provide that costs may be assessed against the party where, by law, the courts are authorized to assess a fine, and the imprisonment cannot exceed one day for each dollar of fine and costs imposed. Sections

¹ No opinion filed.

8026, 3830, Id., authorize the court to enforce its orders, and in case of contempt to impose a fine not exceeding \$200 or imprisonment for five days, or both such fine and imprisonment. The contemnor was convicted of willfully and contemptuously violating an order, decree, and injunction of the court, in removing the measuring box placed in the channel of the stream for the purpose of measuring water, and diverting the waters of the stream, in direct violation and disobedience of such injunctive order. At common law the power to punish for contempt was unlimited, depending upon the discretion of the court imposing the sentence. Under the statutes of this territory, the power of the court to impose punishment is limited by the statute. The contempt charged against the contemnor, and for which he was convicted, was of a criminal character, and the proceeding for its punishment is in the nature of a criminal proceeding; and the above provisions of the statute, in so far as applicable, apply to all other criminal cases not otherwise specially provided for, and to cases of contempt, when criminal, as well as to other misdemeanors. The fine and costs imposed in such a case are inflicted for the public good, in order to secure obedience to lawful authority. The order and sentence to imprisonment—one day for each dollar of fine and costs, in default of its judgment—is but a mode provided by statute for the enforcement of the judgment. The power to enforce an order or judgment is incident to the power given to the court to impose it. In this case the contempt consisted in doing a forbidden act, that was not only injurious to the opposite party, but was a contemptuous violation of the express command of the court. The process was therefore criminal in its nature, and the conviction was properly followed by the imposition of a fine and costs that did not exceed in amount the sum that the court was authorized to impose. The judgment that the contemnor be imprisoned one day for each dollar of fine and costs was within the power of the court to impose, and was not excessive or uncertain as to the period of imprisonment. *Rap. Contempt*, §§ 128, 129; *Ex parte Sweeney*, 18 Nev. 79, 1 Pac. 379; *Fischer v. Hayes*, 6 Fed. 71; *Ex parte Crittenden*, 7 Pac. Coast Law J. 483; *State v. Davis*, (N. D.) 51 N. W. 942; *Phillips v. Welch*, 11 Nev. 187; *People v. Reggel*, 8 Utah, 21, 28 Pac. 955.

The petitioner also contends that the commitment is illegal and void because it was issued after the petitioner, the defendant in the action, had appealed the case to the supreme court, and while said appeal was pending, and that such appeal supersedes the order of commitment. In allowing the appeal and supersedeas bond, the third district court expressly refused to suspend the injunction. The injunction continued to re-

main in force, and was not rendered operative by the appeal, or the giving of supersedeas bond. 2 High, Inj. p. re North Bloomfield Gravel Min. Co. 795; *Hovey v. McDonald*, 109 U. S. 909, 3 Sup. Ct. 136; *Leonard v. Land Co.* S. 465, 6 Sup. Ct. 127; *Bullion, etc. v. Eureka Hill Min. Co.*, 5 Utah, 12, 174; *Knox County v. Harshman*, 16, 10 Sup. Ct. 8; *Lindsay v. District* (Iowa,) 39 N. W. 817.

The petitioner also contends that the appeal taken from the order and sentence for contempt in this proceeding is not the order of commitment, and that he is therefore entitled to his discharge. The authorities bearing upon the question of the right of a party to appeal from a judgment of conviction in a contempt proceeding seem to be in great confusion, but upon careful examination it will be found that this condition results largely from different provisions of the statutes applicable upon that question, and upon the question as to whether or not the contempt was of a civil or criminal nature. It is unquestionably true that every court of record, at common law, has the power to judge of contempt against its own dignity, and the judgment of such a court, in cases of contempt, at common law, is final and conclusive, and not subject to be reversed by appeal or otherwise, unless specially authorized by statute. Counsel for the contemnor insists that the judgment of contempt was a civil proceeding, and that section 3632, Comp. Laws 1888, which provides that "a judgment or order in a civil case, except when expressly made final, may be reviewed as prescribed in this Code, and otherwise," and section 3635, subd. 5, provides that "an appeal may be taken from a final judgment in an action or civil proceeding commenced in the district court, in which the same is rendered," authorize an appeal from the judgment in question. It is not contended that the appeal was taken under section 5134, 5135, which provide for appeals in criminal cases, but that any certificate from the judge was required under section 5142, Id., certifying that a civil cause for appeal existed. Section 5142, subd. 5, Id., provides that the district court, in any lawful judgment, order, or decree of the court is a contempt of the authority of the court. Such contempt is punishable as provided by section 3830, Id., in the case of *State v. Davis*, (N. D.) re 51 N. W. 942, the defendant was found guilty of contempt in advising the plaintiff of an injunction order restraining the voting of certain stock at a stockholders' meeting. In this case the court ordered a fine of \$75, and ordered the defendant committed until the fine was paid, and under a statute very similar to that of this territory the court held there was no appeal.

order. The court said: "It is obvious that the order appealed from is not an order in an action. It in no manner affects the merit of the action. It has no connection with any step taken or to be taken in the action itself. It determines no question in the action for or against either party. It does not affect the final judgment. The action can proceed as though it had never been made. It is an episode in an action. It is the vindication by the court of its authority. If it can be regarded as a proceeding in the action, still it is not an appealable order. Certainly, it is not the final judgment in the action, nor is it an order affecting a substantial right in an action, which, in effect, determines the action, and prevents a judgment from which an appeal might be taken. It does not involve the merits of an action. It remains to be considered whether the order was one made in special proceedings, within the meaning of the appeal law. The New York authorities are cited to sustain the contention that it is such an order. An examination of these cases will disclose the fact that the contempt proceedings, which were there held to be special proceedings, were instituted, not primarily to vindicate the authority of the court, but under a statute authorizing such procedure to compel the contemnor, by way of fine, to make good to his antagonist the damage done the latter by the refusal of the former to obey an order or decree of the court. In some cases where the order has been held appealable the proceeding was instituted to compel obedience to an order or decree in equity. Where a statute gives to the injured party a right to institute contempt proceedings to indemnify him against loss by reason of the disobedience by his antagonist of an order, judgment, or decree, it is clear that, while the proceeding is in name and form a contempt proceeding, it is not instituted for the sole purpose of vindicating the authority of the court, but as a remedy to the suitor, who has a right to insist on obedience to the mandate of the court, and therefore ought to be allowed to demand, as a matter of right, that in a proper case the court give him the benefit of its order or decree in his favor by so exercising its power to punish for contempt, in case of a disobedience thereof, as to indemnify him against injury by reason of such disobedience. The primary object of such a proceeding is indemnity to the litigant. Incidentally, the court's authority is vindicated. The court, under the command of the statute, lends its contempt power to the suitor who has been denied the fruits of an order or decree by the refusal of his opponent to obey it. Such a proceeding is therefore a remedy, and, not falling within the definition of an action, either civil or criminal is of necessity a special proceeding. It is necessary that the contempt proceeding should be remedial in its character, to be a special proceed-

ing. It is not every other "remedy" that is a special proceeding. In New York the decisions stand upon a statute which expressly gives the injured party the legal right to institute and control contempt proceedings, to the end that the court may therein impose, as a punishment for the contempt, such damages as the injured party has sustained by reason of such contempt. This is apparent from the authorities. The leading case in that state on this point is *Sudlow v. Knox*, 7 Abb. Pr. (N. S.) 411. Speaking of the nature of the contempt proceedings, the order in which was held appealable, the court said: "These were instituted and conducted under the provisions of the statute entitled 'Of proceedings as for contempt to enforce civil remedies and to protect the rights of parties in civil actions.'" The court says, further: "Section 21 provides that, in case the fine imposed for indemnity of the party injured shall be paid to and accepted by him, it shall constitute a bar," etc. It is apparent that the contempt proceedings thus held to be special proceedings were, by force of a statute, remedial in their character.

The Michigan authorities belong to the same class. In *People v. Simonson*, 9 Mich. 492, the court said: "This is an appeal from an order made under section 4094, Comp. Laws, punishing defendants for a contempt in violating an injunction, which the relator moves to have dismissed. The section is as follows: 'If an actual loss or injury has been produced to any party by the misconduct alleged, the court shall order a sufficient sum to be paid by the defendant to such party to indemnify him, and to satisfy his costs and expenses, instead of imposing a fine upon such defendant; and in such case the payment and acceptance of such sum shall be an absolute bar to any action by such aggrieved party to recover damages for such injury or loss.' The order is final, and cannot be reviewed unless on an appeal from the order itself. It is more of a civil than of a criminal nature; its principal objects being to compel defendants to make compensation to the relator for the injury they have done him in violating the injunction, rather than to vindicate the dignity of the court and the majesty of the laws. For these reasons, we are of the opinion the motion should be denied." In *Romeyn v. Caplis*, 17 Mich. 449, the court said: "It has been contended before us that the order in this case was not one from which an appeal could be taken, since the appellee did not claim that an actual loss or injury had been produced to the party by the misconduct alleged, and did not ask for any sum to indemnify him. I think this position cannot be sustained. The injunction was an appropriate civil process, belonging to the remedy in the action in which it issued, and the proceeding for its violation was under the chapter entitled 'Of proceedings as for contempt

to enforce civil remedies and to protect the rights of parties in civil actions.' The order complained of was final, and not merely a step in the course of the proceeding, contemplating further action by the court in relation to the same matter, and it belongs to that class of proceedings which are provided to secure obedience to the necessary processes of courts in civil cases. The essential character of the proceeding indicates very clearly that what was sought to be accomplished, and in fact done, was to be in keeping with the purpose of the statute which has been referred to." The cases of *Haines v. Haines*, 35 Mich. 142, and *People v. Jones*, 33 Mich. 303, were brought under a similar statute. The statutes of Michigan are wholly unlike those of Utah.

In Wisconsin, as in New York and Michigan, there exist statutes providing for the punishment of contempt for the benefit of the injured party. The same distinction is there made. If the proceeding is carried on for the benefit of the successful litigant, the remedy is a special proceeding, and the order is appealable. Said the court in *State v. Giles*, 10 Wis. 101: "This is an appeal from an order of the circuit court of Jefferson county, by which the sheriff was adjudged guilty of contempt for not executing a writ of assistance, and fined ten dollars and costs. The general rule in relation to conviction for contempt is that there is no appeal. But there is a very clear distinction between those proceedings for contempt which are merely in the nature of civil remedies for the benefit of the party injured, and those aimed at conduct which tends directly to interrupt the proceedings and impair the authority of the court. In respect to the latter, it is essential to the very object of granting the power to punish for contempt that it should not be subject to appeal. Such being the general rule, the order in this case would not be appealable without an express statutory provision." The same distinction is stated in *Re Pierce*, 44 Wis. 411-422; *State v. Brophy*, 38 Wis. 414; and *Re Murphey*, 39 Wis. 286. This latter case is in point. The appeal was from an order punishing the appellant for contempt in disobeying an injunctive order. The court held that the order was not appealable, saying: "The defendant was convicted of willful disobedience of an order of the court, and was adjudged in contempt because of such disobedience, and fined therefor. Looking at its results, whatever it may have been in its inception, the proceeding was not a controversy between certain parties to a civil action, out of which it arose, and the appellant, in which the former seeks indemnity for the wrongful act of the latter, but a public prosecution, by which the state seeks to vindicate the authority of one of its courts, and to punish the defendant for an alleged interference therewith. It is quite immaterial that the alleged contempt was com-

mitted in the progress of a civil action, was essentially a criminal contempt, the court sought to punish it as such by imposing a fine upon the defendant which paid, goes to the school fund. No part of the civil cause has any more interest in the conviction and punishment of the appellant than has any other citizen of the state. An appeal does not lie from a judgment or order in a criminal case or proceeding which has been frequently adjudicated by this court, and is now too well settled to be questioned or doubted." The same distinction is fully stated in an article in the fifth volume of the *Criminal Law Magazine*, at page 100. After referring to the decision in *Yates v. People*, 6 Johns. 337, holding that a conviction for a criminal contempt was subject to review on appeal, the learned writer says: "The same question subsequently came before the same court in *Yates v. Lansing*, 6 Johns. 395, and the doctrine of the first case was overthrown on all points, and has never been the law of New York from that date to this, though, as elsewhere seen, appeals are constantly prosecuted in that state from judgments in proceedings as for contempt to enforce civil remedies;" referring to the leading New York case of *Sudler v. Knox*, 7 Abb. Pr. (N. S.) 411, already referred to, and also to the late decision resting on that case. There is another class of contempt proceedings which are purely remedial in their character. This class embraces contempt proceedings as were resorted to by a successful litigant in equity to secure the fruits of his litigation in case of the refusal of the defeated party to obey the order or decree made in such action. Such a proceeding, while in form a contempt proceeding, was never instituted primarily to vindicate the court's authority, but for the purpose of giving the successful suitor the fruits of his litigation.

The proceeding in this case, which was instituted in the conviction appealed from, was not instituted to bestow the damages to be recovered upon Elliot, because his individual rights under the injunctive order had been infringed upon. The proceeding was brought in the name of the people of the territory, for the purpose of punishing a party who had violated an order of the court. Elliot obtains no pecuniary benefit from the order of conviction. If he had any remedy for his damages, it was not under this proceeding. The fine, if paid, in this proceeding, goes to the territory, and not to the plaintiff. The act restrained had been done, and was out of the petitioner's power to prevent it. The water had been appropriated to him, and the measuring box had been taken away and destroyed, in violation of the press order of the court. The main object of the proceeding was to vindicate the authority of the court. Where the contempt is such that it results in a violation of the rights of the public, or of the rights of

dividual, which have been adjudicated and fixed by the court, and a punishment is imposed in the interest of public justice, and not in the interest of any individual litigant, as a money indemnity, the offense is necessarily of a public or criminal nature, and is clearly covered and made punishable by our statute as a public offense. In such cases, if a fine is imposed, its limit is fixed and determined by the statute, and is not fixed by the injury demanded or sustained by the individual injured. The proceeds, when collected, go into the public treasury, and not for the benefit of the party injured. This fine is a punishment, and not an indemnity, and, if imprisonment is also imposed, it is in the interest of the public justice, and becomes partly a penalty, and in no way becomes an indemnity to the individual injured. *People v. Court of Oyer and Terminer*, 101 N. Y. 248, 4 N. E. 259. Under our statutes these acts of disobedience of the lawful judgment, order, and process of the court, both in their origin and punishment, partake of the nature of crimes which are a violation of a public law; and while there may be traces tending to the protection of a private right, yet the whole aim, purpose, and object is the punishment for the violation of a public law, and ever in the vindication of public justice, and hence may be properly denominated "criminal contempt." So, under our statutes, all the elements of willfulness or evil intention enter into and characterize the act charged and punished. The statute defines some of them as disorderly, contemptuous behavior to the court or judge, tending to interrupt the course of justice; deceit or abuse of the process or proceedings of the court by a party to an action or special proceeding; disobedience of any lawful judgment, order, or process of the court. Under our statute this offense is punishable by fine and imprisonment. It is an offense public in its nature, which tends to cast discredit upon the administration of public justice. *Rap. Contempt*, § 21. It would indeed seem anomalous that an appellate court should have the power to compel an inferior court to punish a criminal contempt, an insult to the judge or a willful breach of peace in open court, a willful disobedience of a lawful order or judgment which such inferior court had refused to punish, or that it should have the power to review the action of such inferior court, and discharge one whom that court had adjudged guilty of such contempt. "It is true that the judge who presides over the court against which the contempt is directed is not regarded as having any personal interest in the matter. The law punishes the contemnor, out of no personal consideration for the judge. The punishment is not meted out as a 'balm to hurt mind.' Nor is there in the law aught of malice against him who is punished. The power is exercised by the court as the representative, in this respect,

of the people,—the ultimate sovereigns,—and in their interest and for their good. The maintenance of the authority of the judiciary is indispensable to the stability of the government. Having power over neither the purse nor the sword, it is helpless and defenseless, open to wanton insult, the object of universal derision and contempt, unless the people have, by necessary implication, vested in the judiciary authority to assert its powers, to compel respect and obedience to its orders and decrees, and to preserve order and decorum in open court, by calling upon the physical power of the state to uphold this independent department of the government in its full integrity. The people, by the very act of creating a judicial department, necessarily vested in it this prerogative. This power, to punish for contempt, which inheres in the very constitution of every court, is to be exercised solely for the public good, that a branch of the people's government may not lose its efficacy, and thus the government be brought to anarchy. But it does not at all follow that, because the state alone has any interest in the punishment of such a contempt, the power to punish it does not reside exclusively in the tribunal insulted or defied. On the contrary, there has been only one thought touching this question. All the cases speak of this power as being lodged in only the tribunal towards which the contempt is directed." *Rap. Contempt*, § 13, and cases cited. In the case of *People v. Owens*, (Utah,) reported in 28 Pac. 871, this court held that it would not review proceedings in contempt, where the court below had jurisdiction; that there was nothing in our statutes allowing appeals in such cases,—the rule of law being that each court judges for itself in cases of contempt, and the judgment of the court is not a subject of review by an appellate court. In the case of *Phillips v. Welch*, 11 Nev. 187, the court says: "If the contempt consists in the refusal of a party to do something for the benefit or advantage of the opposite party, which is ordered to be done, the process is civil, and he stands committed until he complies with the order. The order, in such cases, is not punitive, but coercive. If, on the other hand, the contempt consists in the doing of a forbidden act, injurious to the opposite party, the process is criminal, and conviction is followed by a penalty of fine or imprisonment, or both, which is purely punitive. In the former case the private party alone is interested in the enforcement of the order, and the moment he is satisfied the imprisonment terminates; in the latter case the state alone is interested in the enforcement of the penalty. It is true the private party receives an incidental advantage from the infliction of the penalty, but it is the same sort of advantage, precisely, which accrues to the prosecuting witness in a case of assault and battery; the advantage being that the punishment operates in terro-

rem, and by that means has a tendency to prevent a repetition of the offense. The principle of discrimination between the civil and criminal processes for contempt, here indicated, though not expressly recognized in any of the cases that have fallen under our observation, is entirely consistent with all the decisions, and is the only means of rendering them consistent with each other. It may therefore be considered established by them." Rap. Contempt, §§ 21, 22. In the case of *Hayes v. Fischer*, 102 U. S. 121, the court held that a proceeding in the court below for contempt cannot be re-examined in that court by an appeal or writ of error.

From an examination of the authorities, we are satisfied that under our statute an appeal does not lie to this court from the judgment and conviction attempted to be appealed from. *Phillips v. Welch*, 11 Nev. 187; *Id.*, 12 Nev. 158; *State v. Davis*, (N. D.) 51 N. W. 942; Rap. Contempt, §§ 143, 141, 21; *Hayes v. Fischer*, 102 U. S. 121; *New Orleans v. Steamship Co.*, 20 Wall. 387; *McMicken v. Perrin*, 20 How. 133; *Bullion, etc., Min. Co. v. Eureka Hill Min. Co.*, 5 Utah, 153, 13 Pac. 174; *Clark v. People*, 12 Amer. Dec. 177, note 184; *Ex parte Martin*, 26 Amer. Dec. 276; *Williamson's Case*, 67 Amer. Dec. 376; *Easton v. State*, 87 Amer. Dec. 49; *State v. Galloway*, 98 Amer. Dec. 409; 2 Bish. Crim. Law (7th Ed.) § 268; *Ex parte Sweeney*, 18 Nev. 74, 1 Pac. 379; *In re Frederick*, 149 U. S. 70, 13 Sup. Ct. 793. The petition for habeas corpus is denied, and the petitioner is remanded to the custody of the sheriff of Salt Lake county, in compliance with the order, judgment, and commitment of the third district court.

BARTCH, J., concurs. SMITH, J., dissents.

IN RE GOVERNOR'S PROCLAMATION.

(Supreme Court of Colorado. Jan. 24, 1894.)

STATE LEGISLATURE—BUSINESS OF SPECIAL SESSION.

1. The business to be transacted at a special session of the legislature is to be specially named in the executive proclamation, but is not to be particularly prescribed, in all its details. The legislature cannot go beyond the limits of the business specially named; but within such limits it may act freely, in whole or in part, or not at all, as it may deem expedient.

2. Quære, whether causes of attachment may be repealed so as to apply to existing contracts.

(Syllabus by the Court.)

Questions by the house of representatives, in relation to the governor's proclamation calling a special session, submitted for opinion.

The other facts fully appear in the following statement by ELLIOTT, J.:

The opinion of the court is in response to certain questions propounded by the house of

representatives, as hereinafter stated. The governor of Colorado, by proclamation, convened the ninth general assembly in session on January 10, 1894. The proclamation is based upon the following provision of the constitution, (article 4:) "Sec. 1. The governor may, on extraordinary occasion, convene the general assembly, by proclamation, stating therein the purpose for which it is to assemble; but at such special session no business shall be transacted other than that specially named in the proclamation. He may, by proclamation, convene the assembly in extraordinary session for the transaction of executive business." The proclamation, among other matters of business, provided that the following bills should be transacted at the special session, to-wit: "The following: "(20) To amend the constitution of the state by striking out the eleventh, and thirteenth causes of attachment; such amendment to take effect on the first day of the next session of the legislature; contracts made after this enactment shall not be a law." At the special session thus convened there was introduced house bill No. 1, titled "A bill for an act to amend the constitution of the state as prescribed in section 2000 of the General Statutes of the State of Colorado." The bill, if passed, would be a substantial re-enactment of section 2000 of the constitution, omitting the justices' attachment act, omitting the seventh, eighth, and tenth causes of attachment. The questions propounded are: "First. Can the legislature legally enact the amendment contemplated by the bill under the constitutional provision? Second. Can the governor's call, as set forth? Second. Can the legislature legally enact this amendment so as to apply to contracts made prior to the passage?"

ELLIOTT, J., (after stating the facts.) The questions submitted require the construction and construction of section 2000 of article 4 of the constitution. In the construction of other constitutional provisions, it is not difficult to determine the object of this provision. The framers of the constitution, apprehending evil from frequent legislative sessions, and from too much legislation, provided for biennial sessions, and limited such sessions to a short period of time. It was considered that changes in the laws of the state should not often occur more often than once in two years were desirable, and that a reasonable time was necessary for our people to become acquainted with new statutes, and test their value before attempting to change them. It is undoubtedly true that if legislative sessions were more frequent the statutes enacted by one legislature would hardly be published before a succeeding legislature would change, modify, or repeal them. Such a provision upon a constitutional provision similar to the one now under consideration, the court of Tennessee said: "This, undoubtedly, is a very salutary provision, tending to what to check overlegislation, and to make laws a little more stable, by furnishing

period of two years, during which they may be, in some degree, subjected to the test of a brief experiment." *Mitchell v. Turnpike Co.*, 3 Humph. 460. These views were expressed more than 50 years ago. It is safe to say that the various state legislatures did not, in those days, manufacture one-quarter the number of statutes at a single session that they do now. As a protection against any sudden or unexpected emergency requiring action by the legislature, our constitution provides that a special session may be convened by proclamation of the governor. It is expressly provided, however, that such special session shall not be convened for general purposes, but that the business to be transacted at such session shall be limited to matters named in the executive proclamation. From the reading of section 9, its meaning seems plain. It consists of ordinary language. Its terms are not unlike those of other state constitutions upon the same subject. But the proclamation under consideration is somewhat extraordinary, for its minuteness of detail. Hence, the task of construing and applying the constitutional provision to the terms of the proclamation is attended with some difficulty. If we construe the language of section 9 with the view to sustain the largest measure of executive control over legislative power, we reach a certain conclusion. If we construe the language with the view to protect legislative power against undue executive control, we reach a conclusion quite different. In a free representative government, like ours,—a government of distributed and balanced powers,—the equality of the different departments of the government, and the supremacy of each department in its appropriate sphere, are cardinal principles, and must be maintained, except in those instances where the constitution expressly authorizes a departure from them. Thus, a conservative construction of section 9 is required. In this matter, truth lies between the extremes, and the middle of the road is the path of safety. The governor is required to state in his proclamation the purpose for which the legislature is to assemble in special session, and it is provided that at such session no business shall be transacted, other than that specially named in the proclamation. The governor is thus invested with extraordinary powers. He alone is to determine when there is an extraordinary occasion for convening the legislature, and he alone is to designate the business which the legislature is to transact when thus convened. Thus far, there can be no question as to the meaning of section 9. But must we go further, and hold that the governor may prescribe the particular way and manner in which the business he has designated shall be transacted in all its details? If the session be called for legislative purposes, may the governor draft the bills, append them to his proclamation, and require the legislature to pass them as pre-

pared by himself, or not legislate at all? In a certain contingency the general assembly may be convened in special session for the purpose of electing a United States senator. Will it be contended that the person to be elected may be specially named in the proclamation, and that no other person than the one thus named can be elected at such special session? It is manifest that such a construction would be to destroy legislative independence, and convert members of the two houses into mere instruments to register and ratify the executive will; that is, to do the bidding of the governor, or not act at all. It is true, section 9 requires that the business to be transacted at the special session shall be specially named; but it does not require that such business shall be definitely and particularly prescribed, in all its details, by executive proclamation. Legislative judgment and discretion as to the transaction of the business specially named are certainly not inhibited at special sessions. The legislature cannot go beyond the limits of the business specially named in the proclamation, nor can it legislate upon business not named in the proclamation; but within the limits of such business it may act freely, in whole or in part, or not at all, as may be deemed expedient, according to its own judgment. The legislature must do this much, or the right of legislating by the representatives of a free people at a special session is destroyed, and all our ideas of such right are rendered obsolete. *Baldwin v. State*, 21 Tex. App. 593, 8 S. W. 109; *Jones v. Theall*, 3 Nev. 233; *City of St. Louis v. Withaus*, 16 Mo. App. 247, affirmed by supreme court, 90 Mo. 646, 8 S. W. 395; *State v. Shores*, (W. Va.) 7 S. E. 413; *Wells v. Railway Co.*, (Mo. Sup.) 19 S. W. 530.

Let us apply the foregoing principles to the matters submitted. By paragraph 20 of the proclamation, the governor, among other things, states the purpose of convening the legislature to be the amendment of the attachment laws of the state, designating the tenth, eleventh, and thirteenth causes of attachment. It is probable that in designating these causes of attachment the governor referred to the causes thus numbered in section 92 of the Code. The Code, however, is applicable only to courts of record; but it appears that the seventh, eighth, and tenth grounds of attachment, as specified in section 77 of the justices' act, correspond substantially to the tenth, eleventh, and thirteenth causes of attachment stated in the Code. It would be a narrow construction, therefore, to hold that the legislature may amend the laws applicable to certain causes of attachment in courts of record, but that like causes of attachment in justices' courts cannot be amended under the proclamation. The subject-matter of legislation includes, in substance, the justices' act, as well as the act governing courts of record, and the necessity or desirability of such amendatory legisla-

tion is certainly as great in the one case as in the other.

The proclamation further provides that the amendment of the attachment laws shall take effect only as to contracts made after such amendment shall become a law. This provision must be held to be an unwarranted restriction upon legislative power and discretion. The governor having specially named the amendment of the attachment laws as part of the business to be transacted at the special session, his authority by proclamation in respect to that matter was exhausted. Whatever he has further said upon that subject must be considered as merely advisory. The manner in which, and the extent to which, the causes of attachment, or any of them, shall be amended, if at all, are matters for the legislature to determine in the first instance, according to its own judgment.

House bill No. 15, as presented for our consideration, is not confined to future contracts. Nevertheless, we are of the opinion that it may be legally passed in that form, notwithstanding the restriction attempted by the proclamation. Whether the act would be obnoxious to those constitutional provisions forbidding the passage of any law impairing the obligation of contracts is a different question. If the bill should pass in the form now presented, such question might arise in some litigated case, and it would then be determined by the courts in the regular course of judicial proceedings. In the determination of such question the courts would not be controlled by the executive proclamation, nor, as a rule, will this court undertake to decide such questions in response to executive or legislative questions. No valid reason has been suggested why the bill may not be constitutionally enacted in the form now presented, even though it should become necessary by judicial decision to restrict its operation to future contracts. As to this point, we deem it inexpedient to express an opinion. In re District Attorneys, 12 Colo. 466, 21 Pac. 478; In re Priority of Legislative Appropriations, 19 Colo. —, 34 Pac. 277; Carille v. Henderson, 17 Colo. 532, 31 Pac. 117.

This opinion has been rendered in obedience to constitutional requirements which we cannot evade, though we are reluctant to express our views in advance upon executive or legislative business.

MULOCK v. WILSON.¹

(Supreme Court of Colorado. Dec. 4, 1893.)

APPEAL — REVIEW — PRESUMPTIONS — CREDITORS' BILL — PLEADINGS — FRAUDULENT CONVEYANCES — PARTNERSHIP.

1. An objection made for the first time in the appellate court is viewed with judicial disfavor, even though the objection be one which may be raised at any time. In such case the

rule that the allegations of a plea be construed most strongly against it does not apply.

2. In an action brought by a plaintiff at sheriff's sale to cancel a former deed on the ground that the deed is fraudulent as to creditors, the complaint need not allege the issuance of execution in the original action, and a return nulla bona, nor that plaintiff had possession of the land.

3. Where the appellant has not, by exception, preserved the evidence, and no objection or exception to the proceedings was made in the trial court, it must be presumed that the proceedings were regular, and that the appellant fully sustained the material allegations of his complaint.

4. Where a conveyance of land is made by an insolvent debtor without consideration and with intent to cheat and defraud creditors, the grantee having notice of such intent, *held*, that the conveyance is void and void as to subsequent creditors, existing creditors, and that the hands of the fraudulent grantee were attached and execution by the creditors, the same as though the fraud had never been executed.

5. Partners are jointly and severally liable for the debts of the partnership, and the rate property of each partner is liable for the debts of the partnership. In this state, by statute, every interest in real estate is subject to levy and execution, unless occupied as a dwelling.

6. Where the existence of a fact is alleged, and the allegations of the plaintiff are not supported by the want of direct and positive averring such fact will not be deemed a fact, and an objection when made for the first time in the appellate court.

(Syllabus by the Court.)

Appeal from district court, Fremont.

Action by John Wilson against Mulock to remove cloud from title of land by cancellation of a fraudulent deed. Judgment for plaintiff, and appeals. Affirmed.

The other facts fully appear in the following statement by ELLIOTT, J.

Among other things, the complaint contains the following: "The plaintiff, John Wilson, complains of the defendant, Mulock, and for cause of complaint, that on, to wit, the — day of —, A. D. 1888, the firm of Mulock Brothers was a partnership composed of Ira A. Mulock and A. R. Gumaer, was indebted to him in the sum of six thousand dollars (\$6,000,) which sum was then due. By reason of the failure of said firm, and every member thereof, to pay him his said demand, he commenced an action at law in this court on the 24th day of February, 1888, against the said firm of Mulock & Co., and on the same day caused a writ of attachment to be issued out of court against the property of the said partnership, and each member thereof, to secure the same; and, there being no partnership, the same was levied upon, and the same was levied upon the 24th day of February, 1888, upon block 9, in Canon City, Fremont county, Colorado, as the property of the said

¹ Rehearing denied February 5, 1894.

lock, and the same was then and there the sole property of said Ira Mulock. That afterwards, and on the 12th day of April, 1888, plaintiff recovered judgment against the said firm of Mulock Bros. & Co. for the sum of six thousand dollars, (\$6,000,) and costs of suit, in this honorable court, amounting to six thousand and thirty-two dollars and twenty cents, (\$6,032.20.) Plaintiff further shows that by virtue of the levy of his said writ of attachment on said lot 14, in block 9, as aforesaid, he acquired a lien thereon prior and superior to that acquired by any other person or persons; that, when said writ was levied, the said premises were the sole and exclusive property of the said Ira Mulock, and no other person or persons had any equitable right therein. Complainant further shows: That on the 1st day of May, 1888, he sued out of this honorable court a writ of execution upon his said judgment, and caused the same to be levied on said lot 14, in block 9. That under such levy the sheriff of Fremont county made due advertisement of the notice of the sale of the said property, to wit, by advertisement in the Fremont County News, a weekly newspaper published in said Canon City, the first publication thereof being on the 10th day of May, 1888, and the last thereof being on the 31st of said month, 1888; and on the 4th day of June, 1888, in pursuance of the commands of said writ of execution and the said notice of such sale, the said sheriff offered said premises for sale at the front door of the courthouse in said Fremont county, between the hours of 10 o'clock A. M. and 5 o'clock P. M., and then and there sold said premises to said plaintiff, he being the highest and best bidder therefor, having bid the sum of six thousand dollars (\$6,000) for said premises, which said sum was greater than that bid by any other person for said property at said sale. That thereby the said judgment theretofore obtained by plaintiff against the said Mulock Bros. & Co. was satisfied and credited to the extent of six thousand dollars, (\$6,000.) Plaintiff further shows: That since the said 4th day of June, 1888, when said sale of said premises was made by said sheriff, and bought by complainant as aforesaid, there has been no payment of said judgment, or any part thereof, made by Ira Mulock, or by any person for him, nor by any one claiming any interest in said premises, nor has there been any redemption of said premises from said sale; and that on the 4th day of March, A. D. 1889, plaintiff, by force of law, became and was entitled, in law and equity, to demand and have, of and from said sheriff, a deed conveying to him all the right, title, and interest of the said Ira Mulock in and to the said land and premises; and on the 7th day of March instant the said sheriff, in pursuance of law, did execute and deliver unto plaintiff a deed by which, as sheriff, he conveyed all the right, title, and interest, in law and

equity, of the said Ira Mulock in and to said lot 14, in block 9, in the town of Canon City, all of which will more fully and at large appear, reference being had thereto. That by force and virtue of the premises plaintiff became, was, and is now the owner of the whole of said premises in fee simple absolute. And, for a further cause of complaint in this behalf, plaintiff shows that for two years and more last past the said Ira Mulock has been largely indebted and in falling circumstances, unwilling and unable to pay his debts; that, intending and contriving how to cheat and defraud his creditors, and to so dispose of and secrete his property, and all thereof, that his said creditors would be unable to subject the same to the payment of their claims and demands, on or about the 20th day of December, 1887, secretly and fraudulently conveyed the said lot 14, in block 9, in Canon City, unto said defendant, Peter Mulock; that said Peter is the son of said Ira; that said Peter then was, and always before that time was, and still is, a young man, unmarried, of no means or estate of any kind or value, and wholly dependent upon said Ira, his father, for support; that the nominal consideration for said conveyance was twelve thousand dollars, (\$12,000,) and payable in ——— years, at the rate of ——— per cent. per annum; that no money in hand was paid on said conveyance by said Peter, nor has any part of said pretended price ever been paid by him to said Ira Mulock, or to any other person representing him; and plaintiff charges the fact to be that said defendant, Peter, took said conveyance of said premises with notice of the fraudulent intent and purpose of the said Ira Mulock, then and there designing and intending to aid and assist the said Ira in his fraudulent purpose aforesaid, or that the said conveyance to the said Peter by the said Ira was then and there intended by the latter to be a gift to the said Peter, well knowing, then and there, his inability to pay his just debts, and was so accepted by the said Peter, and it was then and there understood by, and agreed by and between the said parties thereto, that no consideration was to be expected of, or paid by, the said Peter. * * * In consideration of the premises, plaintiff prays, first, that the said pretended deed of conveyance from the said Ira Mulock to the said defendant, Peter, be decreed fraudulent and void, and for naught held against the plaintiff, and that the same be canceled and set aside."

Westcott & Rizer, for appellant. Macon & Macon and Joseph H. Maupin, for appellee.

ELLIOTT, J., (after stating the facts.)
1. The only matter assigned for error is that the complaint does not state facts sufficient to constitute a cause of action. The defendant did not demur nor otherwise object to

the complaint, for any cause, in the trial court, nor was any motion in arrest of judgment interposed. An objection made for the first time in an appellate court is viewed with judicial disfavor, even though the objection be one which the Code permits to be raised at any time. In *Gelston v. Hoyt*, 13 Johns. 575, Chancellor Kent said: "A party acts against good conscience if he will not come forward and disclose his reasons, when called upon by the proper tribunal, but reserves himself for another court, and for the cold, hard purpose of accumulating costs, or of depriving his adversary of the opportunity of correcting his error." In determining the sufficiency of pleadings upon demurrer, the rule at common law was that the allegations should be construed most strongly against the pleader. After verdict, however, the rule was different; a fortiori on appeal or error, where no objection has been interposed at nisi prius. In the present case, therefore, if in any aspect the complaint states facts sufficient, in substance, to constitute a cause of action, the judgment of the district court must be upheld. Code, § 78; Bliss, Code Pl. §§ 435-438 et seq.

2. The complaint under consideration is not, strictly speaking, a creditors' bill. The action was brought to cancel a deed to real estate on the ground that the deed was and is fraudulent and void as to plaintiff, a creditor of the grantor. The action is of such a nature that it was not necessary that the complaint should allege the issuance of execution in the original suit, and a return nulla bona; nor was it necessary that plaintiff should have been in possession of the land in order to maintain the action. These questions have been much considered by this court, and the doctrine has been announced that, "where a party can only assert an equitable title to real property, though his interest may be full and complete,—as, where there is some trust to be declared, or legal title to be extinguished, some instrument not void on its face to be canceled or corrected, or other obstacle to be removed, before his rights can be made manifest,—he may, though out of possession, under a system of procedure like ours, have his equitable remedy, and may unite with it any appropriate cause of action through which he may secure the full and adequate relief to which he may be entitled;" and, further, "that a person having procured a sheriff's deed to land, based upon valid proceedings, may maintain an action to set aside and cancel a deed given by the judgment debtor before the recovery of the judgment with intent to defraud the judgment creditor; and it is not necessary that such party should be in possession of the premises at the time of instituting such action. A judgment creditor desiring to set aside a supposed fraudulent deed of real estate may bring his action therefor to test the validity of the deed before attempting to subject the premises to

execution sale, or the purchaser, at sale, may bring his action to remove cloud from the title by canceling the supposed fraudulent deed, and to recover possession of the premises." See *Bankton*, 13 Colo. 249, 22 Pac. 444, and cases there cited.

3. This cause was tried upon the facts and evidence given in open court. Findings and decree were in favor of the plaintiff. Appellant has not, by bill of exceptions, preserved the evidence, nor a motion or exception to the proceedings in the trial court. It must therefore be presumed that the proceedings were regular, and the evidence fully sustained all the allegations of the complaint. In respect the case is essentially different from the case of *Burdsall v. Waggoner*, 258, so much relied upon by appellant. In the *Burdsall* Case, Mr. Justice Wells, delivering the opinion of the court, said: "The bill charged the grantee with knowledge and participation in, the fraudulent conveyance of the grantor, as well as a total want of any consideration whatever. These allegations are denied in the separate answers of the defendants, and no proof was made, nor was any evidence attempted to be introduced, touching any of these allegations."

4. In the present case the complaint alleges, and (as must be presumed) the evidence fully proved, that the conveyance made by the father to the son with intent to defraud his creditors, was made when the grantor was "largely indebted and in embarrassed circumstances, unwilling and unable to pay his debts;" that it was made with intent on the part of the grantor to cheat and defraud his creditors; and that the plaintiff received the conveyance with notice of the fraudulent intent. Under such circumstances it is immaterial whether the indebtedness to plaintiff accrued before or after the making of the fraudulent conveyance. The conveyance having been made without consideration and with intent to cheat and defraud the creditors of the grantor, was fraudulent and void as to subsequent, as well as to prior creditors; and so the land in the hands of the fraudulent grantee was as much subject to the attachment and execution of the plaintiff as though the fraudulent deed had been executed. As to plaintiff, the land still belonged to the grantor. *Marston*, 54 Me. 476; *Weightman v. Newman*, 17 Ill. 287; *Newman v. Willetts*, 52 Ill. 171; *Wilcox v. Morgan*, 2 Colo. 12. Justice Wells, delivering the opinion of the court, said: "A conveyance which is only voluntary, but animated by a fraudulent and active intent to defraud existing creditors, is void, not only as to these creditors, but to subsequent creditors as well." See cases there cited; also, *Gregory v. Newman*, 12 Colo. 382, 21 Pac. 489.

5. The separate property of each of the parties in the first suit was subject to at-

and execution to satisfy plaintiff's judgment against the firm. Partners are jointly and severally liable for the debts of the partnership; and by statute, in this state, every interest in land, legal and equitable, is subject to levy and sale under execution, unless occupied as a homestead. Gen. St. § 1883; *Randolph v. Daly*, 16 N. J. Eq. 316.

6. It was not necessary to allege the insolvency of each individual member of the firm of Mulock Bros. & Co., nor to allege, in *haec verba*, that the fraudulent conveyance complained of embarrassed plaintiff in obtaining his deed or judgment. The complaint states that there was no partnership property to be found upon which to levy plaintiff's attachment; and it may be readily gathered from the allegations of the complaint that plaintiff was, and has been, embarrassed in collecting his debt by reason of the fraudulent conveyance. *Dunham v. Cox*, 10 N. J. Eq. 437. Direct and positive averments showing plaintiff's embarrassment would doubtless have been made if the complaint had been challenged on that ground in the trial court. In *Henry v. Insurance Co.*, 16 Colo. 184, 26 Pac. 318, it is said: "Mere uncertainty or ambiguity in the averments of the petition should not be held sufficient to defeat the right of intervention without giving the usual opportunity to amend." In this connection the language of the opinion in *Schilling v. Rominger*, 4 Colo., at page 106, is also in point. That suit arose when suits in chancery and actions at law were necessarily separate, distinct, and independent proceedings. Hence, the objection that the complaint did not contain an averment "that complainant was without a full, complete, and adequate remedy at law" was considered an objection to the jurisdiction of the chancery court. Under the present practice, such an objection is not so classified. The first ground of demurrer under the Code (section 50) is "that the court has no jurisdiction of the person of the defendant or the subject of the action." The objection "that the complaint does not state facts sufficient to constitute a cause of action" is the sixth ground of demurrer. The distinction between these grounds of objection is sometimes lost sight of by those accustomed to the nomenclature of our former practice. Under the present practice it certainly does not follow, because a complaint does not state facts sufficient to constitute a cause of action, that the court has no jurisdiction of the subject of the action. If the *Schilling-Rominger* Case had arisen under the Code, the objection to the complaint would not have been considered jurisdictional, and, being grounded upon the absence of form in the averments, would not have prevailed, because made for the first time in the appellate court, thus depriving plaintiff of an opportunity for amendment. In our opinion, none of the objections urged by counsel

against the complaint are available on this appeal. The judgment of the district court is accordingly affirmed. Affirmed.

KEILKOPF v. CITY OF DENVER.

(Supreme Court of Colorado. Jan. 5, 1894.)

INTOXICATING LIQUORS—MUNICIPAL REGULATIONS
—VALIDITY OF ORDINANCE—SALES WITHOUT LICENSE.

1. The general rule is that a state legislature has authority to regulate, control, and restrain the traffic in intoxicating liquors within its own borders. Such authority belongs to the police power of the state, and may, subject to constitutional restrictions, be delegated to the local legislative bodies of municipal corporations.

2. By the Denver charter the city council is authorized by ordinance to license, or to prohibit and suppress, dramshops. Under such grant of authority an ordinance prescribing a fine not exceeding \$200 for the keeping of a dramshop within the city limits without a license is valid.

3. An application for the renewal of a license, accompanied by a deposit of the license fee, but without procuring the license, is no defense to the charge of keeping a dramshop without a license, especially where the renewal is grantable only in the discretion of the city council.

(Syllabus by the Court.)

Appeal from Arapahoe county court.

Christian Keilkopf, having been convicted of violating an ordinance of the city of Denver, appeals. Affirmed.

The other facts fully appear in the following statement by ELLIOTT, J.:

Action for violation of city ordinance. Defendant, having been adjudged to pay a fine of \$105 and costs, brings his appeal to this court.

From charter of city of Denver: "The city council shall have power by ordinance: * * * Twelfth. (Exclusively subject to the general law of the state, but not at a lower price than six hundred dollars, to keep open until twelve o'clock; nor lower than eight hundred dollars to keep open until two o'clock; nor lower than one thousand dollars to keep open all night.) To license and tax tippling houses, dram shops, billiard tables and bowling alleys, and selling or giving away of any intoxicating or malt liquors by any person within the city, and to regulate the same; provided, that no license shall be issued to keep any liquor saloon or dram shop, except on petition of the owners of a majority of the real estate within the frontage of the block in which said business is to be carried on. When the person applying for such license has fully complied with the laws and ordinances applying thereto, the city council may order such license issued; provided, however, that such license may be renewed from time to time, at the discretion of the city council, for a period not exceeding three years, without further petition. No license shall be issued for a saloon or dram

shop located within five hundred feet of any church or school building; the measurement to be along the same street on which the church or school building fronts, and along the adjoining side streets in the case the license is sought for a dram shop or liquor saloon on such side street. Thirteenth. To prohibit and suppress dance houses, tippling houses, dram shops, opium joints, gaming, gambling houses, dealing in lottery tickets, prize fighting, cock fighting, dog fighting, bawdy houses, disorderly houses, houses of ill-fame or assignation, or any place or resort for the practice of lewdness or fornication, or notoriously reputed to be such, whether kept or frequented by one or more persons, and to destroy instruments of gambling." See Sess. Laws 1889, p. 126, amending act of 1885, (Sess. Laws, pp. 81, 82.)

From ordinances of city of Denver: "Section 1. Whoever within the corporate limits of the city of Denver, not having a license to keep a dram shop or tippling house, shall, by himself or another, either as principal, agent, clerk or servant, directly or indirectly, sell or give away any intoxicating or malt liquors, whether the same be in bottles, jugs, glasses, or any other instrument or thing, to be drunk upon the premises, or in any adjacent room, building, yard, premises or place of public resort, shall upon conviction be fined not less than ten nor more than two hundred dollars for each offense."

Agreed facts in the case: "It is agreed between the parties to the suit that the defendant was keeping a dramshop in the city of Denver, and that he sold liquor, which was consumed, and which was sold for the purpose of being consumed, on the premises of this dramshop, on the 14th day of October, 1889, and that the liquors so sold were intoxicating and malt liquors. It is also admitted that the defendant is so operating and running this dramshop without a license of the city of Denver. It is also admitted that said dramshop is within less than five hundred feet of a church, but across the street from a church, which was used for religious purposes at the time of the bringing of this suit, on the 14th day of October, 1889. It is also agreed that on the 4th day of October, 1889, the defendant made application and tendered the money to the city treasurer for a renewal of his saloon license, having received a license from the city council in 1882 upon the usual petition and bond; that in each subsequent year following the year 1882 he was granted a renewal of his license in periods of six months each up to the 4th day of October, 1889; that on the 21st day of October, 1889, he deposited with the city treasurer of the city of Denver the sum of three hundred dollars for a renewal of his license for the period of six months, and received a receipt from the treasurer for that amount; but that the city treasurer refused to grant him a renewal of his license for the

period of six months. It is also admitted that the defendant has made no application to, or filed a petition of the owners or majority of the real estate within the block of the block in which said business is carried on with, the city council, within three months for granting a license to run a dramshop this number, at the place where this dramshop has been open and operated by the defendant since the year 1882. It is also admitted that this money is still in the hands of the treasurer, and has never been paid to the defendant."

Assignments of error: "(1) The finding of the court below is contrary to the evidence; (2) the finding is contrary to the law."

M. B. Carpenter, for appellant.
Shafroth, G. W. Whitford, and A. J. Smith, for appellee.

ELLIOTT, J., (after stating the case.)
1. The general rule is that a state legislature has authority to regulate, control, and restrain the traffic in intoxicating liquors within its own borders. Such authority is derived to the police power of the state, and is not subject to constitutional restrictions, except as related to the local legislative bodies of municipal corporations. The authority is exercised with the view to lessen poverty, pauperism, and crime, conserve public peace, protect life and property, and promote the general welfare of society to the extent to which such authority should be exercised, and whether it should be exercised by the enactment of general laws or by the adoption of local municipal ordinances, or both, are questions of legislative expediency, with which judicial officers are not charged with responsibility in the first instance. But, when the legislative power has adopted valid statutes regulating or restraining the traffic in intoxicating liquors, the courts are bound to construe and enforce such laws in a fair and impartial manner. Such qualification of the rule above stated as may rest upon the paramount authority of the national constitution need not be considered in the present case. *Cooley, Com. v. Blackington*, 1 D. C. (6th Ed.) p. 716, and notes; 1 D. C. Corp. (4th Ed.) § 141, and notes; *Barrie*, 34 N. Y. 657; *State v. Doan*, Wis. 277; *Com. v. Blackington*, 24 F. Supp. 273; *Mugler v. Kansas*, 123 U. S. 623, 8 S. Ct. 273; *Kidd v. Pearson*, 128 U. S. 1, 8 S. Ct. 6.

2. The ordinance which defendant was charged with violating was enacted in pursuance of specific and definite legislative authority. No question is raised as to the validity of such delegated power. The ordinance cannot be impeached or set aside on the ground that the courts may deem it same unreasonable or against sound public policy. It is not as though the ordinance had been passed under a general grant of legislative power.

authority. See Sess. Laws 1889, p. 126, amending paragraphs 12 and 13, § 20, art. 2, Denver Charter 1885; 1 Dill. Mun. Corp. § 328; Phillips v. City of Denver, 19 Colo. 34 Pac. 902. In behalf of defendant, it is contended that, inasmuch as the charter (paragraph 12) prohibits the issuing of licenses for any saloon or dramshop located within 500 feet of any church or school building, the municipal authorities are deprived of all jurisdiction in respect to dramshops within such 500-foot limit, and that defendant is not amenable to the ordinance, because he kept his dramshop within the 500-foot limit. This argument has the merit of novelty as well as ingenuity, but it ignores altogether another provision of the charter. By paragraph 13 the city council is authorized to prohibit and suppress tippling-houses and dramshops. This provision is in no way qualified or complicated by the 500-foot limit. It applies to the whole city and every part thereof. It was therefore competent for the city council to provide by ordinance that any person keeping a dramshop or tippling-house anywhere within the limits of the city without a license should be subject to the penalty imposed by the ordinance.

3. It appears that defendant had received a license for his dramshop in 1882, and that the same was renewed at intervals of six months up to October, 1889. It is now claimed that he was entitled to a renewal of his license for six months longer upon a deposit of \$300 with the city treasurer. He made such deposit, but his application for a license was refused. Such application and deposit constituted no defense to the charge. He did not procure the license, but he did keep his dramshop open. A license granted might have constituted a defense; but a license applied for, accompanied by a deposit of the license fee, was no defense. To hold otherwise would violate not only the letter of the law, but would ignore the authority and discretion of the city council altogether in such matters. State v. Jamison, 23 Mo. 330; Kadgihn v. City of Bloomington, 58 Ill. 229. The record before us does not show the present case to be one of peculiar hardship. It does not appear that the city treasurer has ever refused to return the \$300 to defendant, nor does it appear that defendant was entitled to a renewal of his license. It is true, paragraph 12, above cited, provides that a license may be renewed from time to time, at the discretion of the city council, for a period not exceeding three years, without further petition; but it does not provide that such license shall be renewed for any period. On the contrary, the renewal is expressly made a matter of discretion with the council. Besides, in this case the three years had elapsed more than twice over, and defendant had not presented the petition of any owners of real estate within the frontage of the block in which his dramshop was carried on. Furthermore, it

is admitted that the dramshop was within 500 feet of a church used for religious purposes. Considering the purpose and intent which the legislature must have had for excluding dramshops for a distance of 500 feet from churches and school buildings, there can be no doubt that the 500-foot limit applies to renewals as well as to original licenses. The law does not provide that a license for a dramshop already issued shall become void in case a school building or church shall be located within 500 feet of such dramshop. There is, therefore, no danger of a forfeiture of money already paid and accepted. But the law does declare that "no license shall be issued for a saloon or dramshop located within five hundred feet of any church or school building." This clause of the statute is inserted in such close connection with the provision for the renewal of licenses that, if it had been intended to apply to original applications only, it is not probable that such unqualified negative words would have been employed. It would be a narrow construction to say that the language does not include the renewal, as well as the issuance, of licenses. The renewal of a license is equivalent to the issuance of a license, in legal as well as practical effect. Perceiving no error in the record, the judgment of the county court must be affirmed. Affirmed.

UNION PAC. RY. CO. v. TRACY.

(Supreme Court of Colorado. Jan. 15, 1894.)

CONSTITUTIONAL LAW—FIRES SET BY RAILROADS—ACTION FOR DAMAGES—QUESTION FOR JURY.

1. Gen. St. p. 812, § 2798, making railroad corporations liable for all damages by fire caused by operating their lines, is constitutional. Railway Co. v. De Busk, 20 Pac. 752, 12 Colo. 294, followed.

2. In an action for damages from fires caused by defendant railway company, the defense of contributory negligence must be pleaded.

3. The overruling of defendant's challenge of a juror for cause, if error, was not prejudicial, where defendant had not exhausted its other peremptory challenges.

Appeal from district court, Boulder county.

This action is brought by H. S. Tracy, under the act of March 31st, (Sess. Laws 1887, p. 368,) to recover damages resulting from fires alleged to have been caused by the Union Pacific Railway Company in operating its railroad. Plaintiff below recovered a judgment, from which the railway company prosecutes this appeal. Affirmed.

Teller & Orahood and C. M. Kendall, for appellant. G. A. Garard, for appellee.

GODDARD, J. The main contention of appellant is that the statute under which the action is brought is unconstitutional, in that it deprives the railway company of its property without due process of law. This question was disposed of by the decision of this

court in the case of *Railway Co. v. De Busk*, 12 Colo. 294, 20 Pac. 752, wherein the constitutionality of the statute is upheld.

It is further contended that the court erred in refusing to submit the question of contributory negligence to the jury. If the defense of contributory negligence is available in actions of this character, it could not be invoked under the issues in this case. There is no averment in the pleadings upon which this defense could have been based. *Railway Co. v. Ryan*, 17 Colo. 98, 28 Pac. 79. And, furthermore, there is no testimony disclosed in the record tending to sustain such a defense, if it had been pleaded. The court below, therefore, properly refused to submit this question to the jury.

The error predicated upon the overruling of appellant's challenge of the juror S. D. Shumate, for cause, is without merit. The record fails to disclose wherein appellant was prejudiced by the ruling of the court, even if it was erroneous. It does, however, appear that the juror was peremptorily challenged by appellant, but it does not appear that it had exhausted its other peremptory challenges. Upon this state of the record, the ruling of the court did not constitute prejudicial error. *Minich v. People*, 8 Colo. 440, 9 Pac. 4. Upon a careful examination of the record, we can find no error that will justify a reversal. The judgment is accordingly affirmed.

KINDEL v. BECK & PAULI LITHO-GRAPHING CO.¹

(Supreme Court of Colorado. Dec. 22, 1893.)

APPEAL—ENTRY OF JUDGMENT—CLERICAL ERROR—FOREIGN CORPORATIONS—RIGHT TO SUE—INTERSTATE COMMERCE.

1. Where the clerk by mistake enters a judgment for a sum in excess of that ordered by the court, and the court subsequently orders the entry to be corrected, no appeal lies on account of such erroneous entry.

2. Failure of a foreign corporation doing business in Colorado, to file a certificate, as required by Const. art. 15, § 10, and Mills' Ann. St. §§ 499, 500, subjects its officers, agents, and stockholders to certain personal liabilities, but does not affect its right of action against a resident of the state for goods sold and delivered.

3. A state statute, requiring a foreign corporation to file a certificate before bringing an action for goods sold and delivered in such state, but made at its place of business in another state,¹ is a regulation of interstate commerce, in violation of Const. U. S. art. 1, § 8.

Appeal from district court, Arapahoe county.

Action by the Beck & Pauli Lithographing Company against George J. Kindel on contract. From a judgment for plaintiff, and an order correcting such judgment, defendant appeals. Affirmed.

The other facts fully appear in the following statement by HAYT, C. J.:

The contest in this case is over \$7.73. The

controversy arose as follows: In 1889 the appellee, the Beck & Pauli Lithographing Company, entered into a contract with appellant, Kindel, by the terms of which appellee agreed to furnish a certain number of 5,000 calendars at 17½ cents each, for a total of \$875. The calendars were printed and furnished, and accepted by appellant. The bill for the same was presented to appellant, and retained a charge of \$15.27 for boxing and freight. This bill appellant refused to pay, and thereupon suit was instituted. Appellee, in its complaint, for a first cause of action alleges the furnishing of the calendars under the contract, and the payment by appellant of the sum of \$15.27 for boxing and freight on the same, and asks for judgment for the same, with interest. It is with the first cause of action alone that we have to deal in this appeal. To this first cause of action, defendant, by answer, interposed several defenses. The first consists of alleging that the effect that plaintiff was a foreign corporation, and had not complied with the requirements of the state of Colorado with reference to filing a certificate as required by the constitution. The second plea to this cause of action consists merely of an offer on the part of the defendant to pay the sum of \$875, a sum which he was indebted in any event to the plaintiff. And the defendant further alleges "that, as to said \$875, he is still willing to pay, and offers to bring same into court." The plaintiff filed a general demurrer to the first defense. It replied to so much of the second defense as constituted an answer, that part of the first cause of action as related to the item of \$15.27. In the meantime, of the pleadings, plaintiff, upon notice, moved for judgment by default for the unpaid portion of his claim. The court sustained this motion, and rendered judgment accordingly on April 23, 1890. From this judgment defendant prayed an appeal, which was allowed, and the amount of the bond fixed by the court. An appeal bond was filed and docketed on May 1, 1890. Thereafter, before the record had been lodged in this court, the same term of the district court as that at which the judgment was rendered, after due notice, plaintiff's counsel moved the court to set aside the entry of the judgment by deducting from the sum of \$7.73, which was the amount of the appeal bond, the sum of \$7.73. The defendant thereupon moved for another appeal, which was allowed, on the condition that he file an appeal bond for a certain time. The entire proceedings are set out in the record now before the court.

Markham & Carr, for appellant.
Starkweather & Dixon, for appellee.

HAYT, J., (after stating the facts of the case) first assignment of error has reference to the judgment of April 23, 1890, for \$882.73. This judgment was excessive to the extent of \$7.73 has at all times been admitted by the appellee, and the only question to

¹ Rehearing denied January 15, 1894.

sidered with reference thereto is as to the right of the court below to correct the same, as was attempted by the judgment entered June 30, 1890. It is apparent from the record before us that the excess in the amount of the first judgment resulted from a clerical mistake of the clerk in entering the same. It was not the judgment asked for by the plaintiff nor the one ordered by the court. Appellant, however, enters into an argument to show that the excess in the judgment resulted from a judicial, and not a clerical, error. If this were true, there is excellent authority in support of the right of the trial court to correct the error, even after the appeal was taken to this court. See *Richardson v. Mellish*, 3 Bing. 346, 14 E. C. L. 366; *Rew v. Barker*, 14 Amer. Dec. 515, and notes; *Cunningham v. Fontaine*, 25 Ala. 644; *Dow v. Whitman*, 36 Ala. 604; *Hunt v. Wallis*, 6 Paige, 371; *Browner v. Davis*, 15 Cal. 9; *Tryon v. Sutton*, 13 Cal. 490. In *Richardson v. Mellish*, supra, an application to amend was made in the lower court, pending an appeal. In allowing the amendment, Best, C. J., said: "If we do not make this amendment, the court of king's bench must give judgment on a false record. We are doing what will enable the court of king's bench to do justice. * * * I have no doubt that the king's bench will suspend their judgment; but, should we be disappointed in this, and the defendant in error, instead of taking a venire de novo, brings a writ of error, it will be our duty to certify to the house of lords, as the court of king's bench did in *Dunbar v. Hitchcock*, 3 Maule & S. 594, that the record sent to that house is a defective record, which will enable the house of lords to set this matter right." In *Cunningham v. Fontaine*, supra, the judgment of the trial court was amended in that court nunc pro tunc, pending a writ of error, and the amended judgment certified to the appellate court, and a reversal thereby avoided. In the case before us the error was purely clerical. The motion of plaintiff was not for a judgment for \$882.73, but for a judgment for that part of the first cause of action not controverted, and the order of the court follows closely this language. It is as follows: "It is ordered by the court that judgment by default be entered herein against said defendant upon that part of plaintiff's 'first cause of action' not controverted by said defendant's answer, and let the same be recorded in the judgment book." If anything additional is necessary to establish the fact that the excess in the amount of the judgment of April 23, 1890, resulted from a mistake on the part of the clerk, it is to be found in the judgment of the district court rendered on the 30th day of June, 1890, in which it is specifically adjudged that the error in the former judgment resulted entirely from a mistake in the entry thereof. It has been held by this court that a judgment "is what is considered and ordered by the

court, and not necessarily what is entered by the clerk." *Gaynor v. Clements*, 16 Colo. 209, 26 Pac. 324. Appellant cannot, by appealing from a judgment never rendered, compel this court to decide such an appeal, or deprive the trial court of the power of correcting the unauthorized act of its clerk. In so far as the views expressed in *Breene v. Booth*, 8 Colo. App. —, 33 Pac. 1007, are inconsistent herewith, they do not meet with the approval of this court. The claim of appellant to the effect that he has a right to have the first judgment corrected in this court, rather than the court below, has no foundation in logic or law. Reviews are had and appeals allowed for the purpose of correcting errors that the trial court is unwilling or unable to correct. In this case the error was fully corrected in the trial court, and the occasion for an appeal on account of the excess in the amount of the judgment was thereby avoided.

The remaining assignments of error may be considered together. They relate to the right of the court to enter judgment without first disposing of the demurrer to the first defense. Undoubtedly, good practice required a ruling directly upon this demurrer. But to entitle appellant to any relief in this court by reason of the omission he must not only show that error intervened, but also that he was prejudiced thereby. The first defense is based upon the failure of appellant, a corporation organized under the laws of another state, but doing business in this state, to file a certificate as required by section 10, art. 15, Const., and by sections 499, 500, Mills' Ann. St. Although by such failure all officers, agents, and stockholders of the company subject themselves to certain personal liabilities, it is no defense to the present action. In case of noncompliance, the penalty of personal liability of officers, agents, etc., was deemed sufficient by the legislature, and will not be enlarged by the courts. This has been decided in a number of cases. *Utley v. Mining Co.*, 4 Colo. 369; *Insurance Co. v. Overholt*, 4 Dill 287; *Manufacturing Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739; *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93. In this case appellee contracted to make the calendars at its place of business in Wisconsin, and deliver them to appellant in Colorado. To give the state constitution and statutes the construction claimed by appellant would be to permit a state to regulate commerce among the states, authority for which is conferred exclusively upon congress. Const. U. S. art. 1, § 8. See opinion by Mr. Justice Matthews in *Manufacturing Co. v. Ferguson*, supra. For these reasons the first defense ought to have been held insufficient, and the demurrer thereto sustained. The same result was, however, reached upon the motion for judgment upon the pleadings. The defect in this defense was not such as could have been cured by amendment, hence appellant is in

no way prejudiced by the course adopted. The error in the proceeding was one of form, and not of substance, and will not avail. Civil Code 1897, § 78. The judgment will be affirmed.

PHILLIPPI v. LEET.¹

(Supreme Court of Colorado. Dec. 22, 1893.)

ESTOPPEL BY DEED—ACTION TO QUIET TITLE—POSSESSION TO SUPPORT.

1. The grantor of a tract of land deeded a part to M., and then deeded a part to L., so describing it that it lapped 25 feet on M.'s part. Such incorrect description caused several conflicts in subsequent deeds of other parts, and the grantor requested all his grantees to quitclaim to him, that he might reconvey to them by deeds containing correct descriptions, which all the grantees but L. did. The grantor, in reconveying, deeded 19 feet of the lapped part to M., and the other 6 feet to L., and made up the balance of the 25 feet to each on the opposite sides of their respective parts. *Held*, that the grantor was a mere conduit through whom title passed to correct a description, so that M.'s quitclaim deed did not inure to L.'s benefit, under Gen. St. c. 18, § 201, and vest the title to all the lapped part in him, as a grantee with warranty from one who subsequently acquired title.

2. The land conveyed was on an open prairie. L. surveyed the land described in his deed, and placed stone monuments at the corners; and M. subsequently surveyed, staked, and fenced the land described in his deed. *Held*, that M.'s possession of the part which lapped was sufficient to support an action against L. to quiet title.

Appeal from district court, Arapahoe county.

Action by Valeria R. Phillippi against John E. Leet to quiet title. Judgment for defendant. Plaintiff appeals. Reversed.

The other facts fully appear in the following statement by GODDARD, J.:

The plaintiff below (appellant here) alleges, among other things, in her complaint, that she "is the equitable owner and in possession" of a certain piece of land situate in the northwest quarter of section 1, township 4 south, of range 64 west, 19.46 feet wide by 338.58 feet in length; that defendant wrongfully holds the legal title to such land, and asserts ownership thereof,—prays, among other things, that defendant be decreed to convey the legal title to her. Defendant denies her title and possession, alleges title in himself, and prays that the land in dispute be adjudged his property, etc. The facts, as admitted in the pleadings and sustained by the evidence, are, in substance, as follows: One John U. Gabathuler was the owner in fee simple of a strip of land lying in the northwest quarter of section 1, township 4 south, of range 64 west, 338.58 feet wide, and 2,332.42 feet long. On the 13th day of December, A. D. 1872, he conveyed by warranty deed to Alonzo M. Morrison an acre of said land, described by metes and bounds. That afterwards, and on the 30th

day of June, 1873, he attempted to convey by warranty deed to one Ananias H. Morrison two acres of said strip, describing the same by metes and bounds, but by mistake conveyed the land described in the latter conveyance on the south end of the acre there conveyed to Morrison 25.1 feet. That by several other deeds and sundry other conveyances he conveyed the remainder of said tract of land to other parties, and by reason of incorrect descriptions in the deeds several conflicts were incurred. Afterwards, and on the 30th day of June, 1885, Ananias H. Morrison executed a warranty deed to the defendant, John E. Leet, conveying the same land theretofore conveyed to him by Gabathuler. That he (Leet) shortly after discovered the mistake that had been made in the description by Gabathuler to H. Morrison, his father, and that by such mistake he had obtained title to the full amount of land intended to be conveyed to him, and learned of these other conflicts that existed between the land conveyed to other parties, and was further informed of the fact that there was sufficient land in the strip originally conveyed to Gabathuler that, with correct descriptions, would give each grantee the amount of land that he claimed,—thereby leaving certain hiatuses equaling the amount of the laps,—proposed to Gabathuler to execute quitclaim deeds from all his grantees, reconveying to him the legal title, so that (Gabathuler) might then execute quitclaim deeds back to the respective parties, with correct descriptions, and thus avoid the conflicts. That, in pursuance of this arrangement, Alonzo M. Morrison, grantor of the plaintiff, upon the understanding that all other parties had executed reconveyance deeds to Gabathuler in pursuance of this arrangement, including Leet among the number, on the 29th day of September, 1885, executed a quitclaim deed, thereby reconveying the title to the land originally conveyed to him to Gabathuler for this purpose. All other owners of the balance of the strip of land, except the defendant, Leet, likewise executed quitclaim deeds to Gabathuler, whereupon, by quitclaim deeds dated September 29, 1885, Gabathuler reconveyed the land to the respective parties the same amount of land they originally held, with correct descriptions, so as to avoid the original conflicts. The quitclaim deed so executed by Alonzo M. Morrison described the same land originally conveyed to him, except it omitted a strip 5.64 feet in width off the south end and added a strip of 5.64 feet on the north end of this acre, thus reducing the width of the area of conflict that originally existed between the land held by him and Leet to 19.46 feet. Gabathuler, also, on that day executed a quitclaim deed to Leet, including the 5.64 feet thus omitted on the south end of Morrison's land, and adding a strip of 19.46 feet in width on the south of the strip of land conveyed to him by H. Morrison.

¹ Rehearing denied, January 15, 1894.

wards, and on the 22d day of June, A. D. 1886, Alonzo M. Morrison conveyed by warranty deed to the plaintiff in this case the land described in the quitclaim deed from Gabathuler to him, which includes the strip in controversy. The facts that are disputed are as to the part that the defendant Leet took in the procurement of the quitclaim deeds aforesaid to Gabathuler, and as to his agreement to reconvey by quitclaim deed as the others did. He admits that he first proposed the plan to Gabathuler, and, under the employment of Gabathuler, interviewed all the other parties, and urged them to enter into the arrangement, but claims that before the matter was consummated, and when he learned that the changing of his lines would throw the south end of his land into what was supposed to be a prospective street, he declined to go further, and so notified Gabathuler, but he gave no notice to any of the other parties that he had abandoned the scheme. The evidence on the part of plaintiff is that he continued to act in the matter until the deeds were executed to Gabathuler, and that he accepted the quitclaim deed of Gabathuler to himself, above mentioned, under and in pursuance of this mutual arrangement. The court below found the issues in favor of the defendant, and adjudged him to be the equitable owner and entitled to the possession of the land, under and by virtue of section 201, c. 18, of the General Statutes of Colorado, which provides: "If any person shall sell and convey to another, by deed or conveyance purporting to convey an estate in fee simple absolute, any tract of land or real estate lying and being in this state, not being possessed of the legal estate or interest therein at the time of the sale and conveyance, and after such sale and conveyance, the vendor shall become possessed of, and confirmed in, the legal estate of the land or real estate so sold and conveyed, it shall be taken and held to be in trust, and for the use of the grantee or vendee, and the conveyance aforesaid shall be held and taken, and shall be as valid as if the grantor or vendor had the legal estate or interest at the time of said sale or conveyance." To reverse this decree, plaintiff prosecutes this appeal.

B. F. Harrington, for appellant. Robert E. Foote, for appellee.

GODDARD, J., (after stating the facts.) It is plainly apparent from the foregoing statement of facts that counsel for plaintiff, in stating her cause of action, was under a misconception of the nature of her title to the property in controversy, and as to the relation the defendant bears thereto, and consequently mistook the relief to which she is entitled. The allegation that she was but "the equitable owner," and that the legal title to the property was vested in defendant, Leet, was clearly erroneous. Yet, notwithstanding this, sufficient facts are stated

to constitute a cause of action entitling her to equitable relief, as it appears therefrom that plaintiff is the owner of both the legal and equitable title and in possession of the property, and that the transaction complained of has cast a cloud upon her title. By a decided preponderance of the evidence, it is shown that the defendant, Leet, was the prime mover, and instrumental, in procuring quitclaim deeds to be made by the various parties to Gabathuler for the purpose, as averred, solely to correct mistakes in former descriptions, and that, through his inducement, Morrison executed his quitclaim deed to Gabathuler for that purpose only. However, we regard it as immaterial what Leet's action was in the matter, since his connection with the transaction is material, if at all, only to show knowledge on his part (if that was necessary) of the purpose for which the quitclaim deed by Morrison was executed. Plaintiff's rights are in no way dependent upon the agreement alleged to have been made with Gabathuler, or upon what he did in carrying it out, as she is not seeking to enforce a performance of that agreement. Hence, we regard as of no moment the contention of counsel for appellee that the agreement, if made, was verbal, and within the statute of frauds. The evidence that Leet had entered into such an agreement, and that plaintiff's grantor, relying thereon, had executed his quitclaim deed, was offered by counsel for appellant under the mistaken notion that the title reconveyed by Morrison to Gabathuler had vested in Leet, and that it was necessary to show such fraud on his part as would estop him from claiming or withholding the title from plaintiff. But we regard this evidence of fraud as immaterial, as it is not necessary to invoke the rule of estoppel, because the reconveyance to Gabathuler by Morrison did not, by virtue of the statute relied on, vest in him either the legal or equitable title to the premises. The legal and equitable title being in Morrison at the time he executed his quitclaim deed of the 29th of September, 1885, and he thereby conveying only the legal title to Gabathuler, not for the purpose of reinvesting him with any interest or estate in the property, but simply for the purpose above stated, Gabathuler became a mere conduit through which such title passed, and in so passing it could in no sense or manner inure to the benefit of Leet by reason of his former conveyance. Our statute is but a legislative recognition of a rule of common law stated in Washburn on Real Property (volume 3, 4th Ed., p. 118, par. 50) as follows: "Where one conveys lands with warranty, but without title, and afterwards acquires one, his first deed works an estoppel, and passes an estate to the grantee the instant the grantor acquires his title." But an exception to this rule is stated in paragraph 51, as follows: "But if, after having made a conveyance with warranty, without having title, the estate comes to him as

a mere conduit in passing it from its owner through him to another person, it does not inure to the benefit of his original grantee." And as announced in *Sinclair v. Jackson*, 8 Cow. 544: "A conveyance to operate as an estoppel, it is necessary that it should be in the same right with the former one. To estop, a conveyance must be by one claiming under and in right of identically the same power and the same estate as he first conveyed." In *Kelley v. Jenness*, 50 Me. 455, it was held that: "A trust estate does not, like an absolute estate, inure to the benefit of the grantee of the trustee, when the latter made the conveyance in his individual capacity." It is unnecessary to multiply authorities on a proposition so manifestly just and equitable. It follows that the only title which the defendant has to any portion of the land comprised in the original conflict is to that portion, only, conveyed by Gabathuler's quitclaim deed to him. This deed includes only the 5.64-foot strip, and no part of the 19.46-foot strip involved in this controversy. The legal and equitable title to the latter was in Alonzo M. Morrison, and was by him conveyed to plaintiff by his deed of June 22, 1886.

It is further urged that the plaintiff did not have the possession which is requisite to maintain an action under section 255 of the Code of 1887. The evidence on this point was that the land was open prairie; that defendant, in the summer of 1885, had a survey made of the tract described in his conveyance from Hearon, and placed stone monuments at the northeast and northwest corners of the tract of land so described, and upon the land then in possession of plaintiff's grantor; that, before commencing this action, plaintiff had her tract of land surveyed and corners staked, and erected a fence around it. Counsel for appellee contends that plaintiff, in fencing the land theretofore surveyed and marked by Leet, committed a trespass, and took the actual possession in this manner for the purpose of bringing this suit. If this be true, it is immaterial. A possession so obtained is sufficient for the purposes of this action. *Mining Co. v. Marsano*, 10 Nev. 370; *Reed v. Calderwood*, 32 Cal. 109; *Calderwood v. Brooks*, 45 Cal. 519; *Gage v. Williams*, 119 Ill. 563, 9 N. E. 193. Furthermore, her possession was complete without these physical acts to evidence it. The law presumes the true owner to be in possession until adverse possession is shown to begin. The acts of Leet in placing the monuments as above described did not constitute a disseisin of plaintiff's grantor, who at the time, as owner in fee simple, was in possession; and the plaintiff, by his conveyance to her, was placed in his status, and at the time of the commencement of the action was in possession of the land, and entitled, in that regard, to maintain the action. The court below clearly erred in holding that the plaintiff's possession was not sufficient to entitle her to maintain the

action, and in adjudging defendant to be the equitable owner of the land in controversy, and entitled to the possession. It appearing beyond dispute that the plaintiff is the legal and equitable owner of the land, and it being necessary to resort to the records to allude to the record to explain the truth of the transaction through which defendant, Leet, seemingly obtained a title thereto, she is clearly entitled to a decree of defendant, Leet, adjudging the title to the land to be hers, and any cloud cast thereby upon her title to be removed, by a proper decree. The court below is therefore reversed, with direction to enter a decree in accordance with the views herein expressed. Costs and decree ordered.

UNION PAC. RY. CO. v. FOLEY
(Supreme Court of Colorado. Nev. 1886.)
OBSTRUCTION OF STREET BY RAILROAD
—ABUTTING OWNERS.

An abutting owner, suing a railroad company for misusing a street so as to obstruct it, unless he show special injury, not shared by the general public, from the obstruction of other parts of said street, can only recover for the obstruction of so much as is directly in front of his own premises.

Appeal from district court, Arapahoe county.

Action by Michael Foley against the Union Pacific Railway Company for damages for obstructing a street, and for a nuisance. Judgment for plaintiff. Reversed on appeal.

Teller & Orabood and C. M. Keane, appellants, Browne, Putnam & Prosser, appellees.

GODDARD, J. This is an action for damages occasioned by the unauthorized use by appellant of a public street in front of appellee's premises. It is conceded that the railroad company's tracks were laid across the street, and that the company has the right to operate its cars thereon for railroad purposes. The grievance complained of is stated as follows: "For six years defendant has had a three-rail track, and narrow gauge cars along the street, a public highway, between Eleventh and Nineteenth streets, in Denver, Colorado, during that period it has used almost daily for passing cars on and for standing, loading, unloading, and cleaning cars, so that the tracks and streets have been almost continuously occupied by cars of defendant, and access from one side of said street to the other has been rendered impossible. The said railway, at said point, during a long time, has not been used by defendant for ordinary railroad purposes, but has been converted into a yard, and thereby the said street as a public highway has been obstructed by defendant; that plaintiff, since April 14, 1883, has been, the owner in fee of lots 16 and 17, in block D

Denver, fronting 50 feet on Wynkoop street, between 18th and 19th streets; that freight cars, during past 6 years, have been almost continuously left standing on said track, in front of plaintiff's premises, and have been loaded and unloaded on wagons standing between the cars and said lots, thus preventing teams from passing and repassing in front of said lots, whereby the use of said street has been rendered dangerous and inconvenient, and plaintiff has been damaged in the sum of \$5,000." No cause for recovery is predicated upon the occupation of the street by the tracks of defendant company, or the operation of its cars thereon for ordinary railroad purposes; but the gist of the cause of action is the wrongful use of the street for loading and unloading cars in front of plaintiff's premises, and thereby shutting off all access from across the street, and obstructing public travel, by rendering the same dangerous and inconvenient. Such wrongful use of a public street may constitute a nuisance that might injuriously affect the right that plaintiff has therein as an owner of lots abutting thereon, and cause him special private damages, recoverable under proper averment and proof. But, waiving the question whether the complaint herein is sufficient to sustain a recovery at all, as it is not raised by counsel for appellant, we are clearly of the opinion that the court below erred in refusing instruction numbered 6, as prayed for by appellant. From the evidence introduced, it appears that cars of the defendant company were loaded and unloaded and cleaned along the entire length of block D, as well as in front of appellee's lots. The appellant asked the following instruction, which was refused: "No. 6. The court instructs the jury that they are not to consider in any way the use of Wynkoop street and the track therein by defendant, whether proper or not, except only so much as is directly in front of plaintiff's premises; and, if plaintiff is entitled to recover at all, it will be only for damages suffered on account of the improper use of that part of said street which is immediately in front of said premises." It is settled in this state that the unlawful obstruction of a public street, more or less remote from abutting property, if it causes a special injury thereto, entitles the owner of such property to a recovery therefor. *Jackson v. Kiel*, 13 Colo. 378, 22 Pac. 504. But the application of this principle is not invoked by the pleadings and evidence in this case. There is no allegation or proof that the obstruction of other portions of Wynkoop street, not in front of plaintiff's premises, caused him any special or peculiar damage, or any inconvenience that was not shared by the public generally. It in no way appears that ingress or egress to or from the property was cut off or materially affected by loading or unloading cars at such other points, and the damage, if any, was caused by the wrongful use of the

street in front of plaintiff's property. We think the recovery should have been thus limited, and the refusal of the court below to do so was an error prejudicial to appellant, and entitles it to a reversal of the judgment.

On Rehearing.

(Feb. 5, 1894.)

PER CURIAM. As indicated by the foregoing opinion, there is a manifest distinction between an action by the owner of abutting property for permanent damages occasioned by the construction and operation of a railroad through a public street in an ordinary, proper, and lawful manner and an action for the use of such street by a railway company in an improper manner. In actions of the former kind, the damages, if any, are for the diminution in the market value of the abutting property for any reasonable use to which the same may be put; and the statute of limitations begins to run in such cases from the time the railroad company first occupies the street for such purpose. In actions of the latter kind, the law in respect to nuisances in the public highway applies; and the cause of action, if it exists at all in favor of a private party, may arise each day so long as the nuisance continues. The leading cases in this state upon these subjects are *City of Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6, and *Jackson v. Kiel*, 13 Colo. 378, 22 Pac. 504. In the latter case, Mr. Justice Helm sustained the complaint, on the ground that it was "framed upon the theory of an unlawful obstruction or abatable public nuisance, whereby plaintiff suffered a special and peculiar private injury." In the present case it appears that a demurrer was sustained to the original complaint, apparently on the ground that the complaint was framed on the theory of permanent damages, and so was barred by the statute of limitations. The amended complaint, as shown by the former opinion, was obviously framed upon the theory that the manner of occupying and using the street by the defendant company, in front of plaintiff's premises, was a nuisance, from which plaintiff suffered peculiar injuries, not shared by the general public. Even if the complaint be held sufficient upon the latter theory, it was nevertheless necessary that the proof should show, not merely that plaintiff was injured by use of the street in an unlawful manner, but that the injury was different in kind from that suffered by the general public from the obstructions complained of. The fact that plaintiff had occasion to use the street more frequently than other persons for purposes of ordinary travel might make his injuries greater in degree, but not necessarily different in kind.

It has been strongly urged on the rehearing that the amended complaint alleges the use of the street in an improper manner the whole distance between Eighteenth and

Nineteenth streets; but it is not shown by the complaint that the injury thus occasioned to plaintiff differed in kind from the injuries suffered by the public generally, except, perhaps, in that portion of the street directly in front of his premises. In this respect the present case differs from the Kiel Case. The court should therefore have restricted the recovery as requested by the instruction quoted in the foregoing opinion. In *Frankle v. Jackson*, 30 Fed. 398, cited by counsel for appellee, the opinion of the court shows that the street was used in an unlawful and improper manner "on the side of the street adjacent to her [plaintiff's] property, and that this was done without her consent and without compensation." The decision does not militate against the views we have expressed, but confirms them in most particulars. The petition for rehearing must be denied.

UNION PAC. RY. CO. v. BENSON.¹

(Supreme Court of Colorado. Nov. 22, 1893.)

Appeal from district court, Arapahoe county.

Action by Christina Benson against the Union Pacific Railway Company for damages for a nuisance. Judgment for plaintiff. Defendant appeals. Reversed.

Teller & Orahood and C. M. Kendall, for appellant. Browne, Putnam & Preston, for appellee.

PER CURIAM. This action was brought by appellee as the owner of lots 18 and 19, in block D, in the city of Denver, and is similar to the case of *Railway Co. v. Foley*, 35 Pac. 542. This case was tried in conjunction with that case, before the same jury, and upon the same pleadings and evidence. For the reasons announced in that case, the judgment herein must be reversed.

EVERETT et al. v. TODD et al.

(Supreme Court of Colorado. Jan. 15, 1894.)

VENDOR AND PURCHASER—BONA FIDE PURCHASER—REVIEW ON APPEAL—CONFLICTING EVIDENCE.

1. Notice of an option for the purchase of a homestead claim before final entry does not bind a subsequent purchaser of such homestead claim after final entry, said option being void. Rev. St. U. S. §§ 2262, 2263.

2. When the evidence is conflicting, the verdict will not be disturbed.

Appeal from district court, Arapahoe county.

Action by William R. Everett and others against John W. Todd and others for specific performance of a contract of sale of land. There was judgment for defendants, and plaintiffs appeal. Affirmed.

A. B. Seaman, for appellants. H. B. Johnson, for appellees.

HAYT, C. J. On the 29th day of May, 1888, one John W. Todd was the claimant,

¹ Rehearing denied February 5, 1894.

under the homestead law of the States, of 160 acres of land in Douglas county, Colo., and Harriette E. Harsel, claimant, under the pre-emption law of the United States, of an adjoining tract. Upon this date, Todd gave a written option to the plaintiffs, W. R. Everett, V. Gray, and J. C. Carpenter, for the purchase of both of said tracts of land for the sum of \$2,100. This option, by its terms, expired on the 1st day of August, 1888. Afterwards, Mrs. Harsel obtained title to the tract claimed by her, and the same was conveyed to Todd, and by Todd to the plaintiffs. On the 16th day of October, 1888, Todd entered the land claimed by him under the homestead act at the land office at Denver, Colo. Thereafter, and on the 15th day of November, 1888, he gave a second option to the plaintiffs. This option covered the tract of land alone, and was not subject to the price mentioned in the option. For the sum of \$2,100, this being the same as the consideration mentioned in the first option, for both tracts. A part of this amount had been paid at the time of the exercise of this second option. On or about the 1st day of the following January, Todd gave to the knowledge of the plaintiffs, co-defendants, a homestead to his codefendants, Everett, Gray, and H. S. Persee, by warranty deed. Plaintiffs allege that defendants, Everett, Gray, and Persee had full knowledge of the contract bearing date November 15, 1888, at the time they acquired title to the 160 acres of land upon the payment of the sum of \$1,050, the balance of the sum of \$2,100, unpaid under the option. Issues having been joined upon the allegations of the plaintiffs, a trial to the district court resulted, and judgment for the defendants was rendered. Plaintiffs appeal.

The district court, from the evidence submitted, found—First, that both Brown and Persee purchased without notice of the existence of the contract of November 15, 1888; second, that this contract was entered into in consideration of a previous illegal contract, that plaintiffs were, for this reason, not entitled to its enforcement. The land claimed by plaintiffs had been previously conveyed to Brown and Persee. To entitle the plaintiffs to a judgment for specific performance it was upon them to show affirmatively that the purchase by defendants was without notice of the equities relied upon by plaintiffs. Between one claiming record title and one claiming under a prior equity or contract, the burden is on the latter to show actual notice to the purchaser of his rights, or prove circumstances such as would put a prudent man on inquiry, and from which actual notice may be inferred." *Abb. Tr. Ev. 716*; *Brooklyn, 64 N. Y. 78*. The proof of notice relates almost entirely to the prior contract. May 29th. This option had expired

ous to such notice as came to the knowledge of plaintiffs. This is manifest from the instrument itself, which defendants, or one of them, examined; and, in answer to inquiries, both Todd and Griffith informed Bronson that the option was of no force or effect. In addition to this, the option of May 29th was given for the purchase of a homestead and a pre-emption claim, before final entry, and was in contravention of the acts of congress, and for this reason was not enforceable. Rev. St. U. S. §§ 2262, 2263; Brown v. Kennedy, 12 Colo. 235, 20 Pac. 696; Dawson v. Merrill, 2 Neb. 119; Oaks v. Heaton, 41 Iowa, 116; Anderson v. Carkins, 135 U. S. 483, 10 Sup. Ct. 905. Notice of the option of May 29th was therefore unavailing for any purpose, and was not even sufficient to put the parties upon inquiry. As the option was contrary to public policy, and void, they had a right to assume that no attempt would be made to consummate the fraud by procuring title thereunder. It was therefore necessary for plaintiffs to show by satisfactory proof that Bronson and Persee had notice of the subsequent unrecorded option. This burden was undertaken by them; but the evidence is far from satisfactory, and is directly contradicted by a number of witnesses introduced by the defendants. In this state of the record the finding of the district court will not be disturbed. As this is conclusive of the controversy, the judgment must be affirmed.

WELLS et al. v. GILPIN.¹

(Supreme Court of Colorado. Dec. 22, 1893.)

ATTORNEY AND CLIENT—CONDITIONAL PROMISE TO PAY FOR SERVICES.

In an action by attorneys for services rendered in a divorce case still pending, defendant alleged that plaintiffs agreed to look for payment merely to allowances against defendant's husband. Plaintiffs testified that, when a part of the services had been rendered, defendant promised to pay them, should their application for counsel fees be denied in the superior and supreme courts. It appeared that application had been made and denied in both courts. *Held* error to charge that, if defendant promised to pay them if they could not obtain an allowance, no action would lie on said promise till the divorce suit were ended.

Appeal from district court, Arapahoe county.

Action by Ebenezer T. Wells, R. T. McNeal, and J. G. Taylor against Julia P. Gilpin for attorneys' fees. Judgment for defendant. Plaintiffs appeal. Reversed.

The other facts fully appear in the following statement by HAYT, O. J.:

In March, 1887, Gov. William Gilpin brought suit against his wife, Julia P. Gilpin, for the purpose of dissolving the marriage relation then existing between the parties. Appellants were employed to defend that suit, and, although there are other items

in the account here sued upon, the only charges controverted are one of \$2,500, for services in the divorce proceedings in the superior court, and a second item of \$2,500, for like services in the supreme court, and upon various interlocutory applications for custody of children, counsel fees, etc. Appellee first consulted plaintiff Wells with reference to her domestic troubles in the year 1878, and these consultations continued at intervals until the institution of the suit by her husband. About the time of the service of the summons in the action upon her, she had frequent and extended consultations with plaintiffs with reference to the preparation of her defense. These consultations extended over a period of several months. The trial in the superior court lasted for two full weeks. At this trial two of plaintiffs participated, and were in constant attendance. Various motions were made at other times, with reference to the custody of the children and defendant's claim for alimony and counsel fees. These motions were contested, the contests occupying fully two weeks' additional time. In the superior court, plaintiff prevailed. Afterwards, a writ of error was prosecuted in this court, and the case argued orally and upon printed briefs, first before the commission, and afterwards before this court. As a result of these proceedings upon error, the judgment of the superior court was reversed, and the case remanded. See Gilpin v. Gilpin, 12 Colo. 504, 21 Pac. 612. It was still pending at the time the present action for fees was tried in the district court. After the reversal of the judgment in the divorce proceeding, plaintiffs collected certain costs in this court. The amount of these costs was credited upon their claim for \$5,000 for services. Appellee, instead of paying, or offering to pay, for these services, denied that she was liable for same, and demanded the payment to her of the full amount of costs paid over to her attorneys by the clerk of this court. The answer consists—First, of a general denial; second, of a special contract to the effect that the services were rendered under an agreement by plaintiffs to receive such sums as the court should allow against her husband in payment for their services, it being distinctly understood and agreed between plaintiffs and defendant, as it is alleged, that defendant should incur no personal liability whatever for or on account of such services, but they were to rely wholly and exclusively on such allowance; third, a counterclaim for that portion of the costs, paid plaintiffs for defendant, remaining after deducting certain disbursements made by plaintiffs in her behalf. The replication denies the agreement and the counterclaim. Upon the trial in the court below, the following instruction was given to the jury, over the objection and exceptions of plaintiffs: "(4) The court instructs you that if you find from the evidence that the plaintiffs agreed

¹ Rehearing denied February 5, 1894.

with the defendant to conduct her defense in the suit of William Gilpin against her, and to look to such sum as the court should allow against William Gilpin for their compensation, and if you further find from the evidence that afterwards the defendant agreed with the plaintiffs and promised to pay them for their services in the event that they could not obtain an allowance by the court against William Gilpin, then you are instructed that no action will lie in favor of the plaintiffs upon such agreement and promise until the final determination of said case of William Gilpin against Julia P. Gilpin; and you are further instructed that there is no final determination of said cause so long as it is pending in any court undetermined." The trial in the district court resulted in a verdict and judgment for defendant for the sum of \$372.85.

Wells, McNeal & Taylor, pro se. Wolcott & Valle, for appellee.

HAYT, C. J., (after stating the facts.) The services, the value of which is sued for, extended over a period of two years, and, in addition to the time given to preparation, upwards of 30 days were spent by two of plaintiffs in contesting the divorce proceedings, and attending to matters incident thereto, in the several courts where the case was, from time to time, pending. The evidence shows that 10 years of the family history of the parties, in its various phases, was detailed before the jury sitting in the case, necessitating laborious investigation and elaborate preparation on the part of counsel. Although we are not called upon to determine the value of the services, we deem the foregoing allusion necessary to a correct understanding of the present controversy, which grows more particularly out of the special contract pleaded. It is admitted that the services charged for were performed at the instance and request of Mrs. Gilpin; the claim of the defendant being that plaintiffs agreed to look exclusively for their fees to such awards as the court should, from time to time, make against Gov. Gilpin for counsel fees, etc., in the divorce proceedings. The evidence in support of such special contract comes exclusively from Mrs. Gilpin; and, while this evidence is somewhat vague and uncertain, we think there is enough in the record to warrant the submission to the jury of the defendant's claim of the existence of such a contract, and therefore the finding of the jury in defendant's favor upon this issue cannot be disturbed in this court, unless error intervene at the trial. We shall dismiss this evidence from consideration with the remark that although the original brief filed by plaintiffs in error, and also the answer filed by defendant in error, each purports to give in full the evidence upon this question, an examination of the record discloses that material testimony giv-

en by Mrs. Gilpin upon the subject is entirely omitted from both.

Plaintiff Wells, with whom alone the negotiations with Mrs. Gilpin were conducted, testified that at one time, early in the transaction, he gave it as his opinion as a lawyer that Gov. Gilpin would have to pay her counsel fees, but that he afterwards told her that a wife who had sufficient means of her own was not entitled to alimony or such money, and that her financial condition was such that it would be impossible to compel her husband to pay anything on account of fees. It appears that, about the time of these conversations, Mrs. Gilpin received from the estate of her deceased father, property and money to the value of over \$30,000; but whether Judge Wells' legal opinion was changed by this fact we are not advised. He denies that defendant's promise to pay plaintiffs for their legal services was in any way dependent upon the success of their efforts to secure an allowance from Gov. Gilpin.

It is claimed by plaintiffs that they were greatly prejudiced by the fourth instruction given, which was duly excepted to at the time. In this the jury were charged that in the event of a finding that the plaintiffs agreed with the defendant to conduct her defense, and to look to such sum only as the court should allow against William Gilpin for their compensation, and should they further find from the evidence that thereafter the defendant agreed with plaintiffs and promised to pay them for their services in the event that they could not obtain an allowance by the court, in such case "no action will lie in favor of the plaintiffs upon such agreement until the final determination of said case of William Gilpin against Julia P. Gilpin." Bearing in mind that the case of Gilpin v. Gilpin was then pending in one of the lower courts, the vice of this instruction is manifest. In effect, it eliminates from contemplation by the jury all consideration of the new contract which the evidence tended to establish, notwithstanding the fact that competent evidence had been introduced to the effect that, after a part only of the services had been rendered, the defendant promised to pay plaintiffs, provided the application for counsel fees was made and refused in the superior court and also in the supreme court. It appears that both these conditions had transpired before the institution of the present action; hence the jury should have been instructed that in the event of finding that such a conditional promise was in fact made, plaintiffs were entitled to recover. The court seems to have entirely overlooked the evidence tending to show that the subsequent promise, if made, was based upon conditions in no way dependent upon the failure to ultimately secure counsel fees. The weight of this evidence was for the jury, and not for the court, to determine. For error in with-

drawing from the consideration of the jury all question as to whether or not the alleged subsequent contract had been fully complied with by the plaintiffs, the judgment will be reversed.

COWAN et al. v. COWAN.¹

(Supreme Court of Colorado. Dec. 22, 1893.)

APPEAL—CONTINUING ORDER—LIABILITY ON UNDERTAKING—TEMPORARY ALIMONY.

1. Under Act 1886, § 23, providing that appeal from an order shall not stay proceedings thereon unless an undertaking be given to pay all costs and damages adjudged to appellee, and also that appellant will satisfy the order appealed from in case of an affirmance, not exceeding in amount the original order, the undertaking does not cover amounts accruing under an order providing payment, every month, of a certain amount as alimony, after affirmance and remittitur.

2. Under an order for temporary alimony, including the allowance to plaintiff of the use of a certain house, defendant cannot have credit for any money received by plaintiff as rent for rooms in the house.

Appeal from district court, Arapahoe county.

Action by Laura Cowan against Edwin R. Cowan and others on an appeal bond. Judgment for plaintiff. Defendants appeal. Modified.

The other facts fully appear in the following statement by GODDARD, J.:

On the 6th day of November, 1889, appellee instituted this action in the district court of Arapahoe county to enforce an alleged liability against the appellants upon an undertaking on appeal. The facts upon which appellee predicates her right to recover are, in substance, as follows: On the 1st day of June, 1886, in a certain action for divorce then pending in the district court of Arapahoe county, wherein Laura Cowan was plaintiff and Edwin R. Cowan was defendant, a certain order granting alimony pendente lite was made, in words and figures as follows: "It is ordered, adjudged, and decreed that on or before the 15th day of June, 1886, the said defendant deposit with the clerk of this court the sum of \$100 for the use and benefit of the plaintiff for her costs herein to accrue, or which may accrue in said cause; also, for the plaintiff personally, for her personal use and benefit, the sum of \$50; also, the further sum of \$300 for plaintiff's counsel and attorney's fees herein,—each and every of the aforesaid payments to be made on or before the 15th day of June. It is further ordered, adjudged, and decreed that on this 1st day of June, and every calendar month during the pendency of this suit, and so until the further order of the court, the defendant pay to the clerk of this court, for the plaintiff personally, the sum of \$25; that the defendant also, from this time forthwith, in addition to the monthly allowance due, furnish for the plaintiff and her children all reason-

able food, fuel, and clothing, or provide for her obtaining the same on his credit, and allow to her and said children the use of the house and residence mentioned in the pleadings herein, and now occupied by them, and the furniture and furnishings therein, as their abiding place and home, without let or hindrance; and, in case of failure of the said defendant to furnish food, fuel, and clothing as aforesaid, or to furnish credit whereon and whereby plaintiff may procure the same, plaintiff has leave, without additional showing, to apply for an increase of the aforesaid monthly allowance; this, without prejudice to the rights of either party hereafter to apply for a modification of this order as far as the aforesaid monthly allowance is concerned. It is further adjudged and decreed that in case of failure on the part of the defendant to pay any one or more of the aforesaid sums of money, or any monthly allowance aforesaid, the plaintiff may have execution to collect the same, with costs of issuing said execution, to be taxed, without prejudice to her rights to proceed against the defendant as for contempt." The defendant Cowan prayed an appeal from said order to the supreme court, and on the 14th day of June, 1886, he as principal, and Michael J. McNamara and J. J. Walley as sureties, made and executed the following undertaking: "Know all men by these presents, that we, Edwin R. Cowan, Michael J. McNamara, and John J. Walley, of the county of Arapahoe and state of Colorado, are held and firmly bound unto Laura Cowan in the penal sum of fifteen hundred dollars, for the payment of which, well and truly to be made, we, and each of us, bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated at the city of Denver, county of Arapahoe, and state of Colorado, this 14th day of June, 1886. The condition of the above obligation is such that whereas," etc., (reciting the substance of the order aforesaid.) "Now, therefore, if the said Edwin R. Cowan shall pay to the said Laura Cowan all costs and damages that shall be adjudged to her on the said appeal, and will satisfy and perform the judgment and order appealed from in case the same shall be confirmed, and any order or judgment the supreme court may render, or order to be rendered by the inferior court, not to exceed the amount or value of the original judgment or order aforesaid made and entered by the said district court, that the obligation shall be null and void; otherwise, to remain in full force and virtue." Afterwards, and on the 23d day of December 1887, the order appealed from was affirmed by the supreme court. 16 Pac. 215. No further order or judgment was made in the divorce case until the 15th day of April, 1889, when it was finally disposed of, and judgment rendered in favor of plaintiff, and the monthly allowances adjudged to plaintiff by the order

¹ Rehearing denied February 5, 1894.

of June 1, 1886, continued to accrue up to that date; that no payment was made by the said Cowan, or any one on his behalf, in pursuance of said order, except the sum of \$100. Plaintiff seeks to recover from said defendants upon the said undertaking, not only the \$300 counsel fees, and the \$50 allowed for plaintiff's personal use, and the allowance of \$25 per month for the support of the family, accruing during the pendency of the appeal, but also the installments which accrued after the judgment of affirmance in the supreme court, and the further sum of \$29.60, costs adjudged on the appeal. The defendants admit the execution of the bond sued on, and set up certain counterclaims on account of money had and received by appellee to the use of said Edwin R. Cowan from certain rents collected, and moneys paid, subsequent to the order of June 1, 1886. The court below rendered judgment in favor of appellee for the sum of \$1,205 and costs. To reverse this judgment, defendants below prosecute this appeal.

Wells, Macon & Furman, for appellants.
Benedict & Phelps, for appellee.

GODDARD, J., (after stating the facts.) The principal question presented for our determination is whether appellants, by virtue of the undertaking executed by them, are liable for the payment of the monthly installments that accrued after the affirmance of the order in the supreme court. We are unaided in our investigation of this question by any adjudicated case involving the same or similar state of facts. The appeal was had under the act of 1885 allowing appeals from interlocutory orders, and the decision of the question depends upon the construction to be given to that act. Section 23 of the act provides: "Sec. 23. An appeal shall not stay proceedings on the judgment or order, or any part thereof, unless the appellant shall cause to be executed, before the clerk of the court which rendered the judgment or order, by one or more sufficient sureties, to be approved by such clerk, an undertaking to the effect that they are bound, in double the amount named in the judgment or order, that the appellant shall pay to the appellee all costs and damages that shall be adjudged to the appellee on the appeal, and also that the appellant will satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the supreme court may render or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order, and all rents or damages to property during the pendency of the appeal, out of the possession of which the appellee is kept by reason of the appeal. * * * If, by force of the clause in the condition of the undertaking, that "appellant will satisfy and perform the judgment and order appealed from" in case of an affirmance, the sureties

are to be held to have undertaken the principal should perform a continuing obligation, as contended by counsel for appellee, we must conclude that the legislature intended to impose a liability upon sureties of a much more extended than has heretofore existed in any other class of appeals, to require them to do more than indemnify the appellee for such damages as they might occasion by suspending the execution of her remedy pending the appeal. Generally accepted, the object of an appeal is to preserve the rights of appellee in the appeal,—that is, to protect him from any loss he may suffer by reason of the suspension of his remedy, and to assure the performance of the judgment superseded in case of affirmance. When, by reason of affirmance of the judgment or order appealed from, the supersedeas obtained by the appeal bond expires, and no longer depends the appellee's remedy, the sureties attaches, and a right of action against them accrues for the payment of the judgment suspended by the appeal. Such damages as they may have occasioned the appellee by postponing his remedy, for good reason seems to exist why such liability should be extended beyond the appeal, and after their interference has prejudiced the appellee's rights. In the application of this principle, the sureties in should be held answerable for the performance of the order appealed from, in so far as its performance was prevented by their interference. Upon the affirmance of the order, appellee might have been in compliance with its terms, for installments subsequently accruing, by execution of proceedings for contempt, as provided in the order, the same as if no appeal had been taken. We do not think that a more extended liability than this was intended by the use of the language quoted, to wit: "the appellant will satisfy and perform the judgment or order appealed from." It is fairly inferable that the legislature intended only such orders as were usual in the progress of the trial of a case, and not an exceptional order of this kind, that imposed a continuing duty, in contemplation the performance of which that required the immediate payment of the money, which had been superseded by the taking provided for. Such intention is manifest by section 30 of the act, which provided: "Sec. 30. Upon the affirmance of any judgment or order for the payment of money, the collection of which in whole or in part has been superseded by an order as above contemplated, the court shall award to the appellee damages upon the judgment superseded, and if satisfied by the appellant that the appeal was taken for the purpose of obtaining such sum as damages, the court may award fifteen per cent. thereon, which shall not be paid until the appeal is finally decided, and shall not be paid until the appeal is finally decided, and shall not be paid until the appeal is finally decided." And section

vides for the restoration to appellant of any money or property taken from him by reason of such judgment or order, in case it is reversed. We think, therefore, the construction to be given the condition of this undertaking is that the sureties obligated themselves that their principal should perform the order appealed from in so far as the supersedeas procured thereby stayed the enforcement of the same, and that their liability cannot be extended to the performance of the order from and after the time the supersedeas was discharged, and no longer prevented appellee from enforcing the order; and that the court below erred in allowing a recovery for such installments as accrued after the remittitur issued from the supreme court.

We think the court below properly excluded evidence in relation to rents received by appellee for rooms in the house, the use of which was allowed to her, in express terms, by the order, and committed no error in disallowing the payments alleged to have been made as a credit upon the amount due under the order. The judgment will therefore be modified, and the court below directed to enter judgment for the amount that had accrued under the terms of the order at the date that the remittitur was issued by the supreme court upon affirmance of the order appealed from, and also for the sum of \$29.60, costs awarded her on the appeal in the supreme court. Judgment modified.

AHERN v. OREGON TELEPHONE & TELEGRAPH CO.

(Supreme Court of Oregon. Jan. 8, 1894.)

TELEPHONE COMPANY—INJURY FROM CHARGED WIRE—DEGREE OF CARE.

Where a telephone company permits a wire liable to become charged from an electric wire to hang down onto the sidewalk, it is bound to exercise such care as will guard the public against injury from it.

On rehearing. For former report, see 33 Pac. 403.

LORD, C. J. The suspended telephone wire, while it was charged with electricity from contact with the electric wire, was not less dangerous than the electric wire itself would have been, similarly suspended as to the street. It was this condition of affairs that led the court, in its charge, to refer to electricity generally as a "subtle and dangerous agency," which required the "utmost caution to control." As the telephone wire was liable to become charged with such dangerous agent, and thus to become dangerous to the traveling public, the duty of inspecting and ascertaining the condition of the wires, and whether there was any interference making them more dangerous than they otherwise would be, was necessarily involved. In view of these circumstances, the degree of

care imposed was commensurate with the danger. "Due care is a degree of care corresponding to the danger involved." Cooley, Torts. It is not the same in all cases. The term is relative, and its application depends on the situation of the parties, and the degree of care and vigilance which the circumstances reasonably impose. Where the danger is great, a high degree of care is necessary, and the failure to observe it is a want of ordinary care under the circumstances. Hence, a wire liable to be charged with an agency so dangerous and difficult to manage, while so located, needed to be looked after with that degree of care and vigilance as would guard the public against liability to accident from it. The court then said: "The question is here submitted to you whether it was negligence or not to leave a wire along a public thoroughfare where it might be found in the way of pedestrians, or where it might be liable to be handled and interfered with by boys or by irresponsible persons." It further added: "'Negligence,' in cases of this kind, means the doing of some act which a cautious and prudent man would not do, or the neglecting to do some act which a cautious and prudent man would not neglect. Applying those definitions to this case, the inquiry to be solved by you is, what did this defendant do that a cautious and prudent man would not have done, in connection with the wire which has been described to you in the testimony, and which is mentioned in the pleadings?" These instructions, taken in connection with the instructions referred to in the main opinion, we think fairly present the law governing the case.

STATE INVESTMENT & INS. CO. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (No. 15,496.)

(Supreme Court of California. Jan. 25, 1894.)

INSURANCE COMPANY—ACTION BY ATTORNEY GENERAL TO DISSOLVE—RECEIVER—POWER OF COURT TO APPOINT—INSOLVENCY ACT—CONFLICTING STATUTES.

1. Pol. Code, § 600, provides that when the insurance commissioner ascertains that a person engaged in the insurance business is insolvent he must require the person to repair the capital stock. Section 601 provides that if the deficiency in stock is not made up the commissioner shall inform the attorney general, who must commence an action in the name of the people, and apply for an order requiring cause to be shown why the business should not be closed; and if such person is insolvent, or the interests of the public so require, the court must decree a dissolution of such corporation, and the winding up of its affairs, and the distribution of its effects. *Held*, that the court, on decreeing the dissolution of a corporation in such action, has no power to appoint a receiver, or assume control of its effects.

2. Code Civil Proc. § 565, empowers the superior court to appoint receivers of a corporation on its dissolution on application of any creditor, stockholder, or member. Civil Code, § 400, provides that on the dissolution

of a corporation, "unless other persons are appointed by the court," the directors or managers at the time of its dissolution are trustees of the creditors and stockholders, and have full power to settle its affairs. *Held*, that such statutes do not authorize the court to appoint a receiver of an insurance company on dissolution thereof in an action brought by the attorney general.

3. Insolvent Act 1880, § 8, providing for an adjudication of involuntary insolvency on the petition of five or more resident creditors, is not made inapplicable to insurance corporations by Pol. Code, § 601, providing for the dissolution of such a corporation in an action brought for that purpose by the attorney general.

4. Where an insolvent insurance company is dissolved on application of the attorney general, the court has no power to appoint a receiver to take charge of its effects "during the pendency of" an appeal by the corporation.

5. On petition of creditors of an insurance company under Insolvent Act 1880, the superior court of San Francisco, department 10, adjudged such corporation to be insolvent. Afterwards the attorney general applied in department 4 of such court, under Pol. Code, § 601, to dissolve such corporation for insolvency, and the insolvency proceedings were transferred to department 4. *Held*, that such transfer did not confer on the court any greater jurisdiction in the action by the attorney general than it otherwise had.

In bank.

Application by the State Investment & Insurance Company for a writ of prohibition to the superior court of the city and county of San Francisco, state of California, Hon. J. C. B. Hebbard, judge thereof, and F. W. Van Reynegom, commanding respondents to desist from further proceeding on a certain judgment and order appointing Van Reynegom receiver of such company, and directing him to take charge of its property. Peremptory writ granted.

Sullivan & Sullivan, for petitioner. W. H. H. Hart, Atty. Gen., Lindley & Elckhoff, and Samuel Rosenheim, for respondents.

HARRISON, J. Application for writ of prohibition. The State Investment & Insurance Company was incorporated under the laws of this state December 1, 1871, with a capital stock of \$400,000, for the purpose of doing a fire insurance business in the city and county of San Francisco, and very soon thereafter organized, with its capital stock fully paid, and commenced the transaction of business. June 1, 1893, certain creditors of the corporation, whose debts aggregated \$49,000, filed a petition in the superior court of the city and county of San Francisco, setting forth facts constituting acts of insolvency on the part of the corporation and alleging that the said corporation was insolvent, and praying that it be adjudged an insolvent debtor. Upon filing this petition, the court made an order requiring the corporation to show cause before it, in department No. 10, on the 13th of June, why it should not be adjudged an insolvent debtor, and in its said order forbade it from transferring any of its property until the

further order of the court. This order duly served upon the corporation, and the return day thereof it appeared in in obedience thereto, and, the hearing being continued until the 14th of July, the court on that day made its adjudging it to be an insolvent debtor, in the intent and meaning of the insolvent act of 1880. July 13, 1893, upon the invitation of the attorney general, an action commenced in said superior court by the people of the state of California against said corporation and its directors, under the provisions of section 601 of the Pol. Code, for its dissolution and the winding up of its affairs and distribution of its assets. In the complaint in this action it was alleged that in April, 1893, the insurance commissioner entered upon an examination of the affairs of the said corporation, and on the 10th of May, as the result thereof, ascertained and declared that on the 1st of January, 1893, the capital stock of the corporation was impaired to the extent of \$442.73, and thereby reduced to a sum of \$200,000, viz. to the sum of \$172,557.25, that by reason thereof the said corporation was, on the 1st day of January, 1893, insolvent; that thereupon the said insurance commissioner, on the 10th of May, 1893, revoked the certificate of authority to do business as an insurance company which had been previously issued to it, and required the said corporation to discontinue the issue of new policies, or the renewal of any policies issued, and also to repair its capital stock to its original amount, within 60 days thereafter, by an assessment upon its stockholders; that said corporation failed to comply with the deficiency of its capital within the 60 days; that on the 10th day of June, 1893, the insurance commissioner reported these facts to the attorney general; that since the 1st day of January the business of said corporation had been so conducted that on the 1st day of July its capital had become impaired to the extent of \$302,100. Upon filing this complaint the clerk of the court issued summons directed to the defendants therein named, and upon its issuance the judge of the court, in department No. 4, made an order of injunction restraining the corporation, its directors, agents, attorneys, and others, and each of them, and all others from rendering aid or assistance of them, from carrying on any litigation, and from interfering with or taking possession of any of the assets of said corporation, and appointed the respondent Van Reynegom temporary receiver to take possession of the assets of the corporation, and directed that the corporation show cause before said court on the 11th of August why it should not be closed as an insolvent business, and why it should not be dissolved, and its assets distributed to its respective creditors. August 10th the defendants answered the complaint, admitting the facts and the validity of the corporation, setting up the

ceedings that had been taken against it upon the aforesaid petition in insolvency, and that it had been therein declared and adjudicated an insolvent debtor, and that such adjudication had become final, and asked that its assets be distributed under the provisions of the insolvent act of 1880. August 24, 1893, the matter having been fully heard before the court, the judge rendered his decision, in which he found the facts substantially as alleged in the complaint and answer, and also found as a fact "that the business of said corporation should be closed; that the interests of the public so require; that said corporation defendant should be dissolved, its affairs wound up, and the assets distributed; that by reason of litigation now pending, and the race between creditors for preference, the assets of said defendant corporation are being injured and wasted, and by reason thereof distribution under the provisions of section 601, Pol. Code, will be prevented, unless injunction issue out of this court, and receiver be appointed to take possession of its assets; that, unless such injunction issue and receiver be appointed, irreparable injury, which cannot be compensated in damages to the state, will result, in that it will defeat the operation and enforcement of the insurance laws of the state of California." Judgment was thereupon rendered in this proceeding "that said defendant, the State Investment & Insurance Company, which is a corporation organized and existing by virtue of the laws of the state of California, be, and the same is hereby, dissolved; that the affairs of said corporation be wound up, and that a distribution of the effects of said defendant corporation be made under the control of said court in the above-entitled action." By said judgment the court also appointed the respondent Van Reynegom as receiver of all the property, estate, and effects of the corporation, and directed every person and official having any property belonging to it to deliver the same into his possession; and provided that such receiver should have power and authority, under the control of the court, and in obedience to its orders, to hold and dispose of the property of said corporation, and to wind up its affairs and distribute its property and effects. From this judgment the defendants appealed to this court on the 26th of August, and on the 28th of August the superior court, upon the motion of the attorney general, made an ex parte order appointing Van Reynegom receiver of the property of the corporation, to keep and preserve the same during the pendency of said appeal. From this latter order the corporation also appealed, and on the 30th of August, after the taking and perfecting of said appeal, the court made another order, reciting its former one appointing the receiver, and that he had qualified as required therein, by which it "finally appointed" him receiver pending the appeal.

September 15th the petitioner herein made an application to this court, setting forth that under the foregoing orders the said receiver claims to be entitled to the possession of its property, and had made demand therefor, and that the superior court had instructed said receiver to demand and take into his possession all of the estate and effects of the petitioner; and prayed for a writ of prohibition directed to the respondents herein, commanding and directing them to refrain and desist from further proceeding upon the said judgment or orders with reference to any property of said corporation, and from interfering with or disturbing the possession or control of the corporation as to any of its property or effects. Upon this application an alternative writ of prohibition was issued, and upon return thereto the respondents filed an answer, substantially in the nature of a demurrer to the petition, in which they contend that the proceedings in insolvency were superseded by and merged in the proceedings for the dissolution of the corporation, and that the court in which this latter proceeding is pending had jurisdiction to make the orders, and to wind up the affairs and distribute the effects of the corporation.

Section 8 of the insolvent act of 1880 provides that "an adjudication of insolvency may be made on the petition of five or more creditors, residents of this state, whose debts or demands accrued in this state, and amount in the aggregate to not less than five hundred dollars; provided that said creditors, or either of them, have not become creditors by assignment within sixty days prior to the filing of said petition;" and section 36 of the act declares that "the provisions of this act shall apply to corporations," and "whenever any corporation is declared insolvent all its property and assets shall be distributed to the creditors; but no discharge shall be granted to any corporation." Upon filing the petition authorized by section 8 the court takes jurisdiction of the subject-matter of the insolvency, and upon the service of the order requiring the alleged insolvent to appear in answer thereto, provided by section 9, it acquires jurisdiction over the debtor. The order of the court forbidding the debtor to transfer any of his property, which is authorized by section 9, is in the nature of a provisional attachment or sequestration of his estate, and brings it under the control and dominion of the court. Section 12 provides that the court may, upon the default of the debtor, or after a trial upon the issues in the proceeding, make an order adjudging that he is, and was at the date of filing the petition, an insolvent debtor; hence this adjudication of insolvency has relation to the time when the petition was filed, and renders void any intervening transfer or incumbrance of his property. The superior court therefore acquired juris-

diction over the estate of the petitioner on the 1st day of June, when the petition for its insolvency was filed; and on the 13th of June, when the corporation appeared in answer to the order to show cause, the court had acquired entire jurisdiction of the subject-matter of the petition and of the insolvent. The jurisdiction thus acquired gave to the court full authority to carry out the provisions of the insolvent act, and to have the estate of the insolvent distributed to the creditors under its supervision and control; and, if the court had proceeded in the matter, and had distributed the estate without interference on the part of the court which had jurisdiction of the proceedings for the dissolution of the corporation, it would not be contended that its orders and judgment would not be conclusive. The insolvent act does not exclude any corporation from its provisions, but its declaration that "the provisions of this act shall apply to corporations" includes corporations organized for the purpose of insurance as well as others. It is contended, however, by the respondents herein that the act, so far as it was originally applicable to insurance corporations, has been superseded by the provisions of section 601 of the Political Code, in which provision is made for the dissolution of such corporations. It is not claimed that there is any express declaration in the section to that effect, or that there has been an express repeal of these provisions of the insolvent act; but it is urged that the provisions of the two statutes are inconsistent, and that, inasmuch as section 601 was amended in 1887, and is the latest legislative declaration, it must prevail over the insolvent act of 1880. The argument from the relative dates at which the several statutes were enacted is not entitled to much consideration, for the reason that the substance of section 601, and all that can be accomplished under its provisions, was on the statute books for many years prior to the enactment of the insolvent act of 1880; the only change in the section, made in 1887, being to limit the time within which the attorney general should institute proceedings thereunder. If any argument is to be drawn from the respective dates of their passage, it would be that, if there is any inconsistency between the two statutes, the insolvency act would prevail over the other. We are, however, of the opinion that there is nothing inconsistent between the two statutes, and that each is operative over the principal subject for which it was enacted; that the provisions of the insolvent act embrace insurance corporations; and that the provisions of section 601 of the Political Code are intended to secure merely the dissolution of a delinquent insurance corporation, and do not confer upon the court which decrees the dissolution the power to distribute its effects to the stockholders and creditors.

The first legislation in this state providing for a supervisory control of the business of insurance was the act of March 28, 1867 (St. 1867-68, p. 336.) By that act the office of insurance commissioner was created, whose duty it was to examine into the financial condition of all persons and corporations who might desire to transact the business of insurance within this state, and to issue to such as may be found to be in a solvent condition, within the meaning of that act, a certificate of authority to transact such business, and making it unlawful for any corporation to transact such business without first receiving such certificate of authority. This act was re-enacted in 1872, in section 594 et seq. of the Political Code, and many of these sections have since, from time to time, been amended. The "insolvency" of an insurance corporation which will authorize the commissioner to revoke his certificate of authority, or to require it to refrain from doing business until it shall have repaired its capital, is not the ordinary commercial insolvency, but is such as is defined by the statute, (*Palache v. Insurance Co.*, 42 Cal. 418,) and, so far as applicable to the petitioner herein, is defined in section 601 of the Political Code as follows: "Whenever any provision for the liabilities of any person engaged in the business of fire insurance in this state for losses reported, expenses, taxes and reinsurance of all outstanding risks, estimated at fifty per cent. of the premiums received and receivable on all risks, would so far impair the capital stock paid in as to reduce the same below one hundred thousand dollars, or below seven and one-half per cent. of said capital stock paid in, such person is insolvent." St. 1887, p. 100. By section 600, whenever the insurance commissioner ascertains that any person engaged in the insurance business is insolvent, "within the meaning of this chapter," he must revoke the certificate granted, and require the person to repair the capital stock of within such period as he may designate; and by section 601 it is provided that in case of such requisition the deficiency of capital is not made up as required by the provisions of the Political Code, the commissioner must communicate the fact to the attorney general, and that officer "must, within two days after receiving such communication, commence an action in the name of the people of this state in the superior court of the county where the person in question is located, or has his principal office, against such person, and apply for an order requiring him to be shown why the business should not be closed; and the court must thereupon hear the allegations and proofs of the respective parties, as in other cases. If it appears to the satisfaction of the court that such person is insolvent, or that the interests of the public so require, the court must decree a dissolution of such corporation, and the winding up of its affairs, and the distribution of its assets."

tion of the effects of such person; but otherwise the court must enter a decree annulling the act of the commissioner in the premises, and authorizing such person to resume business." These provisions of the Political Code are of a governmental character, and are enacted by the legislature in the discharge of its functions to provide for the welfare of the people, in affording security to them in such insurance as they may choose to effect upon their property, and to protect them against fraudulent schemes of insurance, or deception by plausible inducements which may be held out for their patronage. The legislature, in authorizing a corporation to be formed for the purposes of insurance, has attached to it as a condition of its continued existence that it shall comply with the requirements of these sections, and has fixed the forfeiture of its charter as a penalty for noncompliance. Its power to prescribe such conditions, as well as its right to revoke the charter or to dissolve the corporation, is unquestioned, and it may avail itself of such mode in the exercise of the power as it may choose. Its visitatorial power over the corporations of its creation is as extensive as its power to authorize their creation, and it may exercise this power directly by itself, or it may declare a dissolution of the corporation as the result which shall follow a judicial investigation. In whatever mode the power may be exercised, it is but the administration of the legislative power of the state. In sections 600-602 of the Political Code the legislature has conferred the initiatory step for their visitatorial power upon the insurance commissioner, and has declared that if, upon a judicial investigation thereof, it shall be ascertained that his acts have been authorized, and that the corporation has failed to comply with his requirements, a dissolution shall follow. These sections are found in the chapter of the Political Code entitled "Executive Officers," and the object of the action authorized by section 601 is to make effective the acts of the insurance commissioner in revoking the certificate of authority by dissolving the corporation for its failure to comply with such requirement. The jurisdiction of the superior court to decree a dissolution of any corporation exists only by virtue of statutory authority. It does not possess this authority by virtue of its inherent general jurisdiction in equity, (*Neall v. Hill*, 16 Cal. 145; *French Bank Case*, 53 Cal. 495; *Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121,) either at the suit of an individual (*Folger v. Insurance Co.*, 99 Mass. 267) or at the suit of the state, (*Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 371;) and, as its jurisdiction is derived from the statute, it is limited by the provisions of the statute, both as to the conditions under which it may be invoked and the extent of the judgment which it may make in the exercise of this jurisdiction, (*Verplanck v. Insurance Co.*, 1 Edw. Ch.

34.) There is no provision in section 601 by which the court is authorized to appoint a receiver or to assume control or management of the estate of the corporation, and under that section the court has no authority to make any order affecting the corporation or its property until after it has heard the allegations and proofs of the respective parties. When the attorney general commences the action, the only order which the court is authorized to make is one requiring the corporation to show cause why its business should not be closed. Until the return day of this order the court can neither enjoin the corporation from doing business, nor can it disturb it in the possession of its estate; and if, upon the hearing at the return day, it shall not be shown to the satisfaction of the court that the corporation is insolvent, within the meaning of the statute, its only function is to annul the act of the commissioner. The provision in the section that the court must also decree a winding up of the affairs of the corporation and a distribution of its effects does not declare that such winding up and distribution shall be under the direction of the court which has decreed the dissolution, or, indeed, under the direction of any court, but merely that its affairs shall be wound up, and its effects distributed. In *Attorney General v. Bank of Niagara*, Hopk. Ch. 354, the chancellor held that, even though proceedings were pending at law for the dissolution of a corporation, he had no authority to aid them by an injunction, for the reason that such action would be to prejudice the question which was yet to be determined in the court of law. In *Re Boynton Saw & File Co.*, 34 Hun, 369, it was held that proceedings for the dissolution of a corporation were purely statutory, and that the only power or authority which the court possessed was such as had been conferred by the statute, and that, as the statute gave no authority to appoint a temporary receiver, such appointment was void, saying: "The statute does not give the court control over the corporate property until the decision is made upon the return to the order to show cause." See, also, *In re Waterbury*, 8 Paige, 380; *Ward v. Farwell*, 97 Ill. 615; *People v. Seneca Lake Grape & Wine Co.*, 52 Hun, 178, 5 N. Y. Supp. 136. Section 400 of the Civil Code provides that upon the dissolution of a corporation, "unless other persons are appointed by the court, the directors or managers of the affairs of such corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation." The power of the court to appoint other persons, which is implied in this section, does not authorize the court to take upon itself the power to settle its affairs, or to appoint a receiver for that purpose. It was held in the *Havemeyer Case* that the court in which proceedings had been taken for a dissolu-

tion of the corporation did not, by virtue of its judgment for a dissolution, have jurisdiction to appoint a receiver to wind up the affairs of the dissolved corporation. It was said in that case: "When a corporation is dissolved, its property vests in its stockholders, subject only to the claims of creditors, and is thereafter held upon the same tenure, and subject to the same conditions, as similar property owned by other natural persons. What others may do, they may do. They owe no further or higher duty to the public, and are under no other restraints." Page 378, 84 Cal., and page 133, 24 Pac. The proceedings in that case were under section 803, Code Civil Proc., but it was held that the provisions of section 400, Civil Code, apply in all cases of dissolution, whether voluntary or involuntary; and the reasoning therein and the conclusions reached are applicable to the present proceeding. Each is a proceeding on the part of the state for the purpose of revoking the franchise that had been granted to exercise corporate powers, and the function of the state, as well as its interest in the disposition of the property of the corporation, is no greater in the one case than in the other. The power of a court to appoint any persons in the place of those who are directors of the corporation at the time of its dissolution is given in section 565, Code Civil Proc., and the authority given therein is the measure of its power. That section gives to the superior court of the county in which the corporation carries on its business authority to appoint one or more persons to be receivers or trustees of the corporation upon its dissolution, "on application of any creditor of the corporation or of any stockholder or member thereof," and, unless such application is made, the court has no authority to make the appointment. Its jurisdiction to make such appointment rests upon an application therefor by either a creditor or a stockholder, and can neither be invoked at the instance of a stranger nor assumed by the court of its own motion. *Bangs v. McIntosh*, 28 Barb. 600. If there should chance to be no directors in office at the time of the dissolution, or if for any reason the directors of the corporation ought not to be intrusted with the subsequent control of its affairs, the court can appoint others in their place, (Civil Code, § 2289;) but the persons so appointed become trustees in the place of the directors, and with the same powers and responsibility that are conferred by section 400 upon the directors in office at the time of its dissolution.

The only parties to the present action are the people of the state and the delinquent corporation. When the object for which the action is authorized—the revocation by the state of the franchise which it conferred—has been accomplished, there would naturally be no further action for the court to perform. The state has no interest in either

the assets of the corporation or its affairs, and when it has secured the dissolution of the corporation its functions in the matter have ceased. See *People v. Cement Co.*, N. Y. 144, 29 N. E. 947. The statute does not authorize either the attorney general or the insurance commissioner to exercise further direction or control in the affairs of the dissolved corporation, or in the disposition of its assets; nor has the state any interest of its officers any interest in having the assets of the corporation distributed to its creditors receive from the assets of the corporation the amounts in which it may be entitled to them; and it is no concern of the state how or when the assets of the corporation shall be divided between the stockholders. Notwithstanding the decree of dissolution the property still belongs to the stockholders, and the right to wind up the affairs of the corporation and to distribute its assets is given by the statute to the directors, and they can be deprived of this control only by the property of the corporation only by the instigation of a creditor or stockholder. It must be considered that the insolvent corporation, which the dissolution of the corporation is authorized under section 601, Pol. Code, is a statutory, and not an actual, insolvent corporation, and, as the liabilities of an insurance corporation are contingent upon a future loss, rather than an existing indebtedness, the watchfulness which the commissioner is required to exercise over the corporation would rarely happen that an insurance corporation which was in actual business would be actually insolvent, except some gross mismanagement had exhausted its resources. It is also to be observed that in the case of the present instance there is no question of actual insolvency, other than the technical insolvency of the capital stock of the corporation, nor is there any reference therein to the creditors of the corporation, except that it may be inferred from the recital in the finding above quoted. If in fact the corporation is only technically insolvent, is, insolvent within the definition given by the statute,—no reason can be assigned why the court should interfere with the management of its business. The property of the corporation still belongs to the stockholders, and it would require an express statutory declaration to that effect to authorize the court in a proceeding wherein the only parties are the state and the corporation, without any interest in this property, to assume to itself, or to take from the corporation, the control and management thereof. The court have the same right to the control of the property as has any other individual. The court is not authorized to take up the protection the interests of those who seek to invoke its aid for themselves.

When the appeal from the judgment was perfected, its execution was suspended until the determination of the appeal, (*Havens v. Superior Court*, supra,) and while the appeal is pending the court cannot execute to execution that part of its judgment

thorizing the appointment of a receiver. The effect of an appeal from a judgment when the proceedings thereon are stayed is to preserve the rights of the parties to the controversy in the same condition as they were prior to the entry of the judgment. *Dewey v. Superior Court*, 81 Cal. 64, 22 Pac. 333; *Dulin v. Coal Co.*, 98 Cal. 304, 33 Pac. 123. As the court could not take the estate of the corporation into its custody, or exercise any control over it, before the judgment of dissolution, it could have no property under its control which it was authorized to "preserve" pending the appeal from its judgment; but, if it could appoint a receiver to take the appellant's property from its custody and keep it in his possession during the pendency of the appeal, it would exercise an authority after the judgment greater than it possessed before its entry, and the effect of the appeal would thus be destroyed. For this reason the court had no jurisdiction to appoint Van Reynegom as receiver of the effects of the corporation "during the pendency of the appeal." The transfer of the proceedings in insolvency, after the order of adjudication had been made, from the department in which they had been pending to the department in which the action for dissolution was pending, did not confer upon the court any greater jurisdiction in the latter matter than it previously had had. Each of these proceedings was statutory in its character, and was to be conducted in the manner and within the limits prescribed by the statute under which it had been instituted. The application of the petitioner must be granted, and the writ of prohibition made peremptory.

We concur: BEATTY, C. J.; McFARLAND, J.; DE HAVEN, J.; FITZGERALD, J.

HARRISON v. HEBBARD, Judge. (No. 15,492.)

(Supreme Court of California. Jan. 25, 1894.)

INSURANCE—DISSOLUTION OF CORPORATION—CONTEMPT—VIOLATION OF VOID ORDER.

In an action by the attorney general to dissolve an insolvent insurance company the court has no authority, on decreeing dissolution, to appoint a receiver, and restrain such corporation, its directors, agents, attorneys, creditors, etc., from carrying on any litigation, and from interfering with or taking possession of any of its assets; and disobedience to such order does not constitute contempt.

In bank.

Application by Robert Harrison for a writ of prohibition to J. B. C. Hebbard, judge of the superior court of the city and county of San Francisco, to prohibit respondent from hearing a certain order to petitioner to show cause why he should not be adjudged guilty of contempt, and punished for disregarding a certain order made by respondent. Writ granted.

Edward R. Taylor and O. W. Cross, for petitioner. A. Ruef, for respondent.

HARRISON, J. Application for writ of prohibition. The matters embraced herein are closely connected with those involved in *State Inv. & Ins. Co. v. Superior Court*, 33 Pac. 549, (just decided,) and the facts therein stated need not be here repeated. The petitioner herein, as attorney for certain creditors, filed in the superior court of the city and county of San Francisco their petition in involuntary insolvency against the State Investment & Insurance Company, a corporation. The hearing of the petition was set for the 10th day of June, 1893, in department 10 of that court, before Hon. W. H. Levy, J., and was continued from that date until July 14th. On the 13th of July an action was commenced in the same court by the people of the state against the State Investment & Insurance Company; and at its commencement the respondent herein, who presided over department 4 of that court, made an order "that until further order in the premises said defendant corporation, its directors, agents, attorneys, and creditors, and each of them, and their agents, attorneys, and solicitors, and all others acting in aid or assistance of them, be, and are hereby, restrained from carrying on any litigation, and from interfering with or taking possession of any of the assets of said corporation." When the hearing of the proceedings in insolvency came on before the court in department 10, on the 14th of July, the making of this order of injunction was brought to the attention of the court and of the petitioner herein, but the petitioner disregarded the order, and proceeded with the application in insolvency, and obtained from the court in the department in which those proceedings were pending an order adjudging the corporation to be an insolvent debtor. Upon an affidavit of these facts having been brought to the attention of the judge who had issued the order of injunction, he caused an order to be served upon the petitioner herein requiring him to show cause why he should not, on account of those facts, be adjudged guilty of contempt and punished therefor. The present application is to prohibit the respondent from hearing the said order to show cause, or taking any steps thereunder, upon the ground that in so doing the court is proceeding in excess of its jurisdiction. In *State Inv. & Ins. Co. v. Superior Court* we have held that in the action brought by the people against the corporation for its dissolution the statute has not conferred upon the court any authority to take charge or management of the effects of the said corporation; that it has no authority to appoint a receiver pendente lite, and that upon the entry of the judgment of dissolution its functions in the action are at an end; and that it has no authority to assume the distribution of the effects of the

corporation and the winding up of its affairs. Under these principles it follows that the order of injunction issued by the court at the commencement of the proceedings for the dissolution of the corporation was without authority, and that the petitioner was not guilty of any contempt in disregarding the same. The subsequent order of the court requiring him to show cause why he should not be punished for violating this order is equally without authority, and it follows that his petition for a writ of prohibition must be granted; and it is so ordered.

We concur: BEATTY, C. J.; McFARLAND, J.; DE HAVEN, J.; FITZGERALD, J.

LOS ANGELES COUNTY v. LANKERSHIM. (No. 19,235.)

(Supreme Court of California. Jan. 24, 1894.)

COUNTY TREASURER—LIABILITIES—PAYMENT OF WARRANTS.

Where the law requires all county school moneys to be apportioned, and the warrants drawn on the special funds, a finding that a payment of a school warrant was made from the general school fund is not equivalent to a finding that the warrant was not drawn on any special fund, so that the treasurer was liable for an illegal payment.

In bank. On petition for rehearing. Rehearing denied.

For main opinion, see 35 Pac. 153.

PER CURIAM. Response to petition for rehearing. The principal point decided in this case was that the county treasurer, when he has no notice of the illegality of the demand, or of the fact that no requisition has been made upon the auditor, or of any other fact to put him upon inquiry, may safely pay a warrant drawn upon the school fund, if it is in due form, and bears the genuine signature of the auditor or his deputy; and the judgment of the superior court was reversed on the findings, because, while they show that the money here in controversy was paid by the treasurer out of the school fund, on what purported to be a warrant for the amount so paid, they do not show that such warrant was not genuine and in due form, and do not show any other fact that ought to have deterred the treasurer from making the payment on presentation of the warrant. In their petition for a rehearing, counsel for respondent contend that this proposition, conceding its soundness, has no application to this case, because the findings show that the payment was made from the general school fund, whereas the law is that all county school moneys must first be apportioned to the several school districts, and all requisitions made and warrants drawn upon the special funds so created; from which they argue that the warrant in this case, having been drawn upon the general

school fund, (meaning, we suppose, the apportioned school moneys,) bears upon its face the evidence of its illegality. But the fact that the money was paid from the apportioned school fund, while it may be evidence that the warrant was not drawn upon any special or district fund, is not conclusive evidence of such fact, and still less is it the equivalent of a finding to that effect. The finding only means that the treasurer charged the payment against the school fund without specifying the district, and this is quite consistent with this fact to suppose that the warrant may have been properly drawn against the fund of some particular district. In short, the judgment is erroneous, but is not supported by findings definite and conclusive as to one point essential to the liability of the defendant. Conceding, without deciding, that the law governing the apportionment of county school moneys is as recently stated, it, a warrant drawn upon the general fund would be illegal on its face, it is not merely illegal in a technical sense, but would carry evidence that it was not drawn upon any lawful demand or requisition of the county superintendent. We have held, or intended to intimate that the treasurer and his sureties would not be liable for money paid on such a warrant. But, on the other hand, if the warrant was, as we assume, regular on its face, and bore the genuine signature of the auditor, we do not see how that the amount paid can be recovered from the treasurer merely because the payment was made to the wrong account. Upon a new trial, the facts as to the warrant may be proved, and the findings so framed as to show whether it was legal on its face or not. Rehearing denied.

Ex parte AH CUE. (No. 21,041.)
(Supreme Court of California. Jan. 26, 1894.)
CONSTITUTIONAL LAW—STATE CHINESE EXCLUSION ACT—VALIDITY.

Act March 20, 1891, (St. 1891, p. 100), intended to prohibit Chinese from coming into the state, and to prescribe the terms on which those residing in the state may remain on between different points in the state, is in conflict with Const. U. S. art. 1, § 8, giving the general government authority to regulate commerce with foreign nations, and is void.

In bank.

Petition by Ah Cue for a writ of habeas corpus to secure his discharge from the custody of the chief of police of the city and county of San Francisco. Writ granted. Petitioner discharged.

Thos. D. Riordan and Harvey S. Brown, for petitioner. Atty. Gen. Hart, for respondent.

PER CURIAM. The petitioner was arrested on the date of the issuance of the writ here granted, and imprisoned by the chief of police of the city and county of San Francisco, charged with the alleged crime of "unlawfully coming

ing, and remaining within the limits of the state of California," in violation of an act of the legislature of this state approved March 20, 1891. (St. 1891, p. 185,) entitled "An act to prohibit the coming of Chinese persons into the state, whether subjects of the Chinese empire or otherwise, and to provide for registration and certificates of residence, and determine the status of all Chinese persons now resident of this state, and fixing penalties and punishments for violation of this act, and providing for deportation of criminals." The main purpose of this act, as shown by its title and by its provisions, is to prohibit Chinese persons from coming into the state, and also to prescribe terms and conditions upon which those residing within the state shall be permitted to remain or travel between different points in the state. The power thus attempted to be exercised is one which belongs exclusively to the general government by virtue of its authority to regulate commerce with foreign nations, (section 8, art. 1, of the constitution of the United States,) relating, as it does, to a subject-matter in which all the people of the United States are concerned, and not alone those of the state of California. Congress, in the exercise of its constitutional power, has prescribed the terms upon which the Chinese now here shall be permitted to remain within the United States; and it is beyond the power of the state to impose any further conditions. *Ah Kow v. Nunan*, 5 Sawy. 563. See, also, *Chinese Exclusion Case*, 130 U. S. 604, 9 Sup. Ct. 623; *Fong Yue Ting v. U. S.*, 140 U. S. 711, 712, 13 Sup. Ct. 1016. The statute under which the petitioner is held is so plainly in excess of the power of the state, and in conflict with the constitution of the United States, that any extended discussion of its provisions is wholly unnecessary. The petitioner is discharged.

Ex parte LIPPMAN. (No. 21,045.)

(Supreme Court of California. Jan. 26, 1894.)

In bank.

Petition by one Lippman for a writ of habeas corpus to secure his discharge from the custody of the chief of police of the city and county of San Francisco. Writ granted, and petitioner discharged.

Thos. D. Riordan and Harvey S. Brown, for petitioner. Atty. Gen. Hart, for respondent.

PER CURIAM. Upon the authority of *Ex parte Ah Cue*, 35 Pac. 556, (No. 21,041, just decided by this court,) the petitioner is discharged.

Ex parte LIPPMAN. (No. 21,044.)

(Supreme Court of California. Jan. 26, 1894.)

In bank.

Petition by George Lippman for a writ of habeas corpus to secure his discharge from the custody of the chief of police of the city and

county of San Francisco. Writ granted, and petitioner discharged.

Thos. D. Riordan and Harvey S. Brown, for petitioner. Atty. Gen. Hart, for respondent.

PER CURIAM. Upon the authority of *Ex parte Ah Cue*, 35 Pac. 556, (No. 21,041, the opinion in which has been this day filed,) the petitioner is discharged.

NORTHERN COUNTIES INV. TRUST, Limited, v. CADMAN et al. (No. 19,271.)

(Supreme Court of California. Jan. 29, 1894.)

EXECUTION—SALE OF REAL ESTATE—PUBLICATION OF NOTICE—RIGHT OF SHERIFF TO SELECT NEWSPAPER.

Where, before sale of real property on execution, notice thereof must be published "in some newspaper" of the county, if there be one, (Code Civil Proc. § 692,) and an officer selling without such notice forfeits \$500 to the aggrieved party, besides actual damages, (section 693,) the sheriff, and not the plaintiff, has the right to select the newspaper in which such notice shall be published.

Commissioners' decision. Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by the Northern Counties Investment Trust, Limited, against John Cadman and others, in which there was a judgment for plaintiff, and an execution issued. From an order denying plaintiff's motion for an order directing the sheriff to publish notice of sale of real estate on such execution in a newspaper designated by its attorney, plaintiff appeals. Affirmed.

Smith & Winder and Victor Montgomery, for appellant. F. O. Daniel and Chas. S. McKelvey, for respondents.

VANCLIEF, C. This appeal is from an order made after judgment denying plaintiff's motion for an order directing the sheriff to publish notice of sale of real estate on execution in a certain newspaper selected and designated by plaintiff's attorneys. The record contains no part of the judgment roll, nor anything to show the nature of the action, the substance of the judgment, or the form or substance of the execution, except that it required the sheriff to sell real property "under a decree and writ rendered and issued herein," and placed in the sheriff's hands by plaintiff's attorneys for service, with their written instructions to publish notice of the sale in the newspaper designated. The bill of exceptions shows that the motion was supported by, and heard upon, the affidavit of one of plaintiff's attorneys alone, the material substance of which is that, having contracted for the publication of the notice in a daily paper,—the *Daily Evening Blade*,—he gave the sheriff "written instructions, signed by affiant and his associate counsel, requesting and directing said sheriff to advertise said notice of sale of said property in the *Daily Evening Blade* for the

length of time required by the statute;" but that the sheriff ignored and disregarded said instructions, and commenced the publication of said notice in the Weekly Gazette, a weekly paper published in the same county, (Orange,) having, as affiant is informed and believes, a circulation "of about four hundred," whereas he is informed and believes the Daily Blade has a circulation "of about seven hundred." "That the judgment in this case is for a large sum, and plaintiff will be put to heavy costs in connection with the sale of said land, and, as plaintiff is a non-resident, it wishes to avoid the necessity of bidding in said land, or any part thereof, and to secure, if possible, purchasers at said sale who will take said property at such figures as will justify the plaintiff in permitting them to buy the same." Counsel for appellant state in their brief that the action was to foreclose a mortgage, and that the decree was one of foreclosure "in the usual form," and that "a copy of said decree, with a writ for the enforcement of the same, was issued by the clerk, * * * and delivered by appellant's counsel to the sheriff," with the aforesaid written instructions, but give no further information of the contents of the decree, or of the "writ for the enforcement of the same." It may therefore be presumed or assumed, as against the appellant, that the execution conformed to that part of section 684 of the Code of Civil Procedure which provides that "when the judgment requires the sale of property the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment by making the sale and applying the proceeds in conformity therewith." Newmark v. Chapman, 53 Cal. 558. Section 692, Code Civil Proc., provides: "Before the sale of the property on execution, notice thereof must be given as follows: * * * 3. In case of real property, by posting a similar (written) notice * * * in three public places of the township or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof once a week for the same period, in some newspaper published in the county, if there be one." And by section 693 it is enacted that "an officer selling without the notice prescribed by the last section forfeits five hundred dollars to the aggrieved party, in addition to his actual damages." It is admitted that these sections apply to sales on execution of foreclosure decrees; and it is clear that they enjoin upon the sheriff both the duty and the responsibility of posting and publishing the notices of sale as prescribed, which injunction necessarily implies the duty and responsibility of selecting the places where the notices are to be posted, and the newspapers in which they are to be published, since they are not specified. He is required to post the notices in three public places in the township, etc., and to publish them in some newspaper in

the county once a week, under a heavy duty, besides his responsibility for all ages. The penalty and responsibility consistent with the alleged authority plaintiff to dictate the places or papers in which the notices are to be published consistent only with his duty and power to determine and select the places and papers in which to publish the required notices. Richardson v. Tobin, 45 Cal. 31; O'Connell v. San Mateo v. Maloney, 71 Cal. 206, 19 Cal. 53; Publishing Co. v. Whitney, 97 Cal. 32 Pac. 237; In re O'Sullivan, 84 Cal. 281. Moreover, the requirement of notice of sales on execution is quite as important for the benefit and protection of the defendant as of the plaintiff; and the defendant, if not insolvent, ultimately pays the cost of publication. Why is not he, at least equally with the plaintiff, entitled to say to the sheriff how and where he shall publish notice of sale? And, if equally entitled, who is to decide when they disagree? I think the order should be affirmed.

We concur: TEMPLE, C.; BELCHER, J.

PER OURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

CRAIG v. SAN BERNARDINO INVESTMENT COMPANY (No. 19,262.)

(Supreme Court of California. Jan. 25, 1910.)

JUDGMENT—BY DEFAULT—VACATING

A judgment by default is proper where defendant was misled by a lawyer, plaintiff, a lawyer, that the defendant of his codefendants extended his answer.

Commissioners' decision. Department of Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by John W. Craig against the Bernardino Investment Company and for the value of certain shares of stock in investment company. From an order granting a judgment by default, plaintiff appeals. Affirmed.

Willis & Cole and Goodall & Leonard, appellants. Harris & Gregg, for respondents.

TEMPLE, C. This appeal is from an order vacating and setting aside a default judgment, and permitting the defendant to answer. The application was based on two grounds, one of which was that the default was through excusable neglect, and the other was upon terms. Suit was brought to recover the value of certain shares of the corporate stock of the corporate defendant on the ground that the said defendant refused to transfer the shares on its books, and to issue a new certificate to plaintiff, who was purchaser and assignee of the stock. The same was served upon the secretary

corporation, who was also a director, and it does not appear that any other officer of the corporation was aware of the controversy. The secretary, as he states in his affidavit, inquired of the plaintiff, who is a lawyer, if the fact that some of the defendants resided in another county would give all defendants 30 days within which to answer, and was informed that it would. For this reason he did not at once refer the matter to an attorney, but waited until he could see the regular attorney of the corporation, who resided at Los Angeles. But for this assurance, he would have answered in time. This is more than a mere mistake of law. The agent of the corporate defendant was misled, unintentionally no doubt, by the opposite party. Plaintiff should not be allowed to profit by this, even though it was with no design of gaining an unfair advantage. There is a sufficient showing of merits. The affidavit shows that the corporation never did refuse to transfer the stock, and that the plaintiff has obtained a judgment for \$71,750 for stock, which was not then, and has not been since, of the value of more than \$2,050. I think the order should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

WILSON v. SAMUELS et al. (No. 15,333.) (Supreme Court of California. Jan. 25, 1894.)

Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by J. H. Wilson against D. Samuels and another. For former report see 35 Pac. 148. Modified.

Naphtally, Freidenrich & Ackerman and A. G. Eels, for appellants. Geo. D. Collins, for respondent.

PER CURIAM. The judgment heretofore rendered in this court on December 26, 1893, is hereby modified so as to read as follows: "Judgment and order reversed, and cause remanded for a new trial."

FERGUSON v. McBEAN. (No. 19,232.) (Supreme Court of California. Jan. 22, 1894.)

PLEADING—SUFFICIENCY OF COMPLAINT—REVIEW ON APPEAL—CONFLICTING EVIDENCE—ACTION ON CONTRACT—EVIDENCE—COMPETENCY—HARMLESS ERROR.

1. A complaint alleging that plaintiff demanded payment of a specified sum, that defendant refused payment, and that the sum is due and unpaid, sufficiently alleges nonpayment of the sum alleged to be due.

2. Where the evidence is conflicting, the verdict should not be disturbed.

3. Plaintiff, having made a contract to purchase land from C., assigned it to defendant, who agreed to pay plaintiff a certain sum if he purchased the land from C. Held, in an action to recover such sum, that it was competent to show the circumstances attending the making of the contract of assignment; it being disputed whether C.'s sale of the land to defendant's stepson was under the contract between C. and plaintiff, and the relations between defendant and his stepson in regard to the entire transaction being a material issue raised by the pleadings.

4. It was proper to deny defendant's motion to strike out plaintiff's evidence as to conversations with a third person, not in the presence of defendant, and to retain such evidence till plaintiff's evidence was in, as other evidence might show that such third person was authorized to represent defendant.

5. Evidence that a third person agreed to pay plaintiff a part of the sum sued for was properly excluded, since defendant could not be relieved from his written obligation by such person's agreement to pay it, unless plaintiff released him.

6. Evidence that defendant's stepson told another person that he was representing defendant, and was ready to consummate the trade, was competent to show that the purchase was made under the contract assigned to defendant.

7. It was also competent to corroborate defendant's statement, after the sale, that he had purchased the property.

8. The possession and production by defendant's stepson, at the time of the transaction, of the assignment of the contract by plaintiff to defendant, were competent to show that he was defendant's agent.

9. The admission of testimony that plaintiff said defendant was represented by his stepson at the sale was not cause for reversal, when plaintiff had already testified to the circumstances connected with the assignment of the contract, and that the stepson was a party to the assignment, though it was not so stated therein.

10. Plaintiff having made the contract with C. personally, and having assigned it to defendant, evidence that plaintiff made the contract with C. at the request of one R. was properly excluded, as such fact would not alter defendant's liability.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by M. L. Ferguson against Alexander McBean on contract for the sale of lands. There was judgment for plaintiff, and defendant appeals. Affirmed.

Hendrick & Younkin and E. Crossman, for appellant. Rowell & Rowell and Hunsaker, Britt & Goodrich, for respondent.

HAYNES, C. This action was originally brought against McBean and A. V. Bills. The defendants demurred to the original complaint upon the ground that Bills was improperly joined as a defendant. The demurrer was overruled, and, upon the trial, plaintiff had judgment. Upon appeal by defendants it was held that the demurrer should have been sustained, and the judgment was reversed, with leave to the plaintiff to amend her complaint. See 91 Cal. 64, 27 Pac. 518. Respondent thereupon dismissed

the action as to Bills, and amended her complaint in the matters made necessary by the dismissal of the action as to Bills, but retained, in substance, all of the allegations contained in the original complaint connecting Bills with the transaction. For a statement of facts of the case, see the opinion of Mr. Chief Justice Beatty upon the former appeal, 91 Cal. 66, 27 Pac. 518.

The only questions presented upon this appeal which were not disposed of by the former appeal arise upon a demurrer to the amended complaint, and upon certain specifications of insufficiency of the evidence to justify the findings of fact, and upon exceptions to the admission and exclusion of evidence. The demurrer to the amended complaint was properly overruled. The allegations that plaintiff demanded payment of a specific sum, that defendant refused to pay said sum, "and that the same is now due and unpaid," sufficiently allege the nonpayment of the sum alleged to be due from the defendant to the plaintiff. As to the sufficiency of the evidence to justify the findings of fact in the several particulars specified by appellant, it is sufficient to say that upon each of these findings the evidence was materially conflicting, and, under the numerous decisions of this court, cannot be disturbed.

The respondent, called as a witness in her own behalf, was asked by her counsel the following question: "State the circumstances attending the making of the contract between you and McBean, set out in the complaint, wherein you assigned to McBean your interest in the contract theretofore made by you with the Colton Land & Water Co." It was objected by appellant that the question was irrelevant and immaterial, and not in issue in the case; that the contract was in writing, was set out in the complaint, and its execution admitted by the answer; and that evidence was inadmissible under those circumstances to prove either its contents or the circumstances under which it was executed, or that any other persons were parties to the same; and that the contract is not ambiguous. The objection was properly overruled. There were other questions in issue beside the terms and execution of the contract signed by McBean, and as to which the circumstances attending the making of the contract of assignment to McBean were both relevant and material. One of these questions was whether the sale and conveyance of the property by the Colton Land & Water Company to Bills was under the contract between the Colton Land & Water Company and respondent. If the circumstances called for by the question tended to elucidate the matter above suggested, it was material and competent. So, too, the relation between McBean and Bills in reference to the entire transaction, and each part of it, was a material matter put in issue by the pleadings, and, the issue being material, any

competent evidence tending to sustain the motion on the part of the plaintiff was competent. The motion to strike out all the answers to the foregoing question, "except such as pertain to the identification of the contract," was also properly denied. It is essential to the admissibility of evidence that it should prove the issue under which it is offered. It is only necessary that it tend to prove the issue, or some part thereof. We think the answer clearly tended to sustain a material issue, and was therefore properly retained.

Respondent was asked certain questions in chief as to conversations with Bills, and the presence of McBean, to which objections were made. The court overruled the objections, saying that "any conversation with Bills does not bind McBean unless connected with it. It is only a question of the order of proof, and it may as well be in one time as another." Defendant afterwards moved to strike out all the testimony of this witness relating to the conversations that she had with Bills, on the ground that no authority from McBean had been shown authorizing Bills to act as his agent in that manner, and that her testimony, so far as it relates to Bills, is wholly irrelevant and immaterial, which motion was denied, and defendant excepted. The motion to strike out the testimony was premature, and was properly overruled. The court did not abuse its discretion in admitting the evidence to be given at this stage of the case. It involved only the order of the court to control the order of proof, and, even conceding that the testimony of this witness did not then tend to show that Bills was authorized to represent McBean, if it did not show that it was not so authorized, it was proper to retain it until the plaintiff's evidence was in, as otherwise it might, and as we think did, show that it was so authorized.

Upon cross-examination the plaintiff was asked: "Whose \$1,000 was that that was paid for the first payment?" An objection was made on the part of the plaintiff was sustained, which the defendant excepted. This objection was settled upon the first appeal. 91 Cal. 73, 27 Pac. 518. Besides, if the objection was sustained, it was rendered harmless by subsequent evidence that this \$1,000 was furnished to her by the plaintiff.

Plaintiff was asked, upon cross-examination, the following question: "Did you agree to pay you some portion of the money or the whole of it?" Plaintiff's objection was properly sustained. The defendant entered into a written obligation to pay the money demanded, and could not be relieved from that obligation by Raynor's agreement to pay it, unless, in consideration of that agreement, the plaintiff released McBean, and this was not included in the question proposed to be shown.

The testimony of Mr. Mintzer that

property was sold to Bills under the contract made with plaintiff was both material and relevant. The conversation between Bills and Mintzer, testified to by the latter, in which Bills said he was there representing McBean, and was ready to consummate the trade, was competent and material for the purpose of showing that the purchase was made under the contract assigned to McBean by the plaintiff. The absence of McBean did not affect the testimony upon that point, at least. As to its bearing on the question of Bills' agency for McBean, it corroborated the statement of McBean, made to the witness after the sale, "that he had become the purchaser of the property; that he meant to put in larger pipes." So, too, the possession and production by Bills, at the time of the transaction, of the assignment of the contract by plaintiff to McBean, was a circumstance which tended to prove that he was the agent of McBean, and corroborated his statement that he represented McBean.

The subsequent conversation between Mintzer and McBean in regard to the sale of lots made by Mintzer after the contract with plaintiff, and before the conveyance to Bills, was also relevant and material. As urged by counsel, there was no issue in the case as to who was entitled to these lots, or the proceeds of them; but the fact that McBean raised a question in regard to them, and claimed the unpaid portion of the money for which they were sold, was very cogent and convincing evidence of three important facts in controversy, namely: (1) That the purchase, by whomsoever made, was made under this contract, as otherwise no possible claim could be made for lots sold after the date of the contract, and before the sale on July 13th; (2) that McBean was the real purchaser at that sale; and, if so, (3) that Bills was in fact his agent in the transaction. His interest in these lots could only have been acquired under the contract and by the sale made by the Colton Land & Water Company ostensibly to Bills. It does not affect the force of this evidence that Raynor had an interest in the purchase, and that Bills also represented him, for, so far as the Colton Land & Water Company and the plaintiff were concerned, he could serve Raynor only as the agent of McBean, who held the sole title to the contract. The objection to the testimony of the witness Mintzer that Mrs. Ferguson told him that Bills was there to represent McBean does not appear to have been sufficiently presented to the court below; but, assuming it to have been properly taken, the answer of the witness does not justify a reversal of the judgment. The plaintiff had already testified to the circumstances connected with the assignment of the contract to McBean, and that Bills was in fact a party to the assignment, though not so expressed in it. She had given evidence, as had also the witness upon the stand, tend-

ing to show the agency of Bills. Besides, if it were conceded that the court erred in overruling defendant's objection to this testimony, it is clear that the error was harmless, as the testimony abundantly shows, as we have just seen, that Bills was in fact the agent of McBean. The fact of the agency being sufficiently established by other testimony, and especially by the conduct and declarations of the defendant himself, he could not be injured by testimony erroneously admitted upon the same fact.

P. A. Raynor, called on behalf of the defendant, was asked the following question: "State at whose instance she obtained that contract." This question was asked for the purpose of showing that the contract here sued upon was obtained by Mrs. Ferguson from the Colton Land & Water Company at the instance and request of Raynor. This evidence was clearly immaterial. The plaintiff made the contract with the Colton Land & Water Company personally, and it was assigned to the defendant, who agreed in writing that, under the circumstances and conditions therein expressed, he would pay to her the sum of \$3,000. The obligation of the defendant, it is clear, could not be affected by the fact that Raynor, or any one else, had instigated the plaintiff to procure the contract.

W. E. Raynor, a witness for defendant, having testified that the mortgage given by his father to Bills for \$35,000 included the unpaid purchase money of McBean's water right, as well as of the remainder of the land, was asked by defendant the following question: "State what was the relative consideration for the giving of that mortgage, as between McBean's water contract and Bills' interest in the land." Plaintiff's objection thereto was properly sustained. It will be observed that the mortgage was made to Bills alone. The question concedes that it included the unpaid consideration of the water right, which belonged to McBean, and assumes that the land conveyed by Bills to Raynor was in fact owned by Bills, and that McBean had no interest in it. The question at issue was as to McBean's interest in the land purchased from the Colton Land & Water Company under the Ferguson contract. How the relative value of the land and the water could possibly tend to show who in fact owned the land is beyond comprehension. If the witness had answered that the purchase price of the water included in the mortgage was one-fourth, it would have tended neither more nor less to prove the ownership of the land than would the answer that it was three-fourths. The question as to the relative value of these interests was therefore wholly immaterial. Finding no material error in the record, the judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, said judgment and order are affirmed.

**BRANDENSTEIN v. HOKE et al., (BRAND-
ER, Intervener.) (No. 18,233.)**

(Supreme Court of California. Jan. 25, 1894.)

**LEEVE DISTRICTS—CONSTITUTIONAL LAW—BONDS
—ESTOPPEL.**

1. Act March 25, 1868, (St. 1867-68, p. 321,) which requires the county board to erect a levee district whenever a petition therefor shall be presented by persons in possession of more than half the land in the proposed district, without submitting the question of tax to a vote of the people in such district so erected, is unconstitutional, since no discretion is vested in the board to reject the petition, no notice is required to be given to landowners who do not join therein, and no opportunity for contest is allowed. *Moulton v. Parks*, 64 Cal. 166, 30 Pac. 613, approved.

2. A levee district organized under an unconstitutional law is not a corporation de facto, and may set up the unconstitutionality of the law to defeat the collection of bonds issued by it.

3. Such district is not estopped from denying liability on the bonds by the fact that it retained the proceeds arising from their sale, and paid interest on them for several years.

Department 1. Appeal from superior court, Sutter county; E. A. Davis, Judge.

Mandamus by Joseph Brandenstein against William T. Hoke and others, defendants, and George L. Brander, intervener, to compel defendants to levy a tax to pay bonds issued by a levee district. From a judgment for defendants, plaintiff appeals. Affirmed.

Ben Morgan, for appellant. A. C. McLaughlin, Dist. Atty., F. C. Lusk, and M. E. Sanborn, for respondent. Henry Thompson, (Philip P. Galpin, of counsel,) for intervener.

GAROUTTE, J. The defendants other than George L. Brander, an Intervener, are the supervisors of the county of Sutter, and, as such, are ex officio members of and constitute the board of reclamation fund commissioners of levee district No. 5. The plaintiff is the holder of certain bonds of said district, which were issued and sold for the purpose of securing funds to carry on improvements in such levee district. A writ of mandate is prayed for, requiring said board of fund commissioners to take certain steps provided in the statute looking towards the levy and collection of a tax upon the property within the limits of the district, to be applied in liquidation of the principal and interest of plaintiff's bonds. The matters here involved are purely matters of law, and the first and principal question presented involves the constitutionality of the following section of an act of the legislature, passed March 25, 1868, (St. 1867-68, p. 321:) "Sec. 21. Whenever a petition shall be received by said board of supervisors from persons in possession of more than one-half

of the acres of any specified portion of the county, asking to be set apart and into a levee district, said board shall erect such territory into a levee district, and place it under the provisions of this act to be called levee district No. 2, 3, and so on, as the case may be, provided that the board shall not be required to submit the question of tax to a vote of the people of any district so erected." We cannot bring ourselves to the conclusion that it is necessary to enter upon an extended discussion for the purpose of demonstrating the unconstitutionality of the foregoing provision of the statute of this state. That it is violative of fundamental principles of constitutional law is apparent upon the slightest inspection. It is observed that one petitioner, having secured a session of a majority of the acreage of the territory, which he desires to form into a levee district, has the absolute right to organize such district. No notice to his neighbors is required. No opportunity for protest is allowed. No discretion is vested in the board of supervisors to reject the petition, or to change its proposed boundaries. The action of the board is entirely perfunctory, and the lands of the petitioner's neighbors are left to no reclamation. They may consist of valuable meadows, where flood waters are never absent. They, being of great value, may be situated within the lines of the proposed district, the single purpose of bearing the burden of the taxation which is sure to follow the creation of the district. While the interests of the neighbors may be considered trifles in the eyes of the legislature, yet in the eyes of the people, a practice of the things countenanced by the provision involves a violation of the most sacred constitutional rights. This is an undue delegation of power to one or more known persons to deal with their neighbors' property with an iron hand, untrammelled by any of the requirements that are everywhere recognized by our constitutions as absolutely necessary. It is observed before one man may do so, he must not interfere with another's property. The constitutionality of the statute was reviewed by the court in the case of *Moulton v. Parks*, 64 Cal. 166, 30 Pac. 613, and it was there declared to be violative of the constitution of this state. Appellant insists that the case was not before the court, and that the views there expressed were obiter dicta, and is not necessary for us to pass upon the contention here. If those views were correct, they are dicta no longer, for we have now to prove them, as containing a sound basis for the action of the law. We also refer to *v. Bennett*, 29 Mich. 451, in support of the views we have expressed. That case contains an elaborate discussion of the same principle here involved, and, both as to the facts and the law, occupies much broader ground than the case at bar.

It is claimed that this levee district is at least a corporation de facto, and

defendants will not be allowed to set up the unconstitutionality of the law under which it was organized for the purpose of defeating this proceeding; and *Dean v. Davis*, 51 Cal. 406, is relied upon to support this doctrine. That case does not extend to the limits insisted upon. While it is true that the regularity of the proceedings taken in the organization of a corporation cannot be questioned collaterally, still that principle does not arise in this case. This is not a question of regularity of proceedings. The matter here presented is, was there any law whatever under which a corporation similar to this so-called "levee district" could be organized at all? If there is no such law, then there is neither fund commissioners nor corporation, and a void law is no law. It is said in *Norton v. Shelby Co.*, 118 U. S. 442, 6 Sup. Ct. 1121: "An unconstitutional act is not a law. It confers no rights. It imposes no duties. It affords no protection. It creates no office. It is, in legal contemplation, as inoperative as though it had never been passed."

It is also insisted that respondents are estopped from disputing the validity of the bonds by retaining the benefit derived from the proceeds of their sale, and also by the payment of interest upon them for several years. We cannot assent to this view. It might possibly have some weight if the district was a corporation organized under a valid law, and these bonds were issued ultra vires, although the principles declared in *Sutro v. Pettit*, 74 Cal. 332, 16 Pac. 7, seem to negative such contention. But here the principle cuts underneath all mere questions of irregularity of organization, or even the ultra vires issuance of bonds, for there is no organized body or person or persons against whom to urge a waiver or plead an estoppel. It is ordered that the judgment be affirmed.

We concur: HARRISON, J.; PATERSON, J.

STEWART et al. v. SUPERIOR COURT.
(No. 15,482.)

(Supreme Court of California. Jan. 25, 1894.)

Department 1. Application by Julia V. Stewart and W. B. Prentice for writ of review. Modified.

For former report, see 35 Pac. 156.

Gibson & Titus and V. E. Shaw, for petitioners. E. W. Britt, for respondent.

PER CURIAM. It appearing to the court that the demurrer to the petition was submitted without answer being filed, under a misapprehension as to the effect of such submission under subdivision 3, rule 26, it is ordered that the judgment heretofore entered herein be modified to read as follows: "The demurrer to the petition is overruled, and it is ordered that the writ issue as prayed for."

DREW et al. v. HICKS et al. (No. 19,199.)
(Supreme Court of California. Jan. 25, 1894.)
NUISANCE—PRESCRIPTIVE RIGHT—AMENDMENT—
SURFACE WATERS.

1. The rule that a right to maintain a nuisance cannot be acquired by prescription applies only to public, and not to private, nuisances.

2. Where evidence showing a prescriptive right to maintain a private nuisance has been admitted without objection that it is not within the issues made by the pleadings, it is an abuse of discretion to refuse to allow defendant to amend his answer so as to allege the right.

3. The rule that land is subject to the flow of surface water from higher land does not apply to surface water turned on the lower owners by artificial changes made by those owning land above them.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by H. L. Drew and C. W. Fairbanks against Sarah A. Hicks and William Curtis to enjoin defendants from constructing a bulkhead so as to turn water on plaintiffs' premises. From judgment for plaintiffs, defendants appeal. Reversed.

Rolfe & Freeman, Harris & Gregg, and Paris & Satterwhite, for appellants. Willis, Cole & Craig and C. W. C. Rowell, for respondents.

HAYNES, C. Appeal from the judgment, and an order denying defendants' motion for a new trial.

This case and the case of *Drew v. Cole*, (No. 19,143, filed Feb. 4, 1893,) 32 Pac. 229, (not reported in California Reports,) were tried together in superior court, and decided upon the same evidence. In *Drew v. Cole*, findings and judgment were for defendants, and upon appeal the judgment was affirmed, and a petition for rehearing denied. For a description of the premises of the respective parties, and a general statement of the facts involved, see *Drew v. Cole*, supra.

The complaint in *Drew v. Cole* was filed October 14, 1891, and in this case the complaint was filed November 9, 1891. The cases were different as to the specific relief sought, though depending largely upon the same facts, and involving in the main the same questions of law. That case was brought to enjoin the defendants from constructing a bulkhead in a wash or ravine in Colton avenue, which separates the lands of plaintiffs and defendants, whereby the water would be prevented from flowing down that avenue, and would be turned, as was alleged, upon the premises of the plaintiffs. The defendants answered, and also filed a cross complaint alleging that there was a natural water course over the lands lying to the eastward, which entered plaintiffs' premises at the southeast corner; that plaintiffs had built a dam across that water course at said corner of their land, and had excavated the ground on that portion of the

avenue next plaintiffs' premises, whereby the water was turned down the avenue, and cut the ravine therein, and flooded defendants' lands, and, if the dam was allowed to remain, would cause them irreparable damage, —and prayed that it be abated as a nuisance, and for an injunction. Findings and judgment went for the defendants, dismissing the complaint, and granting the prayer of the cross complaint. In this case the complaint alleges, substantially as in the former complaint, "that the general trend of that section of the country is sloping at various grades from east to west and from southeast to northwest down to and across the premises of the defendants, and, in times of heavy storms, rain falling upon the same, or any large body of water flowing thereon, not absorbed by the soil, will, and always has, except when obstructed or diverted from its natural course as hereinafter stated, flowed in wide sheets of water down to, upon, and across the premises of said defendants," and charges that defendants, with a malicious and wrongful design to cause the water to flow down California street on the easterly side of defendants' premises, and with intent to discharge the same upon and across plaintiffs' premises, erected an embankment from two to four feet high along the east line of defendants' lands, (that being the west side line of California street,) and that, on top of said embankment on defendant Curtis' land, he attached wires to cottonwood trees, with the design to intercept brush and debris, which would constitute a barrier to the flow of water, and turn it down to and upon plaintiffs' land. The prayer is that the embankment and wire fence be abated as a nuisance.

The learned judge who tried these cases prepared a written opinion, in which he stated the material or more important facts found by him, and his conclusion thereon, and this opinion was signed and filed February 4, 1892; and afterwards, on the 15th, formal findings were signed and filed in this case, the latter following quite closely the language of the complaint. In several important and controlling particulars, the facts in the latter are wholly inconsistent with the facts stated in the opinion filed by the court, and are also irreconcilable with the findings in *Drew v. Cole* in respect to facts equally pertinent and material to this case as to that. It is true that in *Drew v. Cole* there was no issue as to the embankment and wire fence, and the right of the defendants to maintain them was not adjudicated, while here that is the sole issue, and the sole right to be adjudicated. This conflict of findings, however, does not necessarily require a reversal of this case. If, upon all controlling questions of fact, the evidence was materially conflicting, we would be obliged to affirm both judgments, because of such conflict, unless there were other grounds for a reversal.

Appellants contend, not only that the find-

ings are not justified by the evidence, but that the court erred in denying defendants' motion for leave to amend their pleadings to conform to the proofs given and without objection. In the written opinion of the learned judge, which is incorporated in the statement on motion for a new trial, it is said: "I am satisfied that the testimony of the defendants closes the fact that the Hicks embankment has existed to-day substantially as it existed for fifteen years. From the testimony of the examination of the premises, I am equally satisfied that the embankment is a natural surface of the ground, and that the defendant Hicks could have maintained the same would be by reason of the fact that she had acquired a prescriptive right to do so. This contention is urged by the defendant Hicks in their argument, and in the final submission of the cause. After a full examination of the pleadings, and the evidence, I do not see how their position can be maintained. Under our system of procedure, a party who would avail himself of the provisions of the statute of limitation must do so at the time of murrer or answer. No such objection has been taken in this case, it is to be waived." Counsel for defendants gave notice of a motion to amend their pleadings, on the ground that the allegations in the pleadings do not conform to the facts proven at the trial, and therewith the court refused to grant a copy of the proposed amendment. On the hearing the motion was denied. Defendants excepted, and took a bill of exceptions, and this refusal to permit the amendment is assigned as one of the grounds upon which their motion for new trial was based. Defendants, while controverting the fact that the embankment is in the same condition as formerly, cite authorities to the effect that the continuance of a nuisance for a long period of time does not give a prescriptive right to maintain it. If that is true, as a matter of law, under the circumstances of this case, the motion to amend was properly denied, as it was. The court said the defense. The first case cited in support of the proposition is *Mills v. Hall*, 9 Wall. 157. But this case does not sustain the proposition. If this embankment is a nuisance, it is a private one. In the case of *Mills v. Hall* it was claimed that the dam corrupted the water by which the health of plaintiff's family was affected. The defendants moved for a new trial upon the ground that, the dam had been continued for 20 years, no action could be maintained. The court said: "There is no such thing as a prescriptive right, or any other right to maintain a public nuisance." The court said the defendants have for twenty years permitted to overflow the plaintiff's mill pond, so far as the injury to the land is concerned, they have by their negligence of possession acquired a right to do so in that manner, and are not responsible for the damage to the plaintiff. So a man may pollute his own land; but, if such overflows cause disease and death through the neigh-

It must be abated, and he must respond in damages for any special injury which any individual may have sustained from it." All the cases cited by respondents to this point are cases of public nuisance. But this question has been settled in this state, as well as elsewhere. In *Learned v. Castle*, 78 Cal., at page 461, 18 Pac. 872, and 21 Pac. 11, it was said: "And to thus wrongfully cause water to flow upon another's land, which would not naturally flow there, is to create a nuisance per se. It is an injury to the right, and it cannot be continued because other persons might have a low estimate of the damages which it causes. And especially is this so when the continuance of the wrongful act might ripen into a right in the nature of an easement or servitude." See, also, *Richards v. Dower*, 64 Cal. 64, and other authorities cited in support of the above quotation. I think the court erred in not granting the amendment, as all the evidence in relation to the purposes for which the embankment was made, and the length of time it had been maintained, had been received without any objection, or any suggestion that it was not within the issues. Nor does it appear that it would have caused any delay in the disposition of the case, or that it would have made it necessary to take other or further testimony, while it is conceded by the learned judge that if the issue had been made the proofs already before him would have required a different judgment. If the facts had been found in relation to the embankment as indicated in the opinion of the court, it would be quite clear that a judgment for defendants, which those facts required, could not have been sustained, because not within the issues; and in such case the judgment would have been reversed, and the cause remanded, in order that the answer might be amended to correspond with the facts proved and found, as was done in *Bryan v. Tormey*, 84 Cal. 130, 24 Pac. 319. Justice would clearly have been promoted by the amendment, and no wrong would have been inflicted upon the plaintiff by allowing it; and under such circumstances it was an abuse of discretion to deny the motion. Or if, for any reason, the court was of the opinion that good practice required its denial, it was still sufficient ground for granting a new trial, followed by leave to amend the answer, since it clearly appeared that, such amendment being made, the facts required a different judgment.

Most of the questions likely to arise upon a new trial have been noticed in the opinion in *Drew v. Cole*, supra, though some of them might be made more specific, and which are especially called to our attention in respondents' brief.

So far as the embankment is concerned, a prescriptive right to maintain it would make them immaterial, though we cannot assume that there may not be different evidence upon that point; but in any event the right to

maintain the wire fence does not appear to have been acquired by prescription.

We do not question the proposition laid down by respondents, that where two fields or farms adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. But this question is not always to be tested by the conditions existing at the time the suit is brought. What is meant by "the natural flow" is to be taken as of a time when its course has not been changed or affected by artificial means. As stated by the supreme court of Ohio, "The lower owes a servitude to the upper to receive the water which naturally runs from it, provided the industry of man has not been used to create the servitude." *Butler v. Peck*, 16 Ohio St. 334. See *Ogburn v. Connor*, 46 Cal. 352, where *Butler v. Peck*, and *Washb. Easem.* (2d Ed.) p. 427, to the same effect, are cited and approved. This principle is equally applicable to both plaintiffs and defendants. If before the surface of the lands above were changed, and natural channels or washes in which surface waters flowed were obstructed, the water did not flow over defendants' lands "in times of usual, ordinary, and expected freshets," they have a right to protect themselves against surface water turned upon them by artificial changes made by those owning the land above them, and, so far as they find it necessary for their protection, turn the water to channels where it originally flowed, provided they have not delayed until a right by prescription has been acquired against them. Nor does the flow of water over lands in case of extraordinary freshets, or such as are not expected or reasonably anticipated, affect the question. The supreme court of Pennsylvania, speaking of "usual, ordinary, and expected freshets," for the consequences of which one might be liable, said: "A flood is another thing. It may not come for years together. When it does come, it is a visitation of Providence, and the destruction it brings must be borne by those on whom it happens to fall."¹ A cloud-burst, such as the record shows occurred in 1891, could not aid materially, if at all, in determining the "natural flow" of surface water as it formerly existed, nor affect the rights of any of the parties to this case. It was one of those inevitable calamities which are to be borne without complaint, and cannot convert a fence or an embankment, otherwise lawful and proper, into a nuisance which may be abated. I think the judgment and order appealed from should be reversed, with leave to the defendants to amend their answer.

We concur: VANCLIEF, C.; BELCHER, C.

HARRISON and GAROUTTE, JJ. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, with leave to the defendants to amend their answer.

¹ *McCoy v. Danley*, 20 Pa. St. 89.

PEOPLE v. COORNWELL. (No. 21,073.)
(Supreme Court of California. Jan. 25, 1894.)

CRIMINAL LAW—VERDICT—FIXING DEGREE.

Since there are two degrees of burglary, a verdict of guilty which does not fix the degree, as required by Pen. Code, § 1157, whenever a crime is distinguished into degrees, is erroneous, though the court charged that there could be no conviction of a higher offense than burglary in the second degree. *People v. Bannister*, (Cal.) 34 Pac. 710, followed.

In bank. Appeal from superior court, city and county of San Francisco; W. R. Dangerfield, Judge.

Thomas Cornwell was convicted of burglary, and appeals. Reversed.

W. I. Brobeck and P. A. Bergerot, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. On the authority of *People v. Bannister*, (No. 21,014; opinion filed Nov. 10, 1893,) 34 Pac. 710, the judgment and order of the superior court herein are reversed, and the cause remanded.

DAVIS v. EAMES et al. (No. 19,284.)
(Supreme Court of California. Jan. 25, 1894.)

MINES AND MINING—AGREEMENT TO PURCHASE.

A contract giving an option to purchase a mine, wherein the vendors covenant to sink a shaft of at least 100 feet, imposes on them the absolute duty of sinking the shaft to the agreed depth, though they find no evidence that the mine contains enough valuable ore to justify them in purchasing it. *Woodworth v. McLean*, 11 S. W. 43, 97 Mo. 325, distinguished.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by A. E. Davis against A. W. Eames and others for breach of contract. From a judgment for plaintiff, defendants appeal. Affirmed.

Wilson & Lamme, for appellants. Houghton, Silent & Campbell, for respondent.

BELCHER, C. This is an action to recover damages for an alleged breach of contract by the appellants. The case was tried by the court without a jury, and judgment was entered against appellants for the sum of \$700 and costs, from which, and from an order denying their motion for a new trial, they appeal. The facts are substantially as follows: The respondent, being the owner of a certain mining claim, known as the "Todd Mine," entered into a written contract with the appellants, by which, in consideration of the covenants and agreements to be performed on their part, he agreed to convey to them the property within four months for the sum of \$8,000; and they covenanted and agreed to at once enter upon the mine, and sink a shaft thereon to the depth of at least 100 feet, and to crosscut the ledge on the 50-foot level, and at the bottom of the

shaft to crosscut again at least 10 feet to make such other developments thereon as they might deem proper. They were to have all the ore taken from the mine in doing this work. In pursuance of the terms of the contract, appellants entered upon the mine and sunk a shaft to a depth of 50 feet. At the 50-foot level they ran a crosscut a distance of 47 feet, and struck a ledge of granite wall, which they penetrated to a depth of 3 feet. They then, without the plaintiff's consent, discontinued work in the shaft, and never afterwards did any more work, nor sunk any other shaft in the mine. There were croppings on the surface of the mine, and seams leading out from the croppings containing paying ore. The shaft was worked on one of these seams, and from it the defendants took some three or four tons of ore, which yielded about \$20 per ton; but they went out at a depth of about 26 feet, and at that point they found no ore in the shaft, and crosscut. They afterwards prospected the surface, and spent some \$1,200 in doing so, but did not, as they thought, find evidence that the ledge contained valuable ore in sufficient quantities to justify them in working for the mine, and thereupon they abandoned the contract. It is admitted that it would have cost at least \$700 to sink the shaft the remaining 44 feet and make a 50-foot crosscut at the bottom; and, as a reason for not completing the contract, the witness James, who was a long-experienced miner in charge of the work, testified in support of the defendants, that "One of the reasons why we felt that we could not comply with the written contract, and why we wanted it modified, was because it would require steam works to sink the shaft deeper, which would have been a very good deal."

Counsel for appellants say in their brief that "the only question to be considered is whether, under the facts and circumstances disclosed by the record, the respondent is entitled to anything in excess of nominal damages;" and they insist that he was factually damaged in any sum or to any extent by the failure to sink the shaft to the depth agreed upon, and hence that the court was in error in awarding damages in the sum of \$700. In support of this position, counsel rely upon the case of *Woodworth v. McLean*, 97 Mo. 325, 11 S. W. 43. That was an action to recover damages for breach of a contract. Plaintiffs owned a mining claim in New Mexico, and conveyed two-thirds of it as a consideration for the contract in question. The contract provided that McLean, within two years, at his own expense, should cause a shaft of certain dimensions to be sunk to "the depth of five hundred feet on the vein of ore, or as far as the vein would permit of sinking out on said claim." McLean sunk the shaft, as agreed, to a depth of 330 feet, and refused to carry it further. There was no evidence to the effect that

work was stopped at that point because the vein of mineral had given out entirely. The plaintiffs were awarded nominal damages only, and appealed. The appellate court said: "Plaintiffs regard this contract as obliging McLean to sink the shaft five hundred feet, in any event, irrespective of all intermediate developments. Their entire argument here rests on that assumption. We think the language of the agreement does not reasonably bear that interpretation. Its intent and purpose were to secure a development of the claim in a manner to 'subserve the mutual interests of the parties,' and, on the completion of the work, two-thirds of the shaft (as part of the entire claim) was to belong to McLean. The latter stipulated to sink the shaft five hundred feet 'on the vein of ore cropping out on said claim.' If, in the progress of the work, all indications of valuable mineral ceased, and the vein of ore ran out entirely, there was no obligation on McLean to proceed further. The question whether the vein of ore had ceased is one of fact, to be tried in the usual way. As the work stopped within the five hundred feet, the burden of proof rested on him to show that the vein of ore (along which the shaft was to proceed) had terminated, for the contract itself asserts the existence of the vein at the beginning. But on establishing that fact the requirements of the contract would be met, and there would be no breach whatever. The measure of damages for failing to continue a mining excavation, such as this, to the point fixed by the contract, is the reasonable price or value of the work necessary to complete the shaft to the agreed depth. But this rule is not applicable, in view of the language and evident purpose of the contract here considered, unless the vein of mineral continued to the point where McLean ceased work." That case is plainly distinguishable from this. In that the decision was based upon the theory that as, by the terms of the contract, the shaft was to be sunk on the vein of ore cropping out on the claim, the requirements of the contract were fully met and complied with when the vein wholly gave out. In this case the contract is different. Here, the appellants were given the right to sink the shaft at such point as they might select, without reference to any vein or croppings, and to make such other and further developments as they might deem proper, and to take and appropriate to their use all ore extracted from the mine while doing the work. The obvious purpose of respondent was to have the mine opened to a depth of at least 100 feet, in case appellants declined to purchase it; and of appellants, to satisfy themselves by making the stipulated explorations of the value of the property, before completing the purchase. The obligation of appellants to sink the shaft to the agreed depth was absolute, and was the consideration for the option given them. There were no modifying terms in the con-

tract. The claim that the supposed value of the mine would not have been increased by sinking the shaft to the agreed depth, but would probably have been lessened, is based upon theory, and not upon evidence or common knowledge. Respondent insisted that appellants should complete the shaft and crosscut in accordance with the contract, and we think he had a right to do so. The general rule as to the measure of damages in a case like this is correctly stated in *Woodworth v. McLean*, supra, and we think that rule applicable here, "in view of the language and evident purpose of the contract here considered." The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

WEIR et al. v. MEAD et al. (No. 18,235.)
(Supreme Court of California. Jan. 25, 1894.)
EXECUTOR'S BOND—NONEXECUTION BY PRINCIPAL
—LIABILITY OF SURETIES.

An executor's bond, purporting to be the joint obligation of the principal and sureties, and the several obligation of the sureties, but signed only by the sureties, and not by the principal, as required by Code Civil Proc. § 1388, is absolutely void.

Commissioners' decision. Department 1. Appeal from superior court, Sierra county; Stanley A. Smith, Judge.

Action by James C. Weir and others against Michael H. Mead, Benjamin Pauly, and others, on an executor's bond. From a judgment for plaintiffs, defendants other than Mead appeal. Reversed.

Frank R. Wehe, for appellants. F. D. Soward, for respondents.

BELCHER, C. Hiram G. Weir was a resident of Sierra county, and died in August, 1883, leaving a last will, by which he devised all his property to the respondents in this action, and in which he named the defendant, Mead, as the executor thereof. The will was duly admitted to probate by the superior court of Sierra county in October following, and letters testamentary were ordered to be issued to Mead "upon giving bond required by law in the sum of six thousand and five hundred dollars." A bond was thereafter approved by the judge, and filed by the clerk of the court, which recited: "That I, Michael H. Mead, as principal, am held and firmly bound unto the state of California in the sum of six thousand and five hundred dollars, lawful money of the United States of America, in which sum I am also jointly bound with each of my sureties hereinafter named. * * * And we, Robert Forbes, [and five others,] as sureties, are severally held and

firmly bound, and jointly with said Michael H. Mead are held and firmly bound, unto the said state of California, in the following sums, respectively, * * * for the payment of which, well and truly to be made, we and each of us, respectively, bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally as aforesaid, firmly by these presents." Then follow the conditions of the bond, and the signatures of the six sureties. Mead, the principal, never signed the bond, but, on the day it was filed, letters testamentary were issued to him by the clerk, and there was indorsed thereon the usual oath for the faithful performance of his duties. Thereupon, he took possession of all the property of the estate of the decedent, and thereafter continued to act as executor of the said will until June 9, 1890, when a decree was duly made and entered in the matter of the said estate, settling his final account, and distributing the residue of the estate, consisting of \$1,262.69 in money, to the legatees named in the will, who are the plaintiffs and respondents here. Mead never paid to the distributees any part of the money so distributed to them; and in November, 1892, they commenced this action on the said bond, to recover the same, making Mead and four of the sureties signing it parties defendant. Mead failed to appear, and his default was duly entered. The other defendants answered, and, among other things, denied in effect that the so-called "bond" ever became a valid bond, or imposed any obligation upon them, for the reason that it was never signed or executed by Mead, the principal named therein. The case was tried by the court without a jury, and judgments in proper form were entered in favor of the plaintiffs, from which, and from an order denying their motion for a new trial, the defendants other than Mead appeal.

Our Code provides that "every person to whom letters testamentary or of administration are directed to issue must, before receiving them, execute a bond to the state of California, with two or more sufficient sureties, to be approved by the superior court, or a judge thereof." Code Civil Proc. § 1388. The plain meaning of this provision is that the principal and sureties must sign the bond before letters can be issued, for obviously there can be no execution without signing. It will be observed that the bond in suit here is not in form the joint and several obligation of all the parties, as it should be, but is the joint obligation of the principal and sureties, and the several obligation only of the latter. The question, then, is, was the bond, —it not having been executed by the principal,—valid for any purpose; and can the appellants, who signed it as sureties, be held liable thereunder? In *City & County of Sacramento v. Dunlap*, 14 Cal. 421, the action was upon a bond which purported to be the joint bond of the principal and sureties, but was signed only by the sureties;

and the question for determination was whether the intended principal or the sureties were bound by it. It was held that the plaintiff could not recover upon the bond, and the court, speaking through Justice J., said: "The liability of the sureties is conditional to that of the principal. The principal is bound if he is bound, and not otherwise. The very nature of the contract imposed this condition. The fact that their signatures were attached to the instrument can make no difference in its effect. It purports on its face to be the bond of the three. Some one must have written his signature first, but it is presumed upon the understanding that the sureties named as obligors would adhere to the bond. Not having done so, it was incomplete, and without binding obligation upon either party. See *Bean v. Parker*, 17 Mass. 591; *Washburn*, 2 Pick. 24; *Sharp v. Watts*, 21; *Fletcher v. Austin*, 11; *Johnson v. Erskine*, 9 Tex. 1. The court then refers to certain decisions in other states which might seem to support a different doctrine, and says that the bond is based upon bonds which were both joint and several, and he intimates that the result might be different on the two classes of bonds. In *People v. Hartley*, 21 Cal. 421, the action was upon a bond which was in form to be the joint obligation of the principal and sureties, and the several obligation of the sureties, so far as regards the liability for which each undertook to be liable. The bond was signed by the sureties, but not by the principal. The opinion in this case was also delivered by Field, C. J.; and he held that the rule declared in *City & County of Sacramento v. Dunlap* was applicable, and that the bond imposed no binding obligation upon the sureties. In *Kurtz v. Forster*, 91 Cal. 91, 29 Pac. 413, the action was upon a bond which was alleged to have been executed by two of the defendants as principals, and by the other defendants as sureties. The bond purported to be the joint obligation of all the defendants, but it was in fact signed only by the sureties. It was held that the plaintiff might recover on the bond, and the cases of *City and County of Sacramento v. Dunlap* and *People v. Hartley* were not in point, "because in those cases the bonds sued on were strictly joint and several, while in the case at bar the obligation is expressly joint and several. In *Murfree on Official Bonds* the court thus stated: 'A bond purporting to be that of a principal and his sureties, in form, and only several in recitation of the liabilities of the sureties, is absolutely void, if it is not executed by the principal. Being a joint bond, his signature is necessary to its validity, for the condition which can be cured upon their suggestion. The complaint do not embrace the signature of the principal. Without his signature, the instrument is void. There is no bond of his,

defects can be suggested and cured." Section 252.

In other states the decisions are conflicting upon the question whether the sureties can be held liable on a bond which purports to be joint and several, but has not been signed by the principal. The last case to which our attention is called, bearing upon this question, and deciding in effect that sureties may be so held, is *Trustees v. Shelk*, 119 Ill. 579, 8 N. E. 189. The opinion in the case is an able one, and it reviews quite fully the decisions on both sides of the question. It is said: "We have given the authorities bearing on the question due consideration, and we are not inclined to adopt the view held by the courts, that a bond signed by the sureties without the signature of the principal may not be binding upon those who execute it, as was held in the case cited from Missouri, and other like cases. If the sureties saw proper to bind themselves without the principal executing the bond and becoming bound, we think they might do so, and their undertaking is one that may be enforced in the courts by an appropriate action. The fact that the principal obligor in this case failed to sign the bond was a mere technicality, which ought not to affect the rights of any of the parties concerned." On the other hand, the last case to which our attention is called, holding the other way, is a decision by the supreme court of South Dakota in *Board v. Sweeney*, 48 N. W. 302. In this case, too, the opinion is quite able and clear; and, after reviewing at length all the prior decisions on both sides of the question, it reaches a conclusion directly contrary to that reached by the supreme court of Illinois. It is said: "After a careful review of the authorities, and the reasoning upon which they are based, we think the better rule is that an official bond, in which the officer is named as principal, but which is not executed by him, is *prima facie* invalid, and not binding upon the sureties." It is not necessary here to cite or comment upon the numerous cases reviewed in the opinions last referred to, as this case clearly falls within the rule declared in the two California cases first cited. That rule is well supported in other states, and we think it should be followed here. There is a remark made by the supreme court of Michigan in the case of *Johnston v. Kimball* Tp., 39 Mich. 187, which we think applicable to this case, and we therefore quote and adopt it: "Our statutes plainly contemplate that the treasurer shall himself be a party to his own official bond; and, while we are not prepared to hold that a bond knowingly and intentionally given without his concurrent liability will not bind the obligors, we are of opinion that where he purports to be obligor, and does not sign the bond, there must be positive evidence that the sureties intended to be bound without requiring his signature before they can be held responsible." Here there was no evidence that the

sureties intended to be bound without requiring the principal's signature, but on the contrary the evidence introduced as to one of them tended to show that he did not so intend. It follows that the judgment and order should be reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the appellants.

We concur: SEARLS, C.; HAYNES, C.

PER OURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment and order be reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the appellants.

LEEVE DIST. NO. 9 v. FARMER et al.
(No. 18,159.)

(Supreme Court of California. Jan. 26, 1894.)

HIGHWAYS—VACATION—RIGHTS OF ABUTTING OWNERS.

1. An order of the board of supervisors laying out a new road, and vacating an old one, is not void because it fails to show on its face that there is any connection or relation between the two roads, if the surveys and descriptions of the new and the old roads show the connection.

2. The vacation of a highway established by statutory proceedings is not a taking of property from an abutting owner for a public use, requiring compensation to be first made to him, since he has no interest in such highway that is not common to the public, and must be held to have acquired and improved his property in view of the statute authorizing the vacation of such highways.

Commissioners' decision. Department 2. Appeal from superior court, Sutter county; E. A. Davis, Judge.

Action by Levee District No. 9 against L. P. Farmer and others to enjoin defendants from vacating a road. From a judgment for defendants, plaintiff appeals. Affirmed.

M. C. Barney and W. T. Phipps, for appellant. A. C. McLaughlin, Dist. Atty., W. H. Carlin, and M. E. Sanborn, for respondents.

HAYNES, C. Appellant brought this action against the individuals composing the board of supervisors of Sutter county, two persons who were overseers of road districts, and others who were owners of lands through which a certain road ran, to enjoin them from closing up or vacating said road. Appellant is a corporation organized to maintain a levee along a portion of Feather river to prevent overflows, and the part of said road in question is contiguous, for the greater part of its distance, at least, to the levee; and the complaint alleges that it is the only inlet or outlet to the levee for the purpose of protecting or repairing the same, and charges that the defendants are preparing and threatening to, and will, unless restrained by the court, fence, plow up, and de-

stroy the same, without any legal right or authority so to do, to plaintiff's great and irreparable damage. The prayer is for a temporary restraining order and a perpetual injunction. The answer of defendants, in addition to denials, alleged that on January 6, 1892, the board of supervisors ordered the road abandoned and discontinued, such order to take effect May 1, 1892. Upon the trial, defendants had findings and judgment in their favor, from which judgment the plaintiff appeals. The facts appear in a bill of exceptions. At the commencement of the trial, counsel for defendants suggested that, if the orders of the board of supervisors alleged in the answers were valid, that would dispose of the case, and proposed that the first proofs be directed to that issue, to which counsel for plaintiff assented. The proceedings of the board were thereupon put in evidence by defendants, and plaintiff put in no evidence whatever. The principal question, therefore, is as to the validity of the order vacating the road.

Appellant attacks the validity of the order mainly upon two grounds: (1) That the petition upon which the proceedings were based was for laying out and establishing a new road, and vacating an old one, and (2) that it did not appear from the proceedings that there was any connection or relation between the two, as that the construction of the new road rendered the old unnecessary. It requires neither discussion nor authority to sustain the proposition that two wholly disconnected objects cannot properly be joined in the same proceeding and order; and while these proceedings do not expressly, or in direct language, show that the new road is but an alteration of the old, making a portion of the old road unnecessary, the surveys and descriptions of the new road and the old, which were put in evidence, sufficiently show that fact. The portion of the old road vacated is about two miles in length, and the points where the new diverges from it at one end, and unites with it at the other, are given, while the courses of the surveys show that the divergence is at no place considerable,—perhaps not exceeding 40 rods. The petition was signed by the required number of qualified persons; the descriptions of the road sought to be established and the one to be vacated were definite, and did not show that they were disconnected matters which ought not, or could not, be joined in the same proceeding; and as to all facts tending to show whether the power of the board ought, or ought not, to be exercised, either by granting or denying the petition in whole or in part, the board exercises judicial functions, (*Damrell v. San Joaquin*, 40 Cal. 158; *In re Grove Street*, 61 Cal. 453; *Waugh v. Chauncey*, 13 Cal. 11;) and its judgments are final, and cannot be attacked collaterally, but may be reviewed upon certiorari where the jurisdiction of the board has been exceeded, (*Fall v. Paine*, 23 Cal. 303;

Murray v. Mariposa Co., 23 Cal. 4; *Damrell v. San Joaquin*, 40 Cal. 154; *Board*, 59 Cal. 701.)

This disposes of all the objections to the introduction of the records, except that they are to be noticed, and upon which appellant principally relies, viz.: That the provisions of the Political Code which purport to give the power upon the board of supervisors to vacate public roads are unconstitutional, because they do not authorize the board to assess the damages caused thereby to the owners, nor in any manner provide for compensation to them, and that the rights of abutting owners are property which the constitution cannot be taken away, and damaged without compensation. This is not cited to any case in this state, and the question thus made has been called in question by the court or decided. See *Cites Elliott, Roads & St.* p. 114. This citation has no material bearing upon the question. The author is there discussing the rights of abutting owners arising from the dedication of streets by the owner of the soil, and improvements made on the soil, such dedication, as is clearly shown in the cases cited in the footnote. One of the cases (*Story v. Railroad Co.*, 90 Cal. 1) was where the city owned certain lands, surveyed and platted them into lots, streets, and sold them, the deed containing a covenant on the part of the grantor to make the streets, which streets should ever thereafter continue and be for the use and common passage, and as public highways, and ways, for the inhabitants and the benefit of the city, etc.; and it was held that the city could not be deprived of the streets without compensation. Another case cited is *Clerq v. Gallipolis*, 7 Ohio, 218. In that case a corporation owned the lands, and sold them, and designated a certain portion as a public square, and placed a value on the land at which they were sold, the value on the public square being higher than the value of the other land, and it was held "that where land is dedicated to the use of the inhabitants, and one or more, especially one whose interest is affected in value, may enforce the terms of the trust." In the first of these cases the right of the abutter rested upon a covenant in his deed from the city, and in the second case on a trust created for his benefit, and the trustee could not disregard. Here there was no dedication, nor any covenant on the part of the public, nor any trust created for the public of the land upon which the road was laid for the use of the appellant. The public. Whatever trust existed in the land was of an easement, not for the use and benefit of appellant, but for the use of the public to continue for such time only as the public thereof by the public should be. But it does not appear probable that the levee was built because the road was vacated, or on the faith that it would ne-

cated, but because the river was there and likely to overflow; and therefore appellant is not within the authority he cites. Appellant, however, cites us to the statement of the same author at page 662, where the broad proposition is asserted that "the right which an abutter enjoys as one of the public, and in common with other citizens, is not property in such sense as to entitle him to compensation on the discontinuance of the road or street, but, with respect to the right which he has in the highway as a means of enjoying the free and convenient use of his abutting property, it is radically different, for this right is a special one. If this special right is of value,—and it is of value if it increases the worth of his abutting premises,—then it is property, no matter whether it be of great or small value. * * * For this reason we think the discontinuance or vacation of a street in such manner as to prevent access to the property of an adjoining owner is a 'taking' of property within the constitutional inhibition, and cannot be lawful without compensation to such owner." The cases cited by the author do not sustain the proposition. *Cincinnati City v. White's Lessees*, 6 Pet. 431, was where lands were dedicated and set apart "forever" as a common. *Petition of Concord*, 50 N. H. 530, was under a statute which provided: "On petitions for discontinuance of highways referred to the county commissioners, if they report for the discontinuance, they shall assess the damages occasioned to any person thereby." *Common Council v. Croas*, 7 Ind. 9, related to an alley in the city, and it was held that real estate dedicated for a street or alley could not be reclaimed by the donor without the consent of the owners of the property adjoining such street or alley. The court, in its opinion, called attention to the distinction between the modes of establishing streets in a town and of common roads,—that the former is a dedication by the owner, and the latter by appropriating private property to a public use by the state by the exercise of the right of eminent domain. *Haynes v. Thomas*, 7 Ind. 38, was also a case involving the dedication of land for a public street, and in no way bears upon the question now under consideration. The case cited from 50 Ind. 537 (*Butterworth v. Bartlett*) arose under a statute which provided that, upon the vacation of a highway, one through whose land the highway passed, who should be injured by the vacation of it, should be entitled to damages for such injury. Two other cases cited by the author related to the right of an owner, whose lot abutted on a street, to damages resulting from the use of the street by railroads, such use being an additional servitude. The only case cited by the author in which the question at bar was discussed is *Pearsall v. Board*, 74 Mich. 558, 42 N. W. 77; and the opinion in that case concludes as follows: "The statute of 1887, at page 185, recognizes the right of Mrs. Pearsall to her damages in this case,

and has undertaken to provide a mode for obtaining them, but it is not the one authorized by the constitution." The reporter adds, in a footnote, that the act provided for a jury of six freeholders instead of twelve.

Schaufele v. Doyle, 86 Cal. 107, 24 Pac. 834, and *Brown v. City of Seattle*, 5 Wash. 85, 31 Pac. 313, 32 Pac. 214, cited by appellant, were each cases of injury to abutting property resulting from a change of grade of an existing street in a city, whereby a change in the surface of the lot was made necessary to its convenient use and enjoyment, as by grading or filling, or changing approaches. In these cases, as in multitudes of others of like character, much is said about the rights and property of the abutting owner in the street; but what is said must be read in the light of the facts of each particular case. No one questions that an abutter upon a country highway has an interest in the easement created for public use; but it does not follow that such abutter is entitled to damages upon the vacation of such highway, nor that the vacation of it is a taking or damaging of private property for public use. The interest of each abutting owner is the same. Though it may be of greater use or benefit to one than to others, it is a common right, created in the same way, for the same purpose, of the same duration, and subject to be discontinued when the interests of the public, for whose benefit it was created, requires it,—that is, when it ceases to be necessary for public use. The easement is created for the public, not for an individual, though an individual may have a private way even by condemnation. Nor does the fact that a way may be necessary for a single abutter affect the conclusion that it is no longer necessary as a public road. If it were otherwise, no public road could be vacated so long as it could be shown that it was necessary for a single abutter, and thus the public could be required to maintain what is in fact a private way. That an abutter may be injured by the discontinuance or vacation of the road is conceded; but "there is no contract with surrounding property owners that a public improvement shall always exist as at present, and no damages will be allowed for its discontinuance, notwithstanding improvements have been made on the supposition that they will remain, and notwithstanding property has been thereby enhanced in value." *Mills*, Em. Dom. § 317. In Iowa the supreme court say: "We have held that the vacation of a highway does not take from an individual residing thereon his property, either for public or private use, and that he cannot recover damages therefor, although he may suffer inconvenience and loss therefrom." *Barr v. City of Oskaloosa*, 45 Iowa, 275. The supreme court of Pennsylvania said: "But by the vacation of Washington street no private property was taken or applied to public use;" and the court fur-

ther held that the power of the legislature was not restrained in that regard by the provision in the constitution requiring municipal corporations to make compensation for private property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, and which also provided that private property should not be taken or applied to public use without just compensation. McGee's Appeal, 114 Pa. St. 471, 8 Atl. 237. The supreme court of Illinois said: "It is not true, in fact or in law, that defendant has either taken or damaged plaintiff's property for public use. It has taken no property for public or any other use. That of which complaint is made is the vacating of certain streets. In no sense can that act be construed as either taking or damaging private property for public use, as those terms are used in the constitution." City of East St. Louis v. O'Flynn, 119 Ill. 200, 10 N. E. 395.

Whatever of apparent hardship there may be in particular cases where roads have been created by use when the country was new, as in this state, and for the temporary convenience of a sparsely settled country, a greater hardship would be entailed upon the public if those roads could not now be vacated or changed to meet the present changed situation without compensating those whose premises may abut thereon for the loss or inconvenience they may sustain, as, if that were the rule, none would consent to the change, and the added burden would be an embargo upon the creation of new and more desirable roads. The creation of highways by use, or under the statute, creates an easement for the benefit of the public for such time only as the public necessities and convenience may require, and creates no covenant or obligation in favor of an abutter that it shall always exist; but, on the contrary, the statutes, while providing for the establishment and maintenance of highways, also provide for vacating the same, and abutters must be held to have acquired and improved their property in view of that fact; and hence no one can acquire a legal interest in it other than that which is common to all, and this common interest the authority relied upon by appellant concedes does not entitle an abutter to damages upon the vacation of the road. The public use ceases upon such vacation, and an injury to the appellant consequent upon such ending of the use cannot be held to be a taking or damaging for a public use. The first order of the board of supervisors was valid, and the second order, passed to meet an objection made by appellant, was unnecessary, and did not affect the validity of the first. The plaintiff having introduced no evidence, the findings were proper. If the fact or extent or amount of the injury sustained by appellant had been found by the court, it would not avail to sustain a bill for an injunction, since it was *damnum absque in-*

juria. The judgment appealed from is to be affirmed.

We concur: VANCLIEF, C.; SE

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment appealed from is affirmed.

LEE v. SOUTHERN PAC. R. CO. 19,215.)

(Supreme Court of California. Jan. 19, 1925.)
APPEAL—GRANTING NEW TRIAL—ASSAULT—RISK BY SERVANT—DEFECTIVE MACHINERY

1. An order granting a new trial is affirmed where the verdict is excessive and reversed merely because the supreme court differs with the trial court as to what would have been a just compensation, unless the trial court abused its discretion.
2. An employee does not assume the risk of injury from a defect in the machinery known to him, unless the danger arising from the defect is also known or reasonably apprehended by him.

Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, judge.

Action by Charles A. Lee against Southern Pacific Railroad Company for personal injuries sustained while in defendant's employ. There was judgment for plaintiff and from an order granting a new trial. Appeals. Affirmed.

Cole & Cole and Del Valle & McCall, appellants. John D. Bicknell, for respondent.

PER CURIAM. Action to recover damages for personal injuries. The plaintiff's judgment, and now appeals from the court granting defendant's motion for a new trial.

In the latter part of July, 1888, plaintiff was employed by defendant as a helper on a freight train, and continued in that service until November 13, 1888, when he sustained the injury complained of. At the time of the accident he was about 25 years of age, had from childhood been in good health, and prior to his employment as a helper had had no experience in that service. The additional facts disclosed by the record, so far as necessary to be stated, are that on the day of the accident the plaintiff, which plaintiff was employed by defendant at the time to reach Honby siding in time to reach south-bound passenger train to Los Angeles, "helper" engine was in front of the freight engine, and when near the siding was detached from the train, and went ahead to a flat car on the side track, and proceeded forward so as to let the freight train pass the siding, plaintiff going with the freight train to make the coupling. After he let the freight train in on the siding, he stepped upon the flat car to make the coupling, and as they were approaching the flat car he stooped to the coupling bar; and when it was raised the engine jolted in running.

defect in one of the rails, and caused his foot to slip off the bottom frame of the pilot. That the side track was only partially ballasted, which permitted his foot to catch against a tie, and prevented him from drawing it up, and that in consequence he was thrown off, and one of the wheels of the engine ran over his leg, making it necessary to amputate it about four inches below the knee. He remained in the hospital seven months. As to the condition of the track, he testified, in substance: That it was only partially ballasted, leaving a part of the tie exposed, against which his foot caught. That this side track was about in the same condition as the others along the road. That they were made of refuse iron,—"old rails that are hammered down and battered out, full of ridges and everything; * * * full of hollows and ridges and chuck holes all through, or all along, in lots of places." That the track was pretty well grown over with weeds and grass. That he never ran over a side track that was not a mass of ruts and hollows, all over it, and this was no exception to the rule. Upon cross-examination he testified: That all the side tracks were used,—this, he supposed, as much as the others. That he thought he had been on it, but could not state positively. That he looked at it from the train, lots of times, as he went along there, the same as all the rest of them; knew it was there; saw it grown over with weeds, in a neglected condition. That he did not know, of his own knowledge, that there was any such defect in that rail. That he did not see the hole there in that rail. Other testimony tended to show that at that place there was a chuck hole eight or ten inches long and an inch to an inch and a half deep. There was testimony on the part of the defendant tending to show that the side track was in proper condition; but, as the plaintiff's knowledge of the condition of the siding is principally involved, it is not necessary to state the defendant's testimony in this connection. It seems to be conceded that the mode adopted by the plaintiff to make the coupling was usual and proper. Plaintiff brought the action to recover for the injury upon the theory that, through the negligence of the defendant, its side track was imperfectly constructed, defective, out of repair, and unsafe. The jury returned a verdict for \$25,000 damages. The grounds upon which defendant's motion for a new trial was granted, as appears from the opinion of the court, which is printed in the transcript, were: (1) That the damages were excessive. (2) That the injury suffered by plaintiff occurred while he was engaged in the business he was employed to perform, and that the accident which occasioned it resulted from the ordinary risks of such employment, the plaintiff being aware of the condition of the side track where the accident occurred.

1. Subdivision 5 of section 657, Code Civil

Proc., permits new trials to be granted upon the ground of "excessive damages appearing to have been given under the influence of passion or prejudice." This provision has been in the statute since 1851, and has been frequently considered. *Aldrich v. Palmer*, 24 Cal. 516, is perhaps the leading case. See, also, *Boyce v. Stage Co.*, 25 Cal. 473; *Wheaton v. Railroad Co.*, 36 Cal. 591; *Wilson v. Fitch*, 41 Cal. 385; *Harris v. Zanone*, 93 Cal. 72, 28 Pac. 845. These cases hold that in actions of this character the law does not attempt to fix any precise rules for ascertaining what is a just compensation, but, from the necessity of the case, leaves the assessment of the damages to the good sense and unbiassed judgment of the jury, whose province it is to make the assessment; that while the verdict in these cases, as in all others, is subject to review by the court, it will not be disturbed merely upon the ground that the damages are excessive, nor because the opinion of the court differs from that of the jury, but only where it appears that the excess has been given under the influence of passion or prejudice. Where this does appear, it is as much the duty of the court to grant a new trial as it is where any of the other statutory grounds exist. So the appellate court, in reviewing the action of the court below in granting a new trial upon this ground, will not reverse the order merely because it differs with the trial court as to what would have been just compensation, unless the difference of opinion is such as to justify the conclusion that the court abused its discretion; and upon this ground the order appealed from should be affirmed.

2. As to the second point discussed by the court in its opinion, to wit, the sufficiency of the evidence to support the verdict, we will pass it by without extended notice at this time. The court viewed the evidence of the case in the light of the law it gave to the jury in the following instruction: "(4) I instruct you that it is the duty of an employe of a railroad company to see that the machinery and appliances used by him are in repair, so far as this can be done by the exercise of such care and prudence as should be exercised by an ordinarily careful and prudent man engaged in such business; and if you believe that the plaintiff in this case knew, or by the exercise of ordinary prudence and care should have known, the alleged defect in the track before the happening of the accident, and continued his work without objection, then he assumed the risk, and cannot recover." This instruction is too broad. It is not only necessary that an employe should know of the defect in the machinery, in order to hold that he assumed the risk, but the danger arising from the defect must also be known or reasonably apprehended by him. *Farren v. Sellers*, 39 La. Ann. 1019, 3 South. 363; *Cook v. Railway Co.*, 34 Minn. 47, 24 N. W. 311; *Russell v. Railway Co.*, 32 Minn. 230, 20 N.

W. 147; Wuotilla v. Lumber Co., 37 Minn. 153, 33 N. W. 551; Sanborn v. Trading Co., 70 Ca. 261, 11 Pac. 710; Shear. & R. Neg. (4th Ed.) § 212. In the case of Martin v. Railway Co., 94 Cal. 326, 29 Pac. 645, this court goes to still greater lengths, and declares the doctrine that knowledge by the employe of both the defect in the machinery and the danger arising therefrom do not, in all cases, absolutely bar a recovery for personal injuries received. The order appealed from is affirmed.

NEEDLES v. FROST.

(Supreme Court of Oklahoma. Feb. 2, 1894.)

FINAL JUDGMENT—ENFORCEMENT OUTSIDE OF THE COURT'S JURISDICTION—INJUNCTION.

1. A cause is finally disposed of when final judgment is rendered, and the collection of the judgment is no part of the duty of the court. Judgments are not self-executory; the levy upon and sale of property to satisfy an execution are ministerial acts of the officers designated for such purposes.

2. Judgments in civil actions rendered in the United States court of Indian Territory cannot be enforced by execution in Oklahoma, and the United States marshal of said territory has no authority to sell real estate in Oklahoma on an execution issued from said court. The execution and acts of the marshal are void in Oklahoma, and may be enjoined by the district court of Oklahoma.

3. Proceedings to enjoin the acts of an officer beyond his territorial jurisdiction, or the sale of property on an execution without the jurisdiction of the court rendering the judgment, are not an interference with the officers or process of a court.

4. Judgments rendered in the Indian Territory are only evidences of debt in this territory, and must be reduced to judgment in our courts, and collected under our laws.

(Syllabus by the Court.)

Appeal from district court, Oklahoma county; John G. Clark, Judge.

Action by C. G. Frost against T. B. Needles for an injunction. There was judgment for plaintiff, and defendant appeals. Affirmed.

Amos Green & Son, for appellant. L. Guthrie, for appellee.

BURFORD, J. This was an action to enjoin the sale of certain real estate in Oklahoma city by the United States marshal of Indian Territory upon an execution issued from the district court at Muskogee, I. T. The record discloses the fact that a judgment was rendered in the United States court for the Indian Territory at Muskogee, on the 26th day of June, 1891, in favor of Ransom B. Payne and against C. G. Frost, for the sum of \$321 and costs of suit; that execution was issued on said judgment bearing date the 14th day of February, 1892, and delivered to T. B. Needles, United States marshal for said Indian Territory, and was by him levied upon lots 1 and 2, block 33, and lot No. 30, block No. 20, in South Oklahoma addition to Oklahoma city, Oklahoma county, O. T., and said marshal was pro-

ceeding to advertise and sell said to satisfy said execution at the suit was instituted, which was perpetual injunction and \$100 damages. Appellant, Needles, demurred to plaintiff, which demurrer was overruled by the court, and exception saved. The court refused to plead further, and judgment was rendered on the demurrer for plaintiff. Plaintiff asked the court to grant the injunction, and for damages. From this judgment the defendant, Needles, appeals, to this court.

The question presented by the appeal is whether the judgment rendered and by the assignments of error in the present but one question which is presented to the issues in this cause. The United States district court for Indian Territory has jurisdiction over that portion of the territory where the property levied on is situated, to May 14, 1890. By the act of Congress approved May 2, 1890, (26 Stat. 83) the territory of Oklahoma was created, and jurisdiction of the United States court of Indian Territory limited to the territories of the five civilized tribes. The established courts in Oklahoma, and their jurisdiction. Section 9 of said act contains these provisions, viz.: "All parts of acts heretofore enacted, which give jurisdiction upon United States courts beyond and outside the limits of the territory of Oklahoma as herein defined, to all causes of action or offenses committed in such courts, and crimes committed in such courts, and in the Cherokee outlet territory and in the Cherokee outlet territory the passage of this act, shall be repealed, and proceeded with until finally disposed of, in the courts now having jurisdiction thereof, as if this act had not passed." It will be observed that this act repeals the statute giving jurisdiction to the courts of Indian Territory as to causes of actions in the territory within the boundaries of Oklahoma as defined, except actions already commenced, which class of cases was authorized to proceed with until finally disposed of, so that the jurisdiction of the court goes, and judgment is rendered. The collection of the judgment is no part of the duty of the court. The law furnishes the remedy for the enforcement of personal judgments, execution, levy, and sale of property, and judgments are not self-executory, but are ministerial acts, and are performed by executive or clerical officers as the court designate for such purposes.

In the absence of special statute to the contrary, executions cannot run beyond the jurisdiction of the court that rendered the judgment.

judgment. An execution may be valid and regular upon its face, and issued upon a valid judgment, as appears to be in the case at bar; yet, if the officer attempts to execute the writ beyond his jurisdiction, his acts will be void, and he may be enjoined. But, were we to concede the position of counsel for appellant,—that the court of Indian Territory retains its jurisdiction over Oklahoma for the purpose of collecting its judgments, as well as for rendering them,—it would not avail them anything in this case, for in that event, to authorize the marshal of Indian Territory to execute the process in this jurisdiction, it would be necessary that the writ should show upon its face that it was issued upon a judgment rendered in a cause which was commenced in said court prior to May 14, 1890; and nothing appears in the case at bar to show that fact. We are bound to give full faith and credit to the judgments of that court when properly authenticated transcripts are brought before us, which show that the court had jurisdiction of the parties and subject-matter; but this rule does not extend to executions in the hands of an officer. If a writ appears to have issued from a court beyond the jurisdiction where it is sought to be executed, or it is being executed by an officer foreign to the jurisdiction where the property is situated, in either event the party affected may have his remedy by injunction in proper cases. At common law the writs of each court were only capable of enforcement within the territorial limits of its jurisdiction. 1 Freem. Ex'ns, §§ 104, 198, 199. Judgments obtained in one state are, in another state, or in an independent territorial jurisdiction, only contract debts, and they do not per se authorize the issue of final process or the exercise of auxiliary jurisdiction. They do not have the force and effect of domestic judgments, except for the purposes of evidence. They have no extra-territorial force as judgments, for no court can enforce its process or orders beyond the limits of its territorial jurisdiction. Hence, the holder of a judgment, desiring to enforce it in another territory, must sue upon it in the latter jurisdiction as the evidence of debt, and recover a judgment of the latter territory, and, as such, it will be collected and enforced by the laws of the jurisdiction where last rendered. Black, Judgm. 862; Claffin v. McDermott, 12 Fed. 375; McElmoyle v. Cohen, 13 Pet. 312. A number of other questions have been argued by counsel in this cause, but we do not deem them necessary to a decision of this cause. We think the complaint was sufficient to entitle the appellee to the relief prayed for. It charges both an attempt to sell real estate upon a writ without force in this territory, so far as appears from the notice of sale, and by an officer acting outside his territorial jurisdiction. If the appellant had desired to present and rely upon the question

as to whether the judgment came within the saving clause, and was an action pending at the time the act of May 2, 1890, became operative, he should have presented that question to the trial court by answer. This process and the acts of the marshal are void in this territory on the pleading before us, and the trial court had the power to enjoin said process. To enjoin void acts or proceedings is not, in any sense, an interference with the officers or process of a court, whatever its status or relation to the trial court. The judgment of the district court is affirmed, at costs of appellant.

HERBIEN v. WARREN et al.

(Supreme Court of Oklahoma. Feb. 2, 1894.)

PUBLIC LANDS—ADVERSE CLAIMS TO—FORUM FOR DETERMINATION.

1. A court of law or equity will not interfere to determine the question of title to public lands until the adverse claims have been finally determined by the land department.

2. A complaint to set aside an award of town-site trustees to public lands, which does not show that the cause has been finally determined in the land department, fails to state a cause of action.

(Syllabus by the Court.)

Appeal from district court, Logan county; E. B. Green, Judge.

Action by Henry Herbien against Belle V. Warren, and John Foster, W. S. Robertson, and A. C. Schnell, town-site trustees. Defendants had judgment on demurrer to the complaint, and plaintiff appeals. Affirmed.

H. R. Thurston, for appellant. John F. Stone, for appellees.

BURFORD, J. The appellant brought his action in the district court of Logan county to set aside the award of the town-site board, and to have a conveyance decreed to him of certain lots in East Guthrie, O. T. The complaint shows that he and the appellee Belle V. Warren were each claimants and applicants for said lots before the town-site trustees, who are the coappellees in this action; that their rights were passed upon by said trustees, and an award made, and judgment entered by said trustees in favor of the appellee Belle V. Warren and against the appellant; that she was held to be the rightful occupant and claimant of said lots, and entitled to a conveyance therefor. Appellant further alleges that the award was procured by fraud and perjury and a misapplication of the law, and that he was entitled to said award upon the evidence and under the law applicable to such cases, and he asked to have said cause tried by the district court, said award canceled, and a conveyance decreed to him. The defendants answered this complaint by setting up their official character, and admitting the trial and award as alleged by appellant, but say

that he had appealed from said award to the commissioner of the general land office at Washington, and that said appeal was still pending and undisposed of, and asked that he be estopped from proceeding in the district court. To this answer the appellant filed a general demurrer, and for cause says that said answer does not state facts sufficient to constitute a defense to his cause of action. The court carried this demurrer back, and sustained it to the complaint, for the reason that it does not state facts sufficient to constitute a cause of action. The appellant refused to plead further, and judgment was entered on demurrer for defendants. From this judgment plaintiff appeals, and assigns as error the ruling of the court in sustaining the demurrer to his complaint.

We think the court committed no error in sustaining the demurrer to the complaint. Before a court will interfere to determine the respective rights of claimants to title to public lands, the matter must have been finally determined by the land department. There is no allegation or showing in the complaint, that the award of the town-site trustees had become final, and until it had become final the appellant has no standing in the court. These propositions are too well established to require elucidation or citation of authorities. This proceeding was no doubt brought at a time when it was thought that the award of the town-site trustees was final, and that no appeal could be taken therefrom to the department officers; but, this question having been settled by the supreme court of the United States in the case of *McDaid v. Territory of Oklahoma*, 14 Sup. Ct. 59, (appealed from this court,) the ruling becomes decisive of this case. The judgment of the district court is affirmed, with costs.

BERRY et al. v. SMITH, Sheriff.

(Supreme Court of Oklahoma. Feb. 2, 1894.)

APPEAL—EXCEPTIONS—NEW TRIAL—COMPETENCY OF JUROR—REVIEW—EVIDENCE NOT PART OF RECORD.

1. Unless an exception is saved to the giving of an instruction, as provided by section 19, p. 842, St. 1890, it is not error for the court to overrule a motion for a new trial and to set aside the verdict of the jury, assigning the giving of such instruction as erroneous, notwithstanding the law may be incorrectly stated in such instruction.

2. An affidavit in support of a motion to set aside a verdict of the jury and for a new trial, alleging disqualification of a juror by reason of an alleged expression of opinion as to the merits of the case before the trial, is insufficient, if it fail to show that the rights of the aggrieved party have been prejudiced, and such party did not have full knowledge of such facts when the jury was impaneled, and full opportunity given to challenge the juror for cause, or peremptorily, and this especially in the absence of said juror's voir dire.

3. Affidavits found in the records will not be considered in support of an assignment of

error in a motion for a new trial, aside the verdict of the jury, unless affidavits are in some manner attached to the motion as an exhibit, or designated made or bill of exceptions as having been made in support of the motion.

4. When a question of fact is made by a jury and the evidence is not made a part of the record on appeal, the question of giving instructions to the jury as to the weight of the evidence will not be considered unless such instructions are clearly inapplicable to any state of facts and exception thereto has been properly assigned.

5. When an appellant assigns as error the court permitted evidence to go to the jury, whether the sale and purchase of the land involved was made to defraud creditors, the reason that no such issue was made in the pleadings, the question will not be considered unless it appear that exception was made in due form, and such evidence in the trial made a part of the record, the appellate court may determine whether the evidence was inadmissible under the pleadings. (Syllabus by the Court.)

Appeal from district court, Clev-
land; John G. Clark, Judge.

Action in replevin by Thomas E. Berry and another against George Smith, sheriff of Cleveland county. Judgment was judgment for defendant, and from this appeal. Affirmed.

The other facts fully appear in the statement by SCOTT, J.:

On the 21st day of November, 1893, as E. Berry and A. A. Berry, partners in business as Berry Bros., in the town of Cleveland, filed their complaint in replevin against George Smith, sheriff of Cleveland county, for possession of a stock of confectionery, by George Smith, as sheriff of Cleveland county, under and by authority of a writ of attachment issued out of the probate court of Cleveland county in the case of W. A. Mount and W. H. Ferguson, an insolvent debtor. The probate court the case was assigned to the district court, and judgment rendered for the defendant, for the return of the stock or its value in case the return thereof could not be had. From this judgment appellants appeal.

Berry & Hess and Amos Green are appellants. Leslie P. Ross and Henry H. Mermer, for appellee.

SCOTT, J., (after stating the facts of the case) said: This action was first commenced in the district court of Cleveland county, and in the course of the litigation appealed to the district court and tried de novo. Judgment was rendered for the defendant, which verdict reads: "We, the jury duly impaneled and sworn to try the above case, do, upon our oath, find for the defendant, and find the value of the property sued to be \$150." The record is so incomplete and imperfect, it is the duty of the court to determine to what extent consideration should be given to the record. After the verdict was rendered below next seems to have entertained a motion to set aside the verdict for a new trial. No date of the filing of the motion is given; but in rendering judgment

overruled it, and an exception appears to have been saved in regular form. No other exceptions were taken, either to the instructions of the court or any question, during the progress of the trial. The motion is based upon nine alleged errors, the principal one, affecting the present status of this case, being instruction No. 9, which reads: "If you find for the defendant, you will also find the value of the property taken from the defendant under the writ of replevin." The objections to the other instructions, viz. 3, 3½, 4, 5, 6, 7, and 8, even if exceptions had been properly saved at the time they were given, are not well founded; at least, in the absence of the evidence, which is not made a part of the record. The court refused two instructions offered by plaintiff, but no exception was taken to the refusal of the court to give them, and this point will not be entertained. Hence, with this view expressed, no objections raised to any of the instructions will be considered, except instruction 9, above recited, and this one only to the extent useful to convey the reasoning of the court upon the omission of the appellants to properly present the questions involved by the exceptions necessary to entitle them to a review of the alleged errors of the lower court.

The only exception properly saved is embraced in the order of the court overruling the motion to set aside the verdict, and for a new trial; and this one only raises the point of the sufficiency of the proof by affidavit under the third paragraph of the motion, which reads: "That Jurymen Noland had talked and conversed with a witness in the case before said trial, and expressed himself. See affidavit." The affidavit is short, and reads: "W. H. Ferguson, of lawful age, being duly sworn, upon his oath says that he talked with one Tony Noland with reference to his case shortly after the attachment in question was run; that the said Noland expressed himself in regard to the matter at the time; that the same Noland was a juror upon said case." The affidavit is too indefinite to require serious attention. It does not appear that the rights of either party have been prejudiced on account of the alleged expression of opinion by the juror before the trial. Neither does it appear that the appellants had not full knowledge of all the affidavit contains when the jury was impaneled, and full opportunity given them to challenge the jurors for cause, or peremptorily. Taking this view, the court is of the opinion that the proof is entirely insufficient to support paragraph 3 of the motion, especially in the absence of the juror's voir dire.

Two more affidavits are submitted in the record, presumably in support of paragraph 4 of the motion, but are not attached as an exhibit, or in any manner designated or distinguished in the record as having been considered in support of the motion. If it were proper even for the court to entertain the affidavits, under such circumstances, they could

not be considered serious enough to reverse the lower court, without the entire record before us. Hence, we think the motion was properly overruled.

Judgment was rendered on the verdict, omitting immaterial parts, as follows: "Come now the parties, and, the jury having returned their verdict herein in favor of the defendant, the court renders judgment thereon. It is therefore considered, ordered, and adjudged by the court that the defendant have return of the property described in the complaint, or, upon failure of plaintiffs to return the same, that he recover of the plaintiffs the sum of \$150 found by the jury to be value thereof, and that the defendant recover of plaintiffs his costs laid out and expended, and that execution issue therefor. John G. Clark, Judge." This judgment follows out the theory of the court as indicated by instruction 9, hereinbefore set forth. Section 19, p. 342, St. 1890, clearly provides for exception to instructions, as follows: "A party excepting to the giving of an instruction or the refusal thereof, shall not be required to file a formal bill of exceptions; but it shall be sufficient to write on the margin or at the close of such instruction 'Refused and excepted to' or 'Given and excepted to,' which memorandum shall be signed by the judge and dated." This was not done. The only question then remaining is whether the court erred in rendering the judgment in the manner and form it did on the verdict, and, if not, as to whether this court can now consider this question, in the absence of an exception to the form of the judgment, or a proceeding of some nature to bring it properly before us. We are clearly of the opinion that even this question cannot be considered. It must follow the fate of all the others. Had these points been properly saved, the contention of the appellants that the instruction of the court that the defendant was entitled to recover the value of the property, if a return thereof could not be had, instead of the amount of the attachment liens and costs, would have had some force, provided the proof disclosed final judgment in the attachment case, so that the question as to the amount of the lien of the attaching creditor would not become an issue for trial and determination in the replevin suit. In such event the case of *Chandler v. Colcord*, 1 Okl. 276, 32 Pac. 330, and cases there cited, would have been squarely in point. The record contains no such state of facts, and the points relied upon by appellants in their assignments of error have not been properly raised. It is unnecessary for us to discuss the question presented in the case of *Chandler v. Colcord*, and relied upon by appellants, as to whether it is possible for the court to render an alternate judgment provided for by the statute, (page 848, § 9,) for exception was not saved to the instruction, and it is not error for the court to overrule a motion for a new trial setting up the giving of an instruction

as erroneous, to which exception has not been taken. As to whether the judgment was properly rendered upon the verdict, neither is that question properly before the court. It follows, then, that the judgment must be affirmed, with instructions to the lower court for its enforcement as therein rendered. All the justices concurring.

DE BERRY v. SMITH, Sheriff.

(Supreme Court of Oklahoma. Feb. 2, 1894.)

PRACTICE ON APPEAL—MOTION FOR NEW TRIAL—JURISDICTION OF PROBATE COURT.

1. No motion for a new trial having been filed, the only question for consideration by the court is whether the complaint filed states facts sufficient to constitute a cause of action.

2. When an appellant seeks a reversal of a judgment rendered in a probate court, he must ask for a new trial in the court below before he is entitled to have its proceedings reviewed on appeal.

3. In all cases commenced in the probate court of this territory, wherein the same exceeds the jurisdiction of justices of the peace, the pleadings and practice and proceedings in said courts, both before and after judgment, shall be governed by the chapter on civil procedure of the territory governing pleading and practice and proceedings in the district court.

(Syllabus by the Court.)

Appeal from probate court, Cleveland county.

Action in replevin by John H. De Berry against George Smith, sheriff, to recover specific articles of personal property. Judgment rendered in court below for the plaintiff. From this judgment the defendant appeals. Affirmed.

Davidson & Hocker, for appellant. Andrew Hutchin, for appellee.

SCOTT, J. This action was filed in the probate court of Cleveland county on the 6th day of November, 1892, by John H. De Berry against George Smith, as sheriff, who had levied on the property in controversy in virtue of an execution issued on a judgment in favor of Westheimer & Sons, wholesale liquor dealers, and against the appellee. The property levied upon was a saloon outfit, consisting of a bar, backboard, bar fixtures, whisky, stoves, lamps, and chairs, all of the alleged aggregate value of \$160. The complaint also prays for judgment for \$200 damages, and alleges the property levied upon by the sheriff to be exempt under section 4734, p. 867, St. 1890. After the usual, and many unusual, objections, motions, and exceptions of the parties, the court rendered judgment in favor of the appellee, John H. De Berry, for the return of the property, damages to the amount of \$25, and also attorney's fees for the same amount. The defendant, George Smith, appealed on questions of law, and asks a reversal of the judgment. No motion for a new trial was filed, and the sole question presented in the record for consideration, in the absence of such motion, is

whether or not the complaint states facts sufficient to constitute a cause of action. The complaint clearly states an action, and the case is therefore limited merely to discuss the question as to whether a party feeling himself aggrieved by a judgment of the right to relief in a court when he has failed to ask for a new trial below. This point can be discussed briefly. A motion for a new trial is not necessary. See Elliott's App. Proc. p. 10, which reads: "The earlier cases conflict upon the question whether a new trial was, or was not, necessary. The rule is in accordance with the general principle that a motion for a new trial is essential in order to give the court an opportunity to review its judgment, and, if need be, to correct errors which it may have fallen. The rule is applied upon the further ground that a provision is not to be isolated and detached from other provisions, but is to be considered in connection with them. That all the statutory provisions on the same general subject should receive uniform interpretation, if adhered to, tends to preserve order, and secure symmetry and consistency, so that the rule, as finally settled, may be commended to the court to commend it." See, also, Kent v. Farnham, 12 Ind. 675; Garver v. Daubenspeck, 238; State v. Swarts, 9 Ind. 221; State, 61 Ind. 360; Rousseau v. Conner, 1 Ind. 250; Conner v. Town of M., 1 Ind. 517, 14 N. E. 488; Love v. C., 1 Ind. 284; Shugart v. Miles, 125 Ind. N. E. 551. This court has likewise decided the same question in the case of R. v. Farnham, 1 Okl. 375, 33 Pac. section 2, p. 367, St. 1890, which reads: "In all cases commenced in said courts, wherein the same exceeds the jurisdiction of justices of the peace, the pleadings and practice and proceedings in said courts, both before and after judgment, shall be governed by the chapter on civil procedure of the territory, governing pleading and proceedings in the district court." Article 22, p. 845, St. 1890, provides for a new trial; and, as suggested in the tract above quoted from Elliott's App. Proc., statutory provisions for a new trial should not be isolated and detached from other provisions, but should be considered in connection with them. No motion for a new trial having been filed, as provided in the statute, it follows that the judgment of the court must be affirmed. It is so ordered. All the justices concurring.

DEAN v. STONE et al.

(Supreme Court of Oklahoma. Feb. 2, 1894.)
ATTORNEY AT LAW—DISBARMENT—CIVIL TRIAL BY JURY—EVIDENCE—CHANGE OF VENUE.

1. A complaint which alleges that an attorney who had been disbarred in Indiana

ticed a fraud and deception upon the court by securing his admission to practice in the courts of Oklahoma upon a certificate issued by the Indiana court, prior to judgment disbarring him, states facts sufficient to disbar an attorney, under section 5, c. 3, p. 117, St. 1893.

2. In proceedings to revoke an order of a court, admitting an attorney to practice law, obtained by fraud and deceit, the defendant is not entitled to a trial by jury as a matter of right, and the statutes of Oklahoma do not contemplate that such proceedings shall be tried by jury.

3. A transcript of a judgment from a circuit court of Indiana, duly authenticated by the proper officers, is admissible in evidence, though it does not show that it was signed by the presiding judge. *Anderson v. Ackerman*, 88 Ind. 481, and cases cited, followed.

4. A party in a civil suit, not triable by a jury, is not entitled to a change of venue from the county on account of local prejudice of the citizens; it is only in cases where a jury trial may be had that the aid of such statute may be invoked.

(Syllabus by the Court.)

Appeal from district court, Oklahoma county; John G. Clark, Judge.

Complaint by E. W. Stone and others against J. C. Dean for the cancellation of defendant's license to practice as an attorney at law. There was judgment for plaintiffs, and defendant appeals. Affirmed.

Amos Green & Son, for appellant. W. S. Field, for appellees.

BURFORD, J. The appellant, Dean, is a practicing attorney, duly admitted to the bar in the district court of Oklahoma county. The appellees are a committee of the bar of said court, appointed by the court to prepare, file, and prosecute proceedings against appellant to secure the cancellation of the order of said court admitting him as an attorney at law, and to have him disbarred. A complaint was filed in the district court by appellees, consisting of a number of separate counts, to all of which the appellant demurred, for the reason that they did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and appellant excepted, and assigns this ruling of the court as error. The appellees, after their evidence was introduced, and before finding or judgment, elected to stand upon the first count of the complaint, and judgment was rendered thereon; hence we need only consider the sufficiency of said count.

It is alleged, in substance, that the appellant, Dean, was admitted to the bar, and was a practicing attorney in the state of Indiana; that at the October term, 1891, of the Howard circuit court of Howard county, Ind., such proceedings were had and judgment rendered against the appellant as revoked his license to practice law, and he was, by the judgment of said court, disbarred from practicing law in all the courts of said state; that immediately after the rendition of said judgment, and while same was in full force and effect and unappealed from, and before the appellant, Dean, had ever been reinstated or readmitted, he appeared

in the district court of Oklahoma county, with a certificate of admission as an attorney at law from the circuit court of Grant county, Ind., which certificate bore date long prior to the date of said judgment of disbarment, and presented said certificate to the judge of said court for the purpose of deceiving said judge and court, and for the purpose of proving to said court that he was a man of good moral character, and sufficiently learned in the law to qualify him for admission as an attorney at law in the courts of Oklahoma; and that said court, relying upon said canceled certificate as true, admitted said Dean as an attorney, and licensed him to practice in the courts of Oklahoma. And said complaint seeks to have the order admitting him as an attorney vacated and set aside, and his said certificate revoked. We think this complaint states a good cause of action. It comes squarely within the provisions of section 5, c. 3, p. 117, St. Okl. 1893, which makes it a cause for disbarment for an attorney to be guilty of deceit or collusion, or to consent thereto, with intent to deceive a court or judge. It is evident from the allegations of the complaint in this case that the whole purpose and object of the appellant was to deceive the court, and secure his admission to the bar upon the strength of a certificate which he knew had been revoked by the solemn judgment of a court of record; and, even if it did not come within one of the statutory causes for suspension of an attorney, a fraud of this character could certainly be inquired into, and a proper remedy applied. Courts of general jurisdiction have the inherent power to purge themselves from a fraud perpetrated upon the court by an officer of the court, or by one to secure for himself the privileges of an officer of the court.

The appellant filed a general denial to the complaint, and, before trial, filed his motion and affidavit for a change of venue from the county, alleging, as reasons therefor, that the plaintiffs have an undue influence over the citizens of Oklahoma county, and, second, that an odium attaches to the appellant's defense on account of local prejudice. The trial court overruled the motion for change of venue, and that is complained of as error. Counsel for appellant cite a number of Indiana decisions which announce the doctrine that when an affidavit for a change of venue is filed in a civil case, setting forth the grounds herein specified, it becomes imperative upon the court to order the change, and a failure to do so is fatal error. We have examined these decisions, and they are based upon the theory that the applicant is entitled to a jury trial, and that he has the right to trial by an impartial jury, who would not be influenced by local prejudice or the odium of his defense; but, where the cause is to be tried by the court, there is no reason for this rule, and, where the reason ceases, the rule falls. It was never intended

that a change should be granted from the judge on account of the local prejudice of the citizens in a community, for these things do not affect or influence courts. It is only the inexperienced juror who will become impregnated with local influences, and perhaps inadvertently permit such causes to operate upon his judgment. This is not the character of a case in which the defendant is guaranteed a jury as a matter of right, and the statute, in this case, makes no provision for a jury trial. It was evidently intended by the lawmakers that such proceedings should be tried by the court. It is contended that the chapter of our statute in reference to attorneys was adopted from Indiana. While the two statutes have many provisions in common, yet there are not such similarities as to warrant us in holding that it is an adopted statute. Parts of it may have been taken from that state, but, if it was intended to have been adopted from the Indiana statute, it has been so disfigured in the process as to render it unrecognizable. The Indiana statute provides that proceedings for suspension or disbarment of an attorney may be tried by a jury. This is not contained in our statute, and it was not intended that it should be. The court committed no error in overruling the appellant's motion for change of venue, or his demand for a trial by jury.

The action of the trial court in permitting the appellees to introduce in evidence the certified copy of the judgment from the Howard county, Ind., circuit court is complained of and assigned as error. The only objection urged against this transcript is that the judgment did not purport to be signed by the judge before whom the judgment was rendered. No signature appears upon the judgment appearing in the transcript. We are cited to section 1330, Rev. St. Ind. 1881, which reads as follows: "It shall be the duty of the clerk of the circuit court to draw up each day's proceedings at full length, and the same shall be publicly read in open court, after which they shall be signed by the judge, and no process shall issue on any judgment or decree of the court until it shall have been read and signed." In the case of Galbraith v. Sidener, 28 Ind. 142, the supreme court of Indiana held that an execution issued on an unsigned judgment was void, but we are unable to find where the court of that state has ever held the judgment itself void for such defect. It would, in any event, be a mere irregularity, which might be corrected or remedied at any time. The judgment in the case at bar is used in this cause only as a matter of evidence, and, when the record of a judgment shows that the court had jurisdiction of the parties and the subject-matter, no mere irregularities or defects in the proceedings will destroy its character as evidence. In Adams v. Lee, 82 Ind. 587, this identical question was before the court. It was con-

tended that the trial court had erred in admitting in evidence a transcript of a judgment, because it did not appear that the proceedings had been signed by the judge of the court in which the judgment was rendered. The court said: "Where a transcript of a judicial record of a court of general jurisdiction is properly certified by the authorized officers, the presumption is that the proceedings were regular, and that the judge discharged his duty by signing the record at the close of the day's proceedings." This is plainly so upon principle, and it is expressly declared to be the law in *Scott v. Millard*, 1st Ind. 153. This case is again cited and approved in the later case of *Anderson v. Ackerman*, 88 Ind. 481. We think these authorities properly enunciate the law, and that the trial court committed no error in admitting the transcript in evidence.

The last assignment of error calls in question the sufficiency of the evidence to sustain the finding and judgment of the court. On this question it does not seem to us that there is room for a doubt. The record introduced shows conclusively that the certificate presented by Dean to the district court of Oklahoma county had been canceled by the judgment of the Howard county circuit court. That judgment prohibits him from practicing law in any of the courts of that state. He presented such canceled certificate as an evidence of his character, standing, and qualifications as a practicing attorney. It served his purpose, and secured his admission to practice in the courts of Oklahoma. This was a fraud upon the court, and upon the bar, and the court did not go beyond its duties or exceed its powers when it ordered proceedings instituted to secure the revocation of said order. The evidence fully sustains and justifies the finding and judgment. We find no error in the record. The judgment of the district court is affirmed, with costs.

SCOTT, J., having been of counsel for appellees, did not take part in this decision.

STATE v. MYERS.

(Supreme Court of Washington. Jan. 31, 1941)

MURDER—INFORMATION—CHARGING SAME CRIME AS COMMITMENT—FAILURE OF DEFENDANT TO TESTIFY—INSTRUCTION.

1. An information need not charge the same crime as that named in commitment.

2. Under the statute making it the duty of the court to instruct the jury that no inference of defendant's guilt shall be drawn from the fact of his not testifying it is error to omit the instruction, though his counsel does not ask for it.

Appeal from superior court, Asotin county. R. F. Sturdevant, Judge.

Charles E. Myers was convicted of murder and appeals. Reversed.

L. M. Godman, S. G. Cosgrove, and Geo. Bailey, for appellant. M. F. Gose, for State.

DUNBAR, C. J. The indictment upon which the appellant was tried, convicted, and sentenced to hang was as follows: "Charles Myers is accused by the prosecuting attorney Asotin county, state of Washington, by information, of the crime of murder in the first degree in causing the death of a person by feloniously, willfully, and maliciously setting fire to a certain structure used and occupied as a place of abode, and known to be occupied at the time of setting such fire, committed as follows, to wit: That the said Charles Myers, in the county of Asotin, in the state of Washington, did, on the 15th day of March, A. D. 1893, then and there unlawfully, feloniously, willfully, and maliciously set fire to and burn a certain wooden structure of one Annie Myers, and of the value of one hundred dollars, then and there situate, and which structure was then and there used and occupied as a place of abode by said Annie Myers and one Frank Sherry and by others other persons to the informant and attorney unknown, by reason and by means of which said unlawful, felonious, willful, and malicious setting fire to and burning of the said structure by him, the said Charles Myers, in the manner and at the time aforesaid, the said Frank Sherry, who was at the time aforesaid present in and occupying said structure and premises as aforesaid at the time the said Charles Myers so unlawfully, feloniously, willfully, and maliciously set fire to and burned said structure, as he, the said Charles Myers, then and there well knew, was so mortally injured and burned by the said fire and the flames thereof, so as aforesaid unlawfully, feloniously, willfully, and maliciously set to the said structure by the said Charles Myers, that the death of him, the said Frank Sherry, resulted and ensued therefrom, to wit, from said fire and burning, in said county of Asotin, in said state of Washington, on the 15th day of March, 1893. And the said Charles Myers, in the manner and form aforesaid, him, the said Frank Sherry, did then and there kill, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the laws of the state of Washington." The appellant moved the court to set aside the information on the ground that the same charged the appellant with a different crime than that for which he was held to answer. After trial, motion for a new trial was made, based upon the following grounds: "(1) Error of law occurring at the trial, and excepted to by the defendant. (2) Error of the court in overruling the motion of defendant to set aside the information. (3) That the court erred in failing to instruct the jury that no inference of guilt should arise against the defendant on account of his failing to testify as a witness in his own behalf. (4) That

said verdict is contrary to law and evidence. (5) That the court erred in refusing to give instructions asked by defendant. (6) The court erred in giving to the jury instructions over the objections of the defendant."

We think no error was committed by the court in overruling the motion to set aside the information, as no particular form of complaint is required before a justice of the peace sitting as a committing magistrate, and we know of no law requiring the information to charge the same crime as that named in the commitment. We think the information in this case sets forth facts sufficient to put the appellant on his defense for murder. The statute provides that, if death ensues from certain acts, the person guilty of the commission of such acts shall be guilty of murder in the first degree. It is a statutory crime, denominated "murder;" and the fact that the commission of other acts will also constitute murder does not militate against the power of the legislature to provide a punishment for this particular crime, and to give it any name it sees fit. The information, we think, meets the requirements of the statute, and that the defendant was thereby fully advised of the crime of which he was charged. We think, however, there is merit in the third error alleged by the appellant, viz. that the court erred in failing to instruct the jury that no inference of guilt should arise against the defendant on account of his failing to testify in his own behalf. It appears from the record that the defendant in this case did not testify, and that such instruction was omitted by the court. This question has been squarely decided by this court in *Linbeck v. State*, 1 Wash. St. 336, 25 Pac. 452. In that case this court said: "The defendant was not sworn as a witness in his own behalf, and the court failed to instruct the jury, as required by statute, that from such fact no inference of guilt should be drawn. We think this was error. The statute in question makes it the duty of the court to give such instruction, irrespective of the action of the defendant in relation thereto; and, while we do not now hold that the right to have this instruction given may not be waived by some express act of the defendant to that end, we do hold that the simple fact that he remained silent did not amount to such waiver." Respondent makes an attempt to distinguish the case at bar from the case of *Linbeck v. State*, supra, by asserting that in this case counsel for the defendant asked certain specific instructions; but did not ask for the instruction which was omitted by the court. The asking for other instructions certainly could not be held to be a waiver "by express act" of the right to have the jury instructed on this question in accordance with the provisions of the statute. We are satisfied with what was said in *Linbeck v. State*, and, even if the case had not been decided by this court, would decide now on principle that the defendant was en-

titled to this instruction without affirmative request on his part. Most of the cases cited by the respondent merely sustain the general proposition that where the law requires the court to instruct the jury upon the law, the failure of the court to do so, in the absence of request by defendant, is not error. This general proposition, we think, cannot be disputed; but the statute in this case goes beyond that. It attaches so much importance to this particular instruction that it singles it out, and calls it to the especial attention of the court, recognizing the fact that the jury would naturally infer guilt where the defendant did not testify in his own behalf. Whether they should not rightfully infer such guilt is a question which should be addressed to the legislature, and that question has been passed upon by that body. There are, however, some cases that sustain respondent's contention, and are decided squarely upon the question at issue, but they do not seem to us to be well-considered cases, or to be based upon sound reasoning. In *State v. Stevens*, 67 Iowa, 557, 25 N. W. 777, the court says: "The defendant did not testify in his own behalf. His counsel now urge that the court erred in not instructing the jury that this fact was not to be considered to his prejudice. Had such instruction been requested, it doubtless would have been given. In the absence of this request, we do not think it was the duty of the court to allude to the matter. It cannot be presumed that defendant's case was prejudiced by his silence, in the absence of any allusion thereto by the state, the court, or any person connected with the case." This is all that is said on the subject by that honorable court. It does not appear whether the statute of Iowa was as mandatory as ours, but, if so, then certainly the language of the court, "we do not think it was the duty of the court to allude to the matter," was unwarranted and wrong, for the language of the statute is: "It shall be the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if he fail or refuse to testify as a witness in his own behalf." It does not say it is its duty when its attention is called to it, or when it is requested so to instruct the jury by the defendant, but plainly that it is its duty to so instruct. It seems to us there can be but one interpretation placed upon the plain language of the statute. In *Grubb v. State*, 117 Ind. 277, 20 N. E. 257, 725, after the argument in the cause had closed, and after the court had instructed the jury, the appellant asked the court to give the jury the following instruction: "The defendant has not testified as a witness in his own behalf in this cause. It was competent for him to do so. This fact shall not be considered by you, or commented upon by the jury, in making your verdict;" and the defendant excepted. The supreme court of that state held that, inasmuch as the instruction was not asked before the argument was made, and

the case was closed, it was not error of the court to refuse such instruction. There is no discussion whatever in this case of the principle involved here. In *People v. Flynn* (Cal.) 15 Pac. 102, the question is disposed of thus: "It is next contended that sundry errors were committed by the court, to the manifest prejudice of the defendant. The defendant did not take the stand as a witness in his own behalf, and the court did not instruct the jury in reference to his failure to do so. It is claimed that 'it was the duty of the court to charge the jury that no presumption of guilt followed from his failure to testify in his own behalf, and that they could not consider his failure to testify in arriving at a verdict.' It does not appear from the bill of exceptions that any such instruction was asked. If counsel for defendant desired such an instruction to be given, they should have asked it at the proper time; and, as they failed to do that, they cannot now be heard to complain." Citing *People v. Haun*, 44 Cal. 100; *People v. Ah Wee*, 45 Cal. 239. By reference to the cases cited, and on which the decision was evidently based, it will be found that this question was not in any way involved. There the court neglected to instruct the jury upon the subject of justifiable homicide, where there was no special provision for such instruction. And so with all the cases sustaining courts where this specific instruction has not been given; they have based their decisions upon the decisions of other courts sustaining the general proposition, which is not disputed, that, where the law requires the courts generally to instruct upon the legal questions involved, it is not error for the court to neglect to so instruct where the instruction is not asked for by the defendant. Such cases, it can plainly be seen, are no basis whatever for decisions on questions of the kind at bar, where the law has attached so much importance to this particular instruction, and has called it especially to the attention of the court, and given it specially into its charge. It is insisted by the respondent that this was a mere oversight on the part of the court, and that it should be construed like any other principle of law applicable to criminal law, such as the presumption of innocence, reasonable doubt, and the admissibility of evidence, etc., but, as we have before said, the prominence which the law gives to this particular instruction removes it from the column which embraces the other general propositions. This court has no right to conclude that this omission of the court was not largely instrumental in the conviction of this defendant. It would be a very natural thing for the jury to take into consideration the silence of the defendant when he was charged with this crime, and to use it most tellingly against him. The defendant's rights are not to be subjected to the ignorance or carelessness of his attorneys who may not know of his rights in this re-

spect, or may not be watchful of them. On the other hand, if the defendant's counsel is learned in the law, he has a right to presume that the court will do its duty, and comply with the plain provisions of the statute in relation to criminal trials.

It is argued that if the law is construed as mandatory it would be a trap set for courts who might forget to give this instruction. It might possibly happen that a court would forget to swear a jury to try a cause, or forget to do many things which would absolutely render void and illegal all subsequent proceedings, but that would be no reason for depriving the defendant of the rights and safeguards which the law has seen fit to clothe him with, and throw around him.

So far as the instructions of the court are concerned, while we are not willing to say that the case should be reversed for the errors therein alleged, the following language of the court, viz.: "In many instances circumstantial evidence is the best in the world; for, while an individual claims to have seen an act committed, he may in fact not have seen it committed. It is more improbable that these independent facts mentioned, all tending in the same direction, be false, because in direct testimony there is opportunity for falsehood, while in circumstantial evidence, from the multitude of circumstances which are produced of the subject of a position taken by the prosecution, there is more improbability of falsehood,"—we think goes very nearly stating the case too strongly in favor of the potency of circumstantial evidence.

It is tenaciously urged by the appellant that the testimony of the state, uncontradicted, is not sufficient to sustain the judgment; but, as we are not aware what evidence the state might be able to produce at another trial, we will not now pass upon that question. For the error above specified, the judgment will be reversed, and the cause remanded, with instructions to grant a new trial.

ANDERS and STILES, JJ., concur.

TILZIE v. HAYE et al.

(Supreme Court of Washington. Jan. 31, 1894.)

STREETS—DEDICATION—PLOT—PLEADING AND PROOF.

1. A plot of land, described in the deed of dedication by metes and bounds, showed within it an alley, and on one boundary a street, without the width thereof marked, as required by statute. *Held*, that there was no dedication of it.

2. Under a complaint alleging a statutory dedication of a street on a certain day, a dedication by subsequent acts cannot be shown.

Appeal from superior court, Chehalis county; Mason Irwin, Judge.

Action by George F. Tilzie against James

Haye and another. Judgment for plaintiff, and defendants appeal. Reversed.

T. D. Scofield, for appellants. Linn & Bridges, for respondent.

DUNBAR, C. J. This is an action brought by the respondent in the superior court of Chehalis county to recover damages for a breach of covenant upon the sale of a certain piece of land, claimed to have been located in a certain street, known as "Broad Street," in the city of Montesano. On April 12, 1888, the appellants laid out an addition to the city of Montesano, describing the same in their deed of dedication by metes and bounds. The plat of the addition filed in the auditor's office, in connection with the deed of dedication, shows 12 lots, 50 by 105 feet, with an alley running east and west midway between the lots, 10 feet wide. The width and depth of the respective lots, and the numbers of the same, are designated on the plat, together with the width of the alley, the words marked in the alley being "10-Foot Alley." On the east boundary of the lots are the words "4 Street," with the figures "30," indicating the width of the street. Adjoining the said lots on the north, a space is left, and the words "Broad St." are marked on the plat, with some pencil dots north of the words "Broad St." Some time after the deed of dedication and plat were filed, the appellants deeded to the respondent certain lands located north of the said northerly boundary line of the said plat, and falling within the space occupied by Broad street, if such street had any existence by reason of the filing of the plat aforesaid; and these are the lands which are the subject of this action.

Many questions were raised upon the trial of this case which, under the disposition which we are compelled to make of it, it will not be necessary for us to discuss here. At the conclusion of respondent's testimony, appellants moved for a nonsuit, which motion was overruled by the court. Appellants then sought to introduce testimony showing that it was not the intention of the appellants to dedicate any street north of the plat, which evidence was objected to by respondent, and the objection was sustained by the court. The court then instructed the jury to bring in a verdict for the plaintiff in accordance with his prayer. This judgment, in any event, will have to be reversed, for, if there was a dedication of Broad street at all, it was plainly only an implied dedication, and, under all the authorities, the intention to dedicate in such case can be rebutted by testimony. The rule relied upon by respondent, that whether a plat contains a dedication of a strip of ground to the public is a question of law for the court to determine, is confined to cases where there was an express dedication by acts done which the dedicatory would not be allowed to dispute, and

where the only question could be whether such acts constituted in law a dedication. In this case it must be borne in mind that the deed of dedication describes the land dedicated by metes and bounds, and that the land which respondent contends was dedicated falls outside of these metes and bounds; so that it can only be by implication, if at all, that appellants can be held to have dedicated such land. That being true, then, under all the authorities, they would have a right to rebut this implication by evidence tending to show their intention. The cases cited by the respondent only have an application to express dedication. The law cited by the respondent from Dillon on Municipal Corporations, (section 623,) that "an incomplete or defective statutory dedication will, when accepted by the public, or when rights are acquired under it by third persons, operate in favor of the public and of such persons, respectively, as a common-law dedication by the owner," has reference to defects in the manner of dedication, viz. whether the statutory requirements have been complied with in determining the question of what particular land was dedicated. This is plainly ascertained by referring to the authorities cited by the learned author. The ordinary cases, where the question raised is whether or not certain strips of land have been dedicated as streets, are cases where the land in dispute is within the boundaries of the land dedicated by the deed. There the dedicator would be strictly bound by any marks or indications on the plat which would lead the purchaser to believe that such dedication had been made; but such is not this case, and we have looked in vain for a case where a dedication has been held good where the plain language of the deed showed that the street claimed to have been dedicated was outside of the metes and bounds of the plat. We say, then, that the mere appearance of the words "Broad St." would not be sufficient to raise the conclusive presumption that the statutory law has been violated, which provides that a plat of a town must give the respective widths of all streets, and that the same shall be recorded under like regulations as are provided for recording the original plats of towns.

The introduction of the deed to Holman was entirely irrelevant under the pleadings in this case, for it is a statutory dedication, and none other, that the complaint charges. It alleges the dedication on the 12th day of April, 1888, and it is nowhere alleged that the dedication was made by subsequent acts recognizing the plat filed, and the proof, of course, must be confined to the allegations. There being absolutely no proof of the dedication of Broad street more than was shown by the record, and the record, construing the plat and the deed of dedication together, conclusively convincing us that, as a legal proposition, there was no dedication

whatever of the land described in the complaint, the judgment will be reversed, the cause remanded to the lower court with instructions to grant defendants' nonsuit.

HOYT, ANDERS, and STILES, concur.

TAYLOR v. CITY OF TACOMA
(Supreme Court of Washington. Jan. 1891.)
MUNICIPAL CORPORATIONS — CITY OF TACOMA —
CONTROLLER — SALARY — CHARTER —
OIL — POWERS.

1. The charter of the city of Tacoma provides that all officers of the city shall receive in full compensation for all services rendered, and that the salary of the city controller shall not exceed the following amount: "The salary of the city controller, \$4,000 per annum."—does this limit the salary of the city controller, or does it limit it?

2. The enabling act (Laws 1889, c. 223) provides that the legislative assembly shall have the power to organize any city organized under the provisions of this act, and that the city shall be vested in a mayor and city council, who, with such other elective officers as may be provided for in its charter, shall receive such compensation as may be provided in such charter. Held, that the city of Tacoma organized under such act could not receive a salary of the controller, an elective officer of such city, and that such salary must be provided by the charter.

Appeal from superior court, Pierce county, F. Campbell, Judge.

Action by Fred T. Taylor against the City of Tacoma to recover a balance due plaintiff from defendant city as city controller. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

S. C. Milligan and J. S. White, appellants. F. H. Murray, for respondent.

ANDERS, J. The appellant sued the City of Tacoma for a balance of salary due him as city controller. At the time of his election, in November, 1890, the salary was attached to his office; but on the 4th day of November, 1890, the city council passed an ordinance fixing his salary at \$3,000 per annum, payable monthly, and providing that the ordinance should take effect from and after the 4th day of November, 1890. Subsequently, and on the 5th day of February, 1891, the city council passed another ordinance which the salary of the city controller should be fixed at \$2,400 per annum, payable monthly. The appellant received pay at the rate of \$3,000 per annum up to the 5th day of February, 1891, and from that time to the end of his term, on April 19, 1891, he received a salary at the rate of \$2,400 per annum. He now seeks to recover the difference between what he actually received and what he would have received at the rate of \$4,000 per annum, which he claims is the amount of his annual salary as prescribed in the charter, or, if he is held to that sum, then he demands

ment for the difference between the amount received by him and the amount he would have received at the rate of \$3,000 per annum, the sum specified in said ordinance of December 4, 1890. The cause was tried before the court without a jury, and upon the evidence adduced the court concluded (1) that no salary was fixed in the charter; and (2) that the salary ordinances heretofore mentioned were ineffectual and void. The action was accordingly dismissed at the cost of the plaintiff. The appellant alleges that the court was in error upon both of the above propositions, and therefore asks a reversal of the judgment upon that ground.

At the time of the appellant's election, the city of Tacoma was operating under a charter prepared and adopted under and by virtue of an act of the legislature for the government of cities of 20,000 or more inhabitants, approved March 24, 1890. To all cities organized under that act, certain defined powers and privileges are granted, which are required to be set forth in their charters. Among the powers thus granted is that of fixing the compensation of elective officers, including the city controller. Concerning that question, the enabling act reads as follows: "The legislative powers of any city organized under the provisions of this act shall be vested in a mayor, and a city council, to consist of such number of members and to have such powers as may be provided for in its charter, who, together with such other elective officers as may be provided for in such charter, shall be elected at the times, in such manner and for such terms and shall perform such duties and receive such compensation, as may be prescribed in such charter." See Laws 1889-90, p. 223. From the foregoing provisions of the statute, it seems evident that it was the intention of the legislature to delegate the power under consideration to the framers of the city charter, and to no other persons or body whatever. That it was competent for the legislature to do so, we have no doubt. It therefore follows that, if the city charter fails to prescribe the amount of compensation to be paid the city controller, then no salary has ever been attached to his office, for the simple reason that the freeholders who framed the city charter had no power or authority to delegate any of the duties imposed upon them to the city council.

It is contended on behalf of the appellant that by the terms and provisions of the charter his compensation was fixed at \$4,000 per annum, and if that be true the judgment of the court below was wrong, and must be reversed. On the other hand, it is claimed on behalf of the city that no compensation was attempted to be fixed or prescribed in the city charter, but that, at most, the framers of said charter simply undertook to delegate the power of fixing salaries to the city council. In order to

determine this controverted question, and it is the vital question in the case, it becomes necessary to examine the provisions of the charter upon that subject. Section 216 of that instrument provides as follows: "All the officers of the city, except as otherwise provided, shall receive in full compensation for all services of every kind whatsoever rendered by them the amount of salaries that may be fixed by ordinance, payable in city warrants at the end of each calendar month, but in no case shall said salaries exceed the following amounts: * * * City controller \$4000 per annum." To our minds it seems plain that the charter committee did not intend or undertake to fix the appellant's salary, but only undertook to limit the power of the city council as to the amount to be designated by it. And this being so, and the city council having no right or authority to establish by ordinance or otherwise the compensation to be received by appellant, it follows that there was no error committed by the court below in dismissing the action, and the judgment is therefore affirmed.

DUNBAR, C. J., and STILES and SCOTT, JJ., concur.

HENNESSY v. NIAGARA FIRE INS. CO. OF CITY OF NEW YORK.

(Supreme Court of Washington. Jan. 16, 1894.)

ACTION ON FIRE INSURANCE POLICY — DEFENSE —
FAILURE TO ARBITRATE — EVIDENCE — DEPOSITION
— CAUSE FOR TAKING.

1. Where a fire insurance company rejects proofs of loss, and denies liability, because the assured swore falsely in making such proofs, it cannot set up as a defense to an action on the policy that it provided for the ascertainment of the amount of the loss by appraisers, and that no appraisers have been selected.

2. In an action on a fire insurance policy, tried before a jury, where defendant claims that plaintiff failed to furnish proofs of loss, proofs furnished by plaintiff are admissible to show compliance with the policy, though such question is for the court to determine.

3. The proofs of loss are relevant to a defense that plaintiff swore falsely therein.

4. It will be presumed that the reason for taking a deposition still exists at the time of the trial, unless the contrary is shown.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by F. D. Hennessy against the Niagara Fire Insurance Company of the City of New York on a fire insurance policy. From a judgment entered on a verdict of a jury in favor of plaintiff, defendant appeals. Affirmed.

Jones, Voorhees & Stevens, for appellant
Hyde & Reagan and Turner, Graves & McKinstry, for respondent.

SCOTT, J. This action was brought on an insurance policy to recover the amount insured on a stock of merchandise which was

burned. Judgment was rendered for the plaintiff, and the defendant appeals.

It is contended that the action was prematurely brought, in that the plaintiff failed to furnish proofs of loss after the fire, under the conditions of the policy, and in that the policy provided that in the event of a loss, and in case of a disagreement as to the amount thereof, the same should be ascertained by two competent and disinterested appraisers, the assured and the company each to select one, and the two so chosen to select a competent and disinterested umpire. It appears that proofs of loss were furnished by respondent to appellant, and that they were rejected for certain reasons which were specified; whereupon respondent again furnished proofs which complied with said objections. These proofs were returned to him with a denial upon the part of the company of any liability, on the ground that the claimant had sworn falsely in making his proofs of loss. The last proofs furnished appear to have been technically correct under the terms of the policy, and the appellant, having denied any liability whatever for the loss on the ground of false swearing, could not rely upon the provisions of the policy relating to an arbitration in case of disagreement as to the amount of such loss. Furthermore, it does not appear that either party demanded that such an arbitration be had; and these points are not well taken.

It is further contended that the court erred in admitting the proofs of loss in evidence, and that the same should not have been submitted to the jury. It is contended by the respondent that the proofs were not submitted to the jury, and the record fails to show that they were. The proofs were properly admitted for the purpose of showing that the plaintiff had complied with the terms of the policy in furnishing such proofs, even though this was a question for the court alone to determine. These proofs, however, subsequently became relevant in relation to the defense set up that the plaintiff had sworn falsely therein.

It is further contended that the court erred in allowing two depositions to be read in evidence. These depositions were taken a short time before the cause was brought to a trial, for the reason that the witnesses were about to depart from the jurisdiction of the court. It is not claimed that there were not sufficient grounds for taking them in the first instance, but it is contended that under section 1677, 2 Code,¹ it should have been made to appear at the trial, by the party offering them, that the witnesses could not be

¹ 2 Code, § 1677, provides as follows: "If it appear at the trial that the reason for taking the deposition no longer exists, the deposition shall not be read in evidence, unless the party offering it show that another of the causes specified by section sixteen hundred and sixty-six then exists, or that the witness is dead, or cannot safely attend at the trial on account of sickness, age, or other bodily infirmity."

brought to testify in person. We hold the opinion that this point is not well taken. Nothing appearing to the contrary, we presumed that the reasons which were stated at the time the depositions were taken, which authorized them, were still valid at the trial, and it was incumbent upon the appellant to show otherwise, to overcome such objection.

It is further contended that the evidence is unsupported by the evidence, and that no recovery should have been allowed on the ground that the plaintiff swore falsely in making his proofs of loss aforesaid. No deal of testimony was introduced in support of the defendant to the effect that the plaintiff would have been impossible for the plaintiff to have sustained the loss claimed under the circumstances which were shown to have existed. There was some evidence, however, and the whole was submitted for the jury to determine; and in the plaintiff it must be held that for him upon all of these issues. The opinion that there was testimony sufficient to sustain the verdict, and that there is no ground for any interference by an appellate court in this particular.

The last error alleged is that the court erred in refusing to permit the defendant to prove the damage to the building in question, in order to show the extent of the fire. An inspection of the record shows that the court did permit proof of the damage to which the building was damaged, and refused to allow the defendant to prove the cost to repair the building, and find none of the points alleged as errors. This point is well taken, and the judgment is affirmed.

DUNBAR, C. J., and STILES, J., concur.
HOYT, JJ., concur.

PARMETER v. BOURNE et al.
(Supreme Court of Washington. January 1898.)
COUNTY SEAT—ELECTION TO REMOVE—
—INJUNCTION—WHEN WILL I

In the absence of statutory authority, equity cannot inquire into the legality of an election held to determine the question of removal of a county seat, and to enjoin the removal, at the instance of a taxpayer, from canvassing the votes and the result.

Appeal from superior court, Pacific county, W. W. Langhorne, Judge.

Action by D. O. Parmeter against W. T. Meloy, and S. B. Bourne, commissioners of Pacific county, Washington, and Phil. D. Barney, clerk of such county, to restrain defendants and their successors in office from removing the county seat of such county from Oysterville to Bend. From a judgment sustaining the plaintiff's claim.

¹ For dissenting opinion, see 35 Pac.

murrer to the petition, plaintiff appeals. Affirmed.

Fulton Bros., for appellant. R. K. Boney, Crowley & Sullivan, and Marion D. Egbert, Pros. Atty., for respondents.

DUNBAR, C. J. At the general election held November 8, 1892, there was submitted, by order of the county commissioners, to the electors of Pacific county, a proposition to remove the county seat of that county from the town of Oysterville, where it had been established for a number of years, to the town of South Bend or to the town of Sealand. On November 18, 1892, the board of county commissioners canvassed the votes on that proposition, and ascertained from the poll books that 1,469 votes were cast on the proposition; that the town of South Bend received 984, the town of Sealand 376, and the town of Oysterville 109. The town of South Bend was thereupon declared to be the county seat of Pacific county, and an order was made requiring the public records and archives of the county to be moved to South Bend on or before the 4th day of February, 1893. Appellant, a citizen and taxpayer of Oysterville, brought this action to set aside and vacate the order of the county commissioners of Pacific county, declaring South Bend to be the county seat of Pacific county from and after the 4th day of February, 1893, and asked for an injunction to enjoin and restrain the defendants, and each of them, and their successors in office, from removing from the county building or county offices, or from the town of Oysterville, any of the archives, public records, or any books whatever, or any property whatever, or any records whatever, to the town of South Bend, or elsewhere, and that they be restrained from attempting to remove any such records or archives, etc. The defendants demurred to the complaint, alleging, among other things, that the court had no jurisdiction of the subject-matter of the action; that the complaint did not state facts sufficient to constitute a cause of action as to said defendants, or any of them; that plaintiff had no legal authority to sue in said action; and that the court had no jurisdiction of the persons of the defendants. The demurrer was sustained by the court on the ground that it had no jurisdiction of the subject-matter of the action. The complaint alleges fraud in the counting of the votes by the judges of election, and in issuing fraudulent returns to the board of county commissioners of such election.

It is conceded that there is no provision made, under the special law for the removal of county seats, for a contest in case of illegal voting, unless there be a right of appeal from the action of the county commissioners in canvassing the votes. It is insisted by the appellant that in this instance, if the law would warrant such an appeal, it would be absolutely ineffectual. With the view we

take of the law, it is not necessary to pass upon the question of the right of appeal in this character of a case. The statement of facts set up in the complaint appeals to us very strongly for relief, and shows an aggravated case of perverting the election laws and thwarting the will of the voters; and, had we the authority, we would gladly place the parties upon the proof of their allegations. But from an investigation of the law involving the origin, the history, and the jurisdiction of courts of equity, we are forced to the conclusion that the court has no jurisdiction over this case; and, lamentable as it may be, that the voter is left remediless to have his vote counted for the place of his choice, it would be still more lamentable for a court, which is but a creature of the law, to assume jurisdiction which is not conferred upon it by law, or to usurp the functions of those tribunals in which the lawmaking power has reposed confidence, and upon which it has imposed discretionary powers over the subject-matter. A court of equity is not entirely a free lance, which can be wielded independently of law or regulation. It is just as subservient to and dependent on the law, so far as its jurisdiction is concerned, as is a court of law. It is true that the rules governing the disposition of law, and of enforcing and protecting rights under the law, as applied by courts of equity, are more pliable and adaptive than are the rules governing courts of law. The object of the establishment of courts of equity was to escape the rigidity of the rules governing cases of law, and to confer more discretionary powers upon the chancellor, thereby making the administration of the law more flexible and more effective for the elicitation of truth; and these flexible principles or rules which characterize the proceedings in equity are usually applicable to the investigation of cases where fraud is involved, and for that reason such cases are assigned to the equity jurisdiction. For this reason, loose expressions are sometimes indulged in, to the effect that "it is one of the inherent powers of a court of equity to correct fraud." This proposition is no doubt true, as applied to the powers of a court having jurisdiction of the subject-matter in which the fraud is involved; but it no more follows that the mere suggestion of fraud gives a court of equity jurisdiction, than that the suggestion of the deprivation of a legal right gives a court of law jurisdiction, where the law has provided no remedy, or no tribunal to enforce the right. This discrimination must not be lost sight of, viz. the difference between the jurisdiction and the extended powers of the court under its jurisdiction.

There was a much wider distinction between the jurisdiction of courts of equity and law in ancient times than there is at present. "A court of chancery," says 1 Pom. Eq. Jur. §§ 34, 85, "as a regular tribunal for the administering of equitable relief and extraordi-

ing the opinion, says: "The questions are not such as the courts have any right to disturb, after they have been disposed of by the only authority which the law has empowered to act upon them. The supervisors, at a meeting when all the towns were represented, by a two-thirds vote, ordered an election to determine upon the proposed removal of the county seat. This election was held, and the board determined the result upon a canvass. That action is conclusive, and no authority exists anywhere to dispute it. The controversy, which is not in any sense a judicial one, is closed. The constitution has not empowered this court to settle controversies not judicial, which are very wisely left to the proper local and representative agencies of the people."

It is argued in this case that there is no discretion vested in the board of county commissioners; but, whether that be true or not, it makes no difference, in principle, whether the discretion was vested in the board of county commissioners or in the judges and inspector of the election. The legislature would have power to invest the discretion in either tribunal, and under our constitution they had invested the discretion, and intrusted the board, consisting of the judges and inspector of the precincts, with the power to canvass the votes of the precinct, prepare the returns, and transmit them to the county commissioners; and the county commissioners have been intrusted with the power to canvass the vote as returned by the different election boards, and declare the result; and it can make no difference, in principle, if the legislature has seen fit to invest different tribunals with discretionary power. "In the absence of statutory authorization, the courts are without jurisdiction, *ratione materiae*, to entertain the case of a contested election, and the consent of parties cannot give them jurisdiction. *State v. Judge Second Judicial Dist. Court*, 13 La. Ann. 89. This is not a county seat case, but involves the question of judicial jurisdiction. In that case the court said: "The contesting of votes is not a judicial function, only so far as made such by special statutes. Indeed, some may have gone so far as to question whether this is not wholly a matter of administration, which cannot with propriety be referred to the judicial tribunals at all. At any rate, it is clear that such tribunals cannot usurp any greater control over this business than is specially imposed upon them by law. In the absence of a statutory authorization, they are without jurisdiction of the matter *ratione materiae*. The consent of parties cannot give jurisdiction, and all courts before whom such an unauthorized controversy is brought must decline, *ex officio*, to render any order which would recognize a right to sustain the case." In *State v. Police Jury*, 41 La. Ann. 850, 6 South. 777, the doctrine announced in the case of *State v. Judge of*

Second Judicial Dist. Court, *supra*, was affirmed. This was a parish suit case, and the court, among other things, said: "It seems well settled that, in absence of express statutory authority, courts of equity will not exercise such jurisdiction. * * * It is ancient; and it has been at all times within the power of the legislature to extend to the courts the jurisdiction which they had declined. The fact that the legislature has not done so, or has extended only a jurisdiction defined and limited, clearly conveys the intention of the department to exclude the courts from any jurisdiction in such matters beyond that expressly granted. Indeed, the assumption of such jurisdiction, in absence of any legislative regulations of method, time, and order of procedure, would be fraught with serious consequences. * * * There is no possible reason or consideration for applying a different rule to elections for parish seats from that applied to elections for officers. Both are matters of purely governmental concern, involving only public and popular rights, and conferring no private rights which are susceptible of becoming vested." *Skrine v. Jackson*, 73 Ga. 377, involved the contest of an election on a fence law. It was decided that that was a part of the political power of the state which the legislature had seen fit to confer upon the ordinary, and the courts had no authority to interfere. "There are but two modes," said the court, "by which the legality of an election may be inquired into,—by the common law and by statute. By the common law, an information in the nature of a writ of quo warranto was exhibited by the statute, upon the relation of some person claiming the office said to be usurped by the defendant, and he was required to show by what authority he held the office. The legality of his election might be inquired into by this proceeding." And some reference is made to the Georgia Code. "It is quite clear that such a proceeding is not applicable to the present case. There is no office, and there is no person claiming an office, and no person exercising an office; but simply a law is declared adopted, which provides, for the future, that no fence need be used by the citizens of Richmond county. Is there any statute of force in this state, other than has already been referred to, which authorizes the courts to inquire into the legality of this election? None has been pointed out to us, and we have failed to find any. Then, if the remedies provided by the common law fail, and no statutory remedy be provided, is not the presumption conclusive that the legislature did not intend to have judicial interference in this matter, but to leave it to the determination of the ordinary, as provided in the act?" In *Freeman v. State*, 72 Ga. 812, it was decided that the legislature could provide a tribunal for the determination of contested elections, and that such determination was final and

conclusive. *Clarke v. Jack*, 60 Ala. 271, was a county-seat case, and it was decided that an act to authorize the people of a particular county to vote on the question of removing the county site, and to permanently locate the same according to their vote, is not a special or local law for the benefit of individuals or a corporation, and that the provisions of the general election law regulating contested elections did not apply to county-seat elections, and did not amount to a statutory provision for a contest of such election. In *Harrell v. Lynch*, 65 Tex. 146, it was decided that voters in a county have, in the location of a county seat, no such interest as will form the basis of a suit. Said the court: "As no man has a property right in the location of the county seat, its unlawful removal (no more than trespass upon the court yard) gives him no cause of action. Being deprived of no right, the depreciation in the value of his property is not a wrong for which a court of equity, in the absence of a legal remedy, would invent the means of redress. A valid law authorized the election. The election has been held. The agents appointed to ascertain and declare the result have performed their duty. This accomplishes the fact, and the law here ends the controversy. If a wrong has been done, the usurpation of the power to prescribe a remedy would be a still greater wrong." *Sanders v. Metcalf*, 1 Tenn. Ch. 419, is a case involving the removal of a county seat. The court said: "It is clear to my mind that the legislature has by this language intrusted to the county court, at its quarterly session, as the proper organ of the county, as a quasi corporation, the right to count the votes and declare the result. * * * As soon as the result was declared, the county seat was, eo instanti, changed, as if it had been by an act of the legislature. The county court were commissioners appointed by the legislature to make the removal by declaring the result of the election; and their act, not being judicial, but legislative, is conclusive, and the courts have no power to inquire into its validity." In *McWhirter v. Brainard*, 5 Or. 426, it was held that, upon the submission of the question of the location of a county seat to an election, the question of fact, as to whether the canvass of the vote was correct, and as to what the true vote was, and subordinate questions, cannot be tried in equity. In *Attorney General v. Board of Sup'rs of Lake County*, 33 Mich. 289, it was decided that the question of the removal of a county seat is purely a political question, and does not in any way legally involve the rights of private parties. There is no distinction made in the cases between cases where fraud is alleged and where it is not alleged. They are all decided on the broad ground that the question is a purely political one, over which the court has no jurisdiction, if it is not specially given by the lawmaking power.

Cases supporting this doctrine multiply at great length. In fact, there are states that have held the opposite. In *Boren v. Smith*, 47 Ill. 482, it was held that in a county-seat case, where it was alleged, a court of chancery would have jurisdiction. The court in that case declared the general doctrine, but made an exception as to a county-seat case, for which no reason whatever. They further affirmed their decision on the fact that the supreme court has declared that such a case may be taken before a county seat case, moved, and the court says: "And in applying that provision, it is manifestly designed that the will of the majority of the legal voters of the county should control. It would defeat that object to require this fundamental provision to be applied if the sense of the majority of the voters, constitutionally expressed, could overcome by illegal voters, or by other means. * * * As there is no precedent in England similar to this provision in our constitution, and the organic laws of the states are believed to have no such exception, it is not to be expected that such a case may be found upon which to base a declaration of a court of equity. If the courts of equity were, in the absence of legislative action, to refuse relief, no constitutional provision could, by fraud, be rendered inoperative, and wholly inoperative. This argument is squarely against the decision in *State v. Jones*, 6 Wash. 420, 201, where this court held that, if an act of the legislature had been proved to be void, courts had no authority to set aside any prior proceedings on the part of the legislature to ascertain whether the mandatory provisions of the constitution had been complied with, but that the bill, properly certified to, was conclusive evidence of that question. This decision is based upon the theory that the legislature was one of the co-ordinate departments of the government, with equal authority as the others, and that the assumption that the "mandatory provisions of the constitution are safer if the election thereof is intrusted to the legislature than if so intrusted to the courts." Or, "in other words," said this court, "holding the other view have acted upon the presumption that their department is the only one in which sufficient interest exists to insure the preservation of the constitution." If, then, the removal of a county seat is a political question, (a question which cannot be seriously denied to be within the jurisdiction and control of which, under the constitution of government, are within the exclusive jurisdiction of the legislative department.) It follows from the logic of *State v. Jones*, supra, that the state of facts proved to be by the tribunal solely empowered to pass upon the question involved must be taken as conclusive.

islature has made provisions for the determination of these facts. In these provisions it did not see fit to provide for any review or investigation by the courts, and the courts, therefore, are without authority to act in the premises. *People v. Wiant*, 48 Ill. 263, is decided on the same grounds. But in neither case is it assumed or intimated that they are following the weight of authority, or any authority at all. As, however, the authorities opposed to the jurisdiction in cases of this kind are so overwhelming, we feel bound to follow them, and it will not be necessary to examine the other questions raised by the demurrer. The judgment of lower court is therefore affirmed.

ANDERS and SCOTT, JJ., concur.

WINGATE v. KETNER, Auditor, et al.
(Supreme Court of Washington. Jan. 16, 1894.)

CITY TAXES—LEVY—BASIS OF ASSESSMENT.

1. The requirement of Act March 9, 1893, § 2, that a city council shall, within 30 days after an assessment roll is certified to it, by ordinance fix the rate of taxes to be levied, is not so mandatory that a slight delay will invalidate the levy.

2. The legislature may authorize the assessment of city taxes on the basis of the tax roll of the county for the preceding year.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Injunction by Robert Wingate against R. A. Ketner, auditor of Pierce county, and others. Judgment for defendants. Plaintiff appeals. Affirmed.

S. C. Milligan, for appellant. F. H. Murray, for respondents.

HOYT, J. Appellant brought this action to restrain the city of Tacoma and the auditor of Pierce county from proceeding in the levy of a certain tax, of five mills on the dollar, which the common council of said city had by ordinance directed to be spread upon the roll certified to them by the county assessor, as required by statute. The lower court adjudged him entitled to no relief, and dismissed his complaint, and from the judgment of dismissal he prosecutes this appeal. He presents to this court but two reasons why the tax, if assessed, will be illegal: First, because the common council had no authority to levy it; and, second, that the ordinance making the levy was not passed until more than 30 days after the roll had been certified to the common council.

It is only necessary to say as to the second question that, construing all the proceedings relating to the certifying of the said roll to the common council, and the passage by it of the ordinance in question, it fairly appears that such ordinance was passed within the 30 days provided by statute. But, even if it was passed after the expiration of said 30 days, that fact alone

would not render it invalid. The limitation as to the time is not so mandatory that the least neglect to comply therewith would deprive the city of the right to make any tax levy for the year.

The determination of the other question depends upon the construction of the act passed March 9, 1893, providing for the assessment and collection of taxes in cities of the first class, in connection with the provisions of the general revenue act. It is contended on the part of the appellant in relation to these statutes that, when they are construed together, it is not made to appear therefrom that it was the intention of the legislature to provide that cities which had made and collected a tax levy during the year 1893 should have the right to make a further levy upon the basis of the assessment roll for the county for the same year. We are unable to agree with this contention.

By the provisions of section 2 of said act of March 9th, it is made the duty of all cities of the class to levy a tax in the fall of each year upon the basis of the assessment roll to be certified to them by the county assessor; and, by force of such section, it is clear that the city of Tacoma would have been authorized to make the tax levy in question at the time it was made if it had not already made a levy for the year 1893 in accordance with the provisions of its own charter; and as there is no provision of either of the statutes under consideration which in any manner affects the power so granted to said cities of the class, except the provisions of section 9 of said act, it must follow that, if said section 9 had been omitted, there would be nothing to prevent the city from making the tax levy in question. Under the provisions of the act, unaffected by said section, the city of Tacoma would not have been authorized to have completed the assessment for the year 1893 under the provisions of its charter; and, except as aided by that section, its proceedings to that end would have been irregular and void; but we are unable to see how that fact, or any fact in relation to that levy, could in any manner affect the right of the city under the general provisions of the act to levy the tax in question. Section 9 was in effect an exception in favor of cities which, under the provisions of their charter, were about to levy a tax, and was inserted for the purpose of protecting their right so to do. It contained no words which in any manner made such exception affect the provisions of the act by which general power was conferred upon all cities of the class to levy the regular tax upon the roll certified to it by the assessor of the county. It will be noticed that the power conferred by section 2, above referred to, is so worded that it can be made available to cities, whether under their charters the tax levy was for the current or ensuing year; and for that reason the tax in question could not be affected by the fact

that it was for the ensuing year. It follows from what we have said that, even if the contention of the appellant that the clause at the end of section 9 was invalid is correct, it would not justify his contention that, on account of such invalidity, the tax in question must fail. The language to which he takes exception was inserted to make certain the intention of the legislature that the power conferred by section 2 of the act to levy a tax in each of the cities, such as the one under consideration, could in no manner be affected by reason of the permission contained in section 9, under which the levy in progress at the time of the passage of the act might be continued, under the provisions of the charter. No constitutional or other reason has been suggested by counsel why the legislature had not the power to authorize the assessment of taxes for the year 1894 upon the basis of the tax roll of the county for 1893, and, as the intent of the legislature to authorize such a proceeding appears clearly from the legislation, we must hold that the tax so levied is valid. The judgment must be affirmed.

DUNBAR, C. J., and ANDERS, SCOTT, and STILES, JJ., concur.

YOUNG v. YOUNG et al.

(Supreme Court of Washington. Jan. 16, 1894.)

KEEPING HUSBAND FROM WIFE—ACTION BY WIFE
—EVIDENCE.

An action by a wife against her husband's parents for causing him to abandon her cannot be maintained on evidence that defendants drove plaintiff from their home, and permitted the son to remain there; that his mother, two days thereafter, told plaintiff's father that he might as well understand that her son would no longer live with plaintiff; that the son thereafter failed to keep an engagement to meet plaintiff; and that the son's mother thereafter asked a person to use her influence to keep him from living with plaintiff.

Appeal from superior court, Clarke county; E. A. Wiswall, Judge.

Action by Lucy Young against John Young and Mary Young. Judgment for plaintiff. Defendants appeal. Reversed.

N. H. Bloomfield, M. J. McMahon, and Miller & Stapleton, for appellants. W. H. Metcalf and Dell Stuart, for respondent.

ANDERS, J. This action was brought by the respondent against the appellants to recover damages for causing her husband, who is a son of the appellants, to abandon her, and to refuse to live with her as her husband, or to provide a home for her, and for depriving her of his society and affection, and of support and maintenance. A trial was had, resulting in a judgment for plaintiff, to reverse which the defendants have appealed to this court.

At the close of the plaintiff's evidence the defendants moved for a nonsuit. The motion was denied, and the defendant's motion for judgment was granted. The appellants earnestly insisted that the ruling was error, and we are inclined to sustain them. In our opinion, the evidence is so unsubstantial that it amounts to a probability in favor of plaintiff's contention, and therefore, in the language of the Code, wholly "failed to prove its case for the jury." The facts appearing in the record are briefly these: The respondent was married to Phillip Young on March 19, 1893, at which time she was 24 years old. Immediately after the marriage the respondent and her husband moved to reside with the appellants on a farm about a mile distant from the residence of the respondent, and remained there until March 19, 1893, at which time she moved to the home of her parents, where she and her husband remained, separate and apart. The respondent claimed that she went away because the appellants refused to permit her longer to remain at home. It is not shown, however, that any force or violence was used or threatened against her to cause her to leave, or that she was in any way maltreated or mistreated by the appellants while she resided at home. But their intercourse with each other was not always pleasant and amicable, and disagreements sometimes occurred, in which one party was probably to blame as the other. On one occasion the respondent took exception to some remarks concerning her father, made by the appellants' children, and during the conversation Mary Young said to the respondent that she did not like the way the boys talked. She could "pack up her things and go home." The respondent's husband told her to obey the remark of his mother, which she did. She thereafter thought no more about it. It was about Christmas time, and the respondent's trouble occurred until the 17th of January following. On that evening there was a party at Grange Hall, and Phillip asked the respondent to accompany him there. She at first refused, but when the time came to go, Phillip she was not feeling very well, and would remain at home, and he went alone. During the evening, and after the party was over, the appellant John Young came to her and told her that she did not feel well, and that she should go home. She said to her she did not look sick, and that she did not feel well. She then replied that Phillip had been very kind to her, and was willing that she should go home. The appellant Mrs. Young then remarked to Lucy that she had no business a married woman should do in leaving her husband off alone, and that it was

cause she was sick at all, but because she had a stubborn head on her. The respondent retorted: "I have not been happy since I have been in this house. I have not seen a happy day since I have been here." This statement displeased Mr. Young, and he thereupon said to respondent, "If you haven't been happy, get up and get out." When Phillip came home Lucy told him what had occurred, and said she would go away the next morning. Phillip "cried and took on," and said, "Stay, and it will be all right in a few days." Respondent did not leave the next morning, however, but went down, and worked around in the kitchen, and finally told Mrs. Young she would overlook what had been said, and it would be all right; but Mrs. Young was not in a forgiving mood at that time, and bluntly remarked to Lucy that she would overlook nothing, and that she (Lucy) could pack up and get out. But Lucy evidently did not consider this remark of Mrs. Young as an imperative command to leave the premises, for she remained at work about the house all day. After the work was all done she went over to the house of her father and mother, informed them of her troubles, and, according to her own testimony, "told them to come over Sunday, and we would see what arrangements we could make; and if we did not come to any satisfactory arrangements I would come home with them." Satisfactory arrangements not having been made on Sunday, the respondent got ready to go home with her parents, but at the request of her mother and her husband, who begged her not to go away, concluded to remain with her husband. After the respondent's father and mother had started for home, appellant Mrs. Young said to respondent, "I thought you were going." Respondent replied, "I am going to stay for Phillip's sake;" whereupon Mrs. Young rejoined: "No, you will not. You have got ready to go; now go." Respondent had previously "packed up her things," and, after telling her husband she had to go, she left the house of appellants, without further ceremony, and, for aught that appears in the record, never returned, or offered to return, to her husband. The above is substantially all of the evidence produced by the respondent to prove that the appellants, or either of them, compelled her to leave their house, and, if it be conceded that what was said to her by appellant Mrs. Young was sufficient to justify her leaving, still she can sustain no cause of action upon that ground alone. Appellants were under no legal obligation to provide a home either for her or her husband; and, granting that they drove her away without provocation, and simply permitted, but did not persuade or otherwise influence; their son, her husband, to remain with them, still no action can be maintained against them therefor. While the appellants would have no right to prevent their son from following his wife wherever she

might choose to go, they certainly would not be liable in an action for damages by reason of his refusing to do so, without proof that such refusal was the result of the exercise of some improper influence by them.

In this case there is no direct evidence whatever showing that respondent's husband ever refused to live with or support her, or that his affection for her was any less ardent at the time of the trial than it was when she left his home and he shed tears at their parting. Nor is there any positive evidence showing that the appellants, or either of them, ever by word or deed undertook to induce their son to abandon his wife, or to refuse to "return to her," as alleged in the complaint. But it is claimed on behalf of the respondent that all of these necessary facts are made evident by certain circumstances appearing in the case, the first of which is that two days after the respondent left the house of appellants the appellant Mrs. Young told respondent's father that he might as well understand that Phillip would live no longer with Lucy. But whether Phillip had told her so, or whether she was merely expressing an opinion based upon some other source of information, is not disclosed. If it be conceded that this declaration is some evidence against the declarant, it must also be conceded, we think, that its weight is but little more than infinitesimal. The next circumstance relied on is that some days after their separation Phillip and Lucy made an arrangement to meet at the house of Mr. Ricketts at a certain time, and when the appointed time arrived Lucy went there, but Phillip did not. Now, what does this testimony show? It simply shows that Phillip failed to keep his word, but why he did so is a mere matter of speculation or conjecture, and is no more proof that his parents kept him away than it is that some unavoidable accident prevented him from going. Again, it was shown by the testimony of Mrs. Ricketts, over the objection of defendants, that, after the respondent had gone to reside with her parents, the appellant Mrs. Young requested the witness to use her influence to prevent Phillip from again living with Lucy, and stated as a reason for making the request that if Phillip did so his father would disinherit him, and that would break her heart. It is not shown, however, that Mrs. Ricketts ever mentioned the matter to Phillip, or that anything further was said upon the subject by Mrs. Young. This conversation could, of course, in no way affect the appellant John Young, and, as to Mrs. Mary Young herself, it simply showed a desire to have her son Phillip continue to remain, as he then was, separate and apart from his wife, the respondent, and a willingness on her part to endeavor to induce him to so remain. But it falls far short of showing that Phillip's action was in fact the result of influences brought to bear upon him by the appellants, or even by Mrs. Mary Young alone. Taking the above evidence all

together, (and it is all there was that was material before the court when the motion for nonsuit was made,) it seems too clear for argument that it entirely failed to establish plaintiff's cause of action. No verdict could have been rationally based upon it in favor of the respondent, upon whom was imposed the burden of proof, and therefore the motion for a nonsuit should have been granted. The judgment is reversed, and the cause remanded, with directions to enter a judgment of nonsuit upon defendant's motion.

STILES, SCOTT, and HOYT, JJ., concur.

DUNBAR, C. J. I concur in the result, because I do not think there is any testimony in the case to establish the allegations of the complaint. It probably establishes the fact that the defendants drove their daughter-in-law away from their home, but it goes no further than that, and that they certainly had a right to do.

PARKE v. CITY OF SEATTLE.¹

(Supreme Court of Washington. Jan. 16, 1894.)
EVIDENCE AS TO VALUE—COMMUNITY PROPERTY—
ACTION FOR DAMAGES.

1. In an action against a city for injuries to property caused by the negligent grading of a street in front thereof, evidence as to the amount offered to plaintiff for the land before the grading is inadmissible to prove its value.

2. An action for permanent injuries to community real estate must be brought by husband and wife jointly.

Appeal from superior court, King county; Richard Osborn, Judge.

Action by James Parke against the city of Seattle for injuries to plaintiff's property by the negligent grading of a street in front thereof. From a judgment for plaintiff, defendant appeals. Reversed.

For a full statement of the facts, see 31 Pac. 310.

Geo. Donworth and Jas. B. Howe, for appellant. Greene & Turner, for respondent.

SCOTT, J. This case has once before been before this court, an appeal having been taken by the plaintiff from a judgment sustaining a demurrer interposed by the defendant. The case was reversed, and remanded for trial. 5 Wash. 1, 31 Pac. 310, and 32 Pac. 82. A trial was had, and verdict and judgment rendered for the plaintiff, and defendant now prosecutes this appeal.

The first point raised is with reference to proof admitted relating to the value of the premises which were damaged. The plaintiff was allowed to testify, over the objection of the defendant, that a man from Portland had offered him \$14,000 for said property. The respondent contends that this testimony was admissible, although he admits that the majority of the courts of the various states have held otherwise. Some cases are cited

by the respondent as favoring his case, but none of them go to the extent that would be necessary to go to sustain the mission of this testimony, and we are of the opinion that its admission is erroneous. *Hine v. Railroad Co.*, 132 30 N. E. 985. It is further contended by the respondent that, if the court erred in this particular, the testimony is not prejudicial to the defendant, on the ground that it is apparent that the testimony attached no weight to it; but we think the error fails to show this, and consequently the admission was harmful error.

A second point is raised with reference to the liability of the city for its premises. This question was disposed of in the former appeal, and is therefore not to be considered at this time.

It is further contended by appellant that the court erred in not giving certain instructions to the jury, relating to charge submitted by the defendant, relating to contributory negligence upon the part of the plaintiff; but, as we view the case, there was nothing upon which a finding of contributory negligence could be based, for that reason the court properly refused to give said instructions.

The further point is raised that the city could not maintain this action, for the reason that the real estate damaged was community property of the plaintiff and his wife, and that it was necessary for them to join in an action for damages thereon. We are of the opinion that this point is not taken. The respondent admits that the real estate was community property. The respondent contends that the husband, in such an action, must maintain an action, and that such an action is customarily brought in the name of the husband, only, in this state. However, it seems to us that they are not so brought. The claim of the plaintiff in this case is based upon the fact that the city in the premises amounting to a wrongful taking of his property; damage which destroys substantial value and inflicts irreparable and permanent injury to such real estate. Is a taking of property which would not be contended—at least not be successfully contended—that the husband alone could authorize such a taking or damaging of the community real estate. The first instance; and to allow him to maintain an action for the recovery thereof is simply permitting him to do indirectly what he could not do directly. The authority to maintain such an action is given to the husband, and he has authority to compel the city to release the claims for which the damage was brought. A contrary view was maintained by this court in *Brotton v. City of Seattle*, 1 Wash. St. 73, 23 Pac. 688. Reversed.

DUNBAR, C. J., and ANDERS, J., concur.

HOYT and STILES, JJ., concur with the result.

¹ Rehearing pending.

FORD v. DURIE, City Treasurer.¹

(Supreme Court of Washington. Jan. 16, 1894.)

**MUNICIPAL CORPORATIONS—CONSTRUCTION OF
CHARTER—SALE FOR TAXES.**

Seattle City Charter, art. 9, § 34, providing that no deed of property sold for delinquent taxes "shall be made until the notice is given that a tax deed will be applied for and such notice duly served as prescribed in the laws * * * relating to property sold for state or county taxes," refers to the laws in force at the time when the deed is to be executed, and not to those in force at the time of the adoption of such charter. Dunbar, C. J., dissenting.

Appeal from superior court, King county; T. J. Humes, Judge.

Application by I. D. Ford for mandamus to compel Adolph Krug, treasurer of the city of Seattle, to execute a tax deed to certain lots sold to petitioner by the city of Seattle at a tax sale. A writ was denied, and petitioner appeals. Reversed.

W. D. Lambuth, for appellant. Geo. Donworth and Jas. B. Howe, for respondent.

HOYT, J. But a single question is presented by the record in this case: Was the law in relation to the execution of deeds for lands sold for state and county taxes, in force at the date of the adoption of the charter of the city of Seattle, so made a part thereof by the provisions of section 34 of article 9 of said charter that a subsequent change in the law relating to such sales would have no effect upon the law repealed by such subsequent legislation so far as it related to the provisions of said charter? To ascertain the intent of the framers of the charter in that regard, it will be necessary to look at other provisions contained therein, from which it will clearly appear that it was their aim to assimilate all proceedings for the collection of taxes under the charter, so far as practicable, with those of the general law in force at the time of such collection. Interpreting the language of this particular section in the light of these provisions, and the evident intent of the framers of the charter as shown therefrom, it must be held that no specific provision of the statute in force relating to the execution of deeds for property sold for delinquent taxes was so made a part of the charter as not to be affected by subsequent general legislation. The language used is as follows: "Provided however, that no such deed shall be made until the notice is given that a tax deed will be applied for and such notice duly served as prescribed in the laws of the state of Washington relating to property sold for state or county taxes." The force of such language as well authorizes the contention of the appellant, that it refers to the law in force at the time of the making of the deed, as that of respondent, that it refers to that in force at the time of the adoption of the charter; and the intent of the framers of the charter, as manifested

by other provisions, makes it necessary that we should hold, with the appellant, that they intended by such language to refer to the law in force at the time when the deed was to be executed. There is little force in the contention of respondent that such could not have been their intention, for the reason that, when thus construed, the proviso was only a repetition of the provision already made in section 15 of said article. It is not such an unusual thing for charters and laws to contain unnecessary repetitions that much significance can be attached to such fact. Without this provision of section 34, the regulations relating to the making of deeds for lands sold for state and county taxes would have been applicable to tax deeds to be executed by the authority of the city. But the framers of the charter thought best to make this more certain by the proviso in the section expressly relating to the execution of the deeds. The only effect of such proviso was to require that the city treasurer should not execute such deeds until the notice required by the general statutes in force at the time had been given, and, if such statute required no notice whatever, then none was necessary, as a foundation for the application for a deed from the city treasurer. A question somewhat similar to this was decided by this court on October 31st last, in the case of Newman v. City of North Yakima, 34 Pac. 921, and a like conclusion arrived at. The judgment must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

STILES, SCOTT, and ANDERS, JJ., concur.

DUNBAR, C. J. Construing all of the provisions of the charter together, I am unable to reach the conclusion arrived at by my brothers, and I therefore dissent.

HALEY GROCERY CO. v. HALEY.

(Supreme Court of Washington. Jan. 16, 1894.)

SALE OF GOOD WILL—CONSTRUCTION OF CONTRACT.

A contract by the seller of a business not to engage in a similar business for a limited time, and within a limited territory, with any share in the profits, or interest in the property, or with accounting or division of either property or profits, for his benefit, or for compensation regulated on the basis of profits or value of property or stock, is not violated by the seller's working for a salary in a similar business conducted by another.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by the Haley Grocery Company against John Haley for breach of contract. From a judgment for defendant, plaintiff appeals. Affirmed.

Bausman, Kelleher & Emory, for appellant. Stratton, Lewis & Gilman, for respondent.

¹ Rehearing denied. See 35 Pac. 1082.

ANDERS, J. The respondent was a stockholder and employe of the Haley Grocery Company of Seattle. In October, 1892, he sold his stock to one Hill, and at or about the same time entered into the following contract with the appellant: "For and in consideration of the sum of \$1.00 to me in hand paid, and other good and valuable consideration, the receipt whereof is hereby acknowledged, I undertake and agree with the Haley Grocery Company that within the period of three years from this date I will not engage in the business of wholesale or retail groceries, either in my own name or in that of another, or conduct or engage in any such business for any other firm, person, or corporation with any share of the profits, or with any interest in the property, and with no secret or actual accounting or division of either property or profits, for my benefit, or for compensation regulated on the basis of profits or sales of property or stock. This agreement is limited to the city of Seattle, Washington, and to that part of the city lying within a radius of half a mile from the present place of business of the Haley Grocery Company, in the Boston block, on Second street. Outside of said limits, I retain all rights of engaging in or conducting the grocery or any other business, either for myself or for any firm, person, or corporation, and upon any basis of interest or compensation whatever. Permission is given for business on Pike street." Some two months thereafter, the respondent entered into the service of the Seattle Grocery Company, within the limits mentioned in his contract with the appellant, as a salesman, at a salary of \$100 per month, which was his only compensation. The appellant brought this action to enjoin the respondent from remaining in the service of the Seattle Grocery Company, on the alleged ground that such employment was in violation of the contract above set forth. The court granted a temporary restraining order, but, at the final hearing, dissolved the order, and dismissed the action. From that judgment the plaintiff appeals.

It will be seen by an examination of the contract in question that the respondent's agreement was not to engage, within a certain time, and within certain defined limits, in the grocery business, either in his own name or in that of another, or conduct or engage in such business for any other firm, person, or corporation, with any share of the profits, or with any interest in the property, and with no secret or actual accounting or division of either property or profits, for his benefit, or for compensation regulated on the basis of profits or sales of property or stock. The court below held that, by working for a salary, the respondent violated none of the provisions of his contract, and we are at a loss to see how any other conclusion could have been arrived at. The proof is overwhelming that the respondent received nothing

but a bare monthly salary as compensation for his services, and the conditions and limitations of the contract itself are fully and plainly expressed therein. In our opinion, they are susceptible of but one construction. Judgment affirmed.

DUNBAR, C. J., and SCOTT, H. J.,
STILES, JJ., concur.

MOORMAN et al. v. SEATTLE & CO.

(Supreme Court of Washington. Jan. 1893.)
RAILROAD RIGHT OF WAY—BREACH OF CONTRACT—DAMAGES—EVIDENCE.

1. Failure of a railroad company to dig a ditch along its right of way, as it was intended in the deed therefor, rendered the grantor only for the actual damages resulting; and a report of appraisers at a meeting of the various landowners interested in the ditch is not admissible as evidence of the amount of such damages in the absence of consent by the railroad company to the appointment and acting as such.

2. The fact that the company's survey agent was present at the meeting received from the landowners their assent to his proposal to dig the ditch in compliance with the right of way, does not bind the company to the amount of damages as determined by the appraisers, where the right of way did not participate in any of the arrangements between the ditch beneficiaries, and the appraisers were the choice of appraisers, and the agent consulted in regard to the appraisal.

Appeal from superior court, Skagit county, by Henry McBride, Judge.

Action by D. B. Moorman and others against the Seattle & Pacific Railway Company for defendant's failure to dig a ditch which it had covenanted to dig in a deed conveying to it a right of way. Judgment for plaintiffs, defendant's appeal reversed.

Burke, Shepard & Woods, for plaintiffs.
Million & Houser, for respondents.

STILES, J. Respondents sued for \$1,000 damages for the failure of the plaintiff to dig a certain ditch, other than that claimed in the complaint being abandoned at the trial. This measure of damages was sought to be deduced, and was sustained by the court below, upon the theory that the appellant had in some way made the ditch for the default of certain third parties in failing to pay respondents the consideration mentioned as a consideration for their failure to dig a ditch to the appellant of a right of way for a railroad. The allegations of the plaintiff were very strongly put, and this was sustained by the admission of much competent testimony. What respondents had to prove was that the appellant had received from them a conveyance of land for right of way purposes, and that the agreement participated in by both parties in this case and by the third parties mentioned in the deed, had the effect that if the respondents

convey the right of way the appellant would dig the ditch, and the third parties would pay the \$1,000; but the proof went no further than the establishment of a contract between respondents and appellant, under which the former made a conveyance and the latter agreed to dig the ditch. This contract was in writing, being the conveyance itself, which contained the stipulations concerning the ditch, in the habendum, as follows: "To have and to hold the said premises, with appurtenances, unto the said party of the second part, and to its successors and assigns forever, subject to the following conditions, which are made a part of the consideration of the foregoing transfer: The said party of the second part, its successors and assigns, shall excavate and maintain a continuous and sufficient ditch, not less than four and one-half feet deep, along each side of its grade or embankment, across the aforesaid strip of land, to carry off the drainage of the lands adjacent thereto, and shall continue and maintain a suitable and sufficient ditch, not less than four and one-half feet deep, on one or both sides of its grade or embankment, to a point on or near the south boundary line of Skagit county; * * * said ditch or ditches to be completed to their outlets on completion of the road." The road was completed, but the ditch was not built, and the appellant admits that it does not intend to build it, for the reason that the country is so nearly level that a ditch along its right of way would be of no value whatever for drainage.

With the written contract of the parties pleaded as a part of the complaint, it was error for the court to admit evidence tending to show terms of the contract which had not been included in the writing. By a reformation of the deed, alone, could such evidence have become competent. But, had this evidence been admissible, it would have been insufficient. It was shown that in 1890 the county commissioners had ordered the construction of a ditch along the line of the route afterwards selected by the appellant under the ditch law of that year, (Acts 1890, p. 652,) but the appellant appeared, and proposed to landowners interested in the proposed ditch that, if they would donate to it a strip of land for its right of way, it would construct and maintain the ditch free of further cost to them. This offer was accepted, and the commissioners abandoned their proposed work. But a number of owners of land which did not lie in the route of the ditch, but which was expected to be benefited by it, were called upon to contribute money, according to the benefits to be received by them, sufficient to pay the owners of those lands which were to be taken for the right of way the fair value thereof. A conference of all these owners was held, and it was agreed among them that three disinterested neighbors should appraise the value of each parcel,

and that notes should be given by the benefited owners to cover the awards. These notes were conditioned that they were to be void if the appellant should fail to build the ditch, and \$1,000 worth of the notes were awarded to respondents, but the failure of the appellant to build the ditch has rendered them worthless. The appellant's right of way agent, who negotiated for the conveyances, was present at the meeting when the arrangements described were made, and received from the landowners their assent to his proposal to dig the ditch for the right of way, and a form for the condition which they wished inserted in their deeds; and, from the fact of his presence there, it is sought to fasten upon the appellant a liability measured by the amount of the notes assigned to the respondents. But, taking the respondents' evidence at the strongest, we are unable to see how any such result can be wrought out. It was not shown that the agent participated in any of the arrangements made between the ditch beneficiaries. He had no voice in the choice of the appraisers, and never was consulted in regard to the appraisal or the award of notes. The rule that is invoked by the respondents seems to be that laid down in *Lumber Co. v. Cole*, 2 Wash. 57, 25 Pac. 1077; but the cases have no similarity in principle whatever. *Cole* was allowed to recover the actual, direct losses he suffered, so far as they were held to be within the necessary contemplation of the parties to an executory contract. But here there is an executed sale of land, for a certain consideration expressed in the deed; and if that consideration has wholly failed, and the provision in the deed with regard to a ditch constitutes a covenant, the usual rule of damages in such cases should be applied. Such a rule the parties must be held to have contemplated, not a rule set up and applied by an ex parte tribunal of appraisers, whose action received no assent from the appellant either at the time they were appointed, or when they acted, or afterwards. It is quite likely that the consideration which moved the respondents was the building of the ditch for the benefit of their own land, and the receipt of the \$1,000, and appellant's agent may have known that without both he could not secure the deed; but it is not shown that the agent in any way undertook to procure the payment of the money, or that it was ever suggested to him that a sum of \$1,000 and the building of the ditch were equivalents for the right of way. Much less does he appear to have assented to that proposition. The court admitted the report of the appraisers to establish the damage, and thereby adopted an erroneous basis of admeasurement. Other interesting questions were presented in the case, but they are unnecessary to its determination. As the only damage alleged and persisted in was the loss of the proceeds of

the notes, the judgment must be reversed, and the cause dismissed.

ANDERS and HOYT, JJ., concur.

TRYON v. DAVIS.

(Supreme Court of Washington. Jan. 19, 1894.)

LEASE OF COMMUNITY PROPERTY—EXECUTION BY HUSBAND—RESCISSION.

1. In an action for rent under a lease, an answer alleging that, during his term, defendant found that the lease was invalid because made by plaintiff, a married man, on community property, without joinder of his wife; that he notified plaintiff that, owing to this defect, he would no longer occupy under the lease, and was ready to surrender, or pay a reasonable rental from month to month,—is bad, as failing to allege that, before electing to rescind, he demanded of plaintiff and his wife a new lease on the same terms.

2. In an action for rent under a lease, plaintiff, the lessor, need not prove ownership.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by Anderson D. Tryon against R. F. Davis for rent due under a lease. Judgment for plaintiff. Defendant appeals. Affirmed.

Thomas C. Griffiths, for appellant. Post & Avery, for respondent.

DUNBAR, C. J. This is an action brought by respondent for the recovery of money alleged to be due on a lease. On the 1st day of July, 1889, appellant and respondent entered into an agreement in writing, whereby respondent leased to appellant, for the term of five years from said date, certain real estate in the city of Spokane, at an agreed monthly rental of \$200, payable in advance. The appellant entered into possession of the premises under said lease, and continued to pay the stipulated rental until July 1, 1891, at which time it is claimed by the appellant that he discovered that the lease under which he held possession was void by reason of the fact that the property leased was community property, and that the wife of the respondent had not joined in executing the lease; at which time appellant insisted that he would either abandon the lease, or pay a reasonable value for the use of the premises from that time. It is conceded that respondent and his wife were not residents of the state of Washington at the time the lease was executed, or at the time of the alleged discovery of the illegality of the contract. The complaint was the ordinary complaint for the recovery of money due on a lease. The answer was a general denial of the allegations of the complaint, and an affirmative defense alleging that the respondent was a married man, and setting up the lease, want of execution by the wife, and the further facts: "(5) That on, to wit, the 1st day of July, 1891, the defendant discovered that said lease was illegal and void, and that he could not rely thereon, and

that he had no rights thereunder; then and there notified the plaintiff of the defect in said lease, and that he no longer hold or occupy the said premises under the same, and that he was ready to surrender, or pay a reasonable rental from month to month, and there, to surrender to the plaintiff possession of said premises, or to pay a reasonable rental for the use and occupancy of the same, from month to month, and there, to surrender to the plaintiff possession of said premises, or to pay a reasonable rental for the use and occupancy of the same. From, to wit, the 1st day of July, 1891, until, to wit, the 1st day of July, 1892, the defendant paid to the plaintiff the sum of \$125.00 per month, and the plaintiff received from the defendant as rental on said building, the sum of \$125.00 for each and every month thereof; reasonable rental value of the said premises for said period of time did not exceed the sum of \$125.00 per month. (6) That on, to wit, the 1st day of January, 1892, the plaintiff again leased the said premises to the defendant for the period of six months, at a monthly rental of \$125.00 per month, to wit, the 1st day of July, 1892, the plaintiff again leased the said premises to the defendant for the period of eighteen months thereafter, at the monthly rental of \$125.00 per month the first six months, and \$125.00 per month for each additional month thereafter, to the end of the term. (7) That the defendant is now in possession of the said premises under and by virtue of said last-named lease, and has paid to the plaintiff all of the rentals so promised and to be paid by him. (8) That defendant has occupied said premises under and by virtue of the pretended lease mentioned in the complaint since the 1st day of July, 1891, since that date both plaintiff and defendant have treated said lease as void and of no effect; and defendant's occupancy of said premises, ever since said 1st day of July, 1891, has been as herein stated, and defendant, otherwise, and plaintiff acquiesced therein and consented thereto."

At the conclusion of plaintiff's testimony the defendant moved for a nonsuit for the reason that the evidence showed affirmatively that from July 1, 1891, to January 1, 1892, the defendant occupied the premises under and by virtue of the pretended arrangement from the original lease, and that plaintiff generally had failed to sustain his complaint, because the ownership of the property had not been proven, and that the allegations of the answer were true, and the answer was void. Had this motion been granted, before the cross-examination of witness, it is possible that it might have been sustained; but whatever failure of proof was on the direct examination with reference to the occupancy of the premises from July 1, 1891, to January 1, 1892, was supplied by the appellant, Davis, on his cross-examination, for, in view of the law as pronounced by this court, the appellant, by his testimony, plainly shows that he was in possession of the premises during that period of time, and not by virtue of any arrangement. It is nowhere testified

him that he demanded the execution of a new lease by respondent and his wife on the same terms as the old one. His testimony shows that instead of doing this he informed the agents of the respondent that he would not occupy the premises at all unless a new lease embodying different terms was executed, and that he told said agents that, until such time as said new lease could be executed, (the respondent being a resident of New York,) he would continue in possession of the premises, and pay a reasonable rental therefor.

Conceding, for the purposes of this case, that under the circumstances the property was community property, and that the tenant had any right to dispute the title of his landlord, he has not brought himself within the law as laid down by this court in *Isaacs v. Holland*, 4 Wash. 54, 29 Pac. 976; *Colcord v. Leddy*, 4 Wash. 791, 31 Pac. 320; and *Hunt v. Stearns*, 5 Wash. 167, 31 Pac. 463. There it was held that before a party could elect to rescind a contract which, under the laws, should be executed by both husband and wife, but which had actually been executed by but one of the spouses, he must give the contracting party an opportunity to furnish a contract legally executed.

So far as the contention of appellant is concerned, that plaintiff failed to prove ownership, it is without merit, for the proof of ownership was not necessary. Neither was there any proof whatever tending to show that the arrangement which appellant alleges he had entered into with regard to the occupancy of these premises between July 1, 1891, and January 1, 1892, was ever brought to the attention of, or agreed to by, the respondent. All such arrangements, or agreements for such arrangements, were made with the agents of respondent, who were simply agents for the collection of the rent, and did not claim any other authority; and it is not claimed by appellant in his testimony that they ever held themselves out as claiming any authority to contract for their principal.

On the refusal of the court to grant the nonsuit asked by appellant, this question was asked of one of the alleged agents: "Q. When did Mr. Davis first notify you that the lease that he obtained on July 1, 1889, was void, and that he would no longer occupy the property under it, if at all?" This was objected to by counsel for the plaintiff, for the reason that it was leading, and for the further reason, that no allegations in the affirmative defense justified such proof; that the affirmative proof set up in the answer did not constitute a defense in law; and that it did not appear that this witness was an agent of Mr. Tryon for the purpose of receiving any such notice or information. Some other questions were asked by the counsel for the defense, which were objected to. Finally, the court ruled that the affirm-

ative matter in the answer did not constitute facts sufficient to constitute a defense. Counsel then asked the question under the general issue: "Mr. Galbraith, at any time while you were collecting rents, did Mr. Davis say anything to you with reference to the validity of the lease under which he had been theretofore paying rent?" (Objected to as irrelevant and immaterial to any issue in the case. Objection was sustained.) We think the objection was properly sustained, for the reason that it was irrelevant, and we are also of the opinion that, under the construction placed by this court upon the law respecting cases of this kind in the cases above cited, the answer failed to state any affirmative defense. It alleges that he "notified the plaintiff of the defect in said lease, and that he would no longer hold or occupy said premises under the same, and that he was ready, then and there, to surrender to the plaintiff possession of said premises, or to pay him a reasonable rental for the use and occupation of the same, from month to month, while occupying the same;" and, as we have before said, under the decisions of this court, he had no right to rescind this contract until he had given the appellant an opportunity to execute a legal lease.

The allegations in section 6 of the answer are entirely irrelevant, and, if they were confessed, would be no defense to an action for money due for rent before that date. So far as subdivisions 7 and 8 of the answer are concerned, if they are not the statements of legal conclusions, but are intended to be the statement of facts, they are in plain conflict with the testimony of Davis himself, who, being a party to the action, should not be allowed to dispute or impeach his own evidence. Hence, in no event could the ruling of the court upon the insufficiency of the affirmative allegations of the answer be prejudicial to the appellant. Finding no substantial error, the judgment will be affirmed.

STILES, SCOTT, ANDERS, and HOYT, JJ., concur.

HARRIS v. BROOKER, Justice of the Peace.
(Supreme Court of Washington. Jan. 24, 1894.)

WRIT OF PROHIBITION—PETITION—NECESSARY ALLEGATIONS.

Prohibition to proceed with a case cannot issue on a petition which fails to show what, if any, action the lower court contemplates, or that petitioner would be injured thereby, or that he has not consented to the jurisdiction, or that he has objected to it in the lower court.

Appeal from superior court, Yakima county; Carroll B. Graves, Judge.

Application by Hyman Harris for prohibition to Leroy Brooker, a justice of the peace. Writ granted, and Brooker appeals. Reversed.

MacKinnon & Murane, for appellant.

DUNBAR, C. J. The application for a writ of prohibition, which was issued by the superior court of Yakima county against the appellant in this case, was as follows: "Hyman Harris, of North Yakima, in the county of Yakima, being first duly sworn, says that he is the defendant in a suit now pending in the justice court of Leroy Brooker, one of the justices of the peace in and for Yakima county, state of Washington, in which Cole Brown and P. L. Zirkle are plaintiffs, and that he makes this affidavit for the purpose of procuring a writ of prohibition to be issued out of this court to the said Leroy Brooker, Cole Brown, and P. L. Zirkle, to prohibit them, and each of them, from taking any proceedings in said case, under notice given by Leroy Brooker, justice as aforesaid, on the 8th day of July, 1893, to appear at the Wide Hollow schoolhouse on Saturday, July 15, 1893, to hear said case. Affiant further says that on June 9, 1893, said action was begun before J. O. Clark, a justice of the peace, residing at North Yakima, and that, on the 17th day of June, the date set for the hearing of said case, defendant appeared and answered, and filed his motion for change of venue; that said case was accordingly transferred to the justice court of S. C. Henton, one of the justices of the peace for Yakima county, residing at North Yakima; that on or about the 1st day of July, 1893, the plaintiffs, by their attorney, filed a motion for a change of venue; and that the case was accordingly transferred to the justice court of Leroy Brooker, before whom it is now pending. Wherefore he prays," etc. It is not necessary for the purposes of this case to determine the question whether Justice of the Peace Brooker had jurisdiction of the case, or whether the appellant had a remedy by appeal; for, in our judgment, the facts set forth in the petition are not sufficient to warrant the issue of the writ. It is nowhere alleged in the petition what action the court was about to take in the premises, or, if the court was threatening to take any action whatever, that the petitioner would be injured thereby. A writ of prohibition will not issue unless it appear that there is some threatened injury, for which the petitioner has no other adequate remedy. There is nothing to show in this petition that the respondent did not consent to the removal of the case to the court of Justice Brooker, or that he at any time objected to the jurisdiction of Brooker's court. That objection to the jurisdiction must be raised in the court to which the writ is sought to be addressed was decided by this court in *State v. Superior Court of Whatcom Co.*, 2 Wash. St. 9, 25 Pac. 1007, which followed the rule laid down by the supreme court of the United States in *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570; and the return of the judge to the alternative writ shows the justice of this rule, and the

injustice of allowing a court to be to this writ, and to the costs follow before it has had an opportunity to on the question of jurisdiction, which sailed. The return is as follows: "Justice court of Leroy Brooker, in and Hollow precinct, Yakima county, ton, to whom is directed the writ of tion hereto annexed, for answer to do certify and return: Said court has no steps in said case except notified said parties to appear. Said court, advised on the point of his jurisdiction of the opinion that he had no jurisdiction, and, had a motion been made to dismiss the action, said court would have dismissed the action, unless good authority had been produced to change the views of said court. Said Hyman Harris, nor any person named Harris, has never appeared in the case of Leroy Brooker." It seems to us that requiring very little of the petitioner to demand that he should at least bring to the notice of the court the fact of jurisdiction to the notice of the court before he asks a superior tribunal to set aside its judgment, and to require the judgment of the lower court is reversed, and the cause remanded, with instructions to the court to issue the writ.

SCOTT, ANDERS, HOYT, and
JJ., concur.

MILLER et al. v. VERMURIE
(Supreme Court of Washington. Jan. 1894.)
APPEAL—DISMISSAL—DEFECTIVE BOND—
EXCEPTIONS.

1. An appeal will not be dismissed on the ground of defect in the appeal bond, if the defect has been adjudged, and an order made for the appellant to amend.

2. Where the original notice of appeal, and the statement of facts and exceptions, and the statement filed at such notice was given was so entitled, could proceed as for a settlement of a statement of facts and exceptions, and such right was not taken because, at the court's suggestion, in form to which the exceptions were referred, the papers were entitled and settled simply of exceptions, if the certificate of the court was broad enough to make it a good certificate of a statement of facts.

On petition for rehearing. Denied.
For former report, see 34 Pac. 110.

HOYT, J. In the petition for a writ of prohibition filed in this cause, our attention is called to the fact that in our former opinion nothing was said as to the motion of respondent to strike the statement of facts from the record, and dismiss the appeal. Such was an inadvertence on the part of the writer of the opinion. The court arrived at the conclusion that the writ should be denied, and thereupon, upon an investigation of the merits, it came to a conclusion in regard to the assignment of the case, and the one to

was assigned proceeded at once to a consideration of the case upon the merits, overlooking the fact that a motion had been interposed. On that account, we will here briefly state our reasons for denying such motion.

This court has frequently held that it will not dismiss an appeal or affirm a judgment on account of a defect in the appeal bond until the defect has been adjudged, and an opportunity to amend given to appellant. If the bond in question is defective, its insufficiency cannot be taken advantage of in the manner disclosed by the record. The other branch of the motion grows out of the fact that the errors not originally a part of the record were made a part thereof by a paper entitled a "bill of exceptions," and that, this being so, the statute applicable to the settlement of a bill of exceptions must apply to the making thereof a part of the record, and not that relating to the settlement of a statement of facts. The record discloses that the original notice was for the settlement of a statement of facts and a bill of exceptions, and the statement prepared and filed at the time such notice was given was so entitled; and we think that such notice and statement were sufficient to authorize the court to proceed as for the settlement of a statement of facts, and that that right was not taken away by reason of the fact that, at the suggestion of the court, in the final form to which the exceptions were reduced, the paper was entitled and settled simply as a "bill of exceptions." This would not be so if the certificate of the judge was not broad enough to make it a good certificate to a statement of facts, but it was thus broad. The petition for rehearing raises no new questions as to the merits of the case, and we do not deem it necessary to add anything to what was said in regard thereto. Petition denied.

DUNBAR, C. J., and STILES, ANDERS,
and SCOTT, JJ., concur.

MEYER et al. v. TACOMA LIGHT & WATER CO.

(Supreme Court of Washington. Jan. 26, 1894.)
RIPARIAN RIGHTS—UNDERGROUND FLOW—DIVERSION.

Where the waters of a stream gradually disappear and percolate through the sand, within limits not at all defined, except by the valley in which the stream is located, over an impervious substratum, thus finding their way to a lake, a riparian owner on an outlet to the lake has no right to have such underground flow protected.

Appeal from superior court, Pierce county; Fremont Campbell, Judge.

Action by Frederick Meyer and another against the Tacoma Light & Water Company for damages for diversion of water of a stream. Judgment for plaintiffs. Defendant appeals. Reversed.

Stevens, Seymour & Sharpstein, for appellant. J. P. Case and W. W. Likens, for respondents.

HOYT, J. The questions presented by this record have been elaborately briefed and ably argued by counsel for the respective parties. Such argument has extended over a broad field, and raised questions, the decision of which will have an important bearing upon the history of the state. The conclusion to which we have come as to the facts in the case will, however, make it unnecessary for us to say anything as to many of the questions suggested by the briefs. The plaintiffs' action was founded upon the alleged fact that the diversion of water by the defendant from Clover creek and its tributaries had resulted in the lowering of Stellacoom lake, so that the mill of the plaintiffs, situated upon an outlet of said lake, was, during the dry season, deprived of water necessary to its proper operation. Upon this question, plaintiffs' own proof showed that there was no water flowing into said lake from said Clover creek upon the surface during the dry season. The undisputed proof further showed that during the wet season, when the waters of Clover creek did flow upon the surface into said lake, there was water more than sufficient to supply plaintiffs' needs. It appeared that during that part of the year there was more water flowing through the outlet upon which plaintiffs' mill was located than could well be controlled. It further appeared from the proofs that the waters flowing into the lake in the wet season did not so accumulate as to materially increase the flow in said outlet during the dry season of the year. To state it differently, it appeared from plaintiffs' own proof that, at the time of year when it would be of any benefit to them, there was no flow of the waters of Clover creek into said lake upon the surface of the ground, and that, for that reason, they were in no way damaged by the diversion of the water by defendant, unless they were entitled to have its flow into said lake under the surface of the ground protected the same as a flow upon the surface. Such being the state of the proofs, it follows that unless, under the circumstances connected with such underground flow, plaintiffs were entitled to such protection, they have shown that they have no cause of action against the defendant. Plaintiffs, in their brief, have seen the importance of this question, and have entered into an elaborate argument in relation thereto, in which numerous authorities tending to establish the fact that such flow should be protected have been cited. The authorities so cited by the plaintiffs, as well as those cited by the defendant, establish the doctrine that a flow underground will be protected the same as one upon the surface, if it constitutes a stream with defined course and boundaries. That which has given rise

to difficulty and much diversity among the authorities is as to the application of the rule. Some of the courts have held that the flow can only be protected when in a solid body, like a stream on the surface; while others have applied the rule with greater liberality, and have afforded protection to the lower riparian proprietor, when the underground stream was not so well defined. But, so far as we have been able to discover, none of the cases have gone so far as to hold that he would be thus protected as to water which was percolating through sand or gravel, within limits not at all defined by anything appearing upon the surface, or made to appear by investigation beneath the surface. Counsel for plaintiffs insist that the proofs were sufficient to authorize a finding that the water in question was so flowing as to be entitled to protection. The proof in regard thereto established this state of facts: That the whole valley or watershed of the stream had an underlying impervious stratum; that such stratum was covered by a deposit of gravel of varying depth; that the trend of this impervious stratum from each side of the stream was in general towards the bed thereof. Upon these facts, plaintiffs contend that this whole watershed should be considered as the bed of the stream, and that, since the water which higher up the stream was flowing upon the surface could not get below this impervious stratum, it must, when under the surface, continue to form a stream within defined limits. There is nothing in the proofs in any manner tending to show that the water was confined to a space immediately below or near the actual bed of the stream upon the surface of the ground; hence the contention of plaintiffs can only be sustained by holding that the entire valley through which it flowed constituted the bed of the stream. No case has been cited that would justify such a ruling. It has never been held that a flow of water percolating through the sand and gravel of the hillsides which lead down to the bed of the stream will be protected on account of the fact that such waters are confined to the valley to which such hillsides descend, and of which they form a part, by some underlying stratum below which the waters cannot go. If it had been shown by the proofs that the water all remained upon the surface until it arrived at a defined point, and then all disappeared, the conclusion might follow that it still retained its position as a stream, confined to a point substantially identical with the bed upon the surface. But no such fact was in any manner made to appear. There was nothing to warrant any other conclusion than that the water spread itself through the gravel under and on each side of the stream, with no other boundaries than the underlying stratum of which we have spoken. There is nothing to at all indicate where or how within such boundaries the flow is

continued. It may have appeared once that the waters, or a portion eventually reached the lake; but nothing to show that they so reached the lake in any other manner than by percolation through the entire gravel bed of the valley of the stream. These are the questions to which we have been forced by the proofs, and, applying thereto the rule of the cases referred to, it must be held that the plaintiffs are not entitled to be protected in having such waters flow in an undetermined amount into the lake; and, as these waters appeared at the time plaintiffs rested their case, defendant's motion for a nonsuit must have been granted. The judgment is reversed, and the cause remanded, with instructions to dismiss the action.

DUNBAR, C. J., and SCOTT, STEPHEN, JJ., concur.

HAZELTON et al. v. BOGARDUS.
(Supreme Court of Washington. Jan. 1894.)
RIGHT OF HEIRS — ACTIONS RELATING TO ESTATE — SALE UNDER ORDER OF COURT.

1. An heir cannot maintain an action to quiet title concerning his ancestor's estate after the close of administration.
2. The approval of the administrator of an estate does not terminate the administration, but there must be a final settlement of the estate, and a distribution of the property.
3. A sale of land by an administrator void where the petition for and order of sale describe the land as located in a certain county, when there is no such land in that county, and there is nothing, in the petition or order, to indicate any certain description, to indicate any certain parcel of land.

Appeal from superior court, King county.
I. J. Lichtenberg, Judge.

Action to quiet title, by Caroline Hazelton, formerly Caroline Sabel, and John Sabel, a minor, and Bessie May Sabel, a minor, as plaintiffs, against Caroline Hazelton, their guardian, and H. Bogardus and Emma Bogardus, as defendants. From a judgment for defendants, appeal. Reversed.

H. H. & Gilliam, for appellants.
Albertson & Donworth, for respondents.

HOYT, J. This was an action to quiet title of plaintiffs as against the defendants to a piece of land in King county. The court not only denied plaintiffs an action, but upon a cross complaint filed by the defendants quieted their title as against the plaintiffs. The allegations of the complaint and the undisputed proofs were to the effect that the administration of the estate of the deceased person as heirs of whom the defendants claimed had not been terminated, and that reason the action of the court was erroneous. The plaintiffs are refusing plaintiffs any affirmative relief, correct, as it is now the settled law of this state that actions in relation to the title of an ancestor can only be maintained by the heirs.

by the heir after the close of administration, unless some special circumstance appears which takes the case out of the general rule. See *Dunn v. Peterson*, 4 Wash. 170, 29 Pac. 998; *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648, and cases therein cited. Appellants seek to distinguish the case at bar from the cases above cited, as they were actions in ejectment, whereas this is one to quiet title. We are unable to see why the rule should obtain in one class of cases and not in the other. The heir cannot maintain the action of ejectment, for the reason that the real estate is in the possession, actual or constructive, of the administrator, and he should not be allowed an action to quiet title, for the reason that it is the duty of the administrator to take every step necessary to protect the interests of the estate. It further appears from the opinions in the cases above cited that no complete title, even of an equitable nature, descends to the heir so as to be available to him during the progress of administration.

It is further suggested on the part of the appellants that, since the administration had proceeded so far that the final account of the administrator had been approved, it should be held to have been terminated. Such effect cannot be given to the act of approving what purports to be a final account. The case of *Weyer v. Watt*, (Ohio,) 28 N. E. 670, is directly in point, and the reasoning and conclusions therein satisfactory. They were to the effect that the approval of such final account does not determine the administration. To a like effect are the California cases. Until there has been a final settlement of the estate, and a distribution of the property, or some other act equivalent thereto, the jurisdiction of the probate court over the estate has not been terminated.

The basis of defendants' prayer for affirmative relief was certain proceedings of the probate court culminating in a sale of the property to them. Appellants attack these proceedings on several grounds. It will only be necessary for us to discuss one of them, for the reason that in the case of *Ackerson v. Orchard*, 34 Pac. 1106, (decided by this court December 13, 1893,) proceedings for the sale of real estate fully as defective as these, excepting as to the question to be hereafter considered, were upheld, and a sale made thereunder sustained. The question not decided by that case grows out of the insufficiency of the description of the land in the petition for the sale thereof and in the order of sale made thereon. In such petition and order the land was described as being in section 24, township 29 N. of range 3 E., whereas the land advertised and sold by virtue of such order was in township 25 N. The proof offered on the trial showed that the land intended to be described in such petition and order was the same as that advertised and sold, and the question presented for our decision is as to the effect of such explanation. If the description in the petition

and order had been such as to indicate any certain piece of land, it is possible that they would have furnished authority for selling the land in question, though situated in another township, upon such showing, if it further appeared from the circumstances disclosed by the proofs that the parties interested could not have been misled by the mistake. But here the attempted description is in fact no description at all, for the reason that, in connection with the statement that the land was in township 29 N., was the further statement that it was in King county, in which said township is not situated. It follows that the description can only be made to apply to any certain piece of land by rejecting a portion thereof as surplusage, and that there is nothing to indicate the portion to be thus rejected. The petition and order can have no greater force than they would have had if there had been no attempt to describe any particular piece of land. Under our system for the administration of estates it is probable that the legislature could dispense with most of the forms prescribed for proceedings to sell real property, but until it has done so it must be held that at least a petition and an order of sale which substantially describe the property are necessary to pass the title. The curative statute relied upon by respondents may be held to have made titles under probate sales good without any petition, but that fact will not aid these proceedings, as such curative act only validates titles where, among other things, an order for the sale of the property had been made by the court, and in legal effect no order had been made for the sale of this land. The judgment must be reversed, and the cause remanded, with instructions to dismiss the action.

STILES, ANDERS, and SCOTT, JJ., concur. DUNBAR, C. J., concurs in the result.

WOLFERMAN v. BELL et al.

(Supreme Court of Washington. Jan. 26, 1894.)

MODIFICATION OF JUDGMENT.

The supreme court cannot modify a judgment not void on its face nor fraudulent, on a petition filed several months after a petition for rehearing has been denied and the remittitur sent down.

Application of Harry C. Bell and another to modify a judgment (32 Pac. 1017) against them in favor of Laura Wolferman. Denied.

STILES, J. This action was commenced in the superior court of Spokane county in November, 1891, and was tried, and a decree of foreclosure entered in June, 1892, upon the sole issue as to whether the alleged alteration in the notes should invalidate them. The case was appealed, and heard by this court January 10, 1893, upon the same

issue, and a decision was filed March 9th following, affirming the decree. 6 Wash. 34, 32 Pac. 1017. A petition for rehearing was filed April 8th, containing matters pertinent to the decision only, and that petition was denied May 8th. Subsequently, and in November, 1893, a petition was filed in the superior court to modify the decree which had been affirmed, and this court prohibited the exercise of jurisdiction therein. *State v. Superior Court*, 34 Pac. 930, (decided Nov. 7, 1893.) In deciding the matter of the prohibition, we remarked, in substance, that, when a judgment or decree had been affirmed by this court, all applications for a modification of such judgment or decree must be addressed to this court alone. Upon this hint, as counsel explain, a petition has now been filed, praying that, upon the showing made, the remittitur be recalled, that the decree be modified so as to exclude certain portions of the mortgaged premises, and that the cause be remanded to the superior court, with instructions to permit the answer to be amended so that the partial defense hereinafter mentioned may be set up, and the rights of the parties to the excepted lands may be determined. The basis of this application is contained in the following facts: The deceased, Schneider, sold and conveyed to the appellant Bell, by warranty deed, the lands in question, and on the same day took in payment a sum of money and the notes and mortgage here in litigation. The deed covenanted that, if the purchaser should plat the land, the grantor would at any time, upon payment of \$50, convey, by way of release, any lot to the purchaser thereof; but the mortgage contained no reference to the subject of releases. After the decease of Schneider, his administratrix executed a deed of release of certain lots in accordance with the covenant in the original deed, and two of these lots, having been conveyed by Bell and wife to a third person, were reconveyed by that person to Mrs. Bell, and the family home was erected thereon at an expense of several thousand dollars. When this suit was commenced, this deed of release was in the possession of the appellants, and was by them placed in the keeping of their attorneys, with the summons and other papers in the case. The answer set up the covenant in Schneider's deed; alleged that \$2,000 had been paid, that no lots had been released, and that the respondent had been requested to release certain lots, but had refused. No particular lots were mentioned, and the existing release was not pleaded. The reply denied the new matter.

No evidence touching the subject of releases was adduced at the trial. The omission to plead the release is accounted for on the part of the appellants by a showing of reliance upon their attorneys to do whatever was necessary to protect their interests, the release having been put into the attorneys' possession; and on the part of the attorneys

the lapse is excused by the fact that the release described certain lots in addition to Spokane, which they formed was, in fact, the mortgage of 60 acres. Whether this court should grant a stage of an appeal, furnish the writs invoked, it is not necessary to say. We are satisfied by the reason of the case, and by the overwhelming weight of authority, that at this late day we cannot but grant the appellants' demand. Courts of this jurisdiction generally have the power to set aside a judgment after the time after a judgment has been rendered, and set it aside or modify it, as legal principles may require. The time when this may be done depends either upon the time or upon the common practice of the court. Where the latter is the only guide, the "term" has been the universal rule. In course, if a judgment be void, it may be ignored or attacked at any time; or, if it has been affirmed, it may be set aside on the ground of fraud, it may be set aside on the ground of the limited period, or an independent period, that end may be maintained. But, after the time fixed by law, and in established practice, a judgment is not set aside, neither void on its face, nor void in its procurement or violation of jurisdiction, stands for absolute verification. Whether the court which rendered the judgment, or the appellate court which has affirmed the judgment, or the court which has vacated, modified, or otherwise disposed of it. This is the universal rule, and there are no exceptions to it. Concerning the time when this may be done, the appellants place upon this court, the burden of proof, and urge that inasmuch as, under the circumstances, the court is always open, and therefore no fixed time can be set, which it cannot modify its decision. In our view, there are four periods when the jurisdiction must be exercised: viz.: When the time for filing a petition for rehearing has expired without success; when a petition for a writ has been denied; when the remittitur has been sent down; or at the expiration of the term of the court in which the judgment was rendered, or at the expiration of the term of the court in which the judgment was rendered, or at the expiration of the term of the court in which the judgment was rendered, or at the expiration of the term of the court in which the judgment was rendered. The modification of the judgment in *Bell v. Waudby*, 34 Pac. 917, (decided Nov. 7, 1893,) was based upon a finding that the judgment was void for want of due diligence in appearance by, them; and, in that case, it was an original judgment for the judgment, and it was entirely proper that the court should have the power to set it aside or modify it, as legal principles may require. There is no limit of time to set aside or modify a judgment. The general principle of the law on this subject will be found discussed in *Judgm. § 306*; *Freem. Judgm. § 306*; *v. Maguire*, 17 Wall. 253; *Sibal v. Maguire*, 17 Wall. 253; *Sibal v. Maguire*, 17 Wall. 253. The application is denied.

stay heretofore ordered against the writ of assistance is vacated.

DUNBAR, C. J., and HOYT and ANDERS, JJ., concur.

ACKERSON et al. v. ORCHARD et ux.
(Supreme Court of Washington. Jan. 22, 1894.)

EXECUTORS AND ADMINISTRATORS—JURISDICTION OF PROBATE COURT—CURATIVE ACT—VALIDITY.

1. Under Code 1881, § 1444, giving to an administrator the right to the immediate possession of his intestate's estate on his qualification, the probate court acquires jurisdiction of the estate for the purpose of administration on the administrator's appointment and qualification.

2. As the administration of an estate is a proceeding in rem, the legislature may validate sales previously made, without a compliance with the statutory requirements that a petition be filed and citation issued.

On rehearing. Denied.

For former report, see 34 Pac. 1106.

SCOTT, J. An opinion was filed in this cause on December 13th last, affirming the judgment of the lower court. A petition for rehearing having been filed, we deem it advisable to say something further in answer to the able argument therein presented. It is contended that the order of sale made by the probate court was void, and that the court had no jurisdiction in the premises, in consequence of the failure to give the notice required by law of the hearing upon the petition to sell the real estate in question; and, as such order was void, that the whole proceedings relating to the sale were void for want of jurisdiction, and could not be validated by the curative act passed March 28, 1890, (section 3066, Gen. St.) It becomes important, therefore, to inquire when and how the probate court acquired jurisdiction of the estate. Section 1444 of the 1881 Code provided that the administrator, upon his qualification, should have a right to the immediate possession of the estate of the deceased, both real and personal; and we are of the opinion that, upon the appointment and qualification of the administrator, the probate court acquired jurisdiction of the estate for the purposes of administration. It follows that the court did have jurisdiction of the estate, and its action could not be void for want of jurisdiction. It is true, the law then provided, in relation to sales of real estate, that a petition should first be presented to obtain an order therefor, and a citation issued thereon, notifying parties interested to appear at the time set for the hearing. But could not the legislature have dispensed with this petition? It seems to us unquestionably the legislature had such power, as the court acquired jurisdiction of the estate by the appointment and qualification of the administrator, and, the administration of an estate being a proceeding in rem, the legislature could have provided for a

sale of the lands without any petition or notice whatever. If this is true, the legislature could thereafter pass the statute in question, validating sales where no petition had been filed, when the particular things therein specified appear. It is therefore immaterial whether this petition in question, and the citation to appear at the hearing thereon, were void in consequence of the failure to give the prescribed notice, or for any reason. The respondents' title can safely rest on the subsequent proceedings and the curative act aforesaid, under the conceded facts in the case. Therefore, the petition for a rehearing is denied.

DUNBAR, C. J., and HOYT, STILES, and ANDERS, JJ., concur.

RUSSELL v. CITY OF TACOMA.

(Supreme Court of Washington. Jan. 26, 1894.)

MUNICIPAL CORPORATIONS—IMPROVEMENT OF CITY PARK—NEGLIGENCE OF OFFICERS—LIABILITY OF CITY

Where a city having power to improve parks, and to regulate the use thereof, is merely licensed by the owner of land to occupy it as a park, it is not liable to a person injured by the negligence of its officers while engaged in improving such park.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by John Russell against the city of Tacoma for personal injuries caused by defendant's negligence. From a judgment for defendant, plaintiff appeals. Affirmed.

Hellig & Hartman and Wiley & Bostwick, for appellant. F. H. Murray, City Atty., and Doolittle & Fogg, for respondent.

ANDERS, J. The city of Tacoma is a city of the first class. Its charter was framed and adopted in accordance with the provisions of the act of the legislature entitled "An act to provide for the government of cities having a population of twenty thousand or more inhabitants, and declaring an emergency," approved March 24, 1890. Cities organized under this act are empowered to "lay out, establish, open, alter, widen, extend, grade, pave, plank, establish grades, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and other public grounds, and to regulate and control the use thereof;" and these provisions of the statute are incorporated into, and are a part of, the city charter. By an act of congress approved December 17, 1888, there was granted to the city of Tacoma a license to occupy and control for the purposes of a public park, for the use and benefit of the citizens of the United States, and for no other purposes whatever, a certain described tract of land known as "Point Defiance Park." This license is subject to the condition expressed in the act that the United States may take possession of and occupy said land, or any

part thereof, for military or other purposes, whenever the proper officers of the United States may see fit to do so. The charter of the city of Tacoma provides for a board of park commissioners, consisting of five members, to be appointed by the mayor and confirmed by the city council; and it is made the duty of the board, subject to such rules and regulations as the city council may by ordinance provide, among other things, to take charge of and exercise control over all parks belonging to the city; to make report to the city council, from time to time, regarding the condition of the parks; and to recommend appropriations by the council for the improvement of the parks, and, when such appropriations have been made, expend the same in such improvements, but no member of said commission shall have power to create any debt, obligation, claim, or liability except with the express authority of said commission, conferred at a meeting thereof duly convened and held; to make such rules and regulations in regard to the use of the parks as shall best subserve the interests of the public; and, generally, to do all things necessary and proper to secure for the public the free use and enjoyment of said parks. While the board of park commissioners were in possession of Point Defiance park, and were improving the same for park purposes, appellant was injured by an explosion of giant powder and dynamite, which occurred in a building erected thereon by the commissioners. It appears that, at the time of the explosion, the appellant was a laborer, under the control of a foreman employed by some one connected with the board of park commissioners, and that the powder and dynamite which exploded were stored in a building used for the purposes of a blacksmith shop, and for storing tools. The blacksmith was engaged in sharpening tools, and the explosives were ignited by sparks from his forge or anvil. This action was brought to recover damages for injuries to the person and property of the appellant, alleged to have been caused by the carelessness and negligence of the city in thus storing dangerous explosives in the place above mentioned. The court below held that the city was not liable, and dismissed the action, and plaintiff appeals.

The only question necessary to be determined is whether the city is liable for malfeasance or misfeasance of its officers while employed in the prosecution of a public work of the character of the one under consideration. It is contended by the learned counsel for the appellant that the board of park commissioners, while engaged in this work, were but agents of the city, and that the work itself was but a private enterprise, undertaken by the city for its own benefit; and, if this be true, there is no doubt that the city is liable to the same extent that a private corporation or individual would be liable under the same circumstances. As support-

ing the appellant's contention, the improvement of Point Defiance is not merely the interests of the municipality, but the improvement of mere local concerns. The case of *State v. Kardt*, decided by the supreme court of Missouri, and reported 47. It appears from an examination of the case that the city of St. Louis was the owner of Forest park, and, under the authority conferred by law, was attempting to lease it for the sale of intoxicating liquors, and other refreshments at the park. The action was instituted by the attorney general of the state, to prevent the city from so doing, and the court held that the relation to the property in question was a discretionary control of the city, and must be regarded as a matter of public concern, as held and owned by the city in its political or governmental capacity, in a quasi private capacity, in which the municipal authorities act exclusively for the benefit of the corporation which they represent." We have no doubt of the correctness of that decision, and the facts were the same in the case at bar. The city would be cheerfully recognized as having authority in favor of the appellant's position. But, in one respect at least, the facts in this case are essentially different. In this case the city was the owner of the park, and was leasing it for its own private enterprise. In this case the city of Tacoma is the owner of Point Defiance park, and has the authority to do in it whatever, excepting a license to sell liquor, and control it for the purposes of a park.

It is frankly conceded on behalf of the appellant that if the acts complained of are merely proprietary, and not public or governmental, the city is not liable. While it is not always easy to draw the line between the public and private powers of municipalities, we think the respondent has shown the facts in this case, in connection with the park, was exercising a power conferred upon it for the public use, and not for private corporate advantage. This being so, it is not liable for the acts or omissions of its officers in this case. *Murtaugh v. City of St. Louis*, 100 Mo. 271; *Hart v. Bridgeford*, 13 Blatchf. 311; *Richmond v. Long*, 17 Gratt. 311; *New Haven*, 40 Conn. 72; *Hart v. City of New Haven*, 70 N. Y. 459; *Tindley v. Sales*, 171; *Howard v. City of Worcester*, 27 N. E. 11; *Curran v. City of Worcester*, 27 N. E. 11; *Mass.* 505, 24 N. E. 781; *Sherborn v. City of Boston*, 21 Cal. 113. In *Murtaugh v. City of St. Louis*, supra, it was sought to recover damages from the city of St. Louis for its negligence in allowing a jury to a nonpaying patient, and in speaking of the nonliability of municipal corporations for the acts of their officers and agents, the court declared that

sult of the authorities as follows: "Where the officer or servant of a municipal corporation is in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues from the negligence or misfeasance of such officer or servant, the corporation is liable, as in the case of private corporations or parties; but when the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, then the corporation is not liable for the consequences of such acts or omissions on the part of its officers and servants." The same doctrine was enunciated in other cases above cited; and in *Mead v. New Haven* it was accordingly held that the city was not liable for the negligence of an inspector of steam boilers; and in *Ham v. Mayor*, that the city was not liable for the negligence of servants employed by the department of public instruction. In *Tindley v. Salem*, it was held, upon an elaborate review of the authorities, that the defendant city was not liable for the negligence of its servants in discharging fireworks which were purchased and used for the purposes of a public celebration. In *Howard v. Worcester* the plaintiff was injured by the negligent blasting of rock in excavating the foundation for a public schoolhouse, and the court held that, as the work was purely a benefit to the public, no liability was thereby created against the city. See, also, *Condict v. Jersey City*, 46 N. J. Law, 157; *Bryant v. City of St. Paul*, 33 Minn. 289, 23 N. W. 220; and *Barney v. Lowell*, 98 Mass. 570. Upon the liability of towns for defects in their public commons, the supreme court of Massachusetts, in *Clark v. Waltham*, 128 Mass. 567, said: "The plaintiff was injured while traveling upon a public park, having footpaths across it, which, it is alleged, the defendant had negligently suffered to be out of repair and unsafe. The park was conveyed to the town upon the condition that it should 'forever after be kept open as and for a common, for the use of said inhabitants of the town of Waltham.' By accepting the deeds of conveyance, the town agreed to the condition, and therefore holds the park for the use of the public. It has constructed footpaths and walks over the park in various directions, but these paths were not a part of the system of highways. They were not laid out as public ways, and the town is not liable, under the statutes respecting highways or townways, for any defect or want of repair which may exist in them. *Oliver v. Worcester*, 102 Mass. 489; *Gould v. Boston*, 120 Mass. 300. Nor can the town be held liable upon the ground that it negligently suffered a dangerous place to exist in the park, and failed to give proper notice to persons using the park by its invitation or license. It holds the park, not for its own profit or emolument, but for the direct and

immediate use of the public. If it can be said that there is any duty in the town to construct paths over it, or to keep such paths in repair, it is a corporate duty, imposed upon it as the representative and agent of the public, and for the public benefit. For a breach of such a duty, a private action cannot be maintained against a town or city, unless such action is given by statute." Other reasons are urged by counsel for respondent for sustaining the judgment of the lower court, but, as what we have said disposes of the case, it is not necessary to discuss the points made. The judgment is affirmed.

DUNBAR, C. J., and HOYT and STILES, JJ., concur.

EICHHOLTZ v. HOLMES.

(Supreme Court of Washington. Jan. 16, 1894.)

FRAUDULENT CONVEYANCES—KNOWLEDGE OF PURCHASER—INSTRUCTIONS.

1. In an action by creditors to set aside a sale of their debtor's property as fraudulent, an instruction that the purchaser is not affected by his knowledge of the seller's intent to defraud his creditors, "if he took the property in good faith, in payment of an honest debt," is not objectionable as upholding the sale even if the value of the property exceeded the amount of the debt. Hoyt and Stiles, JJ., dissenting.

2. An instruction upholding a sale in spite of the purchaser's knowledge that it was made with intent to defraud the seller's creditors, and of the inadequacy of the consideration, is harmless error, when the jury finds specially that the purchaser had no knowledge of the seller's intention. Hoyt and Stiles, JJ., dissenting.

3. A finding by the jury that the consideration of the sale equaled the value of the property will be set aside on appeal, where the undisputed evidence of both the purchaser and the seller shows that the property was worth one-third more than was paid for it.

Appeal from superior court, Cowlitz county; N. H. Bloomfield, Judge.

Replevin by L. B. Eichholtz against Ben Holmes. From a judgment for plaintiff, defendant appeals. Affirmed.

Andrew F. Burleigh and J. E. Lilly, for appellant. M. E. Billings and E. W. Ross, for respondent.

DUNBAR, C. J. This is an action of replevin brought by respondent, L. B. Eichholtz, against Ben Holmes, sheriff of Cowlitz county, to recover the possession of certain property which had been levied upon by the sheriff aforesaid as the property of respondent's father, one C. S. Eichholtz, in an action by the Oregon Improvement Company against the said C. S. Eichholtz. The contention of the appellant is that the alleged sale from Eichholtz, father, to Eichholtz, son, was in fraud of appellant's rights. The actual question at issue in the case was whether or not the respondent was a bona fide purchaser of the property. After the trial of the case, among other things, the court in-

structed the jury as follows: "You are instructed that when a person purchases personal property with the knowledge that his vendor intends by the sale to defraud or defeat his creditors, or hinder or delay them in the collection of their debts, such purchaser will not be affected if he takes the property in good faith in payment of an honest debt. Such a creditor violates no law, when he takes payment of his debt, although he knows that the other creditors are thereby deprived of the means of collecting their own equally meritorious claims." It is claimed by the appellant that under this instruction, if the jury believed that any sum whatever was due from the father to the son in this case, if only five dollars, and that the property was transferred to satisfy such debt, then it would be valid as against the creditors, even though the fraudulent attempt should be known to the son. We do not think that the instruction complained of will warrant this construction, but that the jury would understand from the expression, "if he takes the property in good faith in the payment of an honest debt," that reference was made only to the amount of property sufficient to pay the debt. This, it seems to us, is the more natural construction to place upon the language used. The testimony in this case shows, or at least it seems to have shown to the satisfaction of the jury, that there was an actual sale of the property from the father to the son; and in answer to special interrogatories the jury found that the value of the property at the time of the alleged sale was \$300, and that the amount paid by the son to his father for the same was the sum of \$300; so that, even conceding the correctness of the construction placed upon the instruction by appellant, it would be rendered harmless by these findings of the jury. But it is contended by the appellant that the finding of the jury, so far as the value of the property is concerned, is absolutely without foundation, and a perusal of the testimony satisfies us that such contention is correct, for there is not a syllable of testimony going to show the value of the property to be \$300. On the contrary, all the evidence there is on the subject of the value is that of the father and the son; one of them testifying that the property was worth \$490, and the other that it was worth \$450. This corresponds with the allegations of the complaint, also, and in the face of this testimony, absolutely uncontradicted by any other, that particular finding of the jury seems to be entirely without warrant.

However, there is another special finding of the jury, viz. that L. B. Eichholtz, at the time of the alleged sale to him in March, did not know that the conveyance was made with intent to hinder, delay, or defraud the creditors of his father. While the finding in this case may not seem to us to be justified, considered with reference to the weight of the testimony, yet there was testimony on that

subject which, if the jury believed, entitled them, as a legal proposition, to render the special verdict aforesaid, and was one of the controversies in the case concerning which the testimony was taken. It was the special province of the jury to determine that fact in the case, and, having determined it, we do not feel justified in disturbing their verdict. In the light of the special finding, we say that, conceding appellant's contention to be true, it clearly appears that the instruction complained of for the purchaser was without the effect that the vendor intended by the sale to defraud his creditors. Nothing may be said of the alleged error of the court in refusing to give instruction 10 and 11, asked by the defendant.

The other instructions asked by the defendant were more in the form of general instructions, and all of them, we think properly stated the law as applicable to the case. The court on its own motion, thought proper to use different phraseology, and we think that was a fair statement of the law as applicable to the case. The judgment will therefore be affirmed.

ANDERS and SCOTT, JJ., concur.

HOYT, J., (dissenting.) I am unable to agree with the conclusions of the majority in the foregoing opinion. The instruction complained of by appellant, and the special verdict rendered in the case, in said opinion, while perhaps capable of a construction given it by the majority, such as to equally warrant the conclusion contended for by the appellant, so, it is impossible to say how the majority understood it. Hence, it was not such a construction as the appellant was entitled to have related to one of the most vital questions in the case, and he was entitled to have a clear, unambiguous instruction as to the law relating thereto. If he did not get such an instruction, he was entitled to a reversal of the judgment. It affirmatively appears that he has been injured by the error of the court in that regard. It is conceded that the finding of the jury as to the value of the property having been only \$300 was supported by the proofs, and that the reason such finding must be disregarded.

The other reason suggested why the instruction could not have injured the appellant was that the jury specially found that the respondent had no knowledge of the fraudulent intent of his father at the time he purchased the property. In my opinion, this finding is not sufficient to show that the appellant was not injured by the error above referred to. It is in no manner to appear therefrom that the jury at the general verdict might not have been influenced by their understanding of the instruction. It is a fact well known that those who have had anything to do with legal proceedings usually arrive at their general

first, and then answer the special interrogatories submitted to them, and in so doing so resolve every doubtful question of fact as to sustain the general verdict.

There is another reason why I think appellant is entitled to a new trial. The practically undisputed proofs showed that at the time respondent purchased the property there was at most only an unsettled account between himself and his father, on which there was due not to exceed \$200. It further appears that at the time of such purchase this indebtedness was not wiped out, but instead thereof a note for \$300 was given in full payment for the property. For this reason it seems to me that many of the instructions given by the court were inapplicable to the evidence submitted to the jury, and had a tendency to mislead, unless they had been supplemented by further instructions in the line of the requests made by appellant, and refused by the court. I think that justice demands a reversal of the judgment, and a new trial.

STILES, J., concurs.

STATE ex rel. DE RACKIN v. ALLEN et al.
County Commissioners.

(Supreme Court of Washington. Jan. 29, 1894.)

NEWSPAPERS—COUNTY PRINTING—MANDAMUS.

Gen. St. § 2936, requires the county commissioners to let advertising and publication of notices to the publisher of a weekly paper, who is the best and lowest responsible bidder, considering circulation. The commissioners awarded the printing to relator's paper, as per bid on file, as being the best and lowest bidder, provided that the proprietor should make a contract as by law provided, and give a good bond. Later, they rescinded the former order, and awarded the printing to another, though meantime relator had tendered several forms of contract, and a bond, which were all refused. *Held*, that relator was not entitled to mandamus; his remedy, if any, being by appeal. Anders and Stiles, JJ., concur in result; holding that relator's bid was defective, and no basis for a valid acceptance.

Appeal from superior court, Lincoln county; Wallace Mount, Judge.

Mandamus, on relation of Samuel E. De Rackin, to L. V. Allen, M. F. Lafollette, and John Moylan, commissioners of Lincoln county. Writ denied. The state appeals. Affirmed.

N. T. Caton and David Higgins, for the State. C. H. Neal, Pros. Atty., J. W. Merritt, and R. K. McComb, for respondents.

HOYT, J. By this proceeding, relator sought to compel the board of county commissioners of Lincoln county to enter into a contract with him for the county printing for the year ending June 30, 1894. The superior court sustained a demurrer to the alternative writ and petition, and dismissed the proceeding, and from its judgment thereon this appeal is prosecuted.

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It appears from the petition contained in the record: That the relator had put in a bid, in due form, for the county printing to be let by the board of county commissioners, as provided in section 2936 of the General Statutes. That on the 4th day of May the board made, and caused to be entered of record, an order in substantially the following form: "In the Matter of the County Printing for the Year Beginning July 1, 1893. The board, having examined the various bids for same, hereby awards said printing to the Lincoln County Democrat, as per bid on file with this board, that paper being the best and lowest bidder therefor: provided, however, that the proprietor of said paper enter into a contract as required by law for doing the same, and give a good and sufficient bond for the faithful performance of the work." That the relator was the proprietor of the paper named in said order. It further appears from the record that on the 15th day of May, 1893, the board entered another order, which in terms rescinded and repealed the one above set out, and awarded the county printing to another paper. Between the entry of the first order and of the second one, relator had tendered to the board of county commissioners several different forms of contracts executed by himself, and asked that one of them be executed by the board of county commissioners. He also tendered a bond, and asked that it be approved. None of the contracts tendered by relator seemed to satisfy the board, and they refused to sign any of them. They also refused to approve the bond. Two principal questions are presented for our decision: (1) Was the order of May 4th such a final conclusion of the letting of the county printing that the board had no jurisdiction to interfere with said order? And (2) had the relator a remedy by appeal to the superior court?

As to the first proposition, the form of the order entered by the board shows that it did not consider it a final determination of its duties in reference to the award of the printing. The language thereof would warrant the conclusion that the board, in making it, had only intended to pass upon the question of the relative merits of the bids, as such, and had reserved the questions of the responsibility of the bidder, and of the exact terms of the contract, for further consideration. If the order should be thus construed, it would follow that the board retained sufficient jurisdiction over the subject-matter to rescind the order, if, before the contract was entered into, or the bond was approved, they came to the conclusion that the relator was not in fact the lowest and best bidder. This would give it jurisdiction to enter the order of May 15th. Not only would it have this jurisdiction by reason of the reservation in the order of May 4th, but, in our opinion, it would have had such jurisdiction, however absolute the

form of said order, if the rescission was made before a contract was entered into, or anything done to establish the rights of the parties, further than the entry of said order. A fair construction of the section under which the board of county commissioners are required to let the county printing contemplates that there should be a contract entered into, and until this has been done the order of the board in accepting any particular bid does not constitute conclusive action on its part. If this section were not so construed, the advertisement for bids would have to set out all the details necessary in a contract, and before action was taken upon the bids a bond would have to be furnished, so that, in the order accepting the bid, there could also be included an order approving the bond. In our opinion the statute does not contemplate that the bidder shall put in any bond until after an award has been made, and then the successful bidder, alone, is required to put in a bond. If this be so, it must follow that the acceptance of the bid does not complete the transaction, for something further is required before the statutory provisions have been complied with, to wit, the furnishing and approval of the bond of the successful bidder; and, if he does not comply with the order of the board in that regard, there can be no doubt that it would have the right to rescind the acceptance of his bid, and proceed under the statute to make another award. The order of May 15th having been made with jurisdiction, it must have force until reversed by the board itself, or by some revisory power. The proceeding by mandamus can give the court no jurisdiction to reverse or in any manner affect such order, if it was entered by the board in reference to a subject-matter as to which it still had jurisdiction.

What we have said furnishes sufficient reason for the decision of the lower court, but we are also satisfied that the mandamus was properly denied for the reason that there was an ample remedy by appeal. No satisfactory reason has been suggested upon the argument why the relator might not have availed himself of the provisions of the statute in that regard. That an appeal will lie from orders of this kind was ruled by this court in *Baum v. Sweeny*, 5 Wash. 712, 32 Pac. 778. The judgment of the superior court must be affirmed.

SCOTT, J., concura.

DUNBAR, C. J. I concur in the result, because I think there was a plain and adequate remedy by appeal, but I do not place the same construction on section 2936 of the General Statutes as do my brothers in the majority opinion. The consideration of the whole section clearly satisfies me that no special contract is therein contemplated, and that none should have been demanded of the

successful bidder. The specifications published; the publishers on the paper therein contained base their calculations thereon to make their respective bids; and the board of county commissioners award, and they are not authorized by statute to take into consideration anything outside of the bid. That the question is the circulation of the paper. The question of responsibility is primarily by the bond. If the required bond is forthcoming, that ends the consideration of that bidder. In this case the board of county commissioners acted upon all of these questions. That the appellant was the lowest and best bidder, and the award was made to him, and the offer was made and accepted. This, to me, made a complete contract, and all the contract, complete, by the statute; and, when the appellant provided a good and sufficient bond, he had the right to have it approved. It appears to me that the argument in this case that the board not refuse to approve the bond because the bond itself was not ample and sufficient in every way, but because appellant entered into such a contract as suited him, concerning work which was not provided for in the bid. Every character of work to be presumed to have been contemplated in the bid, or else the board's bids amounts absolutely to nothing. Such a construction of the law to make the board make no estimate upon which to award a bid, for it can be plainly seen that the acceptance of the bid will not depend upon the character of the proposition in answer to the call, but will depend upon some proposition in the contract which the bidder must make in accordance with the reference to the board contemplated by the bid, and in which there can be no competition. In other words, the call for bids becomes a mere and simple, and the board chooses the contract to whom it pleases, and on the terms it pleases, and the law is not for any purpose whatever. I prefer to place a construction which leaves it to the efficacy, and which, it seems to me, is the natural construction to be placed on the language used.

ANDERS, J. It is shown by the facts in this case that the relator's bid for the county printing was merely an offer for certain specific portions of such printing at a certain price per charge. As to other and equal portions, the proposal was entire. It therefore seems to me that he was not to file with the clerk of the board of county commissioners such a bid as the statute contemplates, and that the one he did file was not such as the commissioners could reasonably consider and act upon. As the statute requires the letting of the county printing as a whole, to but one person, or to the publisher or publishers of one paper, the commissioners were not

to accept a bid for a portion of the printing, merely. And this being so, when they formally accepted the relator's proposal, on the 4th day of May, they did that which they had no authority to do, and consequently were not bound by that order, and properly disregarded it thereafter. I am of the opinion, however, that if the relator had filed a proper bid, and such bid had been accepted by the commissioners, the result would have been a binding contract between him and the board; but, having failed to do so, he had nothing before the commissioners upon which it was their duty to act, and that fact fully justified them in rejecting the contract and bid tendered by the relator. Irrespective, therefore, of the reasons given in the opinion of Mr. Justice HOYT, I think the judgment of the lower court should be affirmed.

STILES, J., concurs with ANDERS, J.

WILKES v. DAVIES.

(Supreme Court of Washington. Jan. 22, 1894.)

RES JUDICATA—PREVIOUS APPEAL—PLEADING—SCHOOL LANDS—IMPROVEMENTS.

1. Gen. St. § 2146, requiring county commissioners selling school lands to appraise the value of the lessee's improvements thereon, to be paid by the purchaser within 30 days, does not require the lessee to surrender possession before suing the purchaser for such value.

2. The lessee of school lands sued to enjoin the county commissioners from consummating a sale of the lands without first appraising his improvements thereon, as required by law, and joined as defendant the purchaser. In affirming a dismissal of the suit the supreme court said that it should feel inclined to reverse were there no other remedy, but that plaintiff seemed to have the option of defending in ejectment or suing in debt; and that a court and jury could fix the reasonable value of the improvements as well as the commissioners. Accordingly, the lessee sued the purchaser for such value. *Held* that the ultimate relief sought, and the real parties in interest, being the same, the former decision was conclusive of plaintiff's right to bring the suit. Hoyt, J., dissenting.

3. Plaintiff alleged facts which the supreme court had held, in a former suit between the same parties, to constitute a cause of action, and defendant answered, denying them. The court granted defendant's motion to exclude plaintiff's evidence because he had not alleged a cause of action. *Held*, that the court could consider such decision as establishing plaintiff's right to sue, since it was part of the court's own records, and plaintiff had had no chance to plead it below, or prove it under a general denial. Hoyt, J., dissenting.

Appeal from superior court, King county; Richard Osborn, Judge.

Action by P. S. Wilkes against Griffith Davies for the value of certain improvements. Judgment for defendant. Plaintiff appeals. Reversed.

For decision in former suit, see *Wilkes v. Hunt*, 29 Pac. 830.

W. S. Relfe, for appellant. Fishback, Elder & Hardin, for respondent.

DUNBAR, C. J. This was an action at law to recover the alleged value of improvements on school land. The plaintiff alleged his possession of said lands by virtue of a lease from the county commissioners of King county, the appraisement of the land by the county commissioners under the act to provide for the sale and leasing of school lands, approved March 28, 1890, and all the subsequent steps taken by the commissioners under said law. He alleged that the defendant, Davies, was the highest and best bidder for the land upon which the plaintiff's improvements rested, and alleges that in appraising said lands the county commissioners of King county, although, at the time, having full knowledge and notice of the fact that plaintiff had improvements thereon, and of their value, and that the plaintiff was the owner of said improvements and living thereon, arbitrarily, and without just cause, failed and refused to appraise or value the improvements made by the plaintiff, as aforesaid, upon the land, and failed and refused to set down the value of said improvements upon the land so appraised, and to report the same, as required by law. The complaint also alleged the value of the improvements, and asked for judgment for that amount. The complaint is a long one, but we think we have stated sufficient of it for the purposes of this decision. Upon the trial of the cause the defendant objected to the introduction of any testimony by the plaintiff, for the reason that the complaint did not state a cause of action. The court sustained the motion, and plaintiff, standing on his complaint, appeals; so that the only question before the court is the sufficiency of the complaint.

The first and main contention for the respondent is that the plaintiff, being in possession of the improvements, not having delivered them to defendant, he could not recover their value from defendant. We cannot agree with this contention of respondent. We think the law accords to him, without any question or peradventure, the value of his improvements upon the sale of the land, and that he should not be compelled to yield up possession and depend upon a personal judgment, which might prove inadequate or entirely worthless. Neither do we think the law will compel him to remain upon the land awaiting the pleasure of the purchaser to take possession of the premises and the improvements.

There is another proposition in the case, however, that is vastly more troublesome, namely, whether or not the appellant is precluded by the action of the county commissioners in reporting no improvements upon the land, and what appellant's remedies and rights are under such circumstances, if he have any. Although the court entertains grave doubts upon these propositions, yet we think it is unnecessary to determine them in this case. Substantially, this same case

was before the court, and this statute was construed, in *Wilkes v. Hunt*, reported in 4 Wash. 100, 29 Pac. 830. In discussing the statute now under consideration, the court, in its opinion rendered in that case, said: "To maintain injunction against any one, the plaintiff must make sure that he has not some other adequate remedy; and this is none the less the rule when an officer of the state is the person sought to be enjoined, and the object of the injunction is to prevent his performing a statutory duty. In this case the appellant shows that there was no appraisal of his improvements, and that, therefore, the purchasers from the state will take title to the land without paying him for their value, as the statute says he shall do within thirty days. Were we clear that such results would follow, we should feel inclined to reverse the judgment, since it is plain that the intention of the statute is to reimburse persons situated as the appellant avers himself to be. But he seems to have not only one, but even two other remedies, either of which would save him harmless. In the first place, if there has been no compliance with the statute by the appraisal of his improvements, certainly no court would permit a purchaser, under those circumstances, to interfere with his possession of the land until he is compensated as the law required. Secondly, the purchaser is required to pay the appraised value to the owner of the improvements,—that is, he is the debtor to the owner to that amount, and must pay it within thirty days. He can be sued for the debt, and, if there has been no appraisal, the court and a jury can fix the reasonable value as well as the commissioners. With such a wealth of remedies at his hand we think the state should be permitted to proceed with its business without the hindrance of an injunction, and the judgment is therefore affirmed." By reference to the record in the case of *Wilkes v. Hunt*, Id., it will be seen that the parties in interest in that case were the identical parties in interest in this action; it being alleged in that action that Hunt was the agent for Davies, the defendant in the action at bar, in bidding in the land. That action was against both Hunt and Davies. It is true that the land commissioners were necessarily made parties defendant to the action; but it was equally true that they were not the parties in interest, and, under the theory of the plaintiff in that action, it was necessary that the commissioners should be made a vehicle to convey him into court to obtain an adjudication of his right with Hunt and Davies. That adjudication could only affect the parties in interest, namely, Wilkes on the one side, and Hunt and Davies on the other. Afterwards, Davies was substituted for Hunt as the purchaser, so that it will be seen that the parties to this suit were the parties to that.

The next question is, was the subject-mat-

ter of the litigation the same? The object of the first action was to obtain the value of the improvements on the land by enjoining the sale until such improvements were paid for. The avowed object of this action is to obtain the value of the same improvements. The complaints in both actions are the same; the same state of facts is alleged; and, by referring to appellant's brief in the former action, (the respondent not appearing,) it will be seen that the injunctive relief there sought was sought on the theory that no legal relief was available. We quote from appellant's argument, on page 23 of the brief: "Since the title to the land would pass to the purchaser from the state by this contract and patent, if delivered, the plaintiff having only the right to be paid the appraised value of his improvements, he could interpose no defense to an action by the purchaser to recover possession of the lands and improvements. He could not recover the value of his improvements from the state, nor could he compel the purchaser to pay for them, for the reason that no valuation had been placed upon them by the commissioners. How, then, can he be protected, except by injunction?" So that it will be seen that the very question raised by the respondent in this case, namely, that the complaint did not state facts sufficient to constitute a cause of action, was before the court in that case, and one of the grounds alleged by the court for refusing the equitable relief asked for was the ground that the plaintiff was entitled to the relief asked for in this action. So that the question involved here was directly before the court, and passed upon by the court, in *Wilkes v. Hunt*, and the court, in its opinion, plainly states that the judgment in that case was based upon its construction of the statute on the questions raised in the case now before the court; and, while it may be that the case might have been decided on some other ground, these questions were involved in the case, were considered and decided by this court, and such consideration and decision on these points decided the former case. So says this court in its opinion. This was in no sense obiter dictum, but was the decision on one of the points involved in the case.

The plaintiff in this action, relying upon the rule laid down by the court, has brought himself squarely within it, and the decision of this court, whether right or wrong, must bind the parties to the action in which it was rendered, and becomes the law of the case. Whether or not the judgment in the former case was *res adjudicata*, so far as the public is concerned, in the way of a precedent, it is not necessary to determine, for there is a well-defined distinction between the doctrine of *res adjudicata* in that sense and the doctrine of *res adjudicata* in its application exclusively to the parties to the action. The general rule is that the judgment of a competent court is binding and conclusive upon the parties, and will not be reversed or reviewed

by any court possessing concurrent jurisdiction. It is not only binding and conclusive as to all questions of law and fact that were made upon the first trial, but as to all questions of law and fact which, from the organization and powers of the court, might have been submitted. Wells, Res Adj. § 424. In *Davidson v. Dallas*, 15 Cal. 75, the court, in referring to a case which had been before it, and had been decided, at a previous trial, says: "This view of the case is conclusive of this appeal. The same facts are brought before the court now as when the case was heard and decided here. The agreement was before the court between Dallas and Gilsen, and the effect of it was passed upon." In *Thomason v. Dill*, 34 Ala. 175, it was decided that a decision of the supreme court is the law of the case in which it was announced, and is conclusive both in the primary court and on a second appeal; and by the supreme court of Indiana in *Hawley v. Smith*, 45 Ind. 183: "When the supreme court has laid down a rule of law, it will adhere to it in a subsequent action between the same parties, where a different decision would leave one party without a remedy, even though doubtful of the correctness of the rule when applied to other cases." In *Stacy v. Railroad Co.*, 32 Vt. 551, the rule was announced that the supreme court would not revise a former decision made by the same court in the same cause, and on substantially the same state of facts. Said the court: "Upon carefully examining the original bill of exceptions that was then before the court, and comparing it with the one now before us, we are wholly unable to discover in this case any fact material to its determination that was not contained in that. The facts are stated with more particularity now than then, but substantially they are the same. We find no such alteration or addition to the facts as calls for the application of any different rule of law than what the case then required." And so with the cases under consideration. The complaints are substantially identical, and consequently call for the application of no different rules of law or modes of construction. This rule is so obviously based upon the plainest principles of justice and fair dealing that it has been decided by the supreme court of the United States in *Bridge Co. v. Stewart*, 3 How. 413, that after a case has been decided on its merits, and remanded to the court below, and is again brought upon a second appeal, it is then too late to allege even that the court had no jurisdiction to try the first appeal; virtually holding as the law of the case a decision of a court without jurisdiction. This case has been followed by the appellate courts in many of the states. In *Clary v. Hoagland*, 6 Cal. 685, it was decided that when a case has been once taken to an appellate court, and its judgment obtained on the points of law involved, such judgment, however erroneous, becomes the law of the case, and that this rule ap-

plies, not only to questions of law arising out of the case, but to questions of jurisdiction. And while the case at bar was not brought here on appeal directly as a matter of record the second time, yet in fact and in effect it is here, for all the purposes of the case, exactly as though it were brought here on a second appeal. *Dugan v. Hollins*, 13 Md. 149, is a case where the parties to the second action were not nominally the parties to the first action; but the same questions were adjudicated in both cases, and the same law points involved, just as in the action at bar, and it is a case in point, so far as parties to the action are concerned. There the court said: "The present defendants * * * were the plaintiffs in the suit against Coonan, reported in 9 Gill, 62. That case, in form, was an action of assumpsit to recover rent for the house now in dispute, but in reality was designed to obtain a decision upon the title to the property, under the will of Cumberland Dugan, Sr. This is evident from the admission stated on page 66." Analogous to this, the case of *Wilkes v. Hunt* was in form an equitable proceeding, but it was in reality designed to obtain a construction of the statute in relation to the rights of owners of improvements on school land. Quoting again from *Dugan v. Hollins*, the court said: "As regards the effect or influence of the former decision upon the present case, it will be seen to be quite immaterial whether it shall be considered as an estoppel or as a decision by the court of last resort, giving an interpretation to the clauses of the will of Cumberland Dugan, Sr., in relation to the same property now in dispute, and where the same question arises which was before decided." And so we say again that the decision in the case of *Wilkes v. Hunt* was an interpretation of the clauses in the statute with reference to improvements on school land, and in relation to the particular improvements now in dispute, and that the same questions arise in the case at bar which were before decided; and we again adopt the language of the court in that case, and apply it to the case at bar, when we say: "The same property, the same statute, and the same questions arising upon similar facts which were presented in the former case are also before us in this." We therefore think the following quotation from *Hammond's Lessee v. Inloes*, 4 Md. 138, would constitute a very appropriate closing for us: "We have not been able to discover a sufficient reason for making this an exception to the almost uninterrupted practice of all courts, of receiving their own decisions as of binding force."

In the appeal of *Thomson* and others in the case of *Winn v. Albert*, 15 Md. 268, the court decided that, where the court of appeal has declared a deed of trust for the benefit of creditors to be void, that decision is the law of the case, and must govern in all further proceedings in the same case, notwithstanding a different decision

upon a similar deed may have been subsequently made by the court in another case. And this, also, was a case where the parties to the last action were not, in form, parties to the action in the former case. Such, also, was the condition in the case of *Tuttle v. Garrett*, 74 Ill. 444. The parties to the action, the decision of which was held to be stare decisis, were John G. Tuttle et al., plaintiffs in error, against Augustus O. Garrett, defendant in error; but the court held in the latter case that it was substantially the same case, and that the court was concluded by its decision in the former case. The supreme court of the United States, in *Aurora City v. West*, 7 Wall. 82, lays down the rule as follows: "Courts of justice, in stating the rule, do not always employ the same language; but, where every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed in rem judicatam, and the former judgment in such a case is conclusive between the parties. Except in special cases, the plea of res judicata, says Taylor, applies, not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." And, referring to *Packet Co. v. Sickles*, 24 How. 341, the court said: "Attempt was made in that case, as in this, to maintain that the judgment in the first suit could not be held to be an estoppel, unless it was shown by the record that the very point in controversy was distinctly presented by an issue, and that it was explicitly found by the jury; but the court held otherwise."

It seems to us that this high authority is decisive of the case at bar, for, if the contention of the respondent in this cause in regard to the construction of the statute is correct, it would have been a complete answer to the complaint in the former action. It is true that the plea of res adjudicata was not presented by the pleadings, nor was it offered in proof under the general issue, which are the two ordinary ways of bringing this question to the notice of the court. But this case falls within the rule laid down by many courts where no opportunity to plead the former adjudication is presented. The plaintiff brought his action in accordance with his legal rights, as pronounced by this court. He could not very well plead an estoppel in his complaint. The defendant answered, but his answer was a denial of the facts alleged in the complaint. No question of law was raised by the answer to render the plea of an estoppel necessary by reply. It denied that the plaintiff had the improvements which he alleged he had; denied that he lived on the land, or that

he was in possession of the land, as averred in the complaint; denied that the lands were advertised for sale, as alleged; denied that either the defendant or his assigns were claiming the right to take plaintiff's improvements without compensation, but averred that all the plaintiff's improvements had been duly and regularly appraised and compensation made therefor in the sum of \$500, and that plaintiff had accepted and received said sum. There was much more to the same effect in the answer, but it only put in issue questions of fact, and informed the plaintiff that these facts must be substantiated by proof. This court had not passed upon any question of fact in the case. If it had, such decision could have been pleaded as res adjudicata to the answer. But there was certainly no opportunity to plead res adjudicata of any decision of the court on the law involved. Neither was there any opportunity to offer such a plea in evidence, even if it had been admissible to have done more than to have cited the court to the decision; for the case was really disposed of on demurrer, or a motion which was equivalent to a demurrer to the complaint; for, after the jury was impaneled, the defendant objected to the introduction of any evidence, on the ground that the complaint did not state facts sufficient to constitute a cause of action, and the plaintiff was deprived of the right to introduce evidence of any kind by the action of the court in sustaining the motion. But in any event, this objection was not raised here, and we will not raise it for the parties. Both cases are matters of record in this court, and the court can take judicial notice of its own records. But, further, it was made a direct issue by the brief of appellant in this court, and is the only matter which is discussed in the brief. No objection was made in the respondent's answering brief to the consideration of this question, or in oral argument to its discussion. In fact, it was claimed by respondent in his brief that the case of *Wilkes v. Hunt* was res adjudicata, to the effect that the plaintiff could not hold possession of the land, and at the same time recover its value in a suit at law. Both parties therefore conceded it to be res adjudicata, and treated it as such, but placed different constructions upon its decision. In consideration of the importance of this statute in its effect upon the public, and of the doubt that is at present in the minds of the court as to whether the construction placed upon it in *Wilkes v. Hunt* was the proper construction, we will not pass upon that question now, nor consider ourselves bound by it in any independent cases; but, having so construed the statute in a case in which the identical parties to this action were the parties in interest, and the identical property here involved was involved, so far as this case is concerned, we feel ourselves bound by the decision therein rendered, and by the opinion there-

expressed; and on this ground the judgment will be reversed, and the case remanded to the lower court, with instructions to proceed in accordance with this opinion.

STILES, SCOTT, and ANDERS, JJ., concur.

HOYT, J., (dissenting.) I am unable to agree with the conclusions of the majority as stated in the foregoing opinion, and, as I deem the questions discussed therein of great importance, shall at some length state the reasons which induce me to dissent therefrom. Such conclusions are founded entirely upon the alleged fact that what was said by this court in the case of *Wilkes v. Hunt*, 29 Pac. 830, was conclusive of the rights of the parties in the case at bar. If these conclusions had been put upon the ground that what was thus said had become a rule of decision for all cases presenting a similar state of facts, I should find little fault with the reasoning of the court in regard thereto. But it clearly appears from the opinion that they were not at all founded upon such rule. It appears from inferences to be drawn from the course of the discussion in the opinion, and also by express announcement therein, that what was said in that case will not be considered as the settled law of the state; that, owing to the importance of the questions involved, the court will not now decide anything in regard thereto, but will hold them open for further investigation. What was said in that case is not applied to this, for the reason that it is now thought to be the law in this state, settled or unsettled, but is so applied solely on account of the alleged substantial identity of the parties and of the subject-matter in the two cases. By reason of such identity it is argued that what was said in the former had become the law of this case, or a matter *res adjudicata* as between the parties thereto. This makes it necessary that the principles underlying those questions which are technically termed "the law of the case," "*res adjudicata*," and "*stare decisis*" should be considered, and their application pointed out. As I understand these matters, "the law of the case" is a rule of law announced by a court in the particular case under consideration. The question as to its application most frequently arises in a case which has been before an appellate court, and certain rules of law applicable thereto announced by that court, and the cause remanded for a new trial. In such a case the law, as laid down upon the first appeal, will be held to be the law of the case on the second appeal, and will be adhered to by the court, without any investigation as to whether or not the court is then satisfied with the law as so laid down. After a somewhat extended investigation I have been unable to find that the rule of "the law of the case" has ever been applied, except as to questions thus decided. It may

be possible that some courts have, in some particular case, applied the law established in one case in another not technically the same, but it will be found that it was substantially identical with the one in which the rule was laid down. That is said to be "*res adjudicata*" as between the parties to an action when it appears that a court of competent jurisdiction has passed upon it in a case where the parties and the facts were substantially the same. A question thus decided is conclusive upon the parties; and, whether or not it was correctly ruled, they must abide by the decision. A legal principle is said to be "*stare decisis*" when it is so established by the rulings of a court that it feels bound thereby, and will not further investigate the question as to its correctness. The line of distinction between these several principles is clear and distinct, and founded on reason and authority. That such is the fact will sufficiently appear from the cases cited in the foregoing opinion. They are so cited for the apparent purpose of showing that there is no such well-defined distinction, and that what would come within the rule of "*stare decisis*," as above defined, may be applied as "the law of the case," or as "*res adjudicata*" between the parties to the action. I am unable to gather any such doctrine from such cases. All excepting four may be grouped together, and the most careful reading of the entire group will fail to show that in any of them is any other question decided than that a rule of law laid down by a court in a particular case will be adhered to as the law of that identical case when it again comes before the court.

The four cases cited, not included in the above group, will now be considered. *Hammond's Lessee v. Inloes*, 4 Md. 138, refers entirely to the rule of *stare decisis*, and simply holds that when an appellate court has, upon careful consideration, announced a certain rule of law as applicable to a certain state of facts, it should adhere to that rule in another case presenting the same state of facts, unless it is satisfied that the decision is wrong. As I understand the facts of this case, there was much better reason for the application of the rule of "the law of the case" or *res adjudicata* than in the case at bar; but the court refused to found its decision upon either of these principles. In the case of *Dugan v. Hollins*, 13 Md. 149, the court held that where it had once decided as to the force of a law with reference to the title to certain property, and the same law, in reference to the same property, was brought up for consideration upon the same question in another suit, the former decision would be adhered to, whether the judgment be technically an estoppel or not, unless there is manifest error therein. It will be seen that in this case the court announced the doctrine that it would adhere to its former decision even where the parties

were not identical, unless it was satisfied that such decision was erroneous; but there is no intimation in the opinion that the court would hold the parties to that action bound by the decision should it be overruled in its application to other cases. It clearly appears from the opinion that the court refused to decide as to whether or not the former decision was rendered under such circumstances as to bind the parties in the case under consideration. In *Hawley v. Smith*, 45 Ind. 183, the court held a rule of law which had been announced in a former case to be binding upon the court in that one, whether or not said rule of law would, upon a further consideration, be found to be correct; but the facts of the case show clearly that in so holding it applied the rule of "res adjudicata" as above set out. The language of the court is as follows: "It having been held in the former action between the same parties, on the same cause of action, that the relation of principal and agent existed, we should regard the question as res adjudicata between the parties. This should be the rule, even if we doubted the correctness of the ruling when applied to other cases." The case of *Aurora City v. West*, 7 Wall. 82, only applies the rule of "res adjudicata" as between the parties to the action in relation to the same subject-matter, but extends the doctrine to questions which might have been adjudicated in the former suit, as well as to those which were actually so adjudicated. This extension can have no influence in deciding the case at bar, and was only the announcement of what had been held by many of the courts, though Justice Miller, in his dissenting opinion, gives reasons, which to me are satisfactory, why the rule should not be so extended. These are all of the cases cited, and I can gather nothing therefrom that in any manner tends to extend the rule of "the law of the case," res adjudicata, or stare decisis so as to warrant their being in any manner intermingled, or applied to cases except as above stated.

I will now proceed to examine the decision in the case of *Wilkes v. Hunt*, as related to this case, and state my reasons for holding that, if the case at bar is to be at all affected by that decision, it must be because it is stare decisis in this court, and not for the reason that it is "the law of the case" or res adjudicata in any sense. That it is not the law of the case is too well established by the principles hereinbefore announced, and by the cases bearing thereon, cited by the majority, to need further discussion. The case in which that decision was announced was in no sense this case. It was between different parties, and related to an entirely different subject-matter; for while, except for the reason to be hereinafter stated, there may be something in the facts which would justify the statement of the majority that the ultimate object sought by the plaintiff in that case was the same as the ultimate

object sought in this, yet the immediate objects of the suits were entirely different. In the former case the only object was to prevent a sale of the land being consummated as between the state and the purchaser at the sale. Under the complaint therein the court had no jurisdiction whatever to in any manner render a judgment in favor of the plaintiff for the value of his improvements as appraised, or to be appraised. The only thing which he sought was to have the hands of the officers of the land department stayed. There is no intimation in his complaint, or in any part of the proceedings, that he seeks any express relief as against the defendant in this action. It is nowhere suggested that in the proceeding there should be an appraisal ordered, and, upon such appraisal being had, the purchaser at the sale adjudged to pay the amount thereof to the plaintiff. Nor does it in any manner appear therefrom that the injunctive relief is auxiliary to any other relief to which he may be entitled; while in the case at bar the only thing sought is to recover, in an action at law, the value of his improvements. If, in the former case, he had brought his action to recover for such improvements, and had, as auxiliary thereto, sought to stay the hands of the land department from completing the contract of sale, there would be some ground for the contention that the two suits were as to the same subject-matter; but such was not the fact, and the assertion of the majority of the court that the only object of the former suit was to secure the payment to the plaintiff for his improvements is in no manner founded upon the records in that case, but entirely upon a loose statement in the brief of the plaintiff. It in no manner appears from said record that the plaintiff would have been satisfied to submit the question of the value of his improvements to a jury. The gravamen of his complaint is that he was entitled to have them appraised under the statute, and that, until they had been so appraised, the sale should not be consummated. In my opinion the subject-matter of the two cases was in no legal sense the same, and for that reason the decision in the first case could not be res adjudicata in the latter one. But, if it were, the parties were not so identical as to warrant the application of that rule. It is true that, so far as any pecuniary interest was concerned, the defendant in this action was the substantial party in the former one; but when we take into consideration the object of that suit, and the parties at the hands of whom the relief was asked, and also consider the fact that the purchaser at the sale may have cared very little as to whether or not the officers were allowed to consummate it by the execution of the contract, it should not be held that he was the principal person against whom the plaintiff was waging that suit. For aught that appears in that case, this defendant may have been entirely content to

have had the court restrain the execution of said contract. It was nowhere intimated therein that he, or his agent who made the bid for him, had acted in the premises in any manner wrongfully. All the wrongful action alleged was on the part of the officers of the land department, and they were the substantial parties to that action, and the defendant in this action was but incidentally interested therein. Under these circumstances, the responsibility of defending the action should have been, and probably was, cast upon the officers of the land department, and for that reason, if for no other, this defendant should not be bound by the decision rendered therein.

There is another, and to my mind conclusive, reason why the former decision could not be relied upon here as having been an adjudication which established the rights of the parties to this action. Before that rule can be invoked, the former decision must in some manner be brought into the case under consideration; and as the correctness of the ruling of the lower court must be determined upon the record as presented to it, and not by anything occurring in the case subsequent thereto, I am unable to see how its decision can in any manner be affected by the former one. The transcript of the record from the lower court will be searched in vain for anything that in the most remote manner calls the attention of that court to the fact that there had ever been such a decision made by any court as that now relied upon. As I understand the rule, a court will never, for the purpose of applying a principle of law as "*res adjudicata*" in a particular case, go outside of that case to ascertain what that principle is. If a rule of law has been so established by the courts of a state as to be "*stare decisis*" therein, it must be given effect without being specially brought into the particular case; and this must be done as well when the parties and subject-matter are entirely different as when they are identical with those of the case in which the rule was announced. But I cannot understand how it can be held that in the trial of this case in the lower court it was bound to take notice that this principle of law had been adjudicated between the parties under such circumstances as to be binding upon them in this case, without the fact of such decision, or the circumstances under which it was rendered, having been in some manner brought to the attention of that court. The rule announced would require of a trial court not only that it should bear in mind every principle of law theretofore announced by it, and every other court of competent jurisdiction, but also to take judicial notice of all the facts in every case, and at its peril, without its attention being in any manner called thereto, deciding rightfully as to the identical parties in all of the cases, and the entire subject-matter which was, or might have been, adjudicated therein. That such could not be the rule seems

clear to my mind. The utmost extent to which any of the cases go is to hold that, where there has been no opportunity to plead the former adjudication, it may be given in evidence under the general issue. There is no intimation in any of such cases that, where the plaintiff relies upon such adjudication as the foundation for his action, he should not set it up in his complaint. If he does not have to thus set it up, then the court, when it rules as to the sufficiency of such complaint, must bring to its aid an adjudication in another case, of which it has no notice whatever, or else have its decision reversed by having such adjudication suggested in the appellate court. But, even if it was held that it was not necessary for such prior adjudication to be set up in the pleadings, under the circumstances of this case the plaintiff was not in a situation to take any advantage of such adjudication. After the intimation of the court that it thought the complaint on its face insufficient, he made no suggestion that its allegations were in any manner aided by matters not appearing therein. Not only was there no attempt in this manner to aid the complaint, but the plaintiff substantially told the lower court that he had no proof to offer upon that subject, as, after the court had intimated that the complaint was insufficient, he stated to the court what he proposed to prove to establish the issues on his part, and in so doing made no reference whatever to any matter as "*res adjudicata*" between the parties.

The majority of the court have evidently seen the force of some of these suggestions, and have attempted to show that the parties here conceded that the question of *res adjudicata* was involved in the case. But, even if the briefs of the parties do make such concession, that fact would not be sufficient to warrant this court in finding therefrom that the question was presented in the court below; and, unless it was so presented, this court should not allow it to influence the decision here. The transcript of the record shows clearly that nothing of the kind was relied upon in the lower court. Such being the fact, this court, if justified in acting upon any concession of counsel to the contrary, could only do so when the concession was made in such express and unmistakable terms that there could be no doubt of the intention. No suggestion, by way of argument, or anything of that kind, should have the force of such express concession. As I understand the briefs, however, there is no claim, even on the part of appellant, that the question of *res adjudicata* was presented to the court below, or even that he relied upon it here. That there may be no misunderstanding as to the facts, I here set out the entire brief and argument of the appellant. It was in words and figures following: "The sole question before this court is the sufficiency of the complaint. It was contended by counsel for defendant at the trial

that, the plaintiff being in possession of the improvements, not having delivered them to defendant, he could not recover their value from defendant; also, that plaintiff should have appealed to the state school land commission on the refusal of the county commissioners to appraise the improvements. The court, on its own motion, held that there having been no appraisal by the county commissioners, the sale was void, and the defendant acquired no title, hence was not liable. This same controversy came before this court in the case of *Wilkes v. Hunt*, 29 Pac. 830, in which the plaintiff sought to enjoin the execution and delivery of the contract of purchase of the lands in question on the same theory which was adopted by the court below in this case, namely, that the failure of the county commissioners to appraise the improvements vitiated the sale. As a matter of fact, Hunt attended the sale, and was the purchaser, as shown by the memoranda of the sale; but he and defendant, Davies, being members of the same syndicate, Davies was, under the peculiar and loose methods of the King county commissioners, substituted for Hunt in the contract of purchase; hence the suit against Davies as purchaser. In the case cited, this court says, *inter alia*: 'If there has been no compliance with the statute by the appraisal of his improvements, certainly no court would permit a purchaser, under those circumstances, to interfere with his possession of the land until he is compensated as the law requires. The same doctrine is announced in *Pearson v. Ashley*, 31 Pac. 410. Secondly, the purchaser is required to pay the appraised value to the owner of the improvements,—that is, he is the debtor of the owner to that amount, and must pay it within thirty days. He can be sued for the debt, and, if there has been no appraisal, the court and a jury can fix the reasonable value as well as the commissioners.' Relying on this as an announcement from the highest authority, the plaintiff brought his suit. The superior court for King county reversed the decision of the supreme court, and dismissed his case. Having lost his right to an injunction by reason of the fact that he had a legal remedy, and having been denied a legal remedy because of his right to an injunction, he, although somewhat bewildered, confidently appeals to this court for an adjustment of his rights in the premises, and for a reversal of the decision of the court below." It will be seen from an examination of such brief that, while it cites our former decision as an authority, it nowhere suggests that it was made under such circumstances as to make it conclusive of the rights of the parties in this action. The only expression in the most remote degree justifying the contention on the part of the majority is in the statement that "the same controversy came before this court;" but, if counsel had intended to

place any special reliance upon the decision by reason of the identity of the subject-matter and of the parties, it would have been incumbent upon him to have at least shown by the title of the case that the present defendant was a party to that suit. It can only be gathered, from all that is said by appellant, that he relied upon said decision for the reason that it had been announced by this court. But such reliance can only avail him in the event that the court still adheres to the decision as having been properly ruled. This the majority of the court expressly refuse to do. They, in effect, say that, if this question was presented in a case where the parties were different from those in which it was decided, we would not adhere to it, but would proceed to investigate further.

From the brief of respondent it clearly appears that the idea that the former decision was relied upon as "*res adjudicata*" in this case was never in the mind of the one who drew it. The case of *Wilkes v. Hunt* is cited, but there is nothing added to the citation to show that the parties were in any manner identical with those of the case at bar, or that the decision therein was relied upon as in any way concluding their rights. It was simply cited as a case in point, as any other case involving a like principle would have been. This not only appears from what has been already said, but it further appears from the fact that later in the brief the question of *res adjudicata* is expressly presented, and the claim made that, when the board of county commissioners decided that there were no improvements of value upon the land, their decision was conclusive as to plaintiff's right to recover therefor. What was said in the former case as to the right of plaintiff to recover the value of his improvements in an action at law was not an adjudication that could conclude the parties. That matter was not before the court. What the court was called upon to adjudicate in that case was as to whether or not the plaintiff was entitled to an injunction. There was nothing set up in the complaint, or anywhere in the proceedings, which could in any manner authorize an adjudication by the court as to any recovery for the value of said improvements. What was said in relation thereto was only the stating of a reason why the injunction should not be granted. Such reason may not have been a good one, and yet the decision entirely correct. If, for any other reason founded upon the record, the injunction was properly refused, then the decision was right, even although one or a dozen faulty reasons were given therefor. The court was not called upon to say what was the remedy of the plaintiff. The most, under any circumstances, it could properly adjudicate, was that he had a remedy, and it was not called upon to adjudicate that fact to warrant the decision made, if, regardless of the question of remedy, he was not

entitled to the injunction. There is another reason why what was said in that case should not conclude the parties to this. There is nothing to show that the improvements referred to in the two cases are the same. In the first case it is alleged that the improvements are upon a certain 40-acre tract, and there is no direct averment that any portion thereof are upon the particular 20 acres of said tract to which the complaint in this action is confined.

For the foregoing reasons I do not think that what was said in that case should be given any conclusive force in this one. But, if all that was so said is given full force, the contention of appellant is not aided. It cannot be fairly deduced therefrom that the court intended to hold that the owner of improvements, without surrendering possession thereof to the purchaser at the sale, could maintain an action against him for the value of such improvements. The most that can be claimed is that it was there held that the plaintiff had one of two remedies,—he could remain in possession of his improvements until compensated therefor, or surrender the possession to the purchaser, and maintain his action for their value. I cannot believe that the court intended to hold that by making a bid for school land, and accepting a contract therefor, the purchaser becomes at once liable to one having improvements thereon for the value thereof, where there had been no appraisal by the board of county commissioners, and nothing placed of record to show, in any manner, that there are any improvements on the land. Such a construction would compel a purchaser of such lands to settle with the owner of the improvements upon whatever terms he should dictate, or be put to the expense of a lawsuit, in which he was sure to have the costs of both parties to pay. A brief consideration of the facts, as applied to such ruling, will show that such results must follow. If, at the time plaintiff brought his action in this case, the defendant was liable for the value of such improvements, he must have made himself so liable by making the bid, or in accepting the contract from the state, for no other acts of his are alleged which could in any manner tend to establish such liability. It will follow that one in possession of improvements would have a direct interest in not having them appraised by the board of county commissioners. If not so appraised, he can get the value thereof at the time the land is sold, as found by a jury of his neighbors, and can have the beneficial enjoyment thereof while he is prosecuting his action for such value, and while, after the recovery of his judgment therein, the purchaser is waging his action of ejectment to obtain possession of the improvements for which a judgment

has been theretofore rendered against him. Not only will he have the right to do this, but during the time of his beneficial enjoyment of the improvements he may make such use thereof as to absolutely destroy their value to one who afterwards comes into possession of the land. When a construction will lead to such hardships to the purchaser and to the state, some other should be adopted, if possible. As to the construction of the statute, it seems to me there can be little difference of opinion. This court has already announced—what is undoubtedly the law—that the one in possession of such improvements had, at the date of the passage of the act, no vested right to compensation therefor. Therefore, the measure of his rights must be found in the statute, an investigation of which will show that it is only to have the improvements appraised by the board of county commissioners, and, when appraised, to have the purchaser pay to him the value thereof as so appraised. There is nowhere in the act an intimation that he shall have any right to recover, or anybody shall be in any manner liable to him for, the value of such improvements, excepting as so appraised. It must follow that, until there has been such an appraisal, there can be no foundation for his recovery of anything on account of such improvements. He can assert no rights to such improvements or their value, except in accordance with the provisions of the statute. The board of county commissioners will be presumed to have done their duty in that regard, unless the contrary appears, and as they are charged with that duty, and as he has no right to his improvements excepting such as grow out of their action in that regard, it is possible that he has no remedy, when they refuse to make an appraisal thereof, except an appeal to the board of state land commissioners. If he has any remedy aside from that, it can only be to have the board required to make such appraisal by proceedings in mandamus. The majority of the court having expressly refused to say what the rights of the parties would be under the statute, I have a right to assume that, if they did, they would decide as above suggested. It must follow that, in their opinion, what was said by this court by way of argument in deciding a case in equity, where the only object sought was to stay the hands of certain officers, and to which this defendant was only an incidental party, was sufficient to create a liability on the part of the defendant, and a right in the plaintiff to enforce such liability without any contract existing between them, and without any authority of law whatever. I cannot consent that such results shall be held to flow from what was said in the former case. In my opinion the judgment should be affirmed.

ATROPS v. COSTELLO et al.

(Supreme Court of Washington. Jan. 26, 1894.)

DEATH OF CHILD BY WRONGFUL ACT—ACTION BY PARENT—EVIDENCE OF DAMAGE—EXEMPLARY DAMAGES.

1. Exemplary damages cannot be recovered in an action under Code Proc. § 139, for the death of a child.

2. In an action for the death of a minor child the parents may recover without proof of actual pecuniary damage.

3. In an action by parents for the death of a minor child defendant can show the expense of educating and maintaining the child, and the probable value of its earnings.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by Herman Atrops against Peter Costello and the city of Spokane for damages for causing the death of the plaintiff's minor child. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed.

Turner, Graves & McKinstry for appellant Costello. F. T. Post, City Atty., W. W. D. Turner, and Forster & Wakefield, for respondent.

DUNBAR, C. J. This action was brought under section 139 of the Code of Procedure, wherein a father, or, in case of the death or desertion of his family, the mother, is authorized to maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward. The action was brought by the father of Maggie Atrops, who was killed by a blast alleged to have been negligently and carelessly let off by the appellants. It is contended by the respondent that the plaintiff in this action can recover punitive or exemplary damages, and it is desired by the respective counsel in this case that the court pass upon that question. The contention of the respondent is that section 139 is to be construed with reference to section 138. Section 139 corresponds with section 9 of the Laws of 1873, and section 138 corresponds in part with section 8 of the Laws of 1873 which provides that "the widow, or widow and her children, or child or children if no widow, of a man killed in a duel, shall have a right of action against the person killing him, and against the seconds, and all aiders and abettors, and shall recover such a sum as to the jury shall seem reasonable." The contention here is that section 9, standing alone, does not prescribe any rule or measure of damage, nor does it provide under what circumstances suit may be maintained for the injury or death of the child, nor against whom said action may be maintained, and that, without it is construed with, and as a part of, the chapter with which it is enacted, it is absolutely meaningless; and that, therefore, the measure of damages provided for in section 8 of said chapter—that is, "such a sum as to the jury shall seem reasonable"—was intended

ed by the legislature to apply also to section 9. After the enactment of these sections in 1873, the following amendments were made in 1875, to wit: Section 4 of the Laws of 1875 provides as follows: "The following additional section shall follow section eight [referring to section 8 of the Laws of 1873] as a new section in the chapter of said act to which this is amendatory, relating to parties to actions, that is to say: Sec. —. When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or when the death of a person is caused by an injury received in falling through an opening, or defective place in any sidewalk, street, alley, square, or wharf, his heirs or personal representatives may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk, or other place. In every such action the jury may give such damages, pecuniary or exemplary, as, under all the circumstances of the case, may to them seem just." This section, with the amendment passed in 1875, appeared in the Code of 1881 as section 8, leaving out the words, "shall recover such a sum as to the jury shall seem reasonable," which words were not repealed by the enactment of 1875, without it may be considered that they were repealed by implication by the enactment of the provision in the same section that, "in every such action the jury may give such damages, pecuniary or exemplary, as, under all the circumstances of the case, may to them seem just;" this provision being somewhat inconsistent with the former provision at the end of section 8 of the Laws of 1873, that a person should "recover such a sum as to the jury shall seem reasonable." But, however that may be, construing the sections with reference to the statute of 1873 before it was amended, it seems to us that the provisions of section 8 were not intended to apply to section 9, which provides for altogether a different character of action, section 8 providing for a specific action where a man was killed in a duel, and section 9 providing for the maintenance of an action for injury or death of a child generally. Therefore we think that under the decision of this court in *Dray Co. v. Hoefer*, 2 Wash. St. 45, 25 Pac. 1072, the doctrine of punitive or exemplary damages will not apply to an action brought under section 9 of the Laws of 1873, being section 139 of the Code of Procedure.

Upon the trial of this cause evidence was offered by respondent tending to show that the death of the child was caused by the carelessness of the defendants, and all the circumstances attending her death. Plaintiff testified to the age of the girl, who was a healthy and sound child; that she was industrious, and capable and willing to work; was handy about doing housework;

that the parents were engaged in keeping a boarding house, and that she was of great assistance to them in such employment. Defendants objected to any evidence whatever as to the damage, or which tended to show damage, by loss of services or otherwise, which plaintiff had sustained, for the reason that under the complaint there could be no recovery excepting for nominal damages; and to the introduction of any evidence under the complaint, for the reason that it did not state a cause of action, and that there was an improper joinder of defendants. Both of these objections were overruled by the court, and defendants excepted. At the conclusion of plaintiff's evidence defendants moved for a nonsuit, on the ground that the complaint did not state a cause of action; that the evidence did not show any liability against the defendants; and that there was no statute in this state providing a liability in a case of this kind upon an action by the father,—which motion was by the court overruled. Defendants then moved the court to instruct the jury to bring in a verdict against defendants for nominal damages, upon the ground that plaintiff failed by his evidence to show any damages, which motion was denied. Defendants then proceeded to the introduction of testimony showing the cost of clothing a girl between the ages of 8 and 18 years in Spokane, in the poorer walks of life; how much time she would be occupied in school; how much leisure she would have in going through the public schools of the city; what would be the cost of providing such a child in a comfortable and decent way; how much she could earn; how much, if any, service she could be to her parents and others; and as to whether she could render any services between those years and while she was in attendance upon the public schools; all of which was objected to by plaintiff, and objection sustained on the ground that such testimony was immaterial, irrelevant, and incompetent. We are of the opinion that the motion for nonsuit was properly overruled, and, without entering into any review of the authorities, which has so often been done in cases of this character, we are satisfied that the great weight of authority sustains the doctrine that judgment can be obtained in the absence of proof of special pecuniary damage. It is true that a great many of the cases which sustain this position are in states where exemplary damages are allowed in cases of this kind, but the general doctrine is stated on the broad ground that proof of special damages is impracticable, and that no specific loss occasioned by the death of a child is necessary, for the reason that calculations of this kind are within the special province of the jury; and that the jury is as well calculated, knowing the age of the child, her health, her habits, her character, and the station in life of her par-

ents, to judge of the pecuniary loss to the parents, as witnesses who might be called to testify. But, while this may be true, and a plaintiff would have a right to rest after furnishing the jury with sufficient data from which they could come to an intelligent conclusion as to the amount of damages sustained by a parent, we do not think the rule should be extended so as to preclude the defendant, if he saw fit, from introducing testimony affirmatively showing that no damages could arise from the state of facts testified to by the plaintiff; as, for instance, in this case the plaintiff testified that he was sending the girl to school; that he intended to send her through the public schools of Spokane; that he expected to give her the full advantage of the schools; and testified how he clothed and lodged her, and to her capability for work. We think it was certainly competent for the defendant to show by competent testimony the expense of such schooling, such clothing and lodging, and maintenance generally, and the value of the earnings of a child of the same character and in the same place, and any other pertinent facts which might assist the jury in reaching a conclusion as to the proper amount of damages which would be sustained by the parents by reason of the loss of their child. It is true that difficulties present themselves from every standpoint, and that no rule can be laid down to which objections cannot be raised, but we think it is going too far to deprive the defendant of introducing any testimony with relation to the damages which he is called upon to pay in cases of this kind, which would be the result of excluding the testimony offered by the defendant in this case, and his defense would be confined entirely to the question of negligence. In view of a new trial, it will not be necessary to pass upon the question of the excessiveness of the verdict. For the error alleged in excluding defendants' testimony, above referred to, the judgment will be reversed, and a new trial granted.

HOYT, ANDERS, and STILES, JJ., concur.

KLEPSCH v. DONALD et al.¹

(Supreme Court of Washington. Jan. 27, 1894.)

NEGLIGENT BLASTING — PRIMA FACIE EVIDENCE — TRESPASSER — WITNESSES — CREDIBILITY — EVIDENCE TO IMPEACH — STENOGRAPHIC NOTES TAKEN AT FORMER TRIAL.

1. Where an explosive used in blasting destroys all evidence of its management except that of persons interested in avoiding liability, evidence that a person was killed by a rock which was hurled horizontally 940 feet, or three times the usual distance, by a blast, is prima facie evidence of negligence in the management of the blast.

2. In an action against a grading company for the death of plaintiff's intestate, caused by a rock hurled by a blast into his house in which he resided, defendant claimed that intestate was

¹ Rehearing denied.

a trespasser, as to it, under its contract with the landowner, which gave to it possession of such portions of the land as were necessary and convenient for the prosecution of blasting work; but defendant did not show that the location of intestate's house was either necessary or convenient for its purposes. *Held*, that the admission of evidence that the landowner had given an oral option on the land to a third person, and that intestate, who was a squatter, had agreed to pay rent to such person rather than be removed, did not harm defendant, since it had not shown its own right to possession.

3. A stenographer who has shown that he took notes of the testimony of a witness on a former trial, and that such notes were correct, may read his notes, to impeach such witness, though, aside from the notes, he has no recollection of what the witness said.

4. An instruction that the jury should not draw any inference unfavorable to the credibility of witnesses brought a long distance or from another state because defendant had paid their necessary expenses was properly refused, where plaintiff's counsel had not commented in any way on the presence of such witnesses.

Appeal from superior court, Spokane county; Wallace Mount, Judge.

Action by Theresa Klepsch, as administratrix of Frank Klepsch, deceased, against George Donald, James L. Smith, and Frank B. Howell, as partners under the firm name of Donald, Smith & Howell, for negligently causing the death of plaintiff's intestate. From a judgment for plaintiff, defendants appeal. *Affirmed*.

Thomas C. Griffiths and Kinnaird & Happy, for appellants. John B. Hess and Turner, Graves & McKinstry, for respondents.

STILES, J. This is a second appeal in this case, the decision on the former appeal being found in 4 Wash. 436, 30 Pac. 901. The facts proven did not differ materially from those presented at the first trial, excepting that, upon the matter of ascertaining the damage suffered, the showing was in accordance with the rule laid down by this court; the defendants were allowed to show the methods they employed in conducting their blasting operations, and they offered proof tending to show that the deceased, Klepsch, was a trespasser upon lands put into their possession by the railroad company in connection with their grading contract.

The first error complained of is the refusal of the court to sustain a motion for a nonsuit, on the ground that the plaintiff had failed to show the specific act of negligence on the part of the defendants which caused the injury. Counsel renews, under this head, the proposition urged at the former hearing, —that the mere fact of an injury caused by the hurling of the rock was not *prima facie* proof of negligence in the management of the blast; and many cases are cited to sustain the position that the fact of injury does not generally prove negligence. *Hawkins v. Railway Co.*, 3 Wash. 592, 28 Pac. 1021, is one of the cases cited, and there was not at the former hearing of this case, nor is there now, any disposition on the part of this

court to depart from the rule there adhered to; nor do we concede that any such departure was made. The fact of the injury, and the circumstances under which it occurred, viz. by the casting of a rock such an unreasonable distance as 940 feet, with an explosive which, by its very nature, destroys all the evidence of the way in which it is managed, except as it may be proven by parties interested in avoiding liability, was the basis of the ruling which we said ought to be the law of such cases. A passenger on a railroad train is injured, and the fact of injury alone does not sustain a charge of negligence; but, if the train was derailed by reason of a broken wheel, the presumption arises that the carrier was negligent in not providing a sound one. So, here, the deceased was injured in his own house, and at a distance from the place of the blast which the evidence showed was the very extreme of distances to which rocks could be thrown in that manner, being more than three times the distance to which they were usually thrown; and it lay with the defendants to explain how this unreasonable circumstance happened, and that it was not their fault. Nor was it any answer to show that they had given their employees strict general instructions to be careful, or that the employees were competent and usually careful men. The very fact shown in the case that, in general, the rocks from defendants' blasts did not fly half as far as these particular rocks, certainly tended to show that there must have been an unusually heavy charge behind these rocks, or that some less than usually efficient means was taken to prevent their flight to such a prodigious distance. Upon the point of the ordinary distances to which rocks thrown from a carefully managed blast would go, the evidence of the plaintiff was meager; but the defendants' evidence fully supplied any deficiency in that respect, and therefore cured whatever error there may have been in refusing the nonsuit. The claim is also made that this presumption was rebutted by the evidence showing the precautions that were generally taken. But that did not suffice; none of the evidence was directed to the point of showing how this particular blast was treated. In this connection we may also dispose of the exceptions on account of the court's refusal to allow certain questions to be answered touching the directions given employees, and their usual method of laying and protecting blasts. The ingenuity and persistence of counsel were sufficient to circumvent this obstacle, and the same questions were fully answered elsewhere.

Defendants, in order to show that the deceased was, as to them, a mere trespasser on the land where his house was, produced their grading contract with the railroad company, and claimed that, as the land about the place where they were grading was an odd section, which belonged to the

railroad company, they had the implied right to the possession of the whole tract for the prosecution of their work. In response to this claim, a great deal of testimony was taken going to show that the railroad company had given to certain third parties an oral option to buy the land where the Klepsch house was, with permission to take possession, and remove squatters, of whom Klepsch was one, or require them to admit a tenancy by the payment of rent. There was testimony tending to show that Klepsch had paid, or agreed to pay, rent, and also that the place where he was injured was a dedicated, but unopened, street. Exceptions were taken to the admission of the testimony concerning the option, etc., and they are here urged on the ground that any such contract must have been in writing. But, however that may be, we are of opinion that this testimony did the defendants no harm, because their own proposition as to their right of possession was not sustained. All that could be implied from their contract was that they should have possession of such portions of the railroad company's lands as were necessary and convenient for the prosecution of the grading work covered by the contract; and it nowhere appeared that the location of the Klepsch house was thus either necessary or convenient. We will guard this last remark by expressing a serious doubt whether a mere trespasser upon premises devoted to blasting, as claimed, could be injured, under the circumstances of this case, without liability on the part of those who injured him.

To impeach a witness who had testified at the former trial the respondent produced the stenographer who had taken notes of the testimony, and had him read his notes, after showing that he had taken them at the time, that they were correct, and that, aside from them, he had no recollection what the witness had said. We think the practice was correct. *State v. Freidrich*, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, and 31 Pac. 332.

Certain of the witnesses for the defense were, brought from long distances, one of them from without the state; and the court was asked to charge the jury to the effect that no unfavorable inference was to be drawn by the jury against the credibility of such witnesses because of the defendants' having paid, or agreed to pay, their necessary expenses in attending the trial. Refused. The substance of this request would be entirely proper in a proper case; but the propriety of it would depend on whether the jury was invited, in argument, to draw any such inferences. The record before us does not show that counsel for the plaintiff in any way commented upon the presence of the witnesses at the trial, and there was, therefore, no error.

The main point of the contest in this case centered upon the question whether the

rock which killed Klepsch was thrown from the defendants' work, or whether it came from the Franklin school grounds, which were much nearer, and where blasting was in progress during the same period; but upon this point we cannot interfere, for there was a substantial conflict of testimony, which it was properly left to the jury to decide.

There were sundry exceptions not here specifically noticed, but the alleged errors upon which they were founded either do not appear in the record or were connected with the instructions, and the latter were either covered fairly by the charge of the court or have been incidentally disposed of in the foregoing opinion. Finding no reversible error, the judgment will be affirmed.

DUNBAR, C. J., and SCOTT and ANDERS, JJ., concur.

SCHMIDT et al. v. BRIEG et al. (No. 15,132.)

(Supreme Court of California. Dec. 30, 1893.)

TRADE-MARK—WHAT WILL BE PROTECTED—"SARSAPARILLA AND IRON"—INFRINGEMENT—DAMAGES—INJUNCTION.

1. The words "Sarsaparilla and Iron" are generic terms, and cannot be appropriated as a trade-mark, Civ. Code, § 991, providing that a trade-mark shall not include any designation "which relates only to the name, quality, or description of the thing."

2. The fact that such generic terms do not in fact indicate the character, kind, or quality of the article manufactured by persons claiming them as a trade-mark, and on which they are used as such, does not give such persons the right to their exclusive use.

3. Where a person, with intent to divert to himself the business of others, prepares and sells an article similar to that manufactured and sold by such others, and in doing so uses labels and devices so closely resembling those used by the latter as to lead purchasers, while using ordinary care, to believe that they are purchasing the imitated article, he is liable to such other manufacturers in damages, and will be enjoined from continuing the use of such labels and devices, though these do not constitute a trade-mark.

4. Plaintiffs sued defendants for infringement of a trade-mark, and manufacturing and selling an article in imitation of one sold by plaintiffs, and for an injunction, about two years after they discovered the imitation; but they had before brought suit against other infringers, and defendants had changed their label on account of a decision therein. *Held*, that plaintiffs should not be denied damages because of delay in bringing suit.

In bank. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by Schmidt and others against Brieg and others to recover damages for infringement of a trade-mark and for an injunction. From a judgment for plaintiffs, and from an order denying a motion for a new trial, defendants appeal. Order affirmed. Judgment modified and affirmed.

James G. Maguire, E. S. Salomon, and Henry Eickhoff, for appellants. John L. Boone and Langhorne & Miller, for respondents.

PATERSON, J. This is an action for an injunction, and to recover damages for an infringement of plaintiffs' trade-mark and labels. The facts found by the court below are substantially as follows: In the year 1887 plaintiffs commenced to manufacture and sell a new and valuable medicinal compound or beverage, and adopted and used in connection with the sale thereof the name "Sarsaparilla and Iron." By reason of the superior character of the medicinal constituents employed in the manufacture of the beverage or compound it became widely known and highly esteemed by the trade, and identified and distinguished by dealers and consumers under the designation of "Sarsaparilla and Iron." This name was not at that time in use or known as a designation of any similar article of manufacture on sale. For the purpose of identifying the beverage as being of their manufacture, and to distinguish it from other articles of a similar nature, plaintiffs have affixed to the bottles containing the same their own labels, devices, and trade-mark, specimens of which are attached to the complaint herein. The article has become widely known to the public and to buyers and consumers thereof as the beverage manufactured and sold by the plaintiffs, not only through the name "Sarsaparilla and Iron," but through said labels; and up to the time of the infringement, hereinafter referred to, large sales and great profits had been made by the plaintiffs. The defendants, since the month of December, 1888, willfully disregarding the rights of the plaintiffs, and with the intention to divert to themselves the business of the plaintiffs, and the profits and gains thereof, have fraudulently prepared, sold, and now continue to manufacture and sell, throughout the state of California, an article or beverage in imitation of the plaintiffs' beverage, having the same taste, flavor, and appearance as plaintiffs' article, with the intent to deceive and defraud the public and to injure and defraud the plaintiffs. They have put their beverage in bottles and packages similar to those used by the plaintiffs, and have labeled their bottles with labels, names, marks, and devices similar to those used by the plaintiffs. Copies of these labels are attached to the complaint. These marks and devices so closely resembled those used by the plaintiffs as to be calculated and liable to deceive purchasers and consumers of plaintiffs' article, and to lead them, although exercising ordinary care and prudence, to believe that the article contained therein is the plaintiffs' article, greatly to the diminution and damage of the business and profits of plaintiffs derived therefrom. The defendants' beverage in imitation of

the plaintiffs' compound or beverage is inferior to that put up by the plaintiffs, and by reason thereof the reputation of plaintiffs' article has been greatly injured, but there is no deleterious or poisonous substance in the defendants' beverage. By reason of the wrongful acts of the defendants the plaintiffs have sustained damage in the amount of \$3,539.25. Upon these findings the court concluded that the plaintiffs were entitled to an injunction perpetually restraining the defendants from "preparing, putting up, selling, or offering for sale said or any imitation of plaintiffs' article, or any article under or bearing the name of 'Sarsaparilla and Iron,' or any article under or bearing a colorable or other imitation of said name, or any article bearing said false labels, (Exhibit B,) or any imitation of the said labels of plaintiffs, or any article bearing upon or connecting therewith any of the said names, devices, or trade-marks of the plaintiffs which are shown upon said labels or exhibits. Also that plaintiffs were entitled to recover said sum of \$3,539.25 and costs." A decree was entered accordingly.

1. Words which are merely descriptive of the character, quality, or composition of an article cannot be monopolized as a trade-mark. Thus it has been held that the words "Iron Bitters" are so far indicative of the qualities of an article as to fall within the scope of the rule, (*Chemical Co. v. Meyer*, 139 U. S. 542, 11 Sup. Ct. 625,) and that name is no more generic than the name "Sarsaparilla and Iron." Our Code provides that a trade-mark shall not include any designation "which relates only to the name, quality, or description of the thing." Civ. Code, § 991. Words in common use are the common property of the people, and no one can acquire an exclusive right to such words by adopting them as his trade-mark, unless they be used out of their ordinary acceptance, and as a fancy name. The general rule is opposed to the use of mere words as a trade-mark; but if all of the words be used under a new combination in the way of a fancy name or designation, they may constitute a valid trade-mark, if they do in fact indicate origin or ownership. *Lawrence Manuf'g Co. v. Tennessee Manuf'g Co.*, 138 U. S. 546, 11 Sup. Ct. 396. We think the words "Sarsaparilla and Iron" are generic terms, and were used for the purpose of indicating, not so much the origin, manufacture, or ownership of the beverage, as the quality of the article itself. In *Canal Co. v. Clark*, 13 Wall. 327, the court said: "True, it may be that the use by a second producer, in describing truthfully his product by a name or combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the property; but if it is just as true in its application to his goods as it is to those of another, who first applied it, and who, therefore, claims an exclusive right to use it, there

is no legal or moral wrong done." We held here that a person is not entitled to the exclusive use of the words "Antiquarian Book Store" as a trade-mark. *Choynski v. Cohen*, 30 Cal. 501. See, also, *Browne, Trade-Marks*, § 164; *Raggett v. Findlater*, L. R. 17 Eq. 29. The words "Sarsaparilla and Iron" describe ingredients well known to the public. The word "sarsaparilla" means a root, or its extract, and iron, as used in connection with the word "sarsaparilla," must mean a solution of the metal iron. But it is claimed by respondents that the words "Sarsaparilla and Iron" do not, in fact, indicate the character, kind, or quality of their beverage; that it is not a composition of sarsaparilla and iron, but a solution of various substances; that it contains only a small quantity of sarsaparilla and a small quantity of iron, and the name was given to the beverage only as a name by which it might be known, without in any way being descriptive. But it is sufficient to say in answer to this claim that the name given to the article is either generic, or it is of such a character that it can as well be applied to defendants' beverage as to the plaintiffs'; and, this being so, as was said in *Canal Co. v. Clark*, supra, although the use of the name may have the effect of causing the public to mistake as to the origin or ownership of the product, "if it is just as true in its application to his goods as it is to those of another, who first applied it, * * * there is no legal or moral wrong done," the words or combination being of such a character as to designate respectively well-known articles of commerce.

2. It will be observed from our statement of the facts that the court found the defendants willfully, with intention to divert to themselves the business of the plaintiffs, and secure the profits and gains thereof, prepared and sold large quantities of an inferior imitation of the defendants' beverage, and in doing so had used labels, marks, and devices so closely resembling those used by the plaintiffs as to deceive the purchasers, and lead them, although exercising ordinary care, to believe that they were purchasing plaintiffs' beverage. Upon this finding the plaintiffs were entitled to judgment, independently of the validity of the trade-marks in question. In *Lawrence Manuf'g Co. v. Tennessee Manuf'g Co.*, supra, Mr. Chief Justice Fuller said: "Undoubtedly an inferior and fraudulent competition against the business of the plaintiff, conducted with the intent on the part of the defendant to avail itself of the reputation of the plaintiff to palm off its goods as plaintiffs', would, in a proper case, constitute ground for relief;" and in the course of his opinion referred to an English case, in which Lord Justice Lindley remarked that, "although the plaintiffs had no exclusive right to the use of the words 'Stone Ale' alone as against the world, or any right to prevent the defendant selling his goods as having been made at Stone, yet, as against

a particular defendant, who is fraudulently using or going to fraudulently use the words with the express purpose of passing off his goods as the goods of the plaintiffs, it appears to me that the plaintiffs may have rights which they may not have against other traders." A competing business firm is bound to deal fairly in placing its rival article upon the market; and, if it clearly appears that the defendants have closely imitated the plaintiffs' labels and style, and have done obvious damage to the latter's business through the unlawful business methods employed, the plaintiffs are entitled to relief upon the ground of fraud. *Sperry v. Milling Co.*, 81 Cal. 258, 22 Pac. 651; *Pierce v. Guitard*, 68 Cal. 68, 8 Pac. 645. Cases are not wanting of injunctions issued to restrain the use even of one's own name, where such use is made with such additions as to intentionally deceive the public, and make them believe he is selling the goods of another. *McLean v. Fleming*, 96 U. S. 251; *Chemical Co. v. Meyer*, supra. See, also, *Food Co. v. Baumbach*, 32 Fed. 212; *California Fig Syrup Co. v. Improved Fig Syrup Co.*, 51 Fed. 297; *Id.*, 4 C. C. A. 264, 54 Fed. 178; *Stone Co. v. Wallace*, 52 Fed. 438. There is abundant evidence in the record to support the finding of the court. The defendant's label is a palpable imitation in form and design of the plaintiffs' label. Both have the same general appearance, except in color,—one being blue, the other red. Both have crescent-shaped neck labels for the bottle, lined and lettered in similar form. Both have the word "Sarsaparilla" at the top of the label in large letters, and the word "Iron" printed in the border of the lower half of the label. Both have parallel lines running across the middle of the label with the name of the manufacturers between the same. The monogram of the defendants occupies the same position upon their label as the trade-mark of the plaintiffs upon the label of the latter. Both labels have the words, "A great blood purifier," and "Cures all skin diseases," printed in the lower half of the label. In fact the only material difference between the two labels in design and appearance exists in the colors, but this is no defense. *Browne, Trade-Marks*, § 236. The difference in color is a mere probative fact,—a circumstance to be considered by the court in determining the ultimate question as to whether the defendants' devices so closely resembled the plaintiffs' labels as to deceive the public. The court below has found the fact that the purchasers have been deceived by the acts of the defendants, and we cannot say that this finding is not supported by the evidence. As was said in *McLean v. Fleming*, supra: "What degree of resemblance is necessary to constitute an infringement is incapable of exact definition as applicable to all cases. All that courts of justice can do in that regard is to say that no trader can adopt a trade-mark so resem-

bling that of another trader as that ordinary purchasers buying with ordinary caution are likely to be misled." See, also, *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 4 C. C. A. 264, 54 Fed. 178. The testimony shows clearly that the size, form, design, ornamentation, and phraseology of plaintiffs' label were studiously followed by the defendants in the preparation of their own, and that the latter was used and intended to be used as a close imitation of the plaintiffs' label, and for the purpose of leading the public to believe that the beverage contained in the bottles upon which the defendants' labels were placed was the identical article manufactured by the plaintiffs.

3. The appellants insist that the plaintiffs should not be allowed to recover any damages, because of the delay in commencing this action. This claim is set up for the first time in this court, and appears to be an afterthought. There is nothing in the answer, or in the report of the proceedings at the trial below, indicating an intention to set up such a defense. The point ought to have been raised at least at the time the motion for a nonsuit was made, the facts having come out in the evidence of the plaintiffs; but conceding for the purposes of the discussion that, notwithstanding the failure of the defendants to set up the plea of laches until this time, it should still be considered, we think the contention is not supported by the admitted facts. The action was commenced about two years after the plaintiffs discovered the infringements, and the record shows that plaintiffs had, prior to the bringing of this action, brought suit against other infringers, and that the defendants not only had notice of this prior litigation, but had changed the color of their label on account of a decision in the court below. The doctrine of laches, as applied to stale claims in matters of trust, does not apply with full force to cases of infringement. *Browne, Trade-Marks*, § 685.

It follows from the views we have expressed that the judgment of the court is erroneous in two particulars. The plaintiffs were not entitled to a decree restraining the defendants from preparing, putting up, offering for sale, or selling the beverage in question. There is nothing in the complaint upon which a judgment awarding to plaintiffs the exclusive right to manufacture the beverage as against the defendants can be predicated. The decree is also erroneous in so far as it enjoins the defendants from making, offering for sale, or selling any beverage or article under the name of "Sarsaparilla and Iron." As we have seen, the plaintiffs have not the exclusive right to the use of those words. In other respects the decree is correct. The restraining portion of the decree should simply have enjoined the defendants from selling or offering for sale any beverage or article bearing the labels shown by Exhibit B, attached to the complaint, and

from selling or offering to sell any article or beverage under any marks, signs, devices, or labels calculated or liable to deceive purchasers and consumers of plaintiffs' article, or the public generally, or to lead them, while exercising ordinary care and prudence in purchasing, to believe that the article contained in the defendants' bottles and packages is the plaintiffs' article.

The order denying the defendants' motion for a new trial is affirmed. The cause is remanded, with directions to the court below to modify the decree in accordance with the views herein expressed. As so modified the judgment will stand affirmed.

We concur: MCFARLAND, J.; GAROUTTE, J.; HARRISON, J.; FITZGERALD, J.

SCHMIDT et al. v. WELCH et al. (No. 15,136.)

(Supreme Court of California. Dec. 30, 1893.)

TRADE-MARK—INFRINGEMENT—DAMAGES—INJUNCTION.

Where labels used on bottles containing medicine manufactured by defendants in no respect resemble labels used by plaintiffs on bottles containing similar medicine put up by them, except that both labels have thereon the words "Sarsaparilla and Iron," plaintiffs are not entitled to an injunction or to damages.

In bank. Appeal from superior court, city and county of San Francisco; F. W. Lawlor, Judge.

Action by Schmidt and others against Welch and others to recover damages for infringement of a trade-mark and for an injunction. From a judgment for plaintiffs, and from an order denying a motion for a new trial, defendants appeal. Reversed.

James G. Maguire, E. S. Solomon, and Henry Eickhoff, for appellants. John L. Boone and Langhorne & Miller, for respondents.

PATERSON, J. The facts found by the court below in this case are in all respects the same as those found by the court in *Schmidt v. Brieg*, (this day filed,) 35 Pac. 623, except as to the amount of damages. A decree like the decree in the *Brieg* case was entered, the damages, however, being fixed in this case at \$3,163.70. In the *Brieg* case we held that the plaintiffs were not entitled to the exclusive use of the words "Sarsaparilla and Iron" as a trade-mark, but that they were entitled to a decree restraining the defendants from selling or offering to sell any beverage under the label, Exhibit B, attached to the complaint therein, and to an affirmation of the judgment for damages and costs. Our decision in that case is based upon the finding of the court that the defendants, with intent to divert to themselves the business of the plaintiffs and the profits and gains thereof, and to deceive the public, had

fraudulently prepared and sold an inferior article in imitation of the plaintiffs' beverage, and, with intent to deceive and defraud the public and injure and defraud the plaintiffs, had caused said inferior article to be put up in bottles and packages similar to those used by the plaintiffs for their article, and sold under labels, marks, and devices similar to the names, labels, marks, and devices used by the plaintiffs. The fraudulent acts complained of and found consisted in the unlawful and studied imitation of the plaintiffs' label under which the latter's beverage had been sold and become widely known as a valuable and useful beverage, and a source of great profit to them. In the case at bar, however, the defendants' label is in no respect similar to that used by the plaintiffs. With the exception of the words "Sarsaparilla and Iron" there is nothing in defendants' label in form, design, or lettering similar to the plaintiffs' label. The larger label is diamond-shaped, with a flowery border, instead of the strong parallel lines found in the plaintiffs' border. There is no attempt to imitate the trademark in the upper portion of the plaintiffs' label, nor the peculiar and uneven letters in the crescent-shaped label. The name of the manufacturer, "Pioneer Soda Works, S. F.," appears in large letters across the widest portion of the label. Unless we are prepared to hold, therefore, that the defendants are not entitled to put any paper labels upon their bottles, the finding of the court as to the effect of the defendants' label cannot be sustained. Inasmuch as the plaintiffs have no exclusive right to the use of the words "Sarsaparilla and Iron," we think it cannot be said that the use of the defendants' label is an infringement of the plaintiffs' label, or in any manner fraudulent. Judgment and order reversed.

We concur: **McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; FITZGERALD, J.**

BURNHAM et al. v. STONE et al. (No. 19,255.)

(Supreme Court of California. Jan. 26, 1894.)

APPEAL—PROTECTION OF WRIT TO OFFICER—FORCIBLE TAKING POSSESSION BY LANDOWNER—LIABILITY FOR DEATH—INSTRUCTIONS.

1. In an action against a constable and the members of his posse for killing one who resisted them while executing a writ of restitution, plaintiff cannot for the first time on appeal insist that one of defendants did not plead the writ in justification, if no objection was made to the evidence showing such justification, and no request was made that it be restricted to those defendants who pleaded the writ.

2. A description, in a judgment for the possession of land, and in the writ of restitution, by reference to certain buildings, includes the land on which they are situated, notwithstanding an error in the description by government subdivisions; and the officer executing the writ is not liable as a trespasser for the killing of

one resisting him in his attempt to obtain possession of the buildings.

3. An owner of land wrongfully held by another is not civilly liable for the killing of the occupant while resisting the owner's attempt to regain possession without the use of more force than was reasonably necessary.

4. A verdict, though correct on the evidence, will be reversed for an erroneous instruction which cuts off a substantial defense on the merits.

5. The fact that a judgment is fraudulently obtained does not render the officer who executes a writ issued thereon, which is regular on its face, a trespasser.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by John H. Burnham and others against Levi P. Stone, James Stone, and others for the death of Jenny Burnham. From a judgment for plaintiffs, defendant James Stone appeals. Reversed.

Luce & McDonald, for appellant. Haines & Ward and Works & Works, for respondents.

HAYNES, C. Appeal from an order denying the motion of the defendant James Stone for a new trial. The action was brought by John H. Burnham and his two minor children to recover damages for the alleged wrongful killing of Jenny Burnham, the wife of the plaintiff John H. Burnham, and the mother of the minor plaintiffs. The third paragraph of the complaint is as follows: "That on the 18th day of January, 1888, the said defendants, Levi P. Stone, James Stone, George Morris, D. M. Breedlove, Arch Freeman, and W. H. H. Dinwiddie, maliciously, willfully, fraudulently, and unlawfully contriving, conspiring, and confederating together to attack, assault, and remove, with force and arms, one Elizabeth Goings and one Percy Goings from their prior and peaceable possession and occupation of the following described lands and the dwellings thereon, situated in said county of San Diego, state of California, to wit, the southeast quarter of the northwest quarter of section five, (5), in township eleven (11) south, of range two (2) west, S. B. M., did then and there, in the prosecution of their said malicious, willful, fraudulent, and unlawful conspiracy and confederation, enter upon said premises with force and deadly weapons, and did there willfully and maliciously attack, assault, and shoot to death the said Jenny Burnham, then lawfully and peacefully being upon the said premises." All the defendants except Freeman answered, appellant answering separately. The only error assigned is that the court erred in its instructions to the jury given at plaintiff's request.

An outline of the facts in the case, so far as they appear to be uncontroverted, is as follows: That Levi P. Stone, one of the defendants, was the owner of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 5, in a given township and range, upon which there was a

dwelling house, a honey house, and a chicken house; that, during his temporary absence, Elizabeth Goings and her son, Percy Goings, entered upon said premises and took possession, claiming that it was government land and open to settlement, and refused to deliver possession to Stone upon his demand. Afterwards Stone commenced an action in forcible entry and detainer against said Elizabeth and Percy Goings before a justice of the peace, and in his complaint described the land as the "S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, and S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, of section 5," but before the trial he amended the complaint, as to the description, so as to read: "That at the time hereinafter mentioned, and for eight years prior thereto, he was in the peaceable and actual possession and occupation, and entitled to the possession, of all that certain piece, parcel, and tract of land described as follows, to wit: S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, and N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, of section 5, in township 11 S., range 2 W., S. B. M., and comprising 160 acres of land, and of the dwelling house, honey house, and chicken house thereon." As a matter of fact these buildings were on the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of the section. Upon the trial the plaintiff, Levi P. Stone, had judgment for the restitution of the premises described in the amended complaint, and a writ of restitution "in due and sufficient form" was issued thereon, and delivered to the defendant D. M. Breedlove, a constable, for service. The writ is not set out in the record, and whether it contains the added description of the buildings does not appear with certainty. The statement simply says: "The judgment and writ followed the description of the premises given in the amended complaint." The constable then went to the premises on which the buildings were, and which were occupied by the Goings, and demanded that they vacate the premises, but they refused to do so. The constable then left, saying he would be back in the afternoon. About 2 o'clock he returned with Levi P. Stone, James Stone, and another, and found Mrs. Burnham, Mrs. McConnehey, Percy Goings, and Mrs. Goings in the house, with the doors barred, and said they would not go off. The constable then told them that if he had to put them off by force he would try and get enough to do it next morning. The next day (January 17, 1888) he returned with Levi P. Stone, James Stone, Arch Freeman, George Morris, and Stockman Reed, and in the effort to execute the writ, or to obtain possession, Stockman Reed, one of the constable's posse, and Percy Goings, John McConnehey, and Mrs. Burnham were killed or mortally wounded. The jury returned a verdict against all the defendants for \$30,000 actual damages, and, in addition thereto, against Levi P. Stone, \$10,000, and against this appellant for \$2,000 exemplary damages.

So far as the record discloses, no question

seems to have been made but that the defendants would have been justified in all that they did if the judgment and writ of possession had described the subdivision of the section upon which the buildings occupied by the defendants in the writ were situated. Respondents contend, however, that as appellant did not, by his answer, justify under the writ and command of the constable, the question of the sufficiency of the writ is immaterial. It clearly appears from the instructions given to the jury at plaintiff's request that the defendants, no exception being named, did plead the writ in justification; and the record discloses no objection made by plaintiffs to the evidence tending to show justification under the writ, nor any request that it be restricted to those defendants who had pleaded the writ. Under these circumstances, appellant contends that respondents are estopped from raising the question upon appeal. Appellant testified, without objection, as follows: "The way I happened to go at that time was that Constable Breedlove required me to go help him dispossess the Goings under a writ that had been issued to him as constable of Bear Valley township, and I went in accordance with his command." We think that appellant's contention upon this point must be sustained, under the authority of *Murdock v. Clarke*, 90 Cal. 431, 27 Pac. 275, and, if so, that he is entitled to review the instructions of the court relating to justification under the writ and the command of the officer.

The complaint alleged, and the defendants conceded, that the premises occupied by the Goings was the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and the record shows without qualification or contradiction that the defendant Levi P. Stone was the owner of it, and had been in possession of it for seven or eight years prior to the entry of the Goings, who entered unlawfully during his temporary absence. The instructions are too long to copy in full in this opinion, but in substance the jury were instructed, at the request of plaintiffs, that in going upon the land for the purpose of obtaining possession by force, or show of force, all the defendants were trespassers, and their entry unlawful, and because thereof each defendant was liable for the killing of Mrs. Burnham, although the killing was not intended, contemplated, aided, abetted, or advised by him; that, if he aided, abetted, or encouraged the unlawful entry upon the premises, it was sufficient to fix his liability; and that such entry was unlawful unless the writ of possession covered or included the premises where the homicide occurred; but the court did not instruct the jury whether, as matter of law, the reference to the buildings thereon, in the description of the premises contained in the writ, if it did contain such description, did or did not so control the erroneous description by the subdivisions of the government survey as to include the buildings where the homicide occurred, and

operate as a justification to the officer and all who acted under his authority, but, on the contrary, expressly left the jury to find whether the writ did cover the property where the shooting occurred. The jury were further instructed that if they found that Levi P. Stone testified before the justice of the peace that said buildings were on unsurveyed land, and that he knew at that time that the buildings were on the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and if they should further find that but for such testimony he would have been unable to obtain such verdict and to recover such judgment, and that he and the other defendants entered under color of said writ, and, in the attempt to execute the same, Mrs. Burnham was killed, that not only was said writ of restitution no justification to any of the defendants engaged in such undertaking, but that they were authorized to infer express malice on the part of Levi P. Stone, and to consider such conduct on his part as one of the circumstances to be taken into account in fixing the damages as against him. These instructions were erroneous in several particulars. Assuming that the writ of restitution contained the added description of the land by reference to the "dwelling house, honey house, and chicken house thereon," the court should have instructed the jury, as matter of law, that such description included and covered the land on which they were situated, notwithstanding the erroneous description by government subdivisions. Any description which will enable the officer executing the writ to clearly identify the premises is sufficient. *Freem. Ex'ns*, (2d Ed.) § 471, in speaking of writs of possession, declares this to be the general rule. In *Lawrence v. Davidson*, 44 Cal. 177, (an action of ejectment,) the court said: "We cannot see upon the record that the description of the excepted tract is necessarily impossible or incapable of identification in the field. The bay of San Francisco is an object referred to; the 'Dows Claim' and the 'Fairbanks Claim,' which may, so far as we know, be well-ascertained objects, are mentioned too." See, also, *Helm v. Wilson*, 78 Cal. 476, 18 Pac. 604. No more satisfactory means of identifying the property could ordinarily be given than the description of the three buildings mentioned. It could not be expected or intended that the constable should survey the lands for the purpose of identifying them, and even if he had done so, he had a right to regard the description by survey as erroneous, and to execute the writ upon the premises identified by the buildings.

In view of a new trial, and of the possibility that the writ does not refer to the buildings as a part of the description of the land, it becomes necessary to consider the instructions upon the supposition that the writ did not cover the premises from which it was attempted to evict the defendants in the writ. In such case the instructions were also erroneous. It is conceded that Levi P. Stone was

the owner of the buildings and premises where the homicide occurred, and that he had a right to the possession at that time. Mrs. Burnham made no claim that she was entitled to the possession. Her mother and brother were in possession, and the record shows that when the constable, after demanding that they vacate the premises the morning of the day before the homicide, and being met with a refusal, returned in the afternoon, he found Mrs. Burnham there with the others in the house, and with the doors barred. She was also there when the constable and owner of the premises returned the next day with the posse, and at least aided and abetted her mother and brother in retaining possession. Under these circumstances, if she had survived, she could not have maintained an action for assault and battery, or for any injury she might have sustained in an endeavor of the owner to obtain possession, even if the effort were forcible. In *Canavan v. Gray*, 64 Cal. 5, 27 Pac. 788, it was held that, where the owner of real property having the right of possession makes a forcible entry, the person in wrongful possession cannot maintain an action of trespass; that the remedy provided by statute for a forcible entry is exclusive. This case is amply sustained by the authorities upon that subject. *Washb. Real Prop.* *396, after quoting the modern English doctrine as expressed by Baron Parke, says: "And the law, as generally adopted in the United States, may be assumed to be substantially as laid down by Baron Parke. If the owner of land wrongfully held by another enters and expels the occupant, but makes use of no more force than is reasonably necessary to accomplish this, he will not be liable to an action of trespass *quare clausum*, nor for assault and battery, nor for injury to the occupant's goods, although, in order to effect such expulsion and removal, it becomes necessary to use so much force and violence as to subject him to indictment at common law for a breach of the peace, or under the statute for making forcible entry." The same author adds: "The uniform current of authority in the United States sustaining the same doctrine is broken only by the decisions in Vermont and Illinois." The general ground upon which these authorities are based is that, at common law, trespass would not lie against the owner if he were entitled to the possession, as in such case the person in possession, being in wrongfully, could maintain no action against the owner unless unnecessary force was used, and that, the statutes of forcible entry and detainer having provided a remedy in such cases, that remedy is exclusive, so far as the wrongful possessor is concerned; but the public, being interested in preserving the peace, may punish the owner for resorting to force. *Canavan v. Gray*, *supra*, proceeds upon this ground. In *Jackson v. Farmer*, 9 Wend. 201, it is said: "Statutes of forcible entry and de-

tainer punish criminally the force, and in some cases make restitution, but so far as the civil remedy goes there is none whatever." See, also, *Low v. Elwell*, 121 Mass. 309; *Souter v. Codman*, 14 R. I. 119, and notes; *Stearns v. Sampson*, 59 Me. 569. In *Kellam v. Janson*, 17 Pa. St. 469, it is said: "An action is well founded only when a right is invaded; but the plaintiff's right ceased by the entry of defendant,—an act that completely obliterated the shadow of right cast by the plaintiff's possession. A complaint against the assumption of possession is a complaint against the assertion of a right, and a demand that the law shall give the plaintiff damages for the loss of that which it was wrong for him to have." In *Sterling v. Warden*, 51 N. H. 232, it is said: "It is clearly the English law, and, as we believe, the strongly preponderating opinion of the American courts, that no civil action lies against a landlord for regaining with force the possession of the demised premises, unless there is an excess of force, and then only for such excess."

In the light of these authorities the instruction that the entry upon the premises by force, or show of force, was unlawful, and that, if appellant aided and abetted such entry, he was liable for the death of Mrs. Burnham, though he did not aid, abet, advise, or encourage the actual killing, is erroneous. No liability for damages was created against any of the defendants for the entry upon the land, nor for the expulsion, or attempted expulsion, of the occupants by force, unless more force or violence was used than was reasonably necessary; and no such qualification appears in the instructions given to the jury. It is quite true that appellant did not, in his answer, plead the ownership and right of entry of Levi P. Stone. The case was tried, however, without any apparent reference to the issues made by appellant's answer, and all the facts were given in evidence without objection or limitation. The court stated to the jury the substance of the complaint; that all the defendants except Freeman had answered denying the allegations of the complaint, and alleging that Mrs. Burnham and others acting with her first assaulted them; that they used no more force than was necessary to protect themselves from injury; and also alleged facts tending to justify themselves under the writ of restitution. The jury were expressly instructed that the question of the title to the land was not before them; that, "admitting that Stone was the owner of the land, and that Mrs. Goings was wrongfully in possession of it, this gave Stone, or any one acting with or for him, no right to enter upon the land by force or show of force, and take possession of it, or exclude or remove Mrs. Goings or any one else from the land; and, if you find that the defendants went upon the land in the manner and for the purpose mentioned, their entry was unlawful, unless

justified for other reasons, and the defendants would be liable for the consequences resulting therefrom."

Counsel for respondents suggest that, the verdict being right upon the evidence, the judgment should not be reversed because of an erroneous instruction. That there are cases where the judgment should stand, notwithstanding an erroneous instruction, is not questioned; but, where the erroneous instruction is such as to cut off a substantial defense on the merits, the rule suggested can have no application. The case was not tried upon a theory which would justify this court in looking at the evidence to determine whether unnecessary force was used by the defendants, and that became a vital question, assuming that the writ did not cover the premises upon which the entry was made by them.

The jury were also instructed, in substance, that, if Levi P. Stone obtained his verdict and judgment before the justice by false swearing, the writ was no protection to the defendants. But the fact that a judgment is fraudulently obtained does not render the officer a trespasser who executes a writ, regular on its face, issued on such judgment. *Simms v. Slacum*, 3 Cranch, 306. The question as to its effect upon the defendant Levi P. Stone is not pertinent here.

No other questions need be noticed. The order appealed from should be reversed, and a new trial granted.

We concur: VANOLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed, and a new trial granted.

PALMER v. ATCHISON, T. & S. F. R. CO.
(No. 19,198.)

(Supreme Court of California. Jan. 26, 1894.)
CARRIERS OF GOODS—DELAY—ACTION FOR DAMAGES—COMPLAINT—CONNECTING LINES—PROBABLE DELAY—CONTRACT MADE IN ANOTHER STATE.

1. A complaint in an action for delay in transporting goods, which alleges the time between the receipt and delivery, and that they were not transported within a reasonable time, is good against a general demurrer, without alleging what is a reasonable time for such transportation.

2. Though two days before a carrier accepted goods for shipment over its own and connecting lines a snowstorm commenced on a connecting line a thousand miles away, it will not be presumed to have known that an unusual storm had set in, of which it was bound to speak as a fact liable to cause delay, where severe storms in that latitude were up to that time unknown, and the road might reasonably be expected to be open when the goods reached it.

3. Under Civil Code, § 2196, declaring a carrier liable for delay only when caused by want of ordinary care, and section 2201, stating that a carrier accepting freight for a place beyond

its route must, unless otherwise stipulated, deliver to a connecting line, when its liability ceases, a carrier receipting for goods to be shipped beyond its line, with the stipulation that it will not be responsible as carrier any further, is not liable for delay in delivering the goods to the connecting carrier, due to the latter's inability to receive them.

4. In an action on a contract made in another state it will be presumed, in the absence of evidence to the contrary, that the law of that state is the same as that of California.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Oscar Palmer against the Atchison, Topeka & Santa Fe Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

Hunsaker, Britt & Goodrich and A. Brunson, for appellant. Luce & McDonald and Dodson & Ecker, for respondent.

SEARLS, C. This action was brought to recover from defendant, a corporation, and a common carrier, damages sustained by plaintiff by reason of the alleged failure of defendant to transport from Kansas City, Mo., to San Diego, Cal., and deliver to the plaintiff within a reasonable time, five car loads of furniture. Plaintiff had a verdict for \$1,000, upon which judgment was entered. Defendant appeals from the judgment and from an order refusing a new trial.

Plaintiff's recovery was founded upon the second count of his complaint. To this a demurrer was interposed, which appellant contends should have been sustained, but which was overruled. The portion of the complaint to which objection is taken may be epitomized as follows: On the 24th day of December, 1887, the defendant, for a valuable consideration, undertook to receive and carry over its road from Kansas City to San Diego, and deliver to plaintiff within a reasonable time, five car loads of furniture, etc. That defendant received the same at the date mentioned for the purpose of transportation aforesaid, but did not, as it undertook to do, transport said goods to San Diego within a reasonable time, and did not deliver the same to plaintiff until on or about February 15, 1888. The objection goes to the point that the complaint should have specified what was a reasonable time for the transportation of the goods between the two points, and, failing to do so, was open to an attack upon the ground that it did not state facts sufficient to constitute a cause of action. In the absence of a special demurrer directed to this point, we think the general allegation of a failure to transport and deliver within a reasonable time was sufficient. The form used by the pleader is substantially that laid down by Chitty as sufficient in actions ex contractu, in his work on Pleading. 2 Chit. Pl. p. 103. It was admitted at the trial that the Atchison, Topeka & Santa Fe Railroad terminated at Albuquerque, N. M., and that the Atlantic & Pacific ran from Albuquerque

into California, and connected at Barstow with the California Southern, which extended to San Diego; the three roads thus forming a through line from Kansas City, Mo., to San Diego, Cal., each road being operated by a different company. The five car loads of goods were delivered to defendant at Kansas City, directed to the plaintiff at San Diego as follows: Two cars December 24, 1887; one car December 27, 1887; two cars January, 1888. The company furnished to the shipper bills of lading, which, so far as important here, were as follows: "Atchison, Topeka and Santa Fe R. R. Co., K. C. Station, 12-24-1887. Will receive the under-noted property, and transport it over the road, and deliver to consignees, or the next company of carriers, (if the same is going beyond its line of road,) for them to deliver to the place of destination of said property; it being distinctly understood that this company shall not be responsible as common carriers for said property beyond its line of road, or while at any of its stations awaiting delivery to such carriers; the company being liable as warehousemen only. Abernathy Fur. Co. Shipper, to Oscar Palmer, Consignee, San Diego, California," etc. Then follow usual description and number of car, signed, "Wm. Carroll for the Co." The bills of lading for the several cars were the same, except as to dates, numbers, etc. The evidence shows without substantial contradiction that on the 5th day of January, 1888, a snowstorm of unprecedented severity commenced over the mountain region traversed by the Atlantic & Pacific Railroad, which lasted for a period of ten days to two weeks, blocking the road, and practically stopping the transportation of freight, during which time some 683 loaded cars accumulated at Albuquerque and in its vicinity, with the result that when the road was again open it was, say, 30 days before the accumulated freight was finally passed over the road. The Atlantic & Pacific Company seems to have made every effort to open its road. It rented some 38 locomotives, in addition to 46 owned by it, most of which, for many days, were engaged in an effort to open the road, and no labor or expense was spared in the work. The yards and side tracks of the Atlantic & Pacific road became filled with cars, until they could receive no more, when they notified the defendant to hold all cars at Albuquerque until they were able to receive and forward them. This unexpected blockade on the Atlantic & Pacific is shown to have been the sole cause of the delay of plaintiff's goods. There is no showing of delay upon defendant's road, except as the cars were held by it at and near its western terminus because the Atlantic & Pacific could not receive and forward them. All the goods were shipped prior to the storm, except those in the two cars shipped January 7th; and, when the storm was over, the cars were sent forward from Albuquerque in the order received.

It must be conceded that a railroad company receiving freight for transportation over its own and connecting lines, which, by reason of some fact known to it and unknown to the shipper, is liable to detention beyond the usual time occupied in transit, should inform the shipper of such fact, in order that the latter may exercise his judgment as to the propriety of making the shipment. There is not, however, any evidence in the record tending to show that defendant had, at the date of the last shipment, on January 7th, any knowledge of the storm which then, and since the 5th, had been prevailing on the mountain division of the Atlantic & Pacific. Very slight evidence would be sufficient notice of such a fact had the storm been near at hand, or on its own road, but when we consider that it was upon another road, over 1,000 miles away, and in a region where storms of the nature and duration of the one in question were unknown up to that time, we cannot see how, in the absence of evidence, defendant can be presumed to have known that an unusual storm had set in, any more than it would be presumed to know the length of time it would continue, or the great depth to which the snow would fall. In passing judgment on this question we are not at liberty to view it in the light of present known facts, but must confine ourselves to the facts apparent when defendant received the freight. We must bear in mind that the blockade occurred in a latitude and at a point where a like storm was not to be expected, and where, if snow fell, it might be expected to be of short duration; and that freight received at Kansas City, and requiring several days to reach the point in question, might reasonably be expected to meet an open road by the time it reached the point of difficulty. Under such circumstances, had the proofs shown knowledge of the storm on the part of defendant at the date of receiving the goods, it cannot be said as a matter of law that a failure to notify the shipper was negligence, but only that it was such evidence of negligence as should be submitted to the jury to determine whether there was in fact negligence on the part of defendant.

Respondent claims that defendant was aware, when it received the goods, that there was a great blockade of freight on its different connecting lines, to haul which they were unprepared, and that this unusual press of business, coupled with inadequacy of rolling stock, was the cause of the delay; that defendant had notice of these facts, and should have notified the consignor of plaintiff, and, failing so to do, it is liable. The testimony on this point is to the effect that it was the busy season of the year for traffic and travel to southern California; that a large volume of freight was moving westward over the road. The testimony shows, however, that "the principal reason for the delay was on account of the snowstorm, for, had it not been for the snowstorm, the delay would not

have occurred. The rush of freight or the rapid increase of freight over usual traffic did not cause the delay for this reason. * * * The snowstorm alone was the primary cause of the delay, of the accumulation of freight, which I have described. By primary cause I mean the line was open for business before the snowstorm, and was running regularly, and then, when the snowstorm came, that it took such a large amount of motor power to open up the line that, while we were clearing it, no freight or passenger traffic could be moved over the mountain division, and in the mean time it allowed freight to greatly accumulate at other points." The same witness, after describing the storm and the efforts to keep the Atlantic & Pacific open, says: "I do not see that the delay could have been avoided. If that snowstorm had not happened, Mr. Palmer's cars would have gone through all right. The line was running on good time previous to the storm." Thus much is quoted as a sample of the evidence on the part of defendant, which, we think, establishes the fact without substantial conflict that the delay complained of occurred upon the Atlantic & Pacific road, and was occasioned by the storm upon the mountain division of that road, and that the operators of such road used every reasonable effort to keep the line open. "A common carrier is liable for delay only when it is caused by his want of ordinary care and diligence." Civ. Code, § 2196. "Accordingly it has been held that when the carriers' canal boat was run into by a scow, which made it necessary for him to stop for repairs, the delay thereby occasioned was excusable, (*Parsons v. Hardy*, 14 Wend. 215;) or when he was delayed by deep snow, which made the road temporarily impassable, (*Ballentine v. Railroad Co.*, 40 Mo. 491;) or the washing away of a bridge over a stream by a freshet, which it was necessary for the carrier to cross, (*Railroad Co. v. Ragsdale*, 46 Miss. 458.) * * * So a railroad company will be excusable for delay in the delivery of goods, when, having running powers upon another road, it is obstructed by the negligence of the latter." *Livingston v. Railroad Co.*, 5 Hun, 562; *Hutch. Carr.* § 331. The measure of liability of a common carrier of merchandise in case of its loss or injury is very different from that imposed upon him for delay in transporting and delivering such merchandise. In the former case he is liable for its value in any event, except from some inherent weakness, defect, or vice, or from the spontaneous action of the property itself, or the act of a public enemy, or the act of the law, or "any irresistible superhuman cause." (Civ. Code, § 2194;) while for delay he is, as before quoted, only liable for a want of "ordinary care and diligence." Railroad companies may bind themselves by contract not only to convey over their own, but over connecting, lines, and may bind themselves to deliver goods within a given time, (*Pereira v.*

Railroad Co., 60 Cal. 92, 4 Pac. 988; but, in the absence of such contract, express or implied, they are only bound to transport them to the terminus of their own lines, and to deliver them to the connecting carrier for transportation to their final destination; and that within a reasonable time, (Hutch. Carr. §§ 145, 159b, 154, 102, 103a, and cases cited.)

The English courts hold that where goods are delivered to a railway company, to be transported beyond the terminus of its line by a connecting company, the presumption is that the company receiving them is liable for loss, injury, or delay occurring beyond its own line. *Muschamp v. Railway Co.*, 8 Mees. & W. 421, is the leading English case upon this question. The rule as enunciated in that case was that when the carrier accepts for carriage goods directed to a destination beyond its own route it assumes, by the very act of acceptance, in the absence of any express contract on the subject, the obligation to transport them to the place to which they may be directed. This rule has been steadily adhered to in the English courts. On the other hand, the majority of the American courts have held that, in the absence of any other contract than that implied by an acceptance of the goods for carriage, the obligation of the carrier extends only to the end of his route, and a delivery there to the next connecting carrier to further or complete the carriage; and that, in order to be bound, there must be a positive agreement, express or implied, extending the liability. *Nutting v. Railroad Co.*, 1 Gray, 502; *Gray v. Jackson*, 51 N. H. 9, and cases cited. From the review of the cases in *Gray v. Jackson* it will be seen that the rule is by no means uniform in this country. Our Civil Code has, however, settled the question in this state. Section 2201 is as follows: "If a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier carrying to the place of address, or connected with those who thus carry, and his liability ceases upon making such delivery." That there was no stipulation on the part of the defendant to be responsible beyond the terminus of its line, and that it expressly limited its liability to its own road, is attested by its receipt for the goods, which in such cases amounts to a bill of lading, in which, as it might do, it expressly limited its liability to transportation over its own road. *Pollard v. Vinton*, 105 U. S. 7; *Hutch. Carr.* §§ 121, 122; *Civil Code*, § 2176. The law of the place where the contract is made governs in determining the liability of the carrier, unless the parties at the time of making it had some other law in view. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469; *In re Missouri Steamship Co.*, 42 Ch. Div. 321; *Hazel v. Railway Co.*, 82 Iowa, 477, 48 N. W. 926; *Fonseca v. Steamship Co.*, 153 Mass. 553, 27 N. E. 665. There

are exceptions to this rule, founded upon the supposed intention of the parties, gathered from circumstances surrounding the transaction. *Ryan v. Railroad Co.*, 65 Tex. 13. Thus much is said to indicate that the question is not overlooked. The cause, so far as can be determined from the record, was tried upon the theory that the law of California is applicable. There is no suggestion that the law of Missouri, where the contract for transportation was made, was put in evidence. Under such circumstances, we are not at liberty to assume as a fact that the state of Missouri has a special statute on the subject, but must presume as a question of law that the law of that state is the same as our own. *Norris v. Harris*, 15 Cal. 226; *Hill v. Grigsby*, 32 Cal. 56; *Taylor v. Shew*, 39 Cal. 540; *Brown v. Gas-Light Co.*, 58 Cal. 426; *Marsters v. Lash*, 61 Cal. 622; *Shumway v. Leakey*, 67 Cal. 458, 8 Pac. 12. Judged by our own statute, and by the lawful limitation which defendant might and did embrace in its bill of lading, it was bound to transport to Albuquerque, and deliver to the Atlantic & Pacific, connecting road, within a reasonable time, plaintiff's goods. This it is shown to have done, except as it was prevented without fault of its own by the inability of the Atlantic & Pacific to receive them when they reached the terminus of defendant's line. That the delay was caused upon the Atlantic & Pacific road by act of God, or "irresistible superhuman cause," is, we think, clearly established. The scintilla of evidence to the contrary is not sufficient to establish a substantial conflict; but, waiving this question, the negligence or want of it, on the part of the connecting road, is not one for which this defendant, under its contract and the statute, can be held liable. It follows that the evidence is insufficient to justify the verdict, and it is against law. The judgment and order appealed from should be reversed, and a new trial ordered.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial ordered.

HART v. CARNALL-HOPKINS CO. (No. 15,467.)

(Supreme Court of California. Jan. 26, 1894.)

JUSTICE'S JURISDICTION—POSSESSION OF LAND.

An action to recover money paid to defendant under a contract to locate plaintiff on vacant government land, in which the issue is whether the land on which plaintiff was located was in fact vacant, is an action involving the possession of real estate, of which, by Code Civ. Proc. § 838, a justice of the peace has no jurisdiction.

Department 1. Appeal from superior court, city and county of San Francisco; J. O. B. Hebbard, Judge.

Action by J. D. Hart against the Carnall-Hopkins Company for breach of contract, originally brought in justice's court. From a judgment for plaintiff, defendant appealed to the district court, where judgment was again rendered for plaintiff. Defendant again appeals. Plaintiff moves to dismiss. Denied.

Wm. H. Chapman, for appellant. Edwin L. Forester, Fisher Ames, and S. V. Costello, for respondent.

PATERSON, J. This action was brought in the justice's court, to recover the sum of \$299.99, on a contract which reads as follows: "San Francisco, July 22, 1892. Received of J. D. Hart, Esq., one hundred (\$100) dollars, in full payment for ten (10) shares of the capital stock of the San Carlos Oil Company, and our services for locating the said J. D. Hart, Esq., on the limit of the number of acres allowed by the homestead law, not to exceed one hundred and sixty (160) acres. Said location to be on vacant government land in San Benito county, California. The Carnall-Hopkins Company, by Gibbs & Zimmerman, Mngs. C. A. Dep." It is alleged in the complaint that defendant failed to locate the plaintiff on certain vacant government land, or any land at all. In a verified answer, the defendant denied each and every allegation of the complaint, and alleged that a determination of the action would necessarily involve the question of title and possession of real property, that the defendant did locate plaintiff on vacant government land in San Benito county, and that no person had any valid claim thereto at the time. Judgment was entered in favor of the plaintiff for the sum of \$165, \$10 interest, and costs of suit. Thereupon the defendant appealed to the superior court on questions of law and fact, where judgment was again entered in favor of plaintiff, and from this judgment defendant has appealed to this court. Respondent has moved to dismiss the appeal on the ground that, as the justice's court had jurisdiction of the cause of action, the judgment of the superior court was final.

Our Code provides that "the parties to an action in a justice's court cannot give evidence upon any question which involves the title or possession of real property * * *; and if it appear from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title or possession to real property, * * * the justice must suspend all further proceedings in the action, and certify the pleadings * * * to the superior court of the county."¹ The constitution gives the superior court jurisdiction in "all cases at law which involve the title or possession of real property. The question is whether the issue as framed in the justice's

court involved the title or possession of real property." In *Holman v. Taylor*, 31 Cal. 338, the court said: "The idea intended to be embodied in the phrase, 'cases at law which involve the title or possession of real property' may be expressed by the paraphrase, 'cases at law in which the title or possession of real property is a material fact in the case, upon which the plaintiff relies for a recovery, or the defendant for a defense.'" In *Copertini v. Oppermann*, 76 Cal. 181, 18 Pac. 256, it was held that a vendee's right to recover a sum less than \$300 in the justice's court, caused by a defect in the title of the vendor, depended primarily upon whether the defendants had a defective or good title, which they had contracted to sell, and that the superior court had original jurisdiction to hear and determine the controversy, although the amount claimed was less than \$300. It is clear, we think, that the fact that the land was not vacant, that is to say, that it was in the possession of another, claiming the right to hold the same, "is a material fact in the case, upon which the plaintiff relies for a recovery." The court could not decide the issue without determining the question whether the land upon which the defendant attempted to locate the plaintiff was, in fact, in the possession of another. Although the nature of the evidence cannot be considered in determining the question of jurisdiction, it may not be improper to say, in illustration of the test given, that the evidence in the record shows clearly that the main question before the court below was whether or not the land was vacant, and, to show that it was not, the respondent himself introduced a decision of the register and receiver, showing that one Benvenza had made actual settlement on the land, and was a bona fide settler thereon at the time Hart attempted to make an entry. The evidence further tends to show that Benvenza was in the actual possession of the land. "The superior court had original jurisdiction of the subject-matter, and the fact that the case gained ingress to it by a way other than the front door in no manner affects its jurisdiction to hear and determine the cause." *City of Santa Barbara v. Eldred*, 95 Cal. 381, 30 Pac. 562.

Motion denied.

I concur: DE HAVEN, J.

HARRISON, J. I concur in denying the motion. The complaint alleges that the plaintiff paid to the defendant \$100 in consideration of its agreement to "locate" him on certain vacant government land in the county of San Benito, and that the defendant had wholly failed to carry out its agreement. In its answer the defendant alleges that it did so "locate" the plaintiff, and that the property on which the location was made was "open to location," and that no other person had any "valid claim thereto," and that, in

¹ Code Civ. Proc. § 838.

consequence thereof, the determination of the action involved the title and possession of real property. From these averments we cannot determine whether the title or possession of real property is necessarily involved. What significance must be given to the term "locate" must depend upon the sense in which it was used by the parties to the agreement, and whether the property upon which the defendant claims to have "located" the plaintiff, in purported performance of its agreement, was "open to location," or whether any person had a "valid claim" thereto, may present questions involving the title or possession of real property. Upon the present motion we are limited to the averments in the pleadings, and cannot look at the evidence introduced in support thereof. If, upon the hearing of the appeal on its merits, it shall appear that the case before the court below did not involve the title or possession of real estate, we can then dismiss the appeal; but, upon the matter as now presented, the motion should be denied.

DOUGALL v. SCHULENBERG et al. (No. 19,238.)

(Supreme Court of California. Jan. 28, 1894.)
APPEAL—MATTERS NOT APPARENT OF RECORD—
LIMITATION.

A finding by the trial court that plaintiff's cause of action is not barred by the statute of limitations will not be disturbed on appeal where the amended complaint alone appears in the record, and there is nothing to show when the original complaint was filed, or the action begun.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Duncan Dougall against A. R. Schulenberg and George Campbell on two promissory notes. From a judgment for plaintiff, defendant Schulenberg appeals. Affirmed.

M. S. Babcock, for appellant. Luce & McDonald, for respondent.

TEMPLE, C. This action is based upon two promissory notes dated upon the same day, and alike in every respect, except that one is made payable six months after date and the other twelve months after date. The following is a copy of one of them: "\$500. Windsor, Ont., March 5, 1884. Six months after date, for value received, we promise to pay to the order of Duncan Dougall, at the Canadian Bank of Commerce, here, the sum of five hundred dollars. George Campbell. A. R. Schulenberg." It is averred in the complaint that at the time of the execution of the note and at the time when it became due and payable both defendants were nonresidents of the state of California, and so continued until within a period of less than two years before the commence-

ment of the action. Only Schulenberg was served with summons. He answered, and, with other defenses, pleaded the statute of limitations, to wit, that the cause of action was barred by the first subdivision of section 339, Code Civ. Proc. The cause was tried by the court without a jury, and the fifth finding of fact is that the cause of action "was not at the commencement of this action, and is not now, barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure of the State of California, or by any other statute of said state." Judgment was thereupon entered for the plaintiff, and the defendant made a motion for a new trial upon the ground of the insufficiency of the evidence to justify the decision, and specified that the evidence was insufficient to justify the finding that the two promissory notes sued on were not barred at the time of the commencement of the action by the provisions of subdivision 1 of section 339, Code Civ. Proc. The court declined to award a new trial, and defendant appeals both from the order and from the judgment.

The motion for a new trial was made upon the minutes of the court, and the statement of the case was subsequently settled. The complaint had been amended, and the original complaint is not in the record, nor is there anything showing when the suit was commenced. The amended complaint was filed September 2, 1890. Aside from proof of demand and refusal of payment, the only evidence in the statement consists of the two notes and testimony of defendant Schulenberg, who testified for plaintiff. Witness said he first came to this state on the 13th or 14th day of May, 1887. That he came for the purpose of locating, and remained from four to six weeks, during which time he bought some property for his father. He then returned to Ontario, where he remained until January 15, 1888, when he again started for California, arriving in five or six days, and has remained ever since. Since the notes were, in express terms, payable in Ontario, and both of the payors were nonresidents of this state when the cause of action accrued, the statute only commenced to run in their favor when they came to this state, and if afterwards they left the state the time they were so absent would not be a part of the time within which the suit must be commenced. Code Civ. Proc. § 351. The defense of the statute of limitations must be specially pleaded, otherwise a complaint is good although it shows on its face that the cause of action is barred. If, therefore, it was necessary for the plaintiff to allege that his case was within some exception to the statute of limitations, because it was presumably barred, it was only necessary for him to do so to prevent a demurrer on that ground. It was still necessary for the defendant to plead the statute to raise any issue upon that subject. This he did as above stated. This plea is equivalent to saying

that plaintiff's action was not brought within two years after the cause of action accrued, or, perhaps, in this case, to the statement that the defendant had been in this state for more than two years after the cause of action accrued and before the action was commenced. In either case there is implied in the plea an averment of the time when the action was commenced. This might have been by demurrer, which would mean nothing except upon the supposition that the court knew without proof when the suit was commenced, for such fact would not appear by allegation. So, too, when it is pleaded in the answer, the time of the commencement of the action need not be proven.

Appellant claims that the objection was made on his motion for a new trial, in which he specified that finding 5 was not justified by the evidence, therefore the statement is presumed to contain everything upon that subject. This court has often said that in such case it will be presumed that the statement contains all the evidence upon that subject; but this was not a matter of evidence.

Again, to obtain a reversal the appellant must show error. Here, taking the record as it is, appellant has shown none. We cannot presume that the action was commenced when the amended complaint was filed. The presumption is conclusive that it was not. It was commenced some time before,—how long we have no means of determining. There is an entire absence of a fact, without which we can form no opinion upon the question presented. The appellant should have brought the original complaint here as a part of the judgment roll. It was so said in *Redington v. Cornwell*, 90 Cal. 49, 27 Pac. 40. See, also, *Abbott v. Douglass*, 28 Cal. 296. It is true it has often been said that a pleading which has been wholly superseded by an amended pleading is no longer a pleading in the case. For most purposes this is true. It can no longer be looked to for the issues to be tried, or for admissions, yet in some respects it may still be material. In this case, for instance, it was necessary to know when the action was commenced, and the position of the defendant might have been that the amended complaint stated a new cause of action, as to which the suit was commenced only when the complaint was amended. To determine such question, the original complaint must be examined. Courts take judicial notice of those facts the existence of which they must ascertain without evidence. If we may take notice of this fact in this case, we are still not informed, and the practice has prescribed a mode in which that information should be afforded. It was the duty of the appellant to furnish this information. He not only declines to do so, but claims that we cannot now be informed, and that, therefore, upon the record as it is, the case should be reversed. I think the

judgment and order should be affirmed, both on the ground that he has failed to furnish a proper record, and also on the ground that no error appears. If, however, we can assume that the suit was commenced when the respondent states it was, the result must be the same. Deducting the period during which the defendant was absent, he had not been in this state two years when the suit was commenced. Appellant contends that this time cannot be deducted, and relies upon *Palmer v. Shaw*, 16 Cal. 93. I find nothing in that case which tends to support the appellant. Defendant is within the very words of the statute. He was out of the state when the cause of action accrued, and after it accrued he departed from the state. Appellant says there was no allegation in the complaint of a departure from the state after the cause of action accrued, and therefore no proof on the subject was relevant. Admitting that this is a case where the plaintiff must aver and show that he is within an exception to the statute, it was but a variance. Substantially it is averred that the defendant had not been in the state two years when the action was commenced. If this is not sufficiently specific, still there was no objection to the evidence at the trial, and the defendant was not, and could not have been, injured. I think the order and judgment should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment appealed from are affirmed.

JAFFE v. LILIENTHAL (No. 15,353.)
(Supreme Court of California. Jan. 26, 1894.)

BILL OF EXCEPTIONS—DELAY IN FILING—REVIEW
—CONTINUANCE—ABSENCE OF PARTY.

1. Code Civ. Proc. § 650, provides that a bill of exceptions, when settled, must be signed and certified as allowed by the judge, and shall then be filed. *Held* that, the judge having, nearly a year after the settlement and allowance, by order reciting that good cause appeared therefor, allowed a filing nunc pro tunc, his action could not be reviewed, the circumstances not being shown.

2. Under Code Civ. Proc. § 594, authorizing a continuance "for good cause" in the absence of a party, it should be granted on an affidavit of plaintiff and his physician that he is confined by illness to his room in another state, and affidavits of plaintiff and his attorney that the plaintiff's presence is necessary, and that the attorney does not know the names of the witnesses or the details of the case.

Commissioners' decision. Department 2. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by Louis Jaffe against Sol. Lilienthal, administrator of Solomon Lowenberg. Judgment for defendant. Plaintiff appeals. Reversed.

I. I. Brown, for appellant. Lamberson & Middlecoff, for respondent.

HAYNES, C. On the 21st of December, 1891, this cause was set for trial for January 6, 1892. On that day plaintiff's attorney moved for a continuance upon affidavits of the plaintiff and his physician showing, in substance, that the plaintiff, who then, and for about a year prior thereto, resided in Seattle, Wash., was confined to his room by an attack of acute rheumatism, to which he was subject, and was wholly unable to move or leave his room, and, in the opinion of his physician, would not be able to leave his room in less than two months. The affidavit of plaintiff further stated that his presence at the trial was indispensably necessary; that he was the only person who knew the whereabouts of the witnesses necessary to be called on his behalf; that their names had not been communicated to his attorney, nor the matters to which they would testify. D. M. Delmas, Esq., attorney for plaintiff, also presented his own affidavit that plaintiff's presence was necessary; that he did not know the names of plaintiff's witnesses, nor the details of the case. No counter affidavits were presented. The continuance was denied, plaintiff's attorney left the court room, and a judgment was entered for non-appearance of the plaintiff, and plaintiff appeals.

Plaintiff's bill of exceptions was settled and allowed February 3, 1892, but was not then filed. On January 5, 1893, the court made an order reciting that, "good cause appearing therefor," said bill of exceptions should be filed nunc pro tunc as of February 3, 1892. Respondent contends that the bill of exceptions was not filed in time, and cites section 650, Code Civ. Proc., the last clause of which is as follows: "When settled, the bill must be signed by the judge or referee, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk." Whether the delay was "unreasonable," as claimed by respondent, was for the court to determine. The circumstances which the court held were sufficient to justify the order do not appear. In the absence of a bill of exceptions setting out the facts, this order cannot be reviewed. We think the court erred in not granting a continuance.

Respondent suggests that it does not appear that plaintiff was a witness, nor that his attorney used any diligence to prepare for the trial. It seldom happens that a trial can be properly had in the absence of the plaintiff, even where he is disqualified as a witness, especially where it is to be tried upon oral testimony. With all the care that can reasonably be taken by both attorney and client, some matter of vital importance is liable to be overlooked by them until the trial calls it to the recollection of the plaintiff, and this is especially true in relation to matters purely in rebuttal. It is the

right of parties to be present at the trial of their cases. This right may be waived, and should be held to be waived, where the absence of the party is voluntary, and under circumstances which ought not to induce a reasonable man having a due regard for the rights and interests of others and of the public, all of whom are interested in the due and prompt administration of justice, to absent himself. So far as the want of preparation on the part of the attorney is concerned, the most laborious and painstaking preparation on his part would not have prevented the sickness and absence of his client; nor does it appear that, if the plaintiff had not been sick, the necessary preparation could not have been made after the case was set for trial.

Respondent further contends that the affidavits do not show the materiality of the evidence expected to be obtained. The application for continuance was not made under section 595, Code Civ. Proc., but under section 594, which authorizes the court, "for good cause," to postpone the trial in the absence of a party. The consequences of a dismissal of an action because of the absence of a plaintiff should always be considered, especially where any reasonable excuse is shown for his absence, as where a plea of the statute of limitations could be interposed to a new action. In such case the dismissal is the absolute destruction of the plaintiff's right, and so serious a penalty should not be imposed unless the due administration of justice clearly requires it. The judgment appealed from should be reversed.

We concur: VANCLIEF, C.; SEARLS, C.

FITZGERALD and DE HAVEN, JJ. For the reasons given in the foregoing opinion, the judgment appealed from is reversed.

McFARLAND, J. I concur in the judgment.

JOHNSON v. JOHNSON. (No. 15,273.)
(Supreme Court of California. Jan. 26, 1894.)
DIVORCE—CRUELTY—AWARD OF COMMUNITY PROPERTY.

1. A complaint alleging extreme cruelty, in that "about three years ago" defendant, without cause, struck plaintiff, and since has continually, whenever they have been together, used vile language to her, is not demurrable as failing to specify the acts relied on.

2. Plaintiff's physician testified, *inter alia*, that her nose had been flattened by a blow that defendant admitted having struck her, but said he did not mean to, and seemed ashamed. Their son swore that he had heard his father call his mother insulting names as long as she lived with him. Since the assault, plaintiff had been generally sick in bed, and her husband's language seemed to make her worse. Held sufficient proof of "extreme cruelty," consisting of a blow and abusive language, to the injury of plaintiff's health.

3. Plaintiff being an invalid, and defendant more than able to make his living, it was proper for the court, while allowing no permanent

alimony, to give plaintiff, besides most of the household furniture, the whole community house and lot, which was worth only \$3,000, and was subject to a mortgage of \$2,500.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action for divorce by Ane Johnson against Nells Johnson. Decree for plaintiff. Defendant appeals. Affirmed.

Nagle & Nagle, for appellant. Nells Johnson and R. B. Wallace, for respondent.

VANCLIEF, C. Action for divorce on the ground of extreme cruelty, in which the plaintiff prevailed. Besides the divorce, the decree awarded to plaintiff the custody of an infant son of the parties and the greater portion of the community property, but no permanent alimony. Defendant appeals from the judgment, and from an order denying his motion for a new trial.

1. Defendant demurred to the complaint on the grounds that it is ambiguous, uncertain, and unintelligible, in that it does not appear therefrom "when or where defendant was guilty of the alleged extreme cruelty," nor "what was the nature, character, or extent of the alleged acts of extreme cruelty." The allegations of the complaint charging cruelty are as follows: "That during their marriage defendant has been guilty of extreme cruelty to plaintiff, in this: That about three years ago said defendant struck plaintiff without cause, thereby rendering her insensible, and since said time said defendant has wrongfully and unjustly, and without any provocation, continually used vile and offensive language to plaintiff whenever said plaintiff and defendant have been together, thereby inflicting upon said plaintiff grievous mental suffering, by reason of which mental suffering so inflicted by defendant, as aforesaid, plaintiff has been injured in health to such a degree that, by reason of the infliction of said mental suffering as aforesaid by defendant, said plaintiff has become sick, and her health has been greatly impaired. That further cohabitation between the plaintiff and defendant will endanger the physical health and the life of this plaintiff." This seems sufficiently definite as to the times, nature, and extent or degree of the cruelty; and, from the averment that it was commenced by a beating three years before the commencement of the action, and was thence continued by abusive language "whenever said plaintiff and defendant have been together," it must be understood that the places were wherever "said plaintiff and defendant had been together" during that period of three years, which places were presumably as well known to the defendant as to plaintiff. The demurrer does not specify, as a deficiency, that the abusive language is not set out. As against the objections specified in the demurrer, I think the complaint is barely sufficient.

2. The findings as to the fact of extreme

cruelty are in the language of the complaint, and therefore support the judgment in this respect; and it is not denied that they are sufficient in all other respects.

3. The evidence was sufficient to justify the findings. The plaintiff testified to all the acts of cruelty alleged, and was sufficiently corroborated by the testimony of her physician and her son. As to the beating, the physician testified, among other things, that by a forcible blow her nose was crushed down flat on her face, and that defendant admitted he struck her, but said he didn't intend to, and appeared to be ashamed of what he had done. As to his abusive language, the son testified: "I have heard my father call my mother hard names, such as 'whore,' 'bastard,' and 'son of a bitch.' My mother's testimony in this regard is true. He called her such names as long as she was home." It appeared without controversy that, during the greater portion of the time after the beating, the plaintiff was sick, and thereby confined to her bed; and the tendency of the evidence is to prove that defendant's abusive language aggravated her disease.

4. Appellant contends that his offenses were condoned by the plaintiff. But condonation was not pleaded by defendant, (Bishop, Mar. & Div. §§ 619, 645;) and, if it had been pleaded, there is no evidence tending to prove it, unless the mere fact that she continued to cohabit with him until the last of a long series of acts of cruelty had such tendency by implication. Conceding that, under some circumstances, cohabitation after having suffered acts of cruelty implies condonation, it must be remembered that "all condonation, especially the implied, is upon the condition both that the offense shall not be repeated, and likewise that continually afterwards the party forgiven shall treat the other with conjugal kindness; whereupon a breach of the condition revives the original right of divorce." 2 Bish. Mar. & Div. § 308; Civ. Code, § 117. And section 118 of the Civil Code further provides: "Where the cause of divorce consists of a course of offensive conduct, or arises in case of cruelty from successive acts of ill treatment which may aggregately constitute the offense, cohabitation, or passive endurance, or conjugal kindness, shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone." There is no evidence and no pretense of any express agreement to condone.

5. The house and lot awarded to plaintiff was community property, and subject to a mortgage of \$2,500 and seven months' interest thereon. In his answer, defendant alleged this property to be worth only \$3,000, and admitted the mortgage as above stated. The greater portion of the household furniture was also given to plaintiff. Appellant contends that the court erred in awarding the whole lot and house to plain-

tiff; but I think the allowance was proper and just. It appeared that plaintiff was in bad health, and that defendant was able to earn more than was necessary for his support. I think the order and judgment should be affirmed.

We concur: SEARLS, C; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

In re LUX'S ESTATE. (No. 15,146.)

(Supreme Court of California. Jan. 29, 1894.)

In bank. On rehearing. Denied.

For opinion on appeal, see 35 Pac. 341.

PER CURIAM. The order of May 13, 1892, directing the executors to pay to the widow an allowance of \$1,000 per month for her support during the period named therein, has been reversed, and there is nothing said in the opinion filed in this case which can be properly construed as a direction to the superior court in settling the accounts of the executors to only credit them on account of the payments made by them for the support of the widow with the amount named in the reversed order. In settling the accounts the court will credit the executors with such sum as it finds was reasonably and properly advanced by them for the purpose named. In declaring this general principle, the court in its opinion simply explained how the account should have been stated upon the findings appearing in the record of the case; but, as these findings fell with the order reversed, the court will necessarily make new findings, and upon them will state the account in accordance with the general rule announced in the opinion. If the court shall, upon the new hearing, find \$1,000 per month, or any greater or less amount, a reasonable sum to be applied for the support of the widow, then the executors should be credited with the amount so found to be reasonable and proper. Rehearing denied.

BROWN v. FRESNO RAISIN CO. (No. 18,206.)

(Supreme Court of California. Jan. 31, 1894.)

PARTNERSHIP—INDIVIDUAL LIABILITY OF PARTNER—COUNTERCLAIM.

Defendant may counterclaim for goods sold and delivered to a partnership on the individual credit of plaintiff, one of the partners.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by one Brown against the Fresno Raisin Company. From a judgment for defendant on a counterclaim, plaintiff appeals. Affirmed.

L. L. Cory, for appellant. Geo. E. Church, for respondent.

DE HAVEN, J. The defendant recovered a judgment for \$104.45, balance due upon a counterclaim, and the plaintiff appeals. The plaintiff was a member of the firm of Brown & May, and there was evidence from which the court was justified in finding that the raisins delivered by the defendant to that firm were sold and delivered upon the individual credit of the plaintiff, and, this being so, the finding of the court that such goods were sold and delivered by defendant to the plaintiff, and that the counterclaim of defendant was established, cannot be disturbed; for it is well settled that a partner may contract on his own account, and make himself alone liable for the property bought for the copartnership, if the vendor choose to accept such individual liability. 1 Lindl. Partn. (2d Amer. Ed.) pp. *179-192; *Sylvester v. Smith*, 9 Mass. 119. We discover no error in the rulings of the court in relation to the admission of evidence. Judgment and order affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

FIRST NAT. BANK OF CHICAGO v. CALIFORNIA NAT. BANK OF SAN DIEGO. (No. 19,261.)

(Supreme Court of California. Dec. 29, 1893.)

ASSUMPSIT—MONEY LENT—EVIDENCE.

1. G., plaintiff's vice president, being at the C. Hotel in defendant's town, was asked by the latter's president for a loan on collateral, \$25,000 to \$40,000, and agreed to make it on proper security. N., who was present, writing G. about a note which said president proposed to send, "to obtain this loan, as I understand it," gave his opinion about certain notes, defendant's stock, etc. A note for \$25,000 was made to G., vice president, by four of defendant's directors and its cashier. The president, in sending the collaterals, wrote G. that he believed they were, in substance, "about what was spoken of at the C. Hotel when Mr. N. was with us." On receipt of the collaterals, plaintiff credited defendant with \$25,000, less discount, and paid it on defendant's orders. *Held*, that a finding that plaintiff lent defendant \$25,000 was justified.

2. In an action by one bank against another on a note, and for money loaned, where defendant asserts that plaintiff bought the note, proof of the negotiations for the loan, and that defendant received its proceeds, is not incompetent as varying the written instrument.

3. In an action by one bank against another for money loaned, and on a note representing the balance due, the loan and balance being established, it is immaterial whether the note was authorized by the directors.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the First National Bank of Chicago against the California National Bank of San Diego on a promissory note, and for

money loaned. Judgment for plaintiff. Defendant appeals. Affirmed.

Luel & McDonald, for appellant. Tippet, Boone & Neale, for respondent.

SEARLS, O. This appeal is prosecuted from a final judgment in favor of plaintiff, and from an order denying motion for a new trial. There are three counts in the complaint, as follows: (1) Upon a promissory note for \$12,500, dated October 19, 1881, made by "California National Bank, per J. W. Collins, Pres.," upon which a payment of \$2,500 was admitted; (2) a cause of action upon an overdraft for \$9,862.95, which was admitted, except that defendant claimed that the \$2,500 credited in the first cause of action should be applied to the second; (3) a cause of action for the recovery of \$25,000, loaned by plaintiff to defendant May 18, 1891, with a credit thereon of \$15,000.

The findings are in favor of plaintiff, and are sufficient to support the judgment. By the second finding it appears that "the first and third counts of plaintiff's complaint relate to the same indebtedness." According to these findings, the plaintiff on the 18th day of May, 1891, loaned to the defendant \$25,000 at defendant's request; that defendant paid the interest thereon up to the 19th day of October, 1891, and \$12,500 on account of the principal, and that on said last-named date the defendant made its promissory note to the plaintiff for \$12,500, being for the balance due on account of said loan, payable thirty days after date, with interest at 7 per cent. per annum; that defendant received the consideration for said note; that the same is due and unpaid, except the sum of \$2,500, paid thereon December 22, 1891. The court further finds, as to the \$2,500, that it was not collected for the use of the defendant, as averred in the answer, but was collected by the plaintiff on a promissory note deposited with it by defendant as collateral security for the \$12,500 note of plaintiff, etc.

The contention of appellant is that the finding of the court that plaintiff loaned to the defendant \$25,000 on the 28th day of May, 1891, is not supported by the evidence. It is in proof that a promissory note for \$25,000, made by five individuals, payable to "L. J. Gage, Vice President," was sent to the plaintiff in Chicago; and the theory of appellant is that plaintiff discounted the note, and there is certainly some evidence in support of the theory. On the other hand, it appears that Gage, the vice president of the plaintiff bank, located in Chicago, was in San Diego; that the president of the defendant bank negotiated with him for a loan of \$25,000 to \$40,000, offering to put up, as collateral, notes, bank stock, etc.,—anything, in short, that plaintiff wished; and it was finally arranged that, with proper security, plaintiff would make the loan to defendant. H. F. Norcross, who was present at the negotia-

tions, was afterwards requested to write to Gage, vice president of plaintiff, and did on or about May 21, 1891, write in reference to some note which defendant's president proposed sending "to obtain this loan, as I understood it." In this letter he gave his opinion of certain notes, and the value of defendant's stock, etc. The \$25,000 note was made by four of the directors of defendant, and its cashier. In sending on the collaterals to Chicago, Collins, the president of defendant, wrote to Gage that he believed they were, "in substance, about what was spoken of at the Coronado Hotel [where the negotiations had occurred] when Mr. Norcross was with us." Upon the receipt of these collaterals, of which there seems to have been a considerable number, plaintiff placed the \$25,000, less interest, to the credit of defendant, and paid it out on its drafts and orders. This is not all of the evidence going to show a loan of the \$25,000 by plaintiff to defendant, but is sufficient to show a substantial conflict in the evidence, and to uphold the finding of the court in favor of such loan.

Defendant at the trial objected to the testimony in reference to negotiations on the part of plaintiff and defendant for a loan of money by the former to defendant, and that the latter received the funds, upon the ground that it was immaterial, irrelevant, and incompetent, and that it tended to vary and contradict the written instrument, to wit, the promissory note for \$25,000 already in evidence. We do not see that it did anything of the kind. The third cause of action was for money loaned by plaintiff to defendant. This evidence tended to support that cause of action; and the fact that defendant contended that it was not a loan by plaintiff, but a purchase of the promissory note in question, did not militate against the admissibility of the evidence.

On the 19th day of October, 1891, the defendant, having paid the interest on the loan and \$12,500 of the principal, made its promissory note for the remaining \$12,500, payable 30 days after date, with interest, etc. This note was signed as follows: "California National Bank of San Diego, per J. W. Collins, Pres." Appellant contends that this note is not shown to have been authorized by the board of directors of the defendant, and that the president of the defendant, not having been specially empowered so to do, could not bind the defendant by making this note. Respondents meet this contention: (1) By reference to the record, which shows that a meeting of the board of directors of defendant "held in February, 1891, a resolution was passed by the board of directors to authorize Mr. Collins, the president, to borrow \$100,000 from some eastern national bank." The record also shows that in January, 1891, J. W. Collins was elected president, and that section 19 of the by-laws of defendant requires "all contracts, checks, drafts, etc., shall be signed by the president, vice president

or cashier." (2) Authorization implied from course of conduct of business of defendant. (3) That defendant, having received and retained the consideration for which the note was given, with notice, is estopped from denying the validity of the note. We need not notice all of these propositions in detail. Under the first of them, which authorized the president to borrow from some eastern national bank \$100,000, we think it clear that authority was conferred to borrow a less sum from plaintiff, a national bank of Chicago. Ordinarily, the power of a bank to borrow money on time implies the power to give its negotiable note on time. Morse, Banking, § 63. We may waive all this, however, and the case stands thus: In May, 1891, defendant borrowed from plaintiff \$25,000. Of this sum it paid \$12,500, and in October following gave its promissory note for the balance due. The complaint contains two counts for this cause of action. In the third it seeks to recover the balance due on account of the loan. In the first count plaintiff seeks a recovery on account of the note. Being for the same subject-matter, it cannot recover upon both counts; but, if the note was unauthorized, it may still recover upon the count for money loaned. The very object of different causes of action upon the same transaction is to meet just such contingencies as the present; hence, the loan having been established, and plaintiff's right to a recovery therefor fixed, the question of the right of the president of the defendant to bind it by the execution of a promissory note in evidence of the indebtedness becomes of no moment in a case where, like the present, plaintiff has counted upon its claim in each form. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

BARKER et al. v. MASKELL et al. (No. 19,206.)

(Supreme Court of California. Jan. 3, 1894.)

CHATTEL MORTGAGES—FURNITURE IN LODGING HOUSE—FORECLOSURE.

Civil Code, § 2955, provides that mortgages may be made on furniture used in lodging or boarding houses, "when mortgaged to recover the purchase money of the articles mortgaged." *Held*, that a petition in an action by mortgagees to foreclose a mortgage on furniture used in a lodging house need not show that the mortgage was given to secure the purchase money of such furniture, since it is valid, as between the parties to it, though not given for such purpose.

Department 2. Appeal from superior court, Los Angeles, County; Walter Van Dyke, Judge.

v.35p.no.6—41

Action by O. J. Barker and others against John Maskell and E. A. Rhodes to foreclose a chattel mortgage. From a judgment for plaintiffs, defendant Maskell appeals. Affirmed.

The petition alleged that on the 5th day of November, 1890, defendants executed to plaintiffs a certain note, which is set out, and dated October 23, 1890. It also alleged that at the same time, to secure the payment of such note, defendant Maskell executed to plaintiffs a chattel mortgage dated October 23, 1890, which is also set out. The mortgage describes the property as furniture used in a certain lodging house belonging to the mortgagees. It contains a copy of such note, and recites that such note is given as the purchase price of the furniture "above described, and for no other consideration." The petition then alleged that, at the time of the execution of the mortgage, all the property described therein belonged to plaintiffs; that it was sold to be used in such lodging house, and the "mortgage was given to secure the purchase price thereof, to wit, the amount of said note, to the plaintiffs, and for no other consideration, and the said promissory note was given as an evidence of said indebtedness," etc.; and that the note was due and unpaid.

Hugh J. & Wm. Crawford, for appellant.
A. M. Stephens, for respondents.

DE HAVEN, J. The action is for the foreclosure of a mortgage upon certain furniture and upholstery used in a lodging house in the city of Los Angeles. The mortgage was executed to the plaintiffs by one of the defendants, for the purpose of securing a promissory note made by himself and the other defendant. We think it sufficiently appears from the complaint that the note was given for the purchase price of the property mortgaged; and therefore the mortgage is one to secure the purchase money of the articles mortgaged, and valid under section 2955 of the Civil Code.¹ But even if it should be conceded that the complaint is ambiguous, and fails to show that the mortgage was given for the purpose of securing the purchase price of the property therein described, still the mortgage is valid as between the parties to it, and the complaint states a good cause of action from either point of view. There was no error in overruling the demurrer. Judgment affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.

¹ Civ. Code, § 2955, provides as follows: "Mortgages may be made upon * * * upholstery and furniture used in hotels, lodging or boarding houses, when mortgaged to secure the purchase money of the articles mortgaged. * * *"

GRANGHERS' BANK OF CALIFORNIA v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (No. 15, 323.)

(Supreme Court of California. Jan. 26, 1894.)

SUPREME COURT—REHEARING—CASES OF ORIGINAL JURISDICTION.

The power to order a rehearing in bank, after a decision in one of the departments, conferred on the supreme court by the constitution, applies, not only to cases of appellate jurisdiction, but also to cases of original jurisdiction; and hence, in such cases, a motion for rehearing, and not for a new trial, is the proper practice.

On motion to set aside an order granting a rehearing. Denied.

For former report, see 33 Pac. 1095.

McFARLAND, J. This proceeding is on original petition in this court for a writ of prohibition. There was a decision here in favor of petitioner, August 19, 1893, but within 30 days thereafter, an order of this court was made, granting a rehearing. Petitioner now moves to set aside said order granting said rehearing upon the ground that the court had no power to make it, contending that a motion for a new trial was the proper remedy. The point was substantially determined against petitioner's contention in *Re Tyler*, 71 Cal. 374, 12 Pac. 289. It may be further said that the present constitution provides that the judgment of a department of this court shall be final in 30 days, unless before that time ordered into bank; and that there has been a rule of this court, ever since its origin, that a judgment of the court in bank shall be final in 30 days, unless before that time a rehearing shall have been granted. Neither the constitution nor the rule makes any distinction between cases of appellate jurisdiction and cases of original jurisdiction; and, indeed, most of the cases here which are in form original are, like the case at bar, in their nature appellate. Therefore, to apply to this court those parts of the Code of Civil Procedure about new trials, etc., which are evidently intended to regulate procedure in the superior courts, would be to overturn the constitutional provision above mentioned, as well as the ancient rule and uniform practice of the court. A motion for a new trial, with its attendant consequences and delays, would suspend a judgment rendered here beyond the time fixed by the constitution and the rule. Many of the provisions of the Code about procedure have reference to appeals, and were intended as means for the perfection of records in the superior courts upon which cases might be reviewed in the appellate court; but in an original proceeding here this court has its own record. The general powers of this court to grant rehearings is fully discussed and declared in the opinion delivered by Beatty, C. J., in the *Jessup Case*, 81 Cal. 459, 21 Pac. 976, and 22 Pac. 742, 1028. The mo-

tion to set aside the order granting a rehearing is denied.

We concur: **BEATTY, C. J.; DE HAVEN, J.; HARRISON, J.; PATERSON, J.**

OGDEN v. PACKARD. (No. 19,306.)

(Supreme Court of California. Jan. 31, 1894.)

FORECLOSURE OF MORTGAGE—ATTORNEY'S FEES—DISCRETION OF COURT.

On appeal from a judgment foreclosing a mortgage which provides for the allowance of reasonable attorney's fees on foreclosure, the allowance will not be disturbed if the appeal is brought up on the judgment roll alone, without exceptions, and there is nothing in the record to show that the court abused its discretion in making the allowance.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; **George E. Otis, Judge.**

Action by **Matthew B. Ogden** against **C. E. Packard**. From a judgment for plaintiff, defendant appeals. Affirmed.

W. J. McIntyre, for appellant. **Irvington & Adair**, for respondent.

VANCLIEF, C. Action to foreclose a mortgage which provided that, "in the event of the foreclosure of said mortgage, reasonable attorney's fees shall be taxed by the court, and included and paid in the bill of costs." It is alleged in the complaint that \$500 is a reasonable attorney's fee to be allowed under said provision of the mortgage. The answer simply "denies that \$500 is a reasonable attorney's fee," without stating whether such fee is unreasonably large or unreasonably small, or what sum would be a reasonable fee. The court found the amount due on the mortgage notes to be \$16,571.65, and fixed and allowed as plaintiff's attorney's fees the sum of \$500, and for the payment of these sums ordered a sale of the mortgaged property in the usual mode. Findings of fact were waived, but the amount due on the notes and the sum allowed for attorney's fees are recited in the decree. The defendant brings this appeal from the final decree, upon the judgment roll, and without any exceptions; and the only point made is that the court exceeded its discretionary power in fixing and allowing plaintiff's attorney's fees, and asks that the judgment be modified by deducting from the attorney's fees \$350. There is nothing in the record tending to show any abuse of the discretionary power of the court; and, indeed, for aught that appears, the appellant may have expressly acquiesced in the order fixing the attorney's fees. I think the judgment should be affirmed.

We concur: **BELCHER, C.; HAYNES, C.**

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

RUSS LUMBER & MILL CO. v. ROGGENKAMP et al. (No. 19,242.)

(Supreme Court of California. Jan. 30, 1894.)

MECHANICS' LIENS—NOTICE TO OWNER.

Under Code Civ. Proc. § 1184, requiring the owner of a building to retain sufficient funds to pay a claim for materials, furnished by a material man who has given notice of his claim to such owner, a material man who serves the required notice acquires a prior right to the fund in the hands of the owner, due the contractor, though the contractor subsequently abandons the contract.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by the Russ Lumber & Mill Company against William Roggenkamp, W. H. Pierce, J. Lee Burton, and the Union Bank of Redlands to enforce a mechanic's lien. From a judgment for plaintiff against defendant Roggenkamp, personally, said defendant appeals. Affirmed.

Goodcell & Leonard, for appellant. Curtis, Oster & Curtis, for respondent.

PER CURIAM. This action was brought to foreclose a mechanic's lien upon a dwelling house constructed for defendant Roggenkamp, and owned by him. All the defendants made default, except the defendant Roggenkamp; and he alone prosecutes this appeal upon the judgment roll. Defendant Roggenkamp entered into a written contract with the defendant Pierce for the construction by the latter of the building in question, for the price of \$2,750, and this contract was made and filed as required by law. The plaintiff furnished material to the contractor, Pierce, for which there is still due the plaintiff the sum of \$977.23. On June 28, 1891, the plaintiff served upon defendant Roggenkamp written notice that he had furnished material to the contractor to the amount of \$963.87. At that time there was due the contractor \$687.50, and to become due the further sum of \$2,062.50. On July 3, 1891, the contractor ceased work, and abandoned the contract. The work was continued by Roggenkamp, under the supervision of his architect, defendant J. Lee Burton, and the building completed on October 23, 1891. Plaintiff filed its claim of lien on December 18, 1891, which was 56 days after the completion of the building. The lien was disallowed, and judgment rendered against defendant Roggenkamp, personally, for the sum of \$687.50, with interest and costs. The sole question involved in the case was passed upon in *Bates v. Santa Barbara Co.*, 90 Cal. 543, 27 Pac. 438. A careful perusal of the brief of appellant fails to convince us either that this case can, in principle, be distinguished from that, or that the question here was not necessarily involved there. The judgment appealed from is affirmed, upon the authority of *Bates v. Santa Barbara Co.*, *supra*.

McDONALD v. SOUTHERN CALIFORNIA RY. CO. (No. 19,308.)

(Supreme Court of California. Jan. 31, 1894.)

PLEADING—VERIFIED DEFENSES—EVIDENCE—CONVEYANCE OF RIGHT OF WAY—CONSTRUCTION AND EFFORT.

1. Statements made in the special defenses in a verified pleading are not evidence against defendant on issues in other defenses contained in the same answer.

2. A conveyance to a railroad company of a right of way over the grantor's land, for its road, as already constructed and operated, to enable the company to use it as it was then using it, bars the grantor's right to damages for injury to his land, caused by the maintenance and operation of a defective bridge thereon, constructed before the execution of the conveyance.

Commissioners' decision. Department 2. Appeal from superior court; San Bernardino county, John L. Campbell, Judge.

Action by William McDonald against the Southern California Railway Company for damages to plaintiff's premises, caused by a defectively constructed bridge. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Elmer E. Rowell and W. J. Hunsaker, for appellant. A. Brunson, Paris & Allison, and Goodcell & Leonard, for respondent.

TEMPLE, C. This is an appeal by the defendant from the judgment, and order refusing a new trial. Practically, the complaint and the amendments thereto contain four counts. The first charges that defendant is a corporation, owning and operating a railroad in this state, and, for the use of its railroad, in December, 1889, erected a trestle bridge over Lytle creek in the county of San Bernardino, and, in constructing the same, failed to use due and ordinary care in providing for the passage of water, debris, and flood wood under the same in time of flood; that on the 23d day of December, 1889, during a heavy flood, owing to the said negligent construction of the bridge, debris, flood wood, sand, and gravel accumulated under the bridge, choking up the channel, and causing the water to overflow, and damage plaintiff's land, to his injury in the sum of \$4,000. The second count contains the same facts, with the addition that, defendant did not use proper care and diligence in removing wood, debris, etc., from the bridge, but negligently permitted its accumulation, thereby causing the water to run against and wash away plaintiff's land, to his damage, etc. The third count charges that defendant constructed across the creek a modern pile and stringer bridge, which was an unlawful construction, and caused accumulations, obstructing the flow of water; that its construction was due to negligence and want of ordinary care, etc. The last count charges that the spaces between the piles or trestles were not wide enough, or high enough, to permit the free passage

of water; that, as constructed, the bridge would inevitably cause an accumulation of drift, etc., choking up the stream, and that defendant, well knowing its defective nature, nevertheless carelessly continued its use, and failed and neglected to remedy the defects, whereby damage resulted. Each count, or statement of a cause of action, is specifically answered by the defendant, and to each cause of action several defenses were set up. The different answers, however, are very similar. First, there are specific denials of the material allegations of the complaint. The answer denies that defendant was a corporation prior to November 7, 1889, or that it owned or operated a railroad prior to that date, that it built the bridge in question, or that it was negligently constructed. The specific charges of negligence and damage are denied. As a separate defense, charges contributory negligence on the part of plaintiff. As another separate defense, that the injury was by accident, or caused by the elements, and was the act of God. As another separate defense, that on the 7th day of November, 1889, this defendant was formed by the consolidation of three named corporations, one of which was the California Central Railway Company, which last-named company built the bridge in question, and there was, therefore, a misjoinder of parties, in that the California Central is not made a party herein. Still another separate defense avers that, on the 17th of September, 1889, the plaintiff executed and delivered to the California Central Railway Company a deed, which is fully set out, and which purports to convey a right of way, over described land, "for the main track of said railroad, as the same is now located, constructed, and operated," and which contains the following language: "And I do hereby grant to said grantee the right to exercise the right to use the said street for railroad purposes, as it is now doing for its main track, and I do hereby acknowledge full and entire satisfaction or payment of any and all damages sustained by me, by reason of the construction of said railroad upon said street, and by reason of the operation thereof, and, particularly, do I acknowledge payment for damages for any injury caused by the construction of said railroad in front of my property hereinbefore described." It is then averred that, at the date of the deed, the California Central Railway Company owned and operated a line of railroad, which was constructed upon and over said bridge, which was then, and at all times, necessary to the said company in the use of its railroad; that the bridge is constructed upon the property and right of way so conveyed. The consolidation of the three corporations is again set out, to show that defendant has succeeded to the rights of the California Central Railway Company, and it is claimed that the deed is a bar to plaintiff's right to recover.

On the trial, and at the commencement thereof, it was stipulated in open court as follows: "For all purposes of this trial, it is admitted and conceded by both plaintiff and defendant: First. That the bridge and road mentioned in plaintiff's complaint were built and constructed in the year 1886 by the California Central Railway Company, and not by this defendant, and that, at the commencement of this action, and the commencement of action No. 4,033, this defendant was using said bridge and road, and operating its road thereon, and over such bridge, as grantee and successor of said California Central Railway Company. It is admitted that, at the time of the commencement of this action, and that at the time of the commencement of action No. 4,033, plaintiff in this case was the owner of the property, described as belonging to him in the complaints in both actions herein, and that this present defendant had no corporate existence until on or about the 7th day of November, 1889."

One of the findings of fact reads as follows: "The defendant did not construct the bridge mentioned in the complaint. Said bridge was constructed, prior to November 7, 1889, by the California Central Railway Company, a corporation; and after the construction of said bridge, to wit, on November 7, 1889, the defendant was formed by the consolidation of three certain railway corporations, to wit, said California Central Railway Company, the California Southern Railway Company, and the Redondo Beach Railway Company, and, upon such consolidation being effected, the defendant, on November 7, 1889, became the owner of said bridge and of said railroad crossing, and the same commenced the operation of said railroad, and thereafter continuously, until the commencement of this action, the defendant was the owner of said bridge, and in the possession, use, and operation thereof."

The difference between this finding and the admission is obvious. The admission is to the effect that the defendant is the grantee of the California Central Railway, while the finding is to the effect that the defendant is a consolidated company, of which the California Central Railway is a constituent. Under one hypothesis, defendant could only be held responsible for knowingly using a structure which was a nuisance, while on the other it is liable for negligence in its construction. Defendant, in its motion for a new trial, based partly upon the ground of the insufficiency of the evidence, objects to this finding, and charges that there was no evidence whatever tending to show the consolidation, and the fact is against the express admission. Respondent does not claim that there was evidence to support the finding, but contends that appellant cannot complain, for it is so expressly averred in defendant's verified answer. So it is, many times over, but only in so many separate and dis-

distinct defenses. To each cause of action, however, there is a defense which consists of denials only, and which contains no such allegation.

Are the statements made in the special defenses in a verified pleading evidence against the party upon issues tendered in other defenses contained in the same answer? Respondent claims that it was so held in *Bell v. Brown*, 22 Cal. 678. In that case, in a somewhat elaborate opinion, the court held that a defendant may set up as many defenses as he has, and cannot be deprived of any because they are inconsistent. The learned justice, however, says: "There is this difference, however, between verified and unverified pleadings, that, if the truth of the fact is directly averred in any part of the former, whether in a complaint or answer, and then in any other part of the same pleading, whether in the statement of several causes of action in the complaint, or in separate defenses in the answer, the same fact is directly contradicted or denied, the person verifying it is guilty of perjury, for both cannot be true; and the averment which bears most strongly against the party so pleading will be taken as true upon the trial." In the opinion it is shown that one may verify certain inconsistent defenses, and yet not commit perjury. For instance, one may deny the execution of a note sued upon, and yet, in another defense, plead payment, or the statute of limitations. In legal theory, the second defense would admit the execution of the note, and the third admits its execution, and that it has not been paid. Yet one may claim that it is forged, and yet that he has paid it; and, also, in case that he falls in his proofs as to either point, that it is barred. But could not the defendant, in such a case, also plead as a defense that the note was procured by fraud? Of course, this involves a statement that he did, in fact, execute the note. If this statement may be used as conclusively settling the issue raised by the denial, then the defendant is practically, not allowed to interpose all the defenses he has. The matter is again discussed in *Buhne v. Corbett*, 43 Cal. 264. There it is said there is no distinction between verified and unverified pleadings, in this respect. *Billings v. Drew*, 52 Cal. 565, presents the question as suggested in the foregoing illustration, and holds that the statement in one defense cannot be used as evidence upon another issue, because to so hold would deprive the defendant of the benefit of his denials. This I understand to be the universal rule. *Pom. Code Rem.* § 724; *Botto v. Vandament*, 67 Cal. 333, 7 Pac. 753.

Respondent contends that, if this finding in regard to the consolidation of the corporations be stricken out, still the findings left are sufficient to support the judgment. One count in the complaint, as we have seen, is based upon the proposition that the defend-

ant continued to maintain the bridge, knowing that it was a dangerous nuisance. Upon this issue the court finds: "From November 7, 1889, until the time of the commencement of this action, the defendant, well knowing all the facts hereinbefore found, willfully and negligently kept, used, and maintained said bridge, so constructed, and willfully and negligently failed to take any means or precautions to remedy the obstruction of said bridge, or to provide for the free or safe passage of the flood water thereunder, when charged with brush, trees, or other debris, or to protect the plaintiff's said land from injury thereby." This finding is also attacked in the motion for a new trial, but I think this court would not be justified in saying it is unsupported by the evidence. There was much testimony to the effect that the bridge was an improper one for use at that place. Of course, defendant was constantly using it, and it was its duty to have it constantly inspected, and kept in repair. The character of the stream was quite obvious, and, although the defendant was but a few months old, its managers were not without experience. All the evidence tending to show the nature of the structure, and of the stream, may be said to have a bearing upon the question of defendant's knowledge of the defects in the structure, and its inadequacy for emergencies which were likely to arise. We are, therefore, driven to consider the defense based upon the deed given by plaintiff to the California Central Railway Company, the grantor of defendant. The execution of the deed is admitted, and it is averred and found that "said bridge and all approaches thereto are located within the right of way in said deed described, and constitute part of the premises thereby granted to the California Central Railway Company." Respondent attempts to avoid this point by claiming that there is no evidence to sustain this finding, and it is declared in the statement that it contains all the evidence given at the trial. But this finding is not attacked, and cannot be, by the respondent, in this way. It is, no doubt, an embarrassing position to be placed in, when there is a favorable judgment, based upon findings which may be held to show that the judgment ought to have been the other way. The only safety for a party in that position is to attack the erroneous finding himself, unless the consequence of the defect could only be to necessitate a new trial.

Upon the main question, appellant cites us to three cases, which apparently fully sustain its proposition: *McCarty v. Railway Co.*, 31 Minn. 278, 17 N. W. 616. The defendant entered upon plaintiff's land, and built an embankment, upon which it constructed its road. Thereafter it compromised with the owner, and took a deed conveying the land used as a right of way. Held, that the deed licensed the maintenance of the road and embankment as already constructed, and

that defendant was not liable because it continued to maintain the embankment with insufficient culverts, thereby obstructing the natural flow of water from plaintiff's meadow. *Radke v. Railway Co.*, 41 Minn. 350, 43 N. W. 6, is, in all respects, like the last. Referring to the other case, it is said: "The decision must be deemed to rest upon the ground that, from the sale and unqualified conveyance to the railroad company of the premises upon which its road and embankment had already been permanently constructed, and where it was to be expected to remain, it was to be presumed that the grantor consented to the continued existence of such permanent improvements, for the enjoyment and use of which the purchase and conveyance of the land was obviously made. * * * It cannot affect the case that he may not then have apprehended the full extent of the injury which could result from this in the future." To the same effect is *Hoffeditz v. Mining Co.*, 129 Pa. St. 264, 18 Atl. 125. This decision was affirmed in *Uddegrove v. Railroad Co.*, 132 Pa. St. 541, 19 Atl. 283; and in *McMinn v. Railroad Co.*, 147 Pa. St. 5, 23 Atl. 325. The principle of these cases seems to be that one, having conveyed the land with the structure, for the purpose of enabling the purchaser to continue to use it as it was then using it, cannot deprive the purchaser of the benefit by claiming that it constitutes a private nuisance. Respondent has cited us to no case which holds a contrary doctrine. I feel constrained, therefore, to sustain this position of the appellant. Respondent, in his brief, claims that the finding is not only entirely unsupported by the evidence, but is untrue. The plaintiff did not claim to own the land across the river, or attempt to convey it, but only up to the river on one side of it. Since the appellant is here asking for a new trial, I think a new trial should be awarded, even if the findings would justify a judgment for the defendant. I therefore recommend that the judgment and order be reversed, and a new trial granted.

We concur: BELCHER, C.; HAYNES, C.

PER OURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

MCDONALD v. SOUTHERN CALIFORNIA RY. CO. (No. 19,309.)

(Supreme Court of California. Jan. 31, 1894.)

Department 2. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by William McDonald against the Southern California Railway Company for damages to plaintiff's premises, caused by a defectively constructed bridge. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Elmer E. Rowell and W. J. Hunsaker, for appellant. A. Brunson, Paris & Allison, and Goodcell & Leonard, for respondent.

PER CURIAM. This case is, in all essential respects, like the case with the same title, (No. 19,308,) 35 Pac. 643, and on the authority of that case the judgment and order are reversed, and a new trial ordered.

WATKINS v. WILHOIT et al. (No. 18,167.)¹
(Supreme Court of California. Jan. 26, 1894.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—RECORD—LIMITATION.

1. Under Civ. Code, § 3465, which declares an assignment for the benefit of creditors "void" as against nonassenting creditors, unless recorded as required by sections 3463, 3464, no preliminary suit is necessary by a nonassenting creditor to set aside an unrecorded assignment before he can maintain a creditors' bill to apply the assignor's property in the assignee's hands on a judgment against the assignor.

2. The fact that an unrecorded assignment may be valid as between the parties does not render it merely voidable as against nonassenting creditors, since Civ. Code, § 3465, expressly declares it "void" as against them.

3. The right to bring a creditors' bill to set aside an assignment for the benefit of creditors as in fraud of plaintiff's rights accrues when the execution on plaintiff's judgment against the assignor is returned unsatisfied, and not when the assignment was made.

4. Civ. Code, § 1170, which provides that an instrument is deemed to be recorded when deposited in the recorder's office for record, must be read in connection with section 1213, which requires the instrument to be "recorded as prescribed by law" before subsequent purchasers are charged with constructive notice of its contents; and hence no notice is imparted until the instrument is actually placed on record in the proper book, and then it relates back to the date of deposit for record.

5. The negligence of the recorder in recording a conveyance in the wrong book cannot affect third persons, but the injury must fall on the parties to the conveyance, since they are the "parties aggrieved," within the meaning of the county government act, (section 133,) making the recorder liable to the parties aggrieved in three times the amount of damages occasioned by his negligence.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action in the nature of a creditors' bill by C. G. Watkins against R. E. Wilhoit, B. F. Langford, and M. E. Bryant. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

John B. Hall, for appellant. F. T. Baldwin, P. S. Wilkes, and J. C. Campbell, for respondents.

VANCLIEF, C. This action is of the nature of a creditors' bill in equity to subject property in the hands or under the control of the defendants Wilhoit and Langford to the payment of a judgment at law against defendant Bryant in favor of the plaintiff. A demurrer to the complaint having been sustained, and plaintiff having declined to amend his complaint, judgment passed for

¹ Rehearing granted.

defendants. The plaintiff has appealed from the judgment upon the judgment roll containing a bill of exceptions showing that the demurrer was sustained on the grounds "that the complaint does not state facts sufficient to constitute a cause of action, and that the action is barred by the statute of limitations."

The complaint shows that on June 2, 1890, the plaintiff recovered a judgment against Bryant for the sum of \$2,342.60 on a promissory note made by the latter to the former on January 17, 1885, and that no part of the judgment has been paid. That before, and on February 16, 1886, said Bryant was indebted to others besides the plaintiff, and was then, and ever since has been, insolvent, though he was then the owner of considerable real and personal property in the county of San Joaquin, where he resided. That on said 16th day of February, 1886, he executed to defendants Wilhoit and Langford and one Charles Bamert a deed purporting to convey to them all his real and personal property, except such as was exempt from execution, in trust for the benefit of all his creditors, without preference to any, except as provided by law, "to sell and dispose of said real estate and personal property, and to collect the said book accounts and choses in action, using a reasonable discretion as to the times and modes of selling and disposing of said estate as it respects making sales for cash or on credit, at public auction or by private contract or sale, with the right to compound for the said book accounts and choses in action, taking a part for the whole where and when the trustees deem and decree it expedient so to do." Then, after applying the proceeds to the payment of his debts according to law, to pay the surplus, if any, to him, Bryant. This instrument, with an inventory of the property thereby assigned attached thereto and made a part thereof, and the written acceptance of the trust by Wilhoit and Bamert, are fully set out in the complaint. It is next alleged that said instrument has never been recorded in the office of county recorder of said county in any book of records therein of grants, deeds, or transfers of real estate, or in any book kept in said office for the recordation of conveyances or mortgages of either real or personal property, or otherwise or elsewhere recorded in said office, save and except that the instrument was, on the 16th day of February, 1886, transcribed into a book kept in said office, labeled "Book G, Miscellaneous." That within 30 days after the date of said instrument, pursuant to an order of a judge of the superior court, Wilhoit, Langford, and Bamert executed a bond, with sureties, for the faithful discharge of the trust, as required by section 3467 of the Civil Code, and thereupon took possession of all the property described in said instrument, claiming title thereto as assignees. "That said plaintiff at no time, either before or at the time of or since the

execution of said instrument, assented to the execution thereof, or to any matter or thing therein contained, and has never assented to any act of said Wilhoit, Langford, and Bamert, or any or either of them, done or claimed to be done in the execution of the trust in said instrument mentioned." That at different times between February 16, 1886, and the commencement of this suit, said Wilhoit, Langford, and Bamert have sold and disposed of all said property, real and personal, and have received from the sales of said lands \$4,000, from the sale of said personal property, \$4,000, and from rents, issues, and profits of said real property a sum not less than \$10,000; and that the said Wilhoit and Langford "now have in their hands or under their control the full sum of eighteen thousand dollars,—proceeds of the property of said Bryant, so as aforesaid coming into their hands, to which they assert no right or claim other than a right or claim under said pretended assignment of February, 1886;" said Bamert having died in January, 1891. That on January 29, 1892, plaintiff caused to be issued and placed in the hands of the sheriff an execution on his said judgment against Bryant upon which on March 29, 1892, the sheriff indorsed his return that he had "levied upon all moneys, goods, credits, effects, debts due or owing or any personal property of any kind belonging to M. E. Bryant, the judgment debtor named in the annexed writ, and in the custody or under the control of R. E. Wilhoit and B. F. Langford, or either of them;" and proceeds to state the acts constituting a garnishment as required by law, to which Wilhoit and Langford orally answered that they did not owe Bryant anything, but declined to make any written answer; and further returned that he had "made diligent search and inquiry, and had not been able to find any property of any kind in San Joaquin county belonging to M. E. Bryant out of which he could make the sums due on the annexed execution," and the same is returned unsatisfied. It is next alleged that Wilhoit, Langford, and Bamert have not, nor has either of them, accounted for or paid to any creditor of Bryant said funds in their hands, and have refused to deliver the same, or any part thereof, to the sheriff for the satisfaction of said execution, and claim that they rightfully hold the same for the uses and purposes of said pretended assignment. It is further alleged that said pretended assignment is, and ever has been, null and void as against the plaintiff, and that plaintiff has a lien on said money in the hands of Wilhoit and Langford for the payment of his said judgment. The prayer of the complaint is that it be adjudged that the instrument of February 16, 1886, is null and void as against the plaintiff; that plaintiff has acquired a valid lien upon the funds in the hands of Wilhoit and Langford for the payment of his judgment against Bryant; that they pay said

judgment, with interest and costs, from said funds; and that plaintiff have such other and further relief as the court may deem equitable.

The foregoing is the substance of the complaint so far as pertinent to the issues of law raised by the demurrer. It should be observed that the assignment was made under title 3, pt. 2, of division 4 of the Civil Code, before the amendment thereof in March, 1889. The grounds of the demurrer are: (1) That the complaint does not state a cause of action; (2) that the action appears to be barred by section 338, and also by section 343, of the Code of Civil Procedure; and (3) that the complaint is uncertain, and also ambiguous in certain specified particulars. The theory of the complaint is that, as between the defendants and the plaintiff, the assignment of Bryant to the other defendants is void, and that plaintiff is entitled to pursue the \$18,000 in their hands or under their control for the satisfaction of his judgment, as though that assignment had not been attempted. If, upon the facts alleged, this position can be sustained, I think the complaint states a cause of action not barred by the statute of limitations, with sufficient certainty, and without ambiguity.

1. It is claimed by appellant that the assignment is void for the reason that it was not recorded. Section 3458 of the Civil Code provides that an assignment for the benefit of creditors "must be in writing * * * and recorded as required by sections 3463 and 3464." Section 3459 provides: "Unless the provisions of the last section (3458) are complied with, an assignment for the benefit of creditors is void against every creditor of the assignor not assenting thereto." Sections 3463 and 3464 provide that the assignment "must be recorded" and the inventory "filed with the recorder," etc., in the county or counties as therein stated. Section 3465 provides: "An assignment for the benefit of creditors is void against creditors of the assignor, and against purchasers and incumbrancers in good faith and for value, unless it is recorded * * * pursuant to section 3463 within twenty days after the date of the assignment." Section 3466 requires that "where the assignment embraces real property, it is subject to the provisions of article 4 of the chapter on recording transfers as well as to those of this title." Article 4 of the chapter on recording transfers (sections 1213 and 1215) shows that assignments for benefit of creditors embracing real property must be recorded as conveyances of real property. Section 3473 enacts that "an assignment for the benefit of creditors, which has been executed and recorded so as to transfer the property to the assignee, cannot afterwards be canceled or modified by the parties thereto without the consent of every creditor affected thereby." In view of these provisions, I think the assignment was void as to plaintiff, who was a creditor at the

time of the assignment, and did not assent thereto; and therefore that it interposes no obstacle to the relief sought by this action, which is to have Bryant's property, in the hands of Willhoit and Langford, applied to the satisfaction of plaintiff's judgment against Bryant. The assignment being void "against the creditors of the assignor who did not assent thereto, and against purchasers and incumbrancers in good faith and for value," (section 3465,) no preliminary suit by the plaintiff against the parties to it, to set it aside, was necessary. As against the parties to the assignment, at least, nothing more than plaintiff's election to disregard it was necessary.

Yet it is contended by counsel for respondents that the assignment has so far operated upon and affected the plaintiff as to prevent him from pursuing Bryant's property in the hands or under the control of Willhoit and Langford, otherwise than by suit in equity to set it aside, on the ground that it is merely voidable, and that he is not at liberty to disregard it as being void as against him, although the statute declares it to be so; that the word "void" is often used in the sense of "voidable merely," and must have been used in that sense in the sections of the Civil Code above quoted, for the reason that an assignment for the benefit of creditors is valid as between the parties to it, though not recorded. The theory which seems to have led counsel for respondents to this conclusion is that an instrument or contract cannot, at the same time, be valid as between the parties to it and void as against third persons whose rights it purports or was intended to affect; and that it must have the intended effect upon such third persons, until they avoid it by procuring a decree of a court of equity setting the instrument aside so far as it affects them. Yet upon this theory the instrument would still be valid as between the parties to it, after having been nullified as to third persons, and would have its intended effect upon the parties, and also upon the subject-matter not taken to satisfy the decree in favor of third persons; and therefore would at the same time be valid between the parties, and void as to third persons whom it was intended to affect. It follows that the theory propounded is not sound, and that a contract may, at the same time, be binding upon one or all of the parties to it, and wholly void as to others whom it was intended to bind or affect; and surely the legislature has the power to make it so. While it is true that the word "void" has been inappropriately used by lawyers and judges, it nevertheless has a determinate meaning in law when applied, as an adjective, to contracts, statutes, and other acts intended to effect some purpose or purposes; which meaning is that such contracts, statutes, or acts are totally ineffectual for the purposes, or for a part of the purposes, intended. If totally ineffectual for any pur-

pose intended, they are simply void. If totally ineffectual as to only a part of such purposes, they are only relatively void. This distinction is not identical with that between void and voidable, since a voidable act or contract takes effect as intended, and continues to be effectual to all intents and purposes until it is set aside or nullified as to all or some part of the persons or things which were before affected by it. For example: The contracts of infants and contracts procured by fraud, if not otherwise against law or the policy of law, are not void, but only voidable, because they take effect when made, and remain effectual until avoided; whereas void acts, though in the form of contracts or statutes, never take any effect as such; and acts which are only relatively void are denied any effect, even temporary, against a part or class of the persons or things that they purport or were intended to bind or affect. As bearing directly and indirectly upon these distinctions, see Whart. Cont. § 28, and notes; and *Pearson v. Chapin*, 44 Pa. St. 13. Therefore, when the legislature has declared an act or instrument void, or relatively void, it must be understood to have used the word "void" in its primary and ordinary sense as above defined, unless it be made apparent by the context, or by some other statute in *pari materia*, that it was used in a different sense. But, as applied to assignments for the benefit of creditors in the Civil Code, I perceive nothing in the context, and find nothing in either of the Codes, indicating that the word was used by the legislature in any other than its ordinary sense.

But conceding, for the sake of argument merely, that the assignment in question is only voidable, and that the object of this action is to set it aside, as contended by respondents' counsel, still the action is not barred by either of the sections of the statute pleaded, unless the cause of action accrued more than three years before the commencement of the action. It is properly conceded that the action is a creditors' bill in equity to enforce the application of Bryant's property in the hands of and claimed by Wilhoit and Langford to the satisfaction of plaintiff's judgment against Bryant. That such an action is allowable in this state, notwithstanding the provisions of the Code of Civil Procedure for proceedings supplementary to execution, there never has been any question since the decision in the case of *Swift v. Arents*, 4 Cal. 390. And see *Swinford v. Rogers*, 23 Cal. 234; *Reed v. Goldstein*, 53 Cal. 296; *Harmon v. Page*, 62 Cal. 448. But it is essential to the cause of such an action that the plaintiff should have exhausted his remedy at law, otherwise a court of equity has no jurisdiction of the creditor's bill, (3 Pom. Eq. Jur. § 1415;) and the fact that an execution has been returned *nulla bona* is conclusive that the legal remedy has been exhausted, (*Baines v. Babcock*, 95 Cal.

591, 27 Pac. 674, and 80 Pac. 776; *Taylor v. Bowker*, 111 U. S. 110, 4 Sup. Ct. 397.) In the last-cited case the court, by Mr. Justice Harlan, said: "We are of opinion that the complainant's cause of action should not be deemed to have accrued until the return of the execution." Page 117, 111 U. S., and page 400, 4 Sup. Ct. Plaintiff obtained judgment against Bryant June 2, 1890, on which execution was issued January 29, 1892, and returned *nulla bona* March 29, 1892. This action was commenced May 7, 1892, less than two months after the return of the execution, and less than two years after the rendition of the judgment. Since the judgment was a necessary condition precedent to the creditor's bill, it follows that the action was not barred by any statute of limitation.

It is further claimed by respondents that the depositing of the assignment with the recorder on the day of its date was a recordation thereof as required by law, though it has never been transcribed in any book of records in which the law requires deeds, grants, or transfers of real estate to be recorded, and only in a book in which miscellaneous instruments are recorded in supposed accordance with the twelfth subdivision of section 124 of the county government act, which book, however, is not expressly authorized, and for it no index is required to be kept. In support of this point, section 1170 of the Civil Code is cited, and solely relied upon, which reads as follows: "An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office with the proper officer for record." Literally interpreted, without regard to other provisions of the Codes in *pari materia*, and without considering the various objects of recording different instruments, or the differing legal consequences of failing to record, this section would seem to make the depositing of any instrument with the recorder equivalent in effect to the actual recording of it in the appropriate book, though it should never be so recorded; and without such an interpretation it will not answer the purpose for which it is cited by respondent. Yet no case has been cited, and I have been able to find none, in which it has been held that the transcribing of an instrument in a different book from that in which the law requires it to be recorded effects the object of the law, or answers any lawful purpose; but there are many cases to the contrary. In the first place, it is to be observed that section 1170 does not state the effect of recording, nor of a failure to record, any kind of an instrument; such effect generally being declared in each distinct provision of the statute requiring a specific class of instruments to be recorded; but the effect is not uniform in all the classes. For instance, sections 1213 and 1214, Civ. Code, declare the effect of recording, and also of a failure to record, conveyances of real property, but the effect of a

failure to record such conveyances is not commensurate with that of a failure to record an assignment of real property for the benefit of creditors; since the latter, without being recorded, is void, not only against subsequent purchasers and mortgagees without notice and for value, but also against non-consenting creditors of the assignor, without regard to actual notice. Section 1213 declares that the effect of recording a conveyance of real property is as follows: "Every conveyance of real property, acknowledged or proved, and certified and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees." By this section no effect is given to the mere filing of the deed for record until it is actually "recorded as prescribed by law," when the actual record is made to relate back to the date of filing with the recorder; and, since section 1213 is the only provision declaring the effect of recording a conveyance of real property, it cannot be said to be inconsistent with section 1170, which says nothing about the effect, but should be read as an addition to and qualification of section 1170; and a fair construction of the two sections, thus read, is that a conveyance is deemed to have been recorded when filed for record only by relation from the time when it was actually recorded. A statute of Missouri provided that every instrument "certified and recorded in the manner prescribed shall, from the time of filing the same with the recorder, impart notice," etc., and it was held under this statute that no notice was imparted until the instrument was actually placed on record, and then it related back to the date of filing for record; and that the statute must be so understood. *Terrell v. Andrew Co.*, 44 Mo. 309. Mr. Webb, commenting on this case, says: "The greater weight of reason, if not of authority, seems to be in favor of this view of the law." Webb, *Record Titles*, §§ 16-18, and cases there cited. In *Sawyer v. Adams*, 8 Vt. 175, it was said: "There is but little doubt that 'recording' means the copying of the instrument to be recorded into the public records of the town, in a book kept for that purpose, by or under the superintendence of the officer appointed therefor. This recording may and does take effect from the time the deed or instrument is delivered to the officer, if it is in due time placed upon the records. The delivery of the deed to the town clerk, or his minute on the same that he has received the same for record, is not recording; but the record, if completed, is considered as taking effect from that time." In that case the deed was recorded in an improper book, and the court further said: "The act of the town clerk was as wholly inoperative as if he had written this deed on a slate, or copied it into his family record." See, also, 2 Pom. Eq. Jur. §§ 653, 654; *Flanagan v. Wetherill*, 5 Whart. 280; *Reigart's Ap-*

peal, 4 Pa. St. 477; *Watson v. Bagaley*, 12 Pa. St. 184; *Wallace v. Wainwright*, 87 Pa. St. 264; *Rennie v. Bean*, 24 Hun, 123; *Dewey v. Littlejohn*, 2 Ired. Eq. 495.

The precise point under consideration as to the effect of depositing an instrument for record seems not to have been directly decided in this state; but in *Lawton v. Gordon*, 87 Cal. 202, it was expressly assumed that the withdrawal of a deed from the recorder's office after filing suspends the effect of recording (constructive notice) during the time it is withdrawn, although it is afterwards returned and copied into the appropriate book without being refiled. Section 180 of the county government act requires the recorder to indorse upon an instrument the date of its reception, to record the same without delay in the order in which it was received, "and must note at the foot of the record the exact time of its reception." In *Donald v. Beals*, 57 Cal. 399, the facts were that a mortgage to plaintiff was deposited for record on April 15th, and properly indorsed as received for record on that day, but when he recorded it the recorder noted at the foot of the record that it was received for record on April 18th. Held, that the latter date, though inconsistent with the filing, and proved to be erroneous, must prevail over the true date indorsed on the mortgage. This decision, though indubitably correct, is inconsistent with the literal interpretation of section 1170, Civ. Code, contended for by respondents, since it shows that an instrument cannot be deemed to be recorded when deposited with the recorder until it is properly recorded "as prescribed by law." In other words, sections 1170 and 1213, Civ. Code, must be read and construed together. So, in *Chamberlain v. Bell*, 7 Cal. 293, a prior defective record of a prior deed was held to have imparted no notice to a subsequent purchaser. The defect in the record was the omission of the numbers by which the lots conveyed were described by mistake of the recorder. In the opinion the court cite as authorities, *Frost v. Beekman*, 1 Johns. Ch. 288, and *Sanger v. Craigie*, 10 Vt. 555. In *Meherin v. Oaks*, 67 Cal. 57, 7 Pac. 47, cited by respondents, the instrument defectively recorded was a personal mortgage, of which it was said the defendant had actual notice, and the decision cannot properly be supported on any other ground than such actual notice; but, since actual notice to a nonconsenting creditor of an assignment for the benefit of creditors is immaterial, that case is not in point.

It is suggested that the defendants should not suffer for the negligence of the recorder without their fault. The recorder is "liable to the party aggrieved for three times the amount of the damages which may be occasioned thereby," (County Government Act, § 133,) and the question is, which is the aggrieved party, whose sole remedy is by action against the recorder? Upon this ques-

tion the cases are divided, but I think the weight of authority, including California cases, is opposed to the view of respondents, (Webb, Record Titles, § 18, and notes,) though Mr. Devlin, in his work on Deeds, (sections 683-696,) expresses a contrary opinion. Whether the party who deposits a deed for record is the aggrieved party whose remedy is against the recorder in case it is not properly recorded depends upon a solution of the question above considered and answered. If the mere deposit of his deed with the recorder by the grantee or assignee is to be deemed a recording, and to have the full legal effect of a record, though not afterwards actually recorded as required by law, then such grantee or assignee is not aggrieved by the negligence or fraud of the recorder; otherwise he is. As against subsequent purchasers and mortgagees, and as to nonconsenting creditors in cases of assignment for benefit of creditors, it is the duty of the grantee, not only to deposit his deed with the recorder, but to see that it is actually recorded in the proper book, as prescribed by law; and, if not so recorded, it has no effect whatever upon creditors of the assignor, nor upon subsequent purchasers or mortgagees in good faith. (Civ. Code, § 3465;) and, therefore, the non-consenting creditors are not aggrieved by the failure to record. As against them, an unrecorded grant or assignment for the benefit of creditors is void, and raises no equities even though they had actual notice of it. *Dewey v. Littlejohn*, 2 Ired. Eq. 495. And this is admitted by Mr. Devlin, as I understand him, to be a legitimate deduction from the authorities which hold that constructive notice of an instrument does not date from its deposit for record, unless afterwards duly recorded. Sections 683, 684. I think the judgment should be reversed, and the court below directed to overrule the demurrer.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the lower court is directed to overrule the demurrer.

DUFFY v. WILHOIT. (No. 18,170.)¹ LITTLEHAL v. SAME. (No. 18,168.)¹ TULLY v. SAME. (No. 18,169.)¹

(Supreme Court of California. Jan. 26, 1894.)

Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Three separate actions in the nature of creditors' bills by Duffy, Littlehal, and Tully against R. E. Wilhoit, B. F. Langford, and M. E. Bryant. From judgments sustaining demurrers to the complaint, plaintiffs appeal. Reversed.

John B. Hall, for appellants. F. T. Baldwin, P. S. Wilkes, and J. C. Campbell, for respondents.

¹ Rehearing granted.

PER CURIAM. Upon the authority of *Watkins v. Wilhoit*, (No. 18,167; this day decided,) 35 Pac. 646, the judgments herein are reversed, and the court below is directed to overrule the demurrers.

SAN DIEGO WATER CO. v. PACIFIC COAST STEAMSHIP CO. et al. (No. 19,200.)

(Supreme Court of California. Jan. 31, 1894.)

PRELIMINARY INJUNCTION—ACTION ON BOND—RECOVERY OF ATTORNEY'S FEES.

Where defendant recovered final judgment in an injunction suit, and thus dissolved a preliminary injunction which plaintiff had obtained by giving bond, defendant could not recover his attorney's fees in an action on the bond, since they were incurred in the suit, and not in an attempt to dissolve the preliminary injunction.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by the San Diego Water Company against the Pacific Coast Steamship Company, principal, and A. R. Schulenberg and C. T. Chadwick, sureties, on a preliminary injunction bond. From a judgment for defendants, plaintiff appeals. Affirmed.

Works & Works, for appellant. Luce & McDonald, for respondents.

TEMPLE, C. This is an action upon an undertaking alleged to have been given in consideration of an injunction, in an action by the steamship company against the plaintiff, and upon which the individual defendants were sureties. It is denied that any injunction was ever issued in the suit alluded to, and the finding of the court sustains the denial. It appears, however, in the statement that an action was brought to obtain an injunction, and that, before the complaint was filed, the plaintiff obtained an order to show cause why an injunction pendente lite should not be issued. This order contained no restraining clause, but did require the plaintiff to give a bond to the defendant in the sum of \$500. In pursuance of this order, the undertaking sued on was given, and recites that the plaintiff is about to commence an action, and to apply for an injunction, "as in the complaint filed in the said action is more particularly set forth and described." The order was made November 10th, and the undertaking approved on the same day. The next day another order to show cause was made, returnable at the same time that the first order was made returnable. This order contained a clause restraining the defendant "pending this order to show cause, and until the further order of this court." There was no appearance by either party at the time the order to show cause was returnable, nor was the motion for an injunction continued or kept alive in any mode. The restraining order, therefore, which is only authorized to be made pending the motion, fell

with the motion. Code Civ. Proc. § 530; *Hicks v. Michael*, 15 Cal. 107. In the last case Judge Field says that an order dissolving such a restraining order is not necessary. It ends naturally with the motion. To that effect, also, is the reasoning in *Webber v. Wilcox*, 45 Cal. 302, and *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327, although this precise question was not involved in these cases. If the phrase, "and until the further order of this court," could have the effect to prolong the restraining order beyond the pendency of the motion for an injunction, then it would convert the order into a preliminary injunction, which could not be operative until a bond was given. But this order required no bond, and, by making the order to show cause, the court adjudged that a preliminary injunction should not be made until the defendant had been heard. The restraining order is a restraint, of the same nature as an injunction, but the statute not only does not designate it as an injunction, but discriminates between it and an injunction. It is a restraint, pending the conclusion of the court as to whether the party is entitled to a preliminary injunction. The statute does not expressly require an undertaking as a condition for a restraining order, although this court has said one ought to be required. Such undertaking is expressly required as a condition for a preliminary injunction, which does not become operative until the bond is given. But, in this case, there is no specific denial of the allegation in the complaint that the undertaking was given to secure the issuance of the injunction. It may be doubted, therefore, whether the questions above suggested can be raised. I proceed, therefore, to the main question discussed by counsel, which is whether, conceding that a preliminary injunction was issued, and the undertaking sued on was given in consideration of the injunction, plaintiff can recover his attorney's fees. It is admitted that no effort was ever made to dissolve the injunction, except that the case was tried on its merits, and the court, having found against the right of the plaintiff in the injunction suit, dissolved the preliminary injunction. Counsel were simply employed to try the case, and were paid for that service, and for no other. The cost was no greater than it would have been had no preliminary injunction been issued.

Appellant's counsel concedes that, ordinarily, such damages cannot be recovered under such circumstances, but he contends that the rule is different where, as here, injunction is the only relief sought in the action, and where it appears that the same questions would arise on a motion to dissolve which are determined by the final judgment. He cites many very respectable authorities, which seem to sustain his contention, and it is, furthermore, indorsed by High, in his work on Injunctions, § 1686. High seems to think the weight of the authorities is to

the effect that, if the counsel fees were necessarily incurred in procuring the removal of the illegal restraint, they may be recovered, although the dissolution of the injunction was by the final judgment. In *Buford v. Packet Co.*, 3 Mo. App. 159, it is said: "The principle upon which counsel fees are allowed, upon dissolution of an injunction, does not rest upon a supposed increase of the trial expenses, created by the injunction. It is based upon the fact that defendant has been compelled to employ aid in getting rid of an unjust restriction, forced upon him by the act of the plaintiff." If the sureties could be held responsible, without reference to the terms of their contract, for a conspiracy to aid the plaintiff in the imposition of an illegal restraint upon the defendant, there would be some show of reason in such a rule, but, if the sureties are to be held only on their contract, the admission that the expenditures were not caused by the injunction is fatal to the argument. The sureties did not agree to pay the expense of getting rid of the restraint. Ordinarily, such expense would be caused by the injunction; but it is not always so, and is not when a preliminary injunction is ended by a final judgment for defendant. Here the expenditure was caused by the suit, and not by the injunction. The sureties are liable for expenditures caused by the injunction, and not for those caused by the suit. This whole matter was elaborately discussed in *Thurston v. Haskell*, 81 Me. 303, 17 Atl. 73, which was a case in all respects like the present. It was there held that counsel fees could not be recovered in such a case. But it is not true that, in any sense, the counsel fees were expended to get rid of the restraint imposed by the preliminary injunction. The fee was, of course, paid to prevent the permanent injunction. But, in such case, the defendant has not been relieved of the restraint imposed by the preliminary injunction. It was a restraint, in terms, during the pendency of the suit only. It continued unchanged during the whole of that period. Its purpose was to hold the defendant until the rights of the plaintiff could be determined. It did so, and then ceased by original limitation. The attorneys were not employed to get rid of it, and never attempted to do so. The defendant acquiesced, and submitted to all the restraint it assumed to impose. It is true we sometimes speak of making the preliminary injunction perpetual. But while the injunction, by the judgment, may be the same in scope and effect, it is a restraint imposed by a new and distinct command. It is a new injunction, which may be, and often is, different in its effect and terms. This was determined in *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327. But I think the question was practically decided by this court in *Mitchell v. Hawley*, 79 Cal. 301, 21 Pac. 833. Counsel distinguishes that case from the one in hand, on the ground that there injunction

was not the sole relief sought. If the foregoing reasoning be correct, that is not a circumstance of any importance. But that case was upon a bond, given in an action brought to enjoin the defendant from violating an alleged patent right, claimed by the plaintiff, and to recover damage for infringing the right. The issue was as to the validity of the claim. Upon that depended the right to the injunction, and to the damage. Nothing else was tried. The claim having been adjudged invalid, the bill was dismissed, and the injunction fell with the claim. The issue would have been the same on a motion to dissolve. This court refused to allow counsel fees, and remarked that the allowance of counsel fees on injunction bonds is exceptional, "and should not be carried beyond the point to which former decisions have taken it." Former decisions have carried the doctrine to the extent that reasonable counsel fees, paid for the sole purpose of procuring a dissolution of an injunction, may be recovered. Unless this rule is to be extended, the contention of appellant on this point cannot be sustained. If this petition be correct, it is not necessary to consider other points raised. I recommend that the judgment and order be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

NUTT v. SOUTHERN PAC. RY. CO.

(Supreme Court of Oregon. Jan. 29, 1894.)

MASTER AND SERVANT—DUTIES OF MASTER—SAFE AND SUITABLE APPLIANCES—EXPERT TESTIMONY—INJURY TO SERVANT—MISLEADING INSTRUCTIONS.

1. A master, in furnishing a servant with tools and appliances, is liable only for any such defects in them as might be guarded against by the exercise of reasonable care.

2. In an action by a section hand against a railroad company for personal injuries, an instruction that the jury, in assessing damages, might consider, *inter alia*, plaintiff's "condition and station in life," was misleading, as it might mean either his physical condition and occupation, or his social and pecuniary position.

3. It is sufficient if an employer furnishes his employes with reasonably safe and suitable appliances, and he need not furnish appliances of a particular kind.

4. Expert testimony was not necessary to explain the work of lowering heavy tiles from a car by rolling them down skids with a rope, which was placed around the tiles, and then wrapped around, and gradually "snubbed" from a post on the car; since such work required no special skill or knowledge.

Appeal from circuit court, Josephine county; H. K. Hanna, Judge.

Action by Alonzo Nutt against the Southern Pacific Railway Company for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed.

E. C. Bronaugh and W. D. Fenton, for appellant. R. G. Smith, for respondent.

LORD, C. J. This is an action brought by the plaintiff against the defendant to recover damages for personal injuries alleged to have been sustained by him through the negligence of the defendant while unloading some heavy tiling from a flat car. The trial resulted in a verdict for the plaintiff, and from the judgment which followed, this appeal is prosecuted. The complaint charges, *inter alia*, that "the defendant negligently failed to provide the plaintiff with suitable tools or appliances for carrying on such labor," etc., and that, by reason thereof, he was seriously injured. The evidence tends to show that, at the time the plaintiff was injured, he was engaged as a section hand in unloading some heavy pieces of tiling, weighing from 1,500 to 1,800 pounds each, from a flat car; that the agent of the defendant unloaded such tiling by means of a small rope, skids, and other appliances; that a tile was let off the car upon the skids by a rope fastened under the car, brought up and around the tiling, and back to a stake at the side of the car, around which it was passed, and "snubbed off" in lowering the tile to the ground; that the plaintiff was engaged in the work of snubbing off such rope; and that, while so engaged, the stake gave way, and struck him with great force, inflicting the injury complained of. Upon this state of facts, the court charged the jury generally that "it is the master's duty to furnish safe and suitable appliances for his employes, for their safety and protection," etc., and, in applying the law as thus stated, proceeded to say, in substance, that if the jury found that the plaintiff was employed by the defendant as a section laborer, and, at the time specified, was engaged in assisting to unload a car of heavy tiling, and if they found such tiles "were ponderous and heavy objects, incapable of being handled without the aid of tools and appliances, then, in that case, you are instructed that it was the duty of the defendant to furnish said laborers with suitable and safe appliances and tools to perform said labor, and that it could not delegate that duty to any person, whether a vice principal or common servant, so as to exonerate the defendant from liability from any defect in the tools or appliances furnished, or for any failure to furnish safe tools and appliances for use in said work." It thus appears that the trial court regarded and treated the duty of the defendant to furnish its employes with safe and suitable tools for the work at which they were engaged as absolute, and that it could not escape liability for any defect in them, whereby an injury resulted, although the company may have exercised due care and prudence in providing tools and appliances reasonably safe for use in such work. The defendant is not a guarantor that the tools, implements, or

use of its employees are absolutely safe, or free from all defects. Neither individuals nor corporations are bound to insure the absolute safety of the instrumentalities which they furnish their employees for use in their employment. Their duty is discharged when they exercise reasonable care and diligence in providing their employees with reasonably safe tools and appliances with which to work. While such duty is positive, it does not go to the extent of guarantying the safety of such implements, but its proper discharge requires the observance of such care as will not expose the employees to hazards and dangers which might be guarded against by proper diligence. As the employer assumes the duty of exercising due care and diligence to provide the employees with reasonably safe tools and machinery for use in his employment, so the employee, when the employer discharges such duty, assumes the risks and hazards incident to his service in the use of such tools and machinery. The general principles of the law in regard to the employer's liability for an injury to an employee, growing out of defective tools and appliances, or the selection of incompetent servants, etc., are well settled in this court. In *Kincaid v. Railway Co.*, 22 Or. 35, 29 Pac. 3, the court said: "The defendant is not an insurer that its cars and appliances are in a safe condition. The measure of its duty is to exercise reasonable care in this regard, and, prima facie, it is presumed to have done so." So in *Knahtla v. Railway Co.*, 21 Or. 144, 27 Pac. 91, Bean, J., said: "It is the duty of the master to exercise reasonable care to provide safe and proper appliances for the use of a servant; * * * and, for a violation of such duty, he is liable in damages for the injury." *Anderson v. Bennett*, 16 Or. 515, 19 Pac. 765; *Hartvig v. Lumber Co.*, 19 Or. 522, 25 Pac. 358; *Miller v. Railroad Co.*, 20 Or. 285, 26 Pac. 70; *Willis v. Navigation Co.*, 11 Or. 262, 4 Pac. 121. Within the purview of these decisions, it was the duty of the defendant to use reasonable care and prudence for the safety of its workmen, engaged in unloading the heavy tiling from the flat car, by providing reasonably safe and suitable appliances and machinery for use in such work; hence the defendant was not bound absolutely to furnish the plaintiff with safe and suitable machinery and appliances, nor liable for any defect in them, except such as might be guarded against by the exercise of reasonable care and diligence.

The defendant also objects to an instruction in which the court charged the jury that it was for them "to determine from the evidence the amount of damages that plaintiff is entitled to, if any; and, in assessing the same, you should take into consideration the nature and extent of his injuries, the results following therefrom, his physical pain and anguish caused thereby, his

ing capacity." The objection is that the jury are not allowed, in actions of this character, to take into consideration the plaintiff's "condition and station in life" in estimating the damages. By these words, it is claimed that the jury were authorized to consider, in assessing damages, the wealth or poverty, the rank or station in life, of the plaintiff. It is contended for the plaintiff, in view of the pleadings and the facts, that the plaintiff was employed as a laborer by the defendant, and sustained the injury of which he complains in its service; that the word "condition" necessarily refers to his physical condition, as the word "life" does not follow it, and, likewise, that the word "station" relates to his occupation, and not to his social or pecuniary position. As it is conceded that the words referred to in the instruction are calculated to mislead the jury if they are susceptible of the construction claimed by the defendant, and inasmuch as the case must be remanded for a new trial, these objectionable features may be avoided when the trial court comes to instruct the jury upon the matter of estimating the damages.

The last objection relates to the testimony of certain witnesses, who seem to have been called as experts, for the purpose of showing that the manner of lowering the tiles from the car with a "snub" rope was not as safe as if a block and tackle had been used. The question to one of these witnesses was: "Is it generally customary, or has it been your experience, to use a block and tackle to unload heavy material from the railroad cars?" The object of this question was to ascertain from the witness whether, in his opinion, a block and tackle might not have been a better appliance with which to unload the tiling than such as were provided for that purpose. An employer is not required to provide machinery or appliances of any particular kind or description in the conduct of his business, provided the machinery and appliances which he furnishes for the use of his employees are reasonably safe and suitable for the purpose. In such case the inquiry is, not whether better appliances might have been furnished, but whether the defendant is chargeable with negligence in furnishing the machinery and appliances which were used. "The question," said Mr. Woods, "is not whether the master might have provided better machinery, but whether the machinery employed was suitable and proper for the business; that is, whether it was a suitable instrumentality for the business." *Wood, Mast. & Serv.* 332-334.

Nor do we think the work of lowering the tiles to the ground by rolling them down skids, with a rope placed around them, and then wrapped around a post or stake, run through the stake pocket, and gradually snubbed off, involved any work of special

versary is incapable of being detailed and described so as to give the jury an intelligible understanding concerning them; but when the facts are such as can be detailed or described, and the jury are able to understand and draw a correct conclusion from them without such opinion evidence, the necessity for it does not exist. We do not think the work of lowering these tiles involved special skill or knowledge, beyond the range of ordinary observation and experience, or that the manner of doing such work, with the appliances in question, when sufficiently described to the jury, could not be made intelligible to them. We think such work belongs to the ordinary affairs of life, which men, in general, are capable of understanding and comprehending, and that, in such case, the jury are capable of forming an intelligent judgment without the aid of the opinion of others. As a consequence of these considerations, the judgment must be reversed, and the cause remanded for a new trial.

STATE v. MOREY.

(Supreme Court of Oregon. Jan. 29, 1894.)

MURDER—PREMEDITATION—INSTRUCTIONS.

On a trial for murder, where the evidence shows that defendant was in possession of his usual faculties, and that his mind was in its normal state, not influenced by passion, nor disturbed by any sudden or uncontrollable emotion, during the time he was going from the sidewalk into the room of the deceased, where the shooting at once occurred, it is not error to instruct that such time was sufficient to give opportunity for deliberation and premeditation, leaving to the jury the question whether there was deliberation and premeditation.

Appeal from circuit court, Multnomah county; M. G. Munly, Judge.

George Morey was convicted of murder in the first degree, and appeals. Affirmed.

Henry E. McGinn, for appellant. Geo. E. Chamberlain, Atty. Gen., and John H. Hall, Dep. Dist. Atty., for the State.

BEAN, J. The defendant was convicted in the circuit court of Multnomah county of the crime of murder in the first degree in killing one Gus Barry, on the morning of the 15th of January, 1893, by shooting him with a pistol. The proof shows that, previous to the homicide, the deceased, with his wife and Miss Wright, his sister-in-law, lived in a building in the city of Portland fronting upon and abutting Clay street, containing three rooms, the one in front being occupied by the deceased and wife as a bedroom, immediately in the rear of which was the sitting room, connecting with this room by double doors. In the rear of the sitting room was another room, occupied by Miss Wright as a bedroom. The prisoner, who seems to have been a

at the house nights, because the deceased was drinking, and it was feared he might assault and beat his wife, as he sometimes did when under the influence of liquor. On the night of the homicide, the prisoner went to the house about 12:30 or 1 o'clock in the morning, passing in from the street through an alleyway to the rear door, where he was admitted by Miss Wright, of whom he inquired if deceased was in, and, being answered in the negative, said, "I will see for myself." He then walked through the hall, and across the sitting room, to the door of the bedroom of deceased and wife, who were both in bed, opened the door, and immediately thereafter the shooting occurred. It is disclosed from the defendant's own testimony that, up to the time he entered the room of the deceased, nothing had occurred to arouse his passion or disturb his mind in any way. There is some slight variance between the evidence for the state and the defense as to what occurred after the prisoner entered the room, but it is of no consequence on this appeal. The court instructed the jury fully upon the various aspects of the case, and, in so doing, defined particularly and with care the deliberation and premeditation necessary to constitute murder in the first degree.

A short time after the cause was submitted, the jury returned into court, and, through their foreman, asked the following question: "Would the time which elapsed while the defendant was going from the sidewalk into the room where the shooting took place be sufficient to give opportunity for deliberation and premeditation?"—to which the court answered: "It would." This is the principal assignment of error relied upon for the reversal of the judgment. The contention for the defendant is that, while no particular time is necessary for deliberation and premeditation, it was an invasion by the court of the province of the jury to tell them, as a matter of law, under the facts of this particular case, that any fixed time would suffice for deliberation and premeditation on the part of the defendant. The argument is that, as a conclusion of fact, the time occupied by the defendant in passing from the sidewalk to the room of the deceased may have afforded him sufficient time for deliberation and premeditation, although but a few moments elapsed; yet it cannot be so assumed as a matter of law, because its determination was peculiarly within the province of the jury, under the evidence. The crime of murder in the first degree is defined by the statute to be the killing of a human being "purposely and of deliberate and premeditated malice." To constitute this crime, it is essential that the deliberate and premeditated design to kill must precede the killing by some appreciable length of time, sufficient for reflection and consideration upon the mat-

ter, and the formation of a definite purpose to kill; and it matters not how short the time is, if it is sufficient for that purpose. The rapidity of mental action is such that the formation of a design may not occupy more than a moment of time, and it is sufficient if it is formed and matured while the mind is in its normal state, and under the control of the slayer, however brief the space of time may be. In this case it affirmatively appears from all the evidence, both of the state and that of the prisoner himself, that, during the time he was going from the sidewalk into the room of the deceased, he was in possession of his usual faculties, and his mind was in its normal state, not influenced by passion nor disturbed by any sudden and uncontrollable emotions; and, under such circumstances, we think it was not error to declare, as a matter of law, that the time occupied in so doing gave him opportunity for deliberation and premeditation, and this is all the court declares in its answer to the question propounded by the jury. The question did not call for, nor did the court by its answer intimate, any opinion as to whether there was deliberation and premeditation, but only that the time which elapsed after the defendant left the sidewalk was sufficient to give him, as a sane man, in a calm and deliberate state of mind, (as the evidence shows him to have been,) an opportunity sufficient for that purpose, leaving the question as to whether there was deliberation and premeditation for the jury to determine under the law as previously given them. Each of the other assignments of error have been carefully examined, but, finding no error in the record, we have no alternative but to affirm the judgment.

COLEMAN v. OREGONIAN R. CO.

(Supreme Court of Oregon. Jan. 29, 1894.)

LIEN OF RAILROAD SUBCONTRACTOR — PRIORITIES.

Under Laws 1889, p. 75, which confers on a subcontractor performing work for a contractor of any railroad company a lien on the road to the amount of the contract price, on serving notice of his lien on the company, such lien attaches only for the amount actually due the contractor from the company at the time the notice is served; and hence a judgment creditor of the contractor, who has garnished the company for the amount due the contractor, is entitled to priority over a subcontractor who afterwards files his notice of lien with the company.

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Action by R. R. Coleman against the Oregonian Railroad Company to enforce a subcontractor's lien. From a judgment for plaintiff, defendant appeals. Reversed.

L. L. McArthur and Cake & Cake, for appellant. W. T. Muir, for respondent.

BEAN, J. This is a suit against a railroad company to foreclose a subcontractor's lien

under the act of February 25, 1889, (Laws 1889, p. 75.) From the pleadings and evidence it appears that in August, 1890, the defendant corporation contracted with one Burch to furnish 3,000 cords of wood, to be delivered in certain quantities, at stated intervals, alongside of its railroad track, for which it agreed to pay \$2.40 a cord, on the 20th day of each month, for the wood delivered during the preceding month. In October, 1890, Burch sublet to plaintiff a contract for cutting the wood at a stipulated price per cord, to be paid as payments were made to him by the company. On January 20, 1891, there was due the plaintiff, on his contract with Burch, the sum of \$1,130 for wood cut and delivered during the preceding month, and for which the company was indebted to Burch in the sum of \$1,488.25. In order to secure a lien upon the property of the company for the money due him, the plaintiff, on January 22, 1891, served a notice in writing, as required by section 2 of the act of 1889, on the manager of the defendant corporation, at its principal office in the city of Portland. Prior to the service of this notice, however, the money due Burch from the corporation had been garnished under an execution issued on a judgment in favor of one Dawson, recovered in an action brought by him against R. Burch, whom we think the evidence clearly shows to be the same person to whom the company was indebted, and the money had been paid over to the sheriff on the execution.

Upon these facts the important question for decision relates to the priority of lien between a judgment creditor of a contractor with a railroad company, who has duly garnished or levied upon the amount due his debtor from the company, and a subcontractor who, subsequent to the service of the garnishee process, gave the notice of lien required by the act under consideration. Section 1 of the law which governs the rights of the plaintiff in this case provides that any person who shall, as subcontractor, material man, or laborer, furnish to any contractor of a railroad corporation any fuel, ties, materials, supplies, or other article or thing, or who shall do or perform any work or labor for such contractor, in conformity with the terms of any contract which such contractor may have with a railroad corporation, shall have a lien upon all the property, real, personal, and mixed, of said railroad corporation: "provided, such subcontractor, material man or laborer shall have complied with the provisions of this act, but the aggregate of all liens hereby authorized shall not in any case exceed the price agreed upon in the original contract to be paid by such corporation to the original contractor. Nor shall such corporation be liable for any greater sum than the amount then actually due by such corporation to said original contractor; and provided further, that no such lien shall take priority over existing liens." Section 2 pro-

vides, in substance, that the person performing such labor shall cause a notice in writing of his intention to claim such lien to be served upon the officer of the corporation upon whom service of summons may be made, at the principal office of the company. This statute, in effect, provides that every subcontractor, material man, or laborer performing work or furnishing material for any contractor of a railroad company may, upon compliance with its terms, acquire a lien upon the property of the company to the extent of the amount due from it to the original contractor at the time the prescribed notice is given. It differs in many important particulars from the ordinary mechanic's or laborer's lien law. No provision is made for the recording or filing the notice of lien in any public office, nor is there any other means provided whereby the purchaser or mortgagee of a railroad may acquire knowledge of such notice. It does not undertake to give a direct or absolute lien upon the property which has been enhanced in value by the labor or material of the lienor, nor upon the fund due the contractor from the company, but only confers upon a subcontractor, laborer, or material man, the right to intercept, and cause to be paid to him, the amount due his contractor, by giving the prescribed notice, and, if not so paid, to enforce the same as a lien against the entire property of the company; and this, without any record being made, or notice given, of his lien, other than a notice to the railway company. It is merely a means provided by which a subcontractor, laborer, or material man who furnishes labor or material to a railroad company through a contractor may be substituted for him as a creditor of the company to the extent of its indebtedness to such contractor at the time the notice is given, with the additional right, not given the contractor, to enforce the same as a lien against the entire property of the company if not paid. The lien can only be acquired in the manner provided by law,—that is, by giving the prescribed notice,—and, when thus acquired, only attaches for the amount then actually due the contractor from the company. Prior to the notice, the subcontractor, laborer, or material man has no lien, but is in the position of a general creditor, with no preferential right to be paid for his labor or material out of the fund due the contractor from the company. He may acquire a lien by giving the prescribed notice, but, until he does so, no lien can attach in his favor; and, the debt due the contractor being subject to garnishment at the suit of his other creditors, the right of the attaching or execution creditor is not overreached by the notice subsequently given. The notice creates and originates the lien, and the statute provides that the corporation shall not be liable for any greater sum than the amount due the contractor at the time the notice is given and the lien attaches. If, therefore,

before such notice, some general creditor, pursuing the remedies given by law, has acquired a right by garnishment, under an attachment or execution, to have the entire debt applied in satisfaction of his claim, there is nothing "then" due the contractor for which the lien can attach. The subcontractor, laborer, or material man acquires a specific lien when he gives the prescribed notice; but up to that time he is nothing more than a general creditor, without any superior equities over other creditors, and, when he does acquire a specific lien, it is subject to the rights of other persons acquired in good faith. We understand the rule to be, from the authorities, that under a statute like this, which gives a lien upon the giving or filing of the prescribed notice, the lienor takes his lien subject to the rights of other persons, and that whatever rights such persons may assert in or to the fund, as against the contractor or owner, whether arising from contract or operation of law, may be asserted against a subcontractor, laborer, or material man who might have acquired a lien by giving the notice, but has omitted to do so. 2 Jones, Liens, § 1286 et seq.; McCorkle v. Herrman, 117 N. Y. 297, 22 N. E. 948; Stevens v. Ogden, 130 N. Y. 182, 29 N. E. 229; Dorestan v. Krieg, 66 Wis. 613, 29 N. W. 576; Craig v. Smith, 37 N. J. Law, 549; Copeland v. Manton, 22 Ohio St. 398. It is claimed that the implication to be drawn from the provision that the lien given by this statute shall not take priority over existing liens is that no lien on the fund due the contractor shall have preference. This argument assumes that the subcontractor, laborer, or material man has, or can acquire, a lien upon the debt due the contractor from the corporation. But no such right is given him by the statute. His lien, when acquired, is not upon any debt owing the contractor, but upon the property of the company, for the amount actually due the contractor at the time the notice is given. The provision concerning existing liens is only designed to render the subcontractor's lien subject to liens upon the property of the company, and does not affect the question as to whether there is any debt actually due the contractor, within the meaning of the law at the time the notice is given, when the debt has been previously attached at the suit of a general creditor. By giving the notice required by the statute, the subcontractor, laborer, or material man is substituted for the contractor, with the right to enforce, as a lien against the property of the company, whatever claim the contractor himself might enforce against the company. If, at the time the notice is served, the contractor has no claim which he could enforce against the company, because the same has been assigned or attached, then, manifestly, the subcontractor can acquire none by serving his notice. It follows from these considerations that the lien acquired by plaintiff was sub-

ject and subsequent to the rights of Dawson, and the decree of the court below must be reversed.

CORBETT v. WRENN.

(Supreme Court of Oregon. Jan. 29, 1894.)

CONSTRUCTION OF COMPLAINT—COVENANT AGAINST INCUMBRANCES — ACTION FOR BREACH — EVIDENCE—DAMAGES.

1. A complaint which alleges that defendant sold land to plaintiff with a covenant against incumbrances; that defendant knowingly made false representations to plaintiff that it was clear from incumbrances, in reliance on which she purchased; and that she subsequently was compelled to pay a mortgage to secure title,—is properly construed as stating a cause of action for breach of covenant, and not for deceit, in the absence of a demurrer for misjoinder of causes of action, or a motion to compel plaintiff to elect, under the rule that pleadings are to be liberally construed in favor of the pleader.

2. In an action for breach of covenant against incumbrances, where it appears that plaintiff purchased with knowledge of a building association mortgage on the land, and agreed to pay \$1,000 to discharge it, as part of the purchase price, and the issue is whether, under the agreement, such payment was to be made on completion of the sale or on the maturity of the mortgage, evidence is not admissible to show that \$1,000 would have been sufficient to extinguish the mortgage at its maturity, instead of \$1,900, which plaintiff paid on completion of the sale.

3. A vendor of land subject to a valid mortgage not excepted from the operation of the covenant against incumbrances may recover from the vendor the sum she paid for its discharge in excess of what she agreed to pay for the purpose.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by Rebecca Corbett against S. E. Wrenn for breach of contract against incumbrances. From a judgment for plaintiff, defendant appeals. Affirmed.

The other facts fully appear in the following statement by MOORE, J.:

This is an action to recover damages for the breach of a warranty against incumbrances. The facts show that on August 5, 1889, the defendant was the owner of real property in Multnomah county, Or., known as "Sub-division C in lot one of block five in Portland Homestead." That at said date there was a mortgage thereon, executed by one R. H. Blossom, a former owner, to the Franklin Building & Loan Association, to secure the payment of a loan of \$2,300 in six years from November 20, 1888. The said loan was made upon 12 shares of the capital stock of said association, that were assigned to it by the mortgagor as collateral security for the payment thereof, with interest at the rate of 9 per cent. per annum, payable monthly after 45 months, together with all dues, fees, assessments, and working expenses that might accrue upon said shares of stock, and also all fines that might accrue in accordance with the by-laws of said association by reason of delinquency in payment of said in-

terest or otherwise. And it was stipulated in said mortgage that if at any time the said shares of stock were by the board of directors of said association adjudged to have reached, by payments thereon, the par value of \$200 each, then there should be credited on said shares of stock all unpaid dues, fees, assessments, installments, working expenses, fees and fines accruing thereon, and on the loan thereby secured, and said shares of stock should be thereupon canceled and surrendered to the mortgagor. That on said 5th day of August there was due on said mortgage to the Franklin Building & Loan Association \$1,745.66, and on that day the defendant, for the expressed consideration of \$2,700, sold and conveyed said real property to the plaintiff by a deed containing a covenant that said premises were free from all incumbrances, and that the grantor and his heirs, executors, and administrators should warrant and forever defend the same, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever. That the plaintiff paid \$900 upon the execution and delivery of the deed, \$800 two years later, and \$1,997 to the Franklin Building & Loan Association in satisfaction of its mortgage upon said premises. The plaintiff, in substance, alleges that the defendant, at the time said sale was made, in order to induce her to purchase the premises, represented that he was the owner of 12 shares of stock in the Franklin Building & Loan Association, and that a sufficient amount had been paid thereon, so that, upon surrendering them to the association, the mortgage held by it would be discharged upon the payment of \$1,000, and that any other or further sum represented by said mortgage had been fully paid by the defendant; and that, relying upon said representations, she purchased said property, and took an assignment of said shares of stock. That said representations were false, and known to be so by the defendant at the time they were made. That they were made for the purpose of misleading and defrauding her, and that she would not have purchased said property but for the said false and fraudulent representations. That there was then due upon the surrender of said stock \$1,997, which was well known by the defendant, and that by reason of said mortgage the said amount was a valid lien and incumbrance upon said premises, which she was compelled to pay, in order to remove the incumbrance, and discharge the lien thereof; and that said sum was paid for the use and benefit of the defendant. That at the time said purchase was made she did not know the amount necessary to pay off and discharge said mortgage, except as represented by the defendant, and did not learn the truth thereof until after the sale had been consummated. That the transaction between her and the defendant in relation to the purchase and sale of said premises was not reduced to writing until the

only consideration therefor, and the same has been fully paid by the plaintiff. That it was understood and agreed that upon the payment of \$2,700 the plaintiff should receive from the defendant a perfect title in fee simple, free and clear of all incumbrances; and that the defendant, in pursuance thereof, executed and delivered said deed. That the defendant has failed to make good his statements and representations, and refused to carry out or make good his covenants of warranty, to the plaintiff's damage in the sum of \$997. The defendant denied the material allegations of the complaint, and for a further answer, in substance, alleged: That, in addition to the payments made by the plaintiff to him, she, in consideration for said conveyance, assumed said mortgage, which was then a valid lien upon the property, and of record in said county. That the plaintiff accepted an assignment of said shares of stock, and became a member of the Franklin Building & Loan Association, and subject to the rules and laws thereof; and that, under said rules, and according to the usual course of business in said association, plaintiff would not have been compelled to pay off the said mortgage had she kept the said shares of stock until their maturity. The plaintiff having denied these allegations of new matter, the cause was tried, and the jury returned a general verdict in favor of the plaintiff in the sum of \$745.66, together with interest thereon from August 5, 1889, and special verdicts as follows: "Question 1: Were the representations referred to in the complaint as having been made by defendant or his agent to plaintiff as to the amount required to pay off the mortgages in question false? Answer. Yes. Question 2: If these representations were false, did defendant, at the time he made them, if he did make them, know them to be false? Answer. Yes. Question 3: If the said representations were false, and if defendant made them, and knew them to be false at the time he made them, did he make them with intent to defraud the plaintiff? Answer. Yes. Question 4: If the said representations were false, and defendant made them to plaintiff, did he or his agent make them as a matter of opinion? Answer. Yes, as a matter of opinion." The court, having overruled defendant's motion for a new trial, rendered judgment on the general verdict, from which the defendant appeals.

M. W. Smith, for appellant. W. L. Nutting, for respondent.

MOORE, J., (after stating the facts.) The alleged errors relied upon by the defendant may be divided into two classes: First, the rulings and instructions of the court treating the action as being for a breach of war-

rant, and not for a breach of covenant, or a nonsuit. (2) In refusing to instruct the jury to find for the defendant. (3) In giving the following instruction: "I have already stated to you that the gist of this action is a covenant of warranty against any incumbrance on the land, and we have to look at it in that point of view. If you believe from the testimony that the consideration of the purchase was \$900 cash, the \$800 note and mortgage, and \$1,000 for the release of the mortgage upon the property held by the building and loan association, then the defendant became bound to clear the property of all liens not included in these three items, viz. \$900 cash, the \$800 note and mortgage of her own making, and the \$1,000 to the loan company; and, if he failed to do it, or if the \$1,000 would not do it at that time, and more had to be paid in order to accomplish it at that time, then the defendant is responsible for the amount required to remove the lien of that mortgage, and free the property from incumbrance, and no more. As to what was due on the day of the execution of this deed to satisfy that mortgage, you will remember what the evidence of the witnesses was,—whether it was \$1,700 and some odd dollars, more or less,—whichever it was, you will remember; and, if you find that the agreement concerning the sale was that \$1,000 only should be paid to the loan company by plaintiff, then whatever there was more than \$1,000,—whatever was needed on that date besides the \$1,000 to pay off that claim,—together with interest from the date on which the payments were made, should be awarded to plaintiff in this action,—the difference between \$1,000 and the amount due the loan company at that date." (4) In rendering judgment against the defendant.

If the above instruction, as given by the court, was correct, it will not be necessary to examine the other matters assigned as error under the first class. The complaint contains all the necessary allegations of an action for a breach of the covenant against incumbrances. Rawle, Cov. 114; 1 Estee, Pl. & Pr. (3d Ed.) § 1270. The incumbrance was not excepted from the operation of the covenant, and the fact that plaintiff was aware of its existence when the deed was delivered would have been no defense. Rawle, Cov. 117; Medler v. Hiatt, 8 Ind. 171; Snyder v. Lane, 10 Ind. 424. If this action be interpreted as one for a breach of the covenant, it follows that all allegations in relation to the representations of the defendant, his knowledge of their falsity, the intention with which they were made, and the plaintiff's reliance thereon, were unnecessary and immaterial, and might have been stricken out on motion. Deceit is an action sounding in tort, while covenant

arises out of a contract, and a complaint in which they are joined is subject to demurrer. Hill's Code, §§ 67, 93. The authorities, however, are quite uniform in holding that, unless the objection is taken by demurrer, it is waived. Green, Pl. & Pr. § 882. The object and purpose of a demurrer in such cases is to compel the opposite party to elect the cause of action or defense upon which he relies, and, as no demurrer to the complaint was filed in the case at bar, the court, under the rule that pleadings shall be liberally construed, (Hill's Code, § 84,) was justified in instructing the jury that the gist of the action was the alleged breach of warranty against incumbrances. This view disposes of the errors assigned under the first class.

The assignments under the second class are: "The circuit court erred in sustaining plaintiff's objection to the following questions propounded to the witness H. H. Northup, and refusing to permit him to answer the same: 'Examine this mortgage, which is marked "Plaintiff's Exhibit D," and state, if you know, or can tell, how much would be due on that mortgage on August 5, 1889.' 'Under the rules of the association, when would that mortgage become due?' In sustaining plaintiff's objection to the following questions propounded to the witness A. C. Mackenzie, and refusing to allow him to answer the same: 'Can you tell when that mortgage would become due?' 'Can you tell how much Mrs. Corbett would have had to pay if she had continued her payments on the mortgage until it matured?'" The bill of exceptions shows that "the defendant's counsel stated that the object of the questions" propounded to Mr. Northup "was to draw from the witness testimony to the effect that, if plaintiff had paid off the mortgage when it became due, instead of paying it off prior to its maturity, she would have been compelled to have paid only the sum of \$1,000." "And that the object of each of said questions" propounded to Mr. Mackenzie "was to draw out the fact that if plaintiff had held the stock pledged as collateral security with the Franklin Building & Loan Association, until its maturity, or until the maturity of the said mortgage, instead of paying off the said mortgage and surrendering the said stock before their maturity, she would have been compelled to pay the sum of \$1,000, and no more." There seems to be no controversy in relation to the amount that plaintiff was to pay in order to discharge the incumbrance. Both parties appear to agree that \$1,000 was the correct sum, and hence the true consideration is expressed in the deed; but the defendant contends that this sum was not payable until the maturity of the mortgage, unless the stock held as collateral security for the payment of the loan had reached its par value before that time, while the plaintiff contends that she was to have a per-

fect title to the property, free from all incumbrances, upon the payment of the amount agreed upon. The chief question in issue was: When, under the agreement, was this sum payable? No response to the questions propounded to the witnesses Northup and Mackenzie with the purpose avowed by counsel could have tended to determine this issue, and, besides, the mortgage would have furnished the best evidence upon this question. Another reason for rejecting the evidence is that a covenant against incumbrances is broken if the land at the time of the conveyance is subject to an incumbrance not excepted in the deed, which, upon its delivery, entitles the vendee to nominal damages. Rawle, Cov. 89. The doctrine is also well settled that if the covenant has extinguished the incumbrance he is entitled to recover the amount paid for it. Pillsbury v. Mitchell, 5 Wis. 17; Eaton v. Lyman, 30 Wis. 41. As the mortgage to the association was a valid lien upon the premises at the time of the conveyance, not excepted from the operation of the covenant, which plaintiff has discharged, it follows that she is entitled to recover whatever sum she has paid out for that purpose in excess of the amount she had agreed to pay. The defendant, for the purpose of mitigating the damages, had the right to show by parol that the plaintiff had assumed and agreed to pay off and discharge the mortgage as a part of the consideration for the conveyance. Leland v. Stone, 10 Mass. 459; Spurr v. Andrew, 6 Allen 420; Harlow v. Thomas, 15 Pick. 66; Allen v. Lee, 1 Ind. 58; Medler v. Blatt, 5 Ind. 173; Pitman v. Conner, 27 Ind. 35; Fitzer v. Fitzer, 29 Ind. 468; Sidders v. Riley, 22 Ill. 111; Laudman v. Ingram, 49 N. 212. The reason assigned for the introduction of the evidence was not in mitigation of damages, but to negative the covenant by showing that the mortgage could have been discharged at maturity upon the payment of \$1,000 and therefore the defendant was not liable on his covenant. The defendant being liable for at least nominal damages, the evidence was properly rejected. Finding no error, the judgment was affirmed.

BUDD v. UNITED CARRIAGE CO.

(Supreme Court of Oregon. Jan. 29, 1891.)

CARRIERS — INJURY TO PASSENGERS — RECKLESS HORSES — CONTRIBUTORY NEGLIGENCE.

1. In an action against a carrier, operating coaches, for injuries to a passenger, even though the horses ran and kicked, and the driver lost all control over them, raises a presumption that defendant, in disregard of duty, provided wild and unsafe horses and a careless and incompetent driver.

2. Where a passenger in a carriage is placed in imminent peril by the running away of the horses, and the driver calls on her to jump, the question whether she is guilty of contributory negligence in so doing is for the jury.

3. A carrier cannot escape liability for an injury caused by driving a team over an unsafe road by showing that the injured passenger directed him to drive over such road.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by Kate Budd against the United Carriage Company for personal injuries. There was a verdict in plaintiff's favor for \$1,500, and, from a judgment thereon, defendant appeals. Affirmed.

J. W. Paddock, for appellant. Thos. O'Day, for respondent.

LORD, C. J. This is an action brought to recover damages for injuries alleged to have been sustained by the plaintiff through the negligence of the defendant. The complaint, after alleging that the defendant was a common carrier, and its undertaking to carry the plaintiff around and through the city, avers, in substance, that the defendant, in disregard of its duty, sent a team for this purpose which was fractious and unsafe; that it was not properly and safely hitched to the carriage with safe gearing and appliances; and that the driver which the defendant furnished to drive such team was negligent and incompetent. It also alleges "that, while the plaintiff was being conveyed as aforesaid, said team, by reason of being wild, fractious, and unsafe, and being carelessly hitched to said carriage with unsafe gearing and appliances, and being driven by said careless and incompetent driver, became unmanageable and ran away, and said driver was wholly unable to control the team; and that plaintiff, being in imminent danger of life and limb, and believing herself so to be, at the request of said driver, in order to escape greater injury, attempted to get out of said carriage, and was thereby forcibly thrown to the ground, breaking and dislocating the bones of her forearm near the wrist, and otherwise greatly bruising and injuring her." The answer admits that the relation of passenger and carrier existed between the plaintiff and defendant, but denies the alleged negligence, and sets up contributory negligence as a defense. The evidence shows that the plaintiff informed the defendant, through the telephone, that she had a sick or invalid daughter whom she desired to take for a drive about the city, and requested the defendant to send to her residence, for this purpose, an easy carriage, with a safe and gentle team, and a careful and competent driver. In response to this telephonic order, the defendant sent a team hitched to a close carriage or coupe, with a driver, to her residence, and plaintiff and her sick daughter entered the carriage, and the driver, as directed by the plaintiff, proceeded to convey them, with said team and carriage, from place to place upon several business and social errands about the city. The plaintiff, noticing that the horses, when at a halt, were nervous and fidgety, asked

the driver whether they were gentle and safe, and he answered that "the horses were all right." The evidence shows that she was induced to make this inquiry by solicitude for her sick daughter, whom she did not wish to be subjected to the excitement and fright likely to result if the horses proved intractable or unruly. When through with her errands, the plaintiff instructed the driver to convey them to the city park, where, after driving around its driveways for some time, she told him to leave the park by way of Park avenue, so as to pass a certain new residence located thereon which she desired to see. This avenue was graded out to the city park line, but there was a declivity of one or two feet which the carriage had to descend in turning from the park driveway into it. In making this turn, when the wheels descended the pitch or declivity, the tongue flew up between the heads of the horses, the carriage ran forward, whereupon one of them got his leg over the trace and commenced kicking, and then both ran away, kicking. As the horses were thus running and kicking, the driver halloosed to the ladies, "For God's sake, jump out!" which they promptly did; the plaintiff's daughter jumping out on one side, and she on the other, causing the injury complained of. As tending to show the conduct of the driver and the behavior of the horses under the circumstances, one witness testified: "It seemed as though, just as the team started down the hill, one of the horses became frightened and commenced to kick. * * * As soon as the horses began to kick, the man got scared. His actions indicated that from his performance. The driver immediately raised to his feet, and commenced to halloo. I could not understand what he said, but the horses were going down the hill at a rapid rate, and kicking, and the driver did not seem to have any control over them at all. When the team got opposite of us, the carriage door opened, and a woman fell out from the other side from where we were, and, after going several feet, another woman fell out on the other side," etc. Another witness testified that "the pitch was about a foot, and that when they came around, and made the turn to come into the road, the front wheels pitched down, and upon that the tongue flew up between the horses' heads, and one horse got his foot over the trace. Then they started forward again, and the trace straightened out under his hind leg, when the horse commenced kicking, and the man kept halloosing, and they kept coming over the hill in that shape." There was some further evidence tending to show that the team was not hitched to the carriage with proper gear to enable the horses to hold the carriage back when going down a pitch or declivity. Upon the part of the defendant the evidence tended to prove that the man in charge of the team at the time of the accident was a skillful, careful, and com-

safe and proper manner, with safe harness and gearing; that the plaintiff had directed the driver where to go, and which way to drive, and that just before the accident she directed him to leave the park by Park avenue, where there was a sharp declivity of one or two feet; that, in driving down this declivity, in some unknown manner one of the horses got his leg over a trace, which frightened him and caused him to kick, and, the carriage pushing forward on the horses, they commenced running down the street, that the driver checked the team to about a standstill, and requested the plaintiff and her daughter to alight from the carriage; that plaintiff's daughter stepped out without injury, but the plaintiff, being greatly excited, jumped out hastily, and sustained the injury complained of. The trial resulted in a verdict for the plaintiff, and, from the judgment which followed, this appeal is taken.

The record discloses that, when the plaintiff rested, the defendant moved for a nonsuit on the ground that the testimony was insufficient to sustain the allegations of the complaint, which motion the court overruled, and the defendant excepted. The contention for the defendant is, conceding that the driver was careless on the occasion of the accident, it shows but a single act of negligence, which is not, of itself, sufficient to establish his general incompetency; and for a like reason, conceding that the team became unmanageable, and began to kick and run, under the circumstances indicated, it only shows that the team was intractable or unsafe on this particular occasion, which is not sufficient to establish the character of the team as fractious and unsafe. This contention is based on the hypothesis that the negligence alleged as the cause of the injury imposed upon the plaintiff the burden of proving that the team furnished by the defendant was habitually fractious and unsafe, and that the person provided by the defendant to drive such team was incompetent, or not possessed of the requisite skill and qualifications for that business. As a consequence, the defendant claims that the testimony for the plaintiff showing that she sustained an injury by jumping from the carriage by direction of the driver, while the horses were running and kicking, under the circumstances disclosed, although the relation of passenger and carrier existed between the plaintiff and defendant, is incompetent and insufficient to show that such injury resulted from the negligence alleged, and therefore the court erred in overruling the motion for nonsuit and submitting such evidence to the jury. From these considerations it will be observed that, in the view taken by counsel, he has wholly ignored the evidence in support of the allegation that the team was not properly hitched to the carriage with safe gearing and appliances, and confined his ob-

able for the service required, and the driver incompetent and careless in the performance of his duty. He overlooks the fact that the complaint embraces nearly the whole field of the carrier's duty and obligations, and that evidence tending to prove negligence or failure to perform its duty in any essential particular alleged, adequate to have caused the injury, would be sufficient to sustain the verdict. But, as the objection raised involves the same principle as an objection to an instruction given by the court to which an exception is reserved, its consideration becomes important and imperative. The real point of the objection is that the alleged negligence to which it refers, considered in connection with the evidence in support of it, does not make a case which comes within the principle, as sometimes briefly stated, that the happening of an injurious accident raises a presumption of negligence, and throws upon the defendant the onus of showing that it does not exist. The gravamen of the complaint is that, while the relation of passenger and carrier existed between the plaintiff and defendant, the former was injured by reason of the defendant's negligence in furnishing a fractious and unsafe team, which, not being properly hitched with safe gearing to the carriage, nor provided with a careful and competent driver, became unmanageable, and began to kick and run away, when the plaintiff, at the urgent request of the driver, attempted to get out of the carriage, and was forcibly thrown to the ground and injured. As the relation of carrier and passenger is admitted, does the fact that the plaintiff sustained an injury, under the circumstances indicated, make a prima facie case of negligence against the defendant? The general rule undoubtedly is that, in actions for personal injuries caused by the alleged negligence of the defendant, the plaintiff is required to produce some evidence of negligence to warrant the judge in submitting the case to the jury. "But when the cause of the accident is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen, if those who have the management use proper care. It affords reasonable evidence for the jury. In the absence of explanation by the defendant, that the accident arose from want of proper care." *Scott v. London Docks Co.*, 3 Hurl. & C. 596. The law imposes the duty upon the proprietor of a stagecoach or other public vehicle to provide a reasonably safe conveyance, drawn by steady horses, with secure harness, and a skillful and competent driver. In the discharge of this duty the carrier is bound to use the utmost care and diligence of cautious persons to prevent injury to passengers. In *Crofts v. Waterhouse*, 3 Bing. 321, Best, C. J., said: "The coachman must have competent skill, and use that skill with diligence.

He must be well acquainted with the road he undertakes to drive. He must be provided with steady horses, a coach and harness of sufficient strength, and properly made, and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens." But it is not meant by this language that a stage proprietor is a warrantor of the safety of his coach, its equipments, the competency of his driver, or other appliances used, but that he is bound to use the utmost diligence and care in making suitable provisions for those whom he carries. So, in *McKinney v. Nell*, 1 McLean, 540, it is held to be the duty of a stage proprietor "to furnish good coaches, gentle and well-broke horses, good harness, and a prudent and skillful driver," and that he is liable to any passenger who may receive an injury for any defect in these particulars; and *Greene, J.*, said: "With horses gentle and well broke, with coaches and harness good and strong, with drivers sober, prudent, and skillful, a stagecoach line might be regarded as managed with human care and foresight." *Frink v. Coe*, 4 G. Greene, 558. The liabilities of the carrier arise from the duties which the law imposes, and, while he is not an insurer against all defects, his liability extends to such as might be guarded against by care and skill; so that, although the duty is not imposed upon him of conveying his passengers with absolute safety, yet his liability goes to the extent of requiring that he shall use all care and diligence in providing a suitable vehicle, safe horses and harness, and a qualified driver. This is based on the principle that, the means of transportation being under the management of the carrier, and their fitness for such service peculiarly within his knowledge, he is bound to be supplied with every reasonable requisite to insure the safety of his passengers. This being so, when the duty is performed in the ordinary course of things, an accident would not be likely to happen; but, when one occurs from some apparent defect in the means, appliances, men, or apparatus employed by such carrier in the transportation, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from the want of proper care. Hence, the rule is well settled that, in an action by a passenger for personal injuries, when it is made to appear that the accident resulted from defects in the carriage or in the appliances, or in the want of skill of the driver, or in the unfitness of the team, the presumption of negligence arises, and the onus is cast upon the defendant to relieve himself of responsibility by showing that the injury was the result of an accident which the utmost care and foresight could not have prevented. When, therefore, a plaintiff establishes the relation of carrier and passen-

ger, the fact that he received an injury from any defect in the instrumentalities which it was the duty of the carrier to furnish as a means for his transportation makes a prima facie case of negligence against the carrier. The onus is then cast upon the carrier to show that he used reasonable care and diligence in providing a suitable conveyance, steady and well-trained horses, good harness and proper appliances for the journey, and a competent driver, who acted with reasonable caution and skill. In a word, if a carrier would relieve himself from liability, he must rebut the presumption of negligence which arises from the happening of the accident by showing that the injury was not occasioned by any defect in the hack, or want of care or skill in the driver, or any neglect or want of diligence or foresight on his part. *Christie v. Griggs*, 2 Camp. 80; *Jackson v. Tollett*, 2 Stark, 37; *Sales v. Stage Co.*, 4 Iowa, 547; *Farish v. Reigle*, 11 Grat. 711; *Maury v. Talmadge*, 2 McLean, 157; *Stokes v. Saltonstall*, 13 Pet. 181; *Boyce v. Coach Co.*, 25 Cal. 468; *Treadwell v. Whittier*, 80 Cal. 589, 22 Pac. 266; *Story*, Bailm. §§ 592-601.

In the case at bar the record discloses the circumstances under which the horses began to run and kick, the conduct of the driver on the occasion, and how the injury occurred to the plaintiff. The defendant claims that these circumstances afford no inference that it failed in its duty to provide a safe and steady team, or a careful and competent driver. Counsel argues that the fact that the team ran and kicked, or that the driver was careless, on this occasion, does not show that the team were addicted to this habit or vice, or that the driver was generally incompetent, and hence was not evidence that the plaintiff's injury was caused by reason of the defendant's negligence in providing an unsafe or unreliable team, or a careless and incompetent driver. This is putting the onus on the person who has no means of knowing the temper or character of the team, or the particular skill or qualifications of the driver, to show that the team is habitually vicious or unsafe, or that the driver is without the requisite qualifications for his position. In *Simson v. Omnibus Co.*, L. R. 8 C. P. 391, a passenger in an omnibus was injured by a blow from the hoof of one of the horses, which had kicked through the front panel of the vehicle, but there was no evidence to show that this particular horse was vicious or a kicker. It was contended that a casual kick by one of the numerous horses employed by the company was no evidence of a want of due and reasonable care on its part. It was argued, as here, that a horse which has never kicked before may do so once without acquiring the character of being vicious, and hence that the burden of proving the horse unsafe rested on the plaintiff. But in that case *Bovill, C. J.*, said: "In

the present case a horse drawing an omnibus belonging to the defendants, without any assignable cause, kicks out, and strikes and injures the female plaintiff, who was riding in the vehicle. It seems to me that that alone presents a case which calls for some explanation on the part of the proprietors. It is said that it is the nature of horses to kick. But I think it ought not to be the nature of a horse employed to draw a public vehicle to kick. Proof having been given that the horse in question had misconducted itself in the way charged, the burden of showing that he was not habitually a kicker, or something to account for his having kicked on this particular occasion, lay on the defendants. The mere fact of his having kicked out was, I should say, *prima facie* evidence for the jury." In the present case, the fact that the horses ran and kicked, and the driver was unable to control them, under the circumstances disclosed, tended to show that the defendant, in disregard of its duty, had provided wild and unsafe horses, and a careless and incompetent driver, as charged, and cast the onus upon the defendant of showing that such horses were not habitually unsafe or unmanageable, or the driver negligent or incompetent, or something to account for the running and kicking of the horses, or the inability of the driver to control them, on this particular occasion. In *Roberts v. Johnson*, 58 N. Y. 616, the evidence tended to show that, while the plaintiff was getting out of the omnibus, the horses started, whereby plaintiff was violently thrown upon the ground, and injured. Grover, J., said: "This showed, *prima facie*, either that the horses were unsuitable for such service, or the driver incompetent or negligent in the performance of his duty. If the starting of the horses was attributable to some other cause, for which the defendants were not responsible, it was for them to show it. This results from the fact that where proper horses and suitable drivers, who attend to their business, are employed, the horses will not start while passengers are getting into and out of the stage. If anything occurs, causing such start, which is beyond the control of the driver or proprietor, they can readily show it. Such fact is peculiarly within their knowledge, while, in most cases, the persons injured would be entirely ignorant of it." So here, with equal reason, the fact that the horses misconducted themselves showed, *prima facie*, either that the horses were wild and unsafe for such service, or that the driver was negligent and incompetent in the performance of his duty; for, if the running and kicking of the team was attributable to some other cause, for which the defendant was not responsible, it was for the defendant to show it, as such matter was peculiarly within its knowledge, and, generally, without the knowledge of the person injured. But there was other evidence. It was prov-

ed that the horses were without breeching and that the pole was not firmly fastened down by some appliance, so that the horses could hold the carriage back, and prevent it from running upon them, as happened when the team turned from the park into the avenue, in passing down a declivity of a foot or so, when one horse got his hind leg over the trace, and both horses commenced to run and kick. The evidence for the defendant falls to account for the horse's getting his leg over the trace, but says that, "in driving over this declivity, in some unknown manner one horse got his leg over the trace." The cases cited by counsel to the effect that the fact that a horse becomes unmanageable on one occasion does not show him to be vicious in disposition are in actions where no contractual relations existed between the parties, and those that a single act of negligence by a servant does not establish general incompetency are in actions where the relation of master and servant existed. As Gordon, J., said: "An employee, by his contract, is presumed to run the ordinary risks of the machinery and appliances he is engaged to supervise or use. He is also held to a knowledge of the character and obvious defects of such machinery and appliances, as well as the skill and habits of his co-servants. A passenger, on the other hand, neither knows, nor is presumed to know, anything about these things. He has paid his passage, and he is wholly passive in the hands and at the mercy, of the transportation company and its agents. The doctrine advocated by the defendant's counsel, by which a passenger would be put on a par with an employee, will not do; it accords neither with reason nor precedent." *Railroad Co. v. Anderson*, 94 Pa. St. 359.

Whether the plaintiff was contributorily negligent in jumping from the carriage, under the circumstances, depends upon whether her act was precipitate or rash, or such as a person of ordinary prudence might do. The evidence shows that the plaintiff was in a closed coupe, that the horses were running and kicking, and that the driver, who appeared to be frightened and unable to control them, was calling excitedly to the plaintiff and her daughter, "For God's sake, jump out!" These circumstances showed positively that the negligence of the defendant had placed the plaintiff in a situation of imminent peril. In such case the law does not require of the passenger the exercise of the presence of mind and care of a prudent man; and if the plaintiff, in endeavoring to escape from such danger, either by following the directions of the driver or the dictates of her own judgment, acted as a person of ordinary prudence would have done under similar circumstances, she was not negligent. *Amer. & Eng. Enc. Law*, 760. Hence, whether she acted negligently or not was a question of fact to be submitted to the jury.

So, also, in determining whether the plaintiff was negligent, the jury were not only to consider the presumption arising from the happening of the accident and injury, but all the facts and circumstances in evidence.

But it is claimed that, as the plaintiff directed the driver to go down the avenue, so as to afford her an opportunity to view a certain house which was being erected, she assumed the entire control of the driving, and therefore was responsible for the accident which occurred in traveling down such street. This contention relates to that portion of the charge in which the court said that "the plaintiff did not take the responsibility of the road being safe, but left that to the driver's judgment." It is usual for persons who hire a carriage and driver to give general directions as to places where they desire to be conveyed, and the driver is expected to know whether the roads over which he must pass to reach the places to which he is directed to go are suitable and reasonably safe for passage. The carrier cannot escape liability for an injury caused by driving a team over an unsafe road, by showing that the injured passenger directed or expressed a wish to travel over such road. As the court said in *Anderson v. Scholey*, 114 Ind. 553, 17 N. E. 125: "It is true, the driver testified that he was in the road, pursuing the right track, and that he pulled to the left, thereby upsetting the conveyance over the bank, because the plaintiff told him repeatedly he was too far to the right. The plaintiff denies this. However the fact may be, it was the duty of the defendants to supply the coach with a driver who knew the way for himself, and who would not be controlled by the suggestion of a passenger on the inside, while he occupied the seat charged with the duties and responsibility of driver." The fact is, that there is no evidence that the road was unsafe. We do not think, therefore, that the evidence was incompetent, or that the court erred in refusing the nonsuit, or that there was error in the instructions. It follows that the judgment must be affirmed.

SMITH et al. v. CITY OF PORTLAND et al.
(Supreme Court of Oregon. Jan. 29, 1894.)

REVIEW—PUBLIC IMPROVEMENTS—CONTRACT.

1. A writ of review does not bring up questions as to the admissibility of evidence, but only questions as to jurisdiction, and as to the correctness of the judgment on the ultimate facts appearing in the record.

2. A committee of the city council, entering into a contract for the construction of a sewer with the lowest bidder, has no authority to change the terms of the accepted bid by inserting an additional item therein, in violation of an ordinance requiring all contracts for public improvement to be let to the lowest bidder; and the city council cannot collect the amount of such additional item from the abutting owners.

3. The salary paid by a city to the overseer of a public improvement, constructed under con-

tract, cannot be assessed against the abutting owners, where neither the charter nor the ordinance authorizing the improvement make any provision therefor.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Proceeding by A. T. Smith and others against the city of Portland and others to review the action of the common council of said city in the matter of assessments for the cost of constructing a sewer. From a judgment for plaintiffs, defendants appeal. Affirmed.

J. V. Beach, City Atty., and W. H. Adams, for appellants. John Catlin, for respondents.

MOORE, J. This is a special proceeding to review the action of the common council of the city of Portland in the matter of assessments for the cost of constructing a sewer. The return to the writ shows that said council, on April 20, 1892, passed an ordinance providing for the time and manner of constructing Portland Heights sewer, establishing a sewer district, authorizing the committee on sewers and drainage to advertise for, receive, and report bids for its construction to the council, to enter into a contract therefor with the accepted bidder, and appointing assessors to estimate and report the cost to be assessed to the several owners of the property in said district. Whereupon the committee advertised for sealed proposals for the work, to be completed in accordance with the plans and specifications therefor, and in answer thereto five bids were received, of which the bid of \$22,597.50, made by the American Bridge & Contract Company, was the lowest. The committee made its report, recommending that the contract be awarded to the lowest bidder, which was, upon motion, adopted by the council, and said committee, on July 5th, in pursuance thereof, entered into a contract with the American Bridge & Contract Company for the construction of said sewer. The specifications provided for concrete where necessary, but, as it was impossible to tell, in advance of the excavation for the sewer, that any concrete would be required, no estimate thereof was made by the engineer, and no mention was made of it in the accepted bid, but, when the contract was executed, the committee on sewers and drainage inserted the following item, "For all concrete used, per cu. yd., \$12.00," and, under this clause, \$4,344.20 was assessed upon the property within the sewer district. The assessors appointed to estimate the cost of said sewer made a report of the benefits to be assessed to each tract of land within the district, amounting in the aggregate to \$28,310.45, which report was adopted by the council, and on December 21, 1892, an ordinance declaring said assessment, directing the clerk to enter a statement thereof in the docket of city lens, and to publish notice of said assessment, was passed. The sewer was

completed 'according to contract, and city warrants, amounting to \$27,167.75, were, by order of the council, drawn upon the fund to be raised by said assessment, and delivered to the contractor, and an additional charge of \$1,142.70 was made for the wages of an overseer in superintending the work. That, on February 14, 1893, warrants for the collection of the delinquent sewer assessments were, by resolution of the council, issued, and delivered to the chief of police; and on April 3d the plaintiffs, whose property was liable therefor, commenced this proceeding to review the action of the council, in relation to that portion of the assessment in excess of the contractor's bid. The court, at the hearing, made findings upon all the facts in relation to the council's proceedings, in the matter of the construction of said sewer, and, among others, the following: "That the committee on sewers and drainage had no authority to enter in the contract the item, 'For all concrete used, per cu. yd., \$12.00,' which amounts to \$4,344, and that, in doing so, it exceeded its authority. That there is charged to said property the further sum of \$1,142.70, no part of which was included in said bid, nor in said contract, and the common council exceeded its authority in so charging the same to the property benefited by said sewer, and in attempting to collect the same. That the common council exceeded its authority in directing the auditor and clerk of said city to issue warrants for the collection of \$28,310.45, or for any greater amount than the sum of \$22,579.75. That the assessment upon the several tracts or parcels of land owned by the petitioners should be reduced in proportion that \$28,310.45, the erroneous assessment upon the whole property, bears to what the true assessment should be, to wit, \$22,579.75." The court rendered a judgment against the defendants for the costs and disbursements, and annulled and set aside all the assessment upon the petitioners' property, in excess of their proportion of the \$22,579.75, from which the defendants appeal. At the hearing they offered to prove that the plaintiffs, A. T. Smith and others, appeared before the committee on sewers and drainage, and requested it to let the contract for concrete at the price agreed upon, without asking bids therefor, giving as a reason for their request that the season was so far advanced that further delay would postpone the work, to their damage. The court having sustained an objection to this offer, the defendants took an exception to said ruling, which was noted and allowed, and this is assigned as error.

"The authorities," says Shattuck, J., "fully sustain the position that the writ of review only brings up the record of the inferior court, and that the superior court, upon review, tries the cause only by the record, and only as to questions of jurisdiction, and as to error in proceeding. It will not, on re-

view, try questions of fact." *Douglas County Road Co. v. Douglas Co.*, 5 Or. 406. This doctrine was adhered to by the same learned judge, who, in speaking of the rule then adopted, said: "We adhere to that ruling, and repeat the decision that, upon a writ of review, under our statute, the superior court will not examine the evidence which was before the inferior court, nor try a new question of fact, but will review the decision of the court below only upon the ultimate facts appearing in the record." *Id.*, 6 Or. 36. Courts will not examine the evidence, in such cases, when in the record, to determine whether questions of fact have been properly decided. It is only when there is an entire absence of proof, on some material fact, found, that the finding becomes erroneous as a matter of law. *Hyde v. Nelson*, 11 Mich. 353. If courts will not examine the evidence, when in the record, they certainly will not examine it when, as in this case, it is no part thereof.

Appellants contend that the insertion of the price for concrete in the contract was not a judicial, but merely a ministerial, act of the committee, as was also the subsequent ratification thereof by the council, when the sewer was accepted, and warrants drawn and delivered to the contractor for the amount thereof, and therefore not subject to review. The council of a city exercises legislative, executive, and judicial powers. When an ordinance is passed, it is an exercise of the legislative power; when a contract is entered into, in pursuance of an ordinance, it is executing the laws; but, when it determines what property should be assessed, and the amount of benefits it has received, it exercises judicial power. When the council assessed the benefits upon the property within the sewer district, it was an adjudication that the property described in the docket of city liens was liable for the amount assessed and therefore became a final judgment against it. *People v. Supervisors of Livingston Co.*, 43 Barb. 232; *People v. Morris*, 65 Barb. 473; 2 Dill. Mun. Corp. § 924, note 3. To entitle a municipal corporation to recover from an abutter the expense of a local improvement, it must comply with all conditions precedent, whether prescribed by charter or ordinance. *Id.* § 811. Section 4 of Ordinance No. 6439, entitled "An ordinance to provide for the time and manner of, as the letting of contracts for improving streets and constructing sewers, accepting and drawing warrants, and making payments therefor," approved December 9, 1890, and in force in said city when said contract was executed, provides that: "As soon after the time fixed for receiving bids as practically the committee on streets in case of street improvements, and the committee on sewers and drainage in case of constructing a sewer, shall open the same and report them together with a summary of the several bids to the common council. When so reported to

common council shall award the contract or contracts as the case may be to the lowest and best responsible bidder or bidders if in its judgment such bid or bids be not unreasonable. All unreasonable bids or bids for less than all of one class of work chargeable to one block, or that do not conform to the provisions of this ordinance, shall be rejected."

When the American Bridge & Contract Company offered to construct the sewer for \$22,597.50, the amount of its bid, and this was accepted by the council, the minds of the contracting parties met and agreed upon the terms, and, in pursuance thereof, the committee was authorized to enter into a contract with said company. This made the members of the committee the agents of the council to execute a mere ministerial duty, and gave them no authority to change its terms, and when they inserted in the contract the item, "For all concrete used, per cu. yd., \$12.00," they exceeded their authority to that extent, and violated the provisions of section 4 of Ordinance No. 6439, *supra*, by letting the contract without any bid for concrete. This is not a proceeding between the city and the contractor, but is one between it and the property owners affected by the assessment, and, as to them, it was not in the power of the council, under its ordinances, to make a contract that would bind their property for the payment of concrete, without a bid therefor, and hence no ratification by the council could bring into existence a power it did not possess in the first instance. 1 Dill. Mun. Corp. § 463; Doughty v. Hope, 3 Denio, 594; *In re Turfier*, 44 Barb. 46.

The appellants also contend that the employment of an overseer to superintend the construction of the sewer was necessary, and that a reasonable amount paid one for that service was properly chargeable to the property. Section 121 of the city charter provides that: "The council shall have power to lay down all necessary sewers and drains and cause the same to be assessed on the property directly benefited by such drain or sewer; * * * and when the council shall direct the same to be assessed on the property directly benefited, such expense shall, in every other respect, be assessed and collected in the same manner as is provided in the case of street improvements." The published notice of intention to construct said sewer described its location, and informed parties interested that the council proposed "to designate and describe the district benefited thereby, and to assess the property within said district the necessary expense of building such sewer, in accordance with the provisions of section 121 of the charter of the city of Portland." Section 3 of the ordinance authorizing its construction, passed in pursuance of said notice, provides that "said sewer, together with all manholes, catchbasins and branches connected therewith shall be paid for by the property benefited by the

construction of said sewer, as provided by section 121 of the city charter of Portland." The charter nowhere directly provides that incidental expenses, not embraced within the actual cost of a local improvement, shall be chargeable to the property benefited. The notice of intention to construct said sewer might be construed to include such expenses, but the ordinance passed in pursuance thereof made no provision therefor. The authority under the charter to make local improvements is exercised by ordinance, which must with reasonable certainty prescribe a rule that will fully guide those who are to execute it, and give to those interested fair notice of how and to what extent it is to operate. *Elliot, Roads & S.* 382. The ordinance in question does not provide that the incidental expenses of the construction of the sewer shall be chargeable to the property within the district, nor could it give to the owners fair, or any, notice that their property would be burdened by such expenses. The enumeration of manholes, catchbasins, and branches connected therewith would seem to exclude all other expenses under the maxim, "*expressio unius est exclusio alterius*."

The assessment of benefits in excess of the contractor's bid having been made without authority, the judgment is affirmed.

MARTIN v. MAXEY et al.

(Supreme Court of Montana. Feb. 5, 1894.)

ATTACHMENT—LIEN—WAIVER—STARE DECISIS.

1. An attaching creditor does not waive his attachment lien by proceeding to judgment and execution sale of the attached property pending his appeal from an order dissolving his attachment.

2. Where the supreme court has entertained the appeal of an attaching creditor from an order dissolving the attachment, a question of practice relating to the regularity of such appeal will not be reviewed, several years later, by such court, on an appeal by a judgment creditor in a subsequent action by creditors' bill against the attaching creditor.

Appeal from district court, Gallatin county; Frank K. Armstrong, Judge.

Creditors' bill by J. P. Martin, as administrator, against Daniel Maxey and others, on judgments against Jacob F. Speith, survivor of the firm of Speith & King. From a judgment for defendants, plaintiff appeals. Affirmed.

E. P. Cadwell, for appellant. Luce & Luce, for respondents.

HARWOOD, J. This action is of kindred nature with, and mainly determined by, *Ryan v. Maxey*, (just decided in this court,) 35 Pac. 515; but a few slight distinctions should be noticed.

Appellant insists, first, that the attachment lien acquired by attachment of the property in controversy was lost by taking out execution, and selling the attached property thereon, while the appeal from the or-

The attaching creditor perfected his appeal from that order, and, while the same was pending and undetermined, he prosecuted the action in which the attachment was issued to judgment, and took execution on the judgment, and sold the attached premises. Appellant insists that thereby the attachment was abandoned, but acknowledges that he could find no cases to cite in support of this proposition; and we consider it illogical and untenable to contend that while a litigant appeals from an order dissolving his attachment, and prosecutes such appeal to the effect of reversing the order appealed from, because he also pursues the attached property by execution after prosecuting his action to judgment he thereby abandons the attachment, which he is at the same time seeking to uphold and keep in force by all the means provided by law on his behalf.

Secondly. Appellant contends that the attachment in question failed because the appeal from the order dissolving it was not taken within five days after that order was made, as provided in section 428, Code Civil Proc. We know, from the treatment of that appeal, that it was taken from the order dissolving the attachment in question, and that the appellate court considered that appeal, and reversed the order dissolving said attachment. We presume therefrom that the appeal was taken, as required by law, to keep in force the attachment. The contrary view would assume that the court on that appeal considered and determined a case not properly appealed so as to give the appellate court jurisdiction, and its determination effect upon the proceedings in question. We cannot now review the question of practice raised by appellant relating to the regularity of the appeal taken, entertained, and determined several years since, as reported in 8 Mont. 494, 20 Pac. 806.

Thirdly. Appellant insists that, although respondents support their claim to the property in question by several sheriff's deeds executed in pursuance of a sale of the property in question, on independent judgments in several and distinct actions, the purchase of those outstanding titles by respondents merged them in that obtained by him through the sale of the same property on execution on his judgment, and insists that by reason of such merger, if the title founded on appellant's judgment can be found wanting in any respect, such defect taints all the other independent outstanding titles acquired to said property by purchase. Appellant asserts that he has cited authorities to support this position, but we think it doubtful, as there seems to be no reason in it. The case of *Vantilburgh v. Black*, 2 Mont. 371, is against that proposition, although in that case equitable titles were in question, while here legal titles are in question. It is unnecessary to de-

quired through his own attachment and judgment. We therefore leave the point with these observations. An order will be entered affirming the judgment of the trial court. Judgment affirmed.

PEMBERTON, C. J., concurs.

MCDONALD et al. v. MONTANA WOOD CO.

(Supreme Court of Montana. Feb. 5, 1894.)

PLACER MINING CLAIM—LOCATION AND ACQUISITION—TRESPASS—TREBLE DAMAGES.

1. It is not necessary that a separate discovery, separate marking of boundaries, separate recording, and separate work should be made and performed on each of the 20 acres contained in a 160-acre placer claim, authorized by Rev. St. U. S. § 2330, to be located under one location by an association of persons.

2. To recover treble damages under Code Civ. Proc. § 363, plaintiff must prove that the cutting of timber on his land, and its conversion by defendant, were willful, wanton, or malicious.

Appeal from district court, Jefferson county; Thomas J. Galbraith, Judge.

Action by John McDonald and others against the Montana Wood Company for damages for trespass in cutting down and converting timber on plaintiff's placer mining claim. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Modified.

Cowan & Parker, for appellant. Thomas Joyes, for respondents.

PEMBERTON, C. J. On the 23d day of September, 1890, plaintiffs (being seven in number) and Thomas Joyes located the Landlock placer mining claim, a tract of ground in Jefferson county, which they estimated at the time contained 160 acres, but which afterwards, by a survey, was found to contain about 76 acres. Plaintiffs made but one discovery on the entire tract. They marked the boundaries by blazing a tree at each corner of the entire tract of ground, and designated each of said corners of the claim by writing with a pencil, on the respective blazed trees, the name of the claim, and the corner each tree represented. They also marked a tree at the discovery shaft, and posted a notice on the claim. The notice contained the names of all the locaters, and a description of the ground claimed. The tract of land so located was not in any way subdivided into 20-acre claims, and no other discoveries were made, or marking done on the ground, than as stated above. During the year 1891 plaintiffs did work and made improvements on the entire tract of land to the amount of about \$150. The complaint, which was filed November 21, 1891, charged that in the month of December, 1890, and at divers times between that date and the commencement of

this suit, the defendant knowingly, willfully, and maliciously entered upon said land without the consent of plaintiffs, and cut down and carried away a large amount of trees and timber growing thereon, etc., claiming actual damages in the sum of \$3,000, and asking judgment for treble damages under section 363, Code Civ. Proc. The answer denies the title of plaintiffs, and all the material allegations of the complaint. The case was tried by the court with a jury. The jury returned a verdict for plaintiff in the sum of \$549.63, as actual damages, which they trebled, making the sum of \$1,648.49, for which sum judgment was rendered. Defendant moved for new trial. This motion was overruled. The defendant appealed from the judgment, and the order refusing a new trial.

The appellant contends that the location of the mining claim in the manner as above described is a nullity, and conferred upon plaintiffs no right or title to the Landlock placer mining claim, or to the right of possession thereof. The appellant claims that, under the law, the plaintiffs should have made a discovery on each 20-acre tract contained in the land sought to be located; that each 20-acre tract therein contained should have been marked upon the surface thereof, so that the boundaries thereof could have been readily traced; that a separate location of each 20-acre tract was necessary under the law; and that work or improvements of the value of \$100 should have been done on each 20-acre tract contained therein, for the year 1891. Section 2330, Rev. St. U. S., among other things, provides: "But no location of a placer claim made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons." This statute, it seems to us, confers the right upon an association of not less than eight persons to locate not to exceed 160 acres in one claim. This has been the holding and ruling of the United States land department uniformly, as far as we have been able to discover; and patents have uniformly issued in such cases when there was a showing of an expenditure of \$500 in work or improvements upon any part of the 160-acre claim. See *Good Return Min. Co.*, 4 Dec. Dep. Int. p. 221; also, *Morr. Min. Rights*, (7th Ed.) p. 134. In *Smelting Co. v. Kemp*, 104 U. S. 636, Mr. Justice Field, delivering the opinion of the court, says: "The last position of the court below—that the owner of contiguous locations, who seeks a patent, must present a separate application for each, and obtain a separate survey, and prove that upon each the required work has been performed—is as untenable as the rulings already considered;" and in the same case it is said: "It would be absurd to require a shaft to be sunk on each location in a consolidated claim, when one shaft would suffice for all the locations." In this case just cited, Mr. Justice Field is speaking of the things necessary to be done

by an applicant to obtain a patent to placer mining ground. In no case, nor in any ruling or decision of the United States land department, that we have been able to find, is it held to be necessary that a separate discovery, separate marking of the boundaries, separate recording, and separate work should be made and performed upon each 20 acres contained in a 160-acre placer claim authorized to be located under one location by an association of persons. If the plaintiffs in this suit had made such a discovery on the ground in controversy, and had made such a location thereof, and were performing such work and making such improvements thereon as would entitle them to a patent therefor under the mining laws of the United States, then they had such title and right to possession as would entitle them to prosecute this action for damages for the trespass complained of.

The appellant further contends that the evidence shows that the plaintiffs had forfeited any right or title they may have had to the ground in controversy, by failing to do the required amount of work thereon for the year 1891. The evidence in this case shows that work of the value of about \$150 was done for that year upon the entire claim. If, under the decisions of the land department and the tendency of the adjudications of the courts, \$500 in work and improvements, on any part of a 160-acre claim, or any one of a number of contiguous claims, is sufficient to entitle applicants to a patent for the whole of such ground or claims, then, by parity of reason, it would seem that \$100 in work or improvements expended or made upon such 160-acre claim in any one year would save it from forfeiture. Such seems to be the view taken by the land offices, and is in accordance with the customs, rules and regulations of miners in this jurisdiction. But in this case a forfeiture was not pleaded by appellant in its answer, although the court below permitted evidence of the amount of work done on said claim for the year 1891. There is no evidence of a re-entry or relocation by any one on account of failure to do the required work by plaintiffs on said ground; nor does the defendant connect itself with any outstanding title adverse to plaintiffs, or plead any license or warrant to enter upon the ground in controversy. We do not find anything in the record to support the plea of forfeiture.

The appellant contends that in this case, if it were liable for actual damages, the court below erred in rendering judgment for treble damages. This suit was instituted for damages for willful and malicious trespass; but respondents contend that, notwithstanding the complaint charges willful and malicious trespass, they are nevertheless entitled to treble damages, under section 363, Code Civ. Proc. The respondents contend that it was not necessary, under said section, to allege or prove malice, wantonness, or evil design,

etc. In *Endlich* on the Interpretation of Statutes, (section 129,) the author, commenting on similar statutes, says: "Similarly, statutes giving punitive, double, or treble damages against one cutting and converting to his own use timber growing on the land of another, without the latter's consent, are held confined to cases where some element of willfulness, wantonness, carelessness, or evil design enters into the act." In *Cohn v. Neeves*, 40 Wis. 393, the court, in a case involving the construction of a statute similar to the one under consideration here, says: "The important question arising upon the various exceptions taken by defendants is: Does the statute give the treble damages when the conversion is merely a technical conversion in law, as in the case before us, or was it only intended to apply to cases where some ingredient of willfulness, wantonness, or evil design enters into the act? According to the view of the circuit judge, the statute applies to every case of the conversion of logs, timber, or lumber floating in any of the waters of this state, or lying on the banks or shores of such waters, or on any island where the same may have drifted, and gives treble damages as the measure of recovery. It seems to us that this is an unreasonable and unsound construction of the provision. True, the language used is general, and, if literally interpreted, would include any conversion. But, says an acknowledged authority on this subject, in interpreting a statute it is not always a safe rule, or a true line of construction, to decide according to the strict letter of the act, but courts will rather consider what is its fair meaning, and will expound it differently from the letter, in order to preserve the intent. *Qui haeret in litera haeret in cortice*. Broom, Leg. Max. p. 538. Observing this rule of interpretation, looking at the object and purpose of the statute, we cannot think it was intended to apply to every conversion of this kind of property, situated or found as described, without regard to the question whether the conversion was wanton and willful or not. It is needless to observe that the law is highly penal in its character. By way of punishment it subjects the wrongdoer in certain cases to an extraordinary liability for the property of another appropriated to his use. In some cases the conversion may be merely a technical one in law, arising from accident, mistake, or even carelessness, without any evil design, and where the damages recoverable at common law afford an adequate compensation to the party injured." The same conclusion is arrived at, and the same construction placed upon a similar statute, in *Wallace v. Finch*, 24 Mich. 256. In *Kramer v. Goodlander*, 98 Pa. St. 353, construing a statute almost identical with ours, the court say: "Its [the statute's] object is the prevention of willful or careless cutting of another's timber, by at once punishing the wrongdoer, and amply

compensating the owner." In the case at bar the evidence shows that the land in controversy was located out in the wilderness far away from human habitation. The plaintiffs had to cut a trail through the timber to get to it. The defendant, coming to the land from another direction, had to cut a trail also. The defendant found but little evidence that any of the land in the vicinity had ever been claimed by any person for any purpose, except the blazing of four or five trees, and a small discovery shaft on the ground in controversy, as the work of plaintiffs. There was nothing to indicate that anybody actually asserted ownership or dominion over any part of the country thereabout. The circumstances attending the trespass complained of here are vastly different from a case where a person cuts down a shade tree in front of another's house, a lot, or enters another's close, and damages trees or timber therein, when all the evidences of ownership in another are present. These are the acts and trespasses which are intended to be denounced and punished by our statute. The evidence in the case does not support the contention that there was any willfulness, wantonness, or maliciousness in the acts or conduct of the defendant. We therefore think that the evidence did not justify the rendering of judgment for treble damages against defendant in this case. It is ordered that the judgment of the court below be modified by rendering judgment in favor of plaintiffs, against the defendant, for the amount of actual damages found by the jury, and in other respects the judgment is affirmed as modified.

HARWOOD, J., concur.

DOLAN et al. v. JOHN DOUGLAS CO
(Court of Appeals of Colorado. Jan. 22, 1894.)

SALES—FALSE REPRESENTATIONS.

Where the defense to an action for the price of goods was that they were not as represented, and that they had to be repaired before use, and there was evidence that they were of some value, the court properly gave judgment for the purchase price, less the amount expended in repairs, on defendants' failure to show how much less than the purchase price their value was.

Appeal from district court, Arapahoe county.

Action by the John Douglas Company against Dolan Bros. and others for the price of goods sold and delivered. From a judgment for plaintiff, defendants appeal affirmed.

The other facts fully appear in the following statement by REED, J.:

Appellee, by a travelling agent, sold appellants plumbers' supplies, consisting of six water closets, tanks, etc. The goods were cheaper in price than standard goods of the kind. There was no warranty. The price

approach to it was the representation of the traveling agent: "He claimed that he had a closet that he considered was as good or superior to any that is in the market, of its quality and kind." "He said just as good as the Mott goods." Five of them were put into a building known as the "McClelland Block," by the appellants. The sixth was received, but not used, and is not involved in the controversy. Appellants refused to pay for the goods. Suit was brought. Defendants answered, alleging: "That the goods were not as represented; that they required extensive repairs to make them fit for use; that they were not of a greater value than \$50. Second defense: That plaintiff made representations about the water closets; that defendants purchased relying upon the representations, and that the representations were untrue; and that defendants were damaged thereby in the sum of \$200." On the issues so made, the case was tried to the court. The purchase price appears to have been \$24.50 each, making an aggregate of \$147.00. The court allowed \$25 (\$5 on each closet) as damages, and gave judgment for the balance,—\$122 and costs. The only errors assigned are: 1) "That the evidence in said cause is wholly insufficient to support the judgment and findings of the court below." (2) "The judgment should have been in favor of the defendants, and against the plaintiff."

John P. Brockway, for appellants. E. P. Harman, for appellee.

REED, J., (after stating the facts.) It is hard to ascertain upon what theory the defense was attempted to be maintained. The purchasers might, upon examination of the goods, have refused to receive them, and rescinded the contract, or—having, as in this case, received, used, and retained the goods—recoup any damages sustained by reason of breach of warranty or false representations. No warranty appears to have been made. The goods were bought at low prices, and intended to be cheap and ordinary. The statement of the agent "that he considered them as good or superior to other goods in the market, of the same quality and kind," amounted to no warranty,—merely is opinion that they were equal to or superior to others of the same cost; and the statement that they were just as good as the Mott goods must be taken in connection with the former qualified statement,—that they were equal to any other make of the same quality and kind. The evidence in regard to the character of the Mott goods as very limited and unsatisfactory, furnishing no basis for comparison. It showed several qualities of Mott goods, the best selling at \$60 to \$80 each. It cannot be supposed that either party expected to find an article at \$24.50 equal to standard goods at \$60 or \$80. Having failed to rescind, the

purchasers were remitted to damages for the false representations, and trouble and cost of repairs, changes, and alterations in making them available for the purposes for which they were bought. Instead of making accurate and definite proof of damages, it was attempted to show, generally, that the goods were of no value. The proof failed to establish the contention, and the character of the evidence was too desultory and unsatisfactory to furnish the court a basis to establish the damage, except in the single instance of five dollars each for relining, which was allowed by the court. There was sufficient evidence on the part of both plaintiff and defendants to show the articles of some value; and, as the defendants failed to show how much less such value was than the purchase price, the court could only give judgment for the balance after deducting the items proved as damages, which was done. The judgment of the district court must be affirmed. Affirmed.

HUETT v. CLARK.¹

(Court of Appeals of Colorado. Jan. 9, 1894.)

OPINION EVIDENCE—NUMBER OF WITNESSES.

1. Where witnesses are giving their opinions as to what the brand on an animal is, the court may fix the number of witnesses that the parties may call on the subject.

2. The fact that the court erroneously held that a party had called the number of witnesses, to give their opinions on a subject, to which the court had limited the parties, is not ground for reversal, where the party's rights were abundantly protected by the witnesses whom he was allowed to call.

Appeal from district court, Arapahoe county.

Action between A. J. Huett and Edward K. Clark. Judgment for Clark, and Huett appeals. Affirmed.

Hipp & Tesch, for appellant. Ralph Talbot, for appellee.

BISSELL, P. J. This action was brought to recover a horse claimed by the parties to this suit. It has evidently engendered a bitter controversy, which is not infrequently the outcome of a dispute between two parties as to the ownership of an animal. Our convictions could be very briefly expressed, but out of deference to the very earnest contentions of counsel, and the exceeding interest of the litigants, we shall notice the several propositions which are assigned as error.

The principal argument is addressed to the consideration of the evidence by which the claims of the respective parties have been supported. Counsel insist that the verdict is unsupported by the testimony, is against its weight and its preponderance, and that the verdict discloses such a bias and prejudice

¹ Rehearing denied February 12, 1894.

as will permit an appellate tribunal to disregard what is ordinarily treated as conclusive on questions of fact, to wit, the verdict of a jury. We might have contented ourselves with the reannouncement of the well-settled doctrine that wherever there is a conflict of testimony, and there is evidence in the record which may fairly be said to support the verdict, we will not go further in our examination. That we might be certain that the appellant was without a just right of complaint, we have carefully read and considered the proofs. At the outset it is conceded that the appellant's contention that the brand upon the horse was his, and that it therefore demonstrated his title, finds very strong support in the record. The similarity of the two brands is so decidedly close as to render a mistake upon this proposition both easy and natural. Both consist of the two letters D and A. The appellant's brand lacks a crossbar in the A, and is rounded at the top. The A of the appellee's brand ends in sharply-defined lines, and is also distinguished by the bar necessary to make a perfect letter. The brands were produced in court. The animal was examined by the parties in interest and the adherents of their respective opinions, and apparently by disinterested persons, who scrutinized the marks, and expressed their opinion concerning the brand. This very careful examination of the testimony has not served to satisfy us that the jury were influenced by bias or by prejudice, and that their verdict is not well supported by the evidence. We might possibly reach a different result from a consideration of the case as printed; but this fact would not justify a conclusion, on our part, that the jury were without fair and well-supported reasons for their finding. The witnesses were before them, and they were better qualified than we can possibly be to determine what weight should be given to their varying opinions. We therefore conclude that upon the record as it stands, and under the force of the rule concerning the effect to be given to verdicts, the judgment may not be disturbed by reason of these considerations.

During the progress of the trial, while the parties were producing witnesses to give their opinions concerning the identity of the brands, and whether or not the second letter of it was distinguished by a crossbar, the court limited the number of this class which each party might be permitted to call. The appellant insists that he was harmed by the rule, and that the rule itself, as laid down by the court, was not fairly and equitably administered. He complains that he was shut off before he was permitted to call the last witness which he had a right to produce under the limitation, and particularly because one of his experts had given unexpected testimony on the subject. It is quite possible the appellant's complaint finds some basis in the record; but we do not

conceive that the action of the court in respect of this matter was so harmful and prejudicial as to warrant us in setting aside the judgment. Where the evidence is, in its nature, of an expert character, and witnesses are testifying as to their opinions, and are giving evidence on an otherwise controversial fact which is an essential ingredient of the case, it seems to be fairly well settled that the court may exercise its discretion in fixing the limit beyond which parties may not go in accumulating their proofs. The trial court does not appear to have infringed upon the doctrine, and the difficulty, if any, will spring from the mistake which the court committed in holding that the limit had been reached. We are not clear that this is true, but, if it were, the appellants' rights were so abundantly protected by the number of witnesses which he did call that this error would scarcely be justified in disturbing the result. It appears to be a fairly justifiable result. *Interest reipublicae ut sit finis litum.*

The only other complaint concerns the action of the court in admitting and rejecting testimony. We have carefully considered the record in this respect, and reached conclusions that the rights of the parties were not interfered with, nor their interests prejudiced by, what the court did, and that its rulings accord with the law of evidence in these particulars.

There is no error in the record which will permit us to disturb this judgment, and it will accordingly be affirmed. Affirmed.

CHARLES v. VARIAN et al¹

(Court of Appeals of Colorado. Jan. 2, 1914.)

EVIDENCE—ON REBUTTAL.

In an action for services for drawing plans for a house, defendant having attempted to show that the agreement to pay depended upon the acceptance and use of the plans, it is ground for reversal that plaintiff was permitted to show that the contract did not make recovery for the plans conditional upon their use, though plaintiff might have given the evidence in making his case.

Appeal from district court, Arapahoe county.

Action by Varian & Sterner against John Q. Charles for services as architect. Judgment for plaintiffs, and defendant appeals. Affirmed.

John R. Smith, for appellant. James E. Brown and Milton H. Smith, for appellees.

BISSELL, P. J. During the year 1887 Varian & Sterner, the appellees, were architects engaged in the practice of their profession in the city of Denver. In the spring of that year, John Q. Charles came to them to engage their services in the preparation of plans and specifications for the construction of a dwelling house. Several conferences

¹ Rehearing denied February 12, 1914.

were held between the architects and Charles and his wife concerning the general character of the projected dwelling. These resulted in what the architects claimed was an employment to prepare what was needful for the purposes of the contemplated house. The appellant disputes the circumstances and the terms of the employment, and contends there were certain limitations which would defeat the recovery if established. There is also a controversy between the parties as to the amount which was to be paid. Mr. Charles contends that no compensation was payable, except in the event of his acceptance of the plans, which was to be followed by the construction of the house, and that whatever pay the architects should receive was to be computed as a percentage on the cost, which would cover both the plans and the superintendency of the construction. On the other hand, the architects insist that neither of these limitations was placed upon the hiring, but that they were employed generally to prepare the plans, and were entitled to compensation based upon the reasonable value of such services, and were in no wise chargeable with a responsibility growing out of the failure to erect the building. The case was tried to the court without the intervention of a jury, and the architects got judgment for \$300, from which Mr. Charles appeals.

Substantially, there are only three errors insisted upon by the appellant in his briefs, and to us none of them seem to be well laid. A very learned argument has been filed in maintenance of the proposition that wherever an action is brought under the Code, and the plaintiff declares in the old and well-known form of the common counts to recover the value of services performed under contract, he can only recover upon proof of performance of the contract as an entirety, and he may not have judgment for the value of his services as upon a quantum meruit. It is insisted that to permit a plaintiff to declare in that form, and then to allow him to have the damages sustained by reason of the breach of a contract which he was prevented from performing by the acts of the other party is to justify a judgment where there has been a total variance between the pleadings and the proof. We are not called upon to settle this somewhat difficult and troublesome question. Whether such a variance would be available to reverse a judgment, when it is possible to determine from the record that justice has not been done, need not be considered. The fundamental difficulty with the argument in the present case is that counsel assume the contract to be an entirety, and that there was failure to perform according to its terms on the part of the architects. This is not necessarily true. There is evidence in the record which tends to show that the architects were hired to prepare plans for a house according to the general outlines given by

the contemplated builder, and that there was no such limitation upon the hiring as to compel them to make plans which should be wholly satisfactory to him, or to make plans for his inspection, which might or might not be used, at his option, in which event the compensation of the architects might be dependent upon the performance of the subsequent work by the employer. Since this is true, even though we should concede the proposition to be well laid, we have the right to conclude that the court found the contract to be as the architects claimed it, to wit, an employment to prepare plans, for which Charles would become obligated, even though he might never use them, and the building might never be erected. Under these circumstances, there is no rule which compels us to adopt the appellant's theory, and then hold that there is a variance which renders the judgment irregular. We must conclude that upon this proposition the court found the facts to be as the architects claimed them.

The appellant also insists that some of the evidence which was received was inadmissible, because the witness was permitted to testify on the subject of the value of the services, when the plaintiff had not declared as for his damages, for the breach of a contract. The preceding discussion on the subject of variance disposes of this objection.

Very great stress is laid on the point that the court departed from the well-settled forms of practice in the trial of cases in permitting the plaintiffs to introduce, on their rebuttal, evidence which tended to support their theory that the contract was one of a hiring to prepare plans, so made, and in such terms, as to permit them to recover the value, though the plans were never used. The appellant insists that although, by way of defense, he attempted to show the agreement to pay was dependent upon the acceptance and use of the plans, they might not, by way of overcoming his evidence, offer in support of their complaint proof which might legitimately have been produced while their case was being made. As a general proposition, doubtless, this is true, and courts very seldom depart from this practice, and rarely permit parties, when giving evidence in rebuttal, to offer that which ought to have been put in when they were making out their own side of the controversy. Conceding this proposition, the departure from the practice will never be made an opportunity to upset a judgment, unless it can be seen that there was a very great abuse of the court's discretion in this matter, and that the other side was prejudiced by the court's action. We do not remember any case in which a judgment has been reversed because of such an exercise of discretion on the part of the trial court. It often happens in the trial of cases that through the oversight of counsel, or by reason of an erroneous exercise of judgment, they have failed to offer important evidence when they were making out their case, and

have been compelled to appeal to the court for leave to introduce it in rebuttal. Unless it plainly appears that the ends of justice have manifestly been defeated by the practice, it would not do to say the judgment cannot be permitted to stand.

The only other error on which counsel insists is the one that is always urged upon our attention,—that the finding is not supported by the evidence. This omnium gatherum is universally resorted to very much as the equity pleader concludes his prayer for relief with the formal words, "and for such other and further relief." This is no ground for a reversal of the present judgment. The case contains testimony which fully supports the decision, and, whatever might be our own conclusions concerning its weight, or concerning its preponderance, we are without the right, under the circumstances, to say that the court erred in its conclusions. In cases of conflict like this, we are free to accept the determination of the trial judge, and are never inclined to disturb it.

The foregoing discussion disposes of all the errors which have been argued by counsel, or which can be legitimately raised upon the record, and, since the judgment of the court does no violence to the law, as we conceive it to be, we shall affirm the judgment. Affirmed.

HAMMOND v. BOVEE.

(Court of Appeals of Colorado. Jan. 22, 1894.)

BILL OF EXCEPTIONS—AUTHENTICATION.

The signature of the judge to a bill of exceptions must be attested by his own seal.

Error to Otero county court.

Replevin by Mrs. O. Z. Bovee against George Hammond. Judgment for plaintiff. Defendant brings error. Affirmed.

Platt Wicks and A. F. Thompson, for plaintiff in error. John Hipp and George A. Kilgore, for defendant in error.

BISSELL, P. J. During the summer of 1891, Frank Day was cultivating a farm in Otero county, and mortgaged certain of his growing crops to Mrs. Bovee, the defendant in error. The mortgage matured on the 30th of November, and the note which it was given to secure was not paid when it fell due. A portion of the property covered by the security consisted of alfalfa seed, which was threshed, and turned over by Day to George Hammond, the plaintiff in error, under some sort of a contract, and Hammond held it when the mortgage matured, and Mrs. Bovee demanded the possession. Hammond refused to surrender, and Mrs. Bovee brought replevin. The suit was defended by Hammond on the theory of a purchase of this part of the property from Day, with the consent and knowledge of the mortgagee. A good many questions are discussed by counsel, but those relied on relate to the admis-

sion of the note and mortgage in evidence, and the giving of certain instructions by the court. None of the alleged errors warrant us in disturbing the judgment. The questions of fact were settled by the verdict, adversely to the defendant, and the issue as to the validity of the transfer of the seed by Day to Hammond was fairly presented to the jury by the court, and they found with Mrs. Bovee on this proposition. Under these circumstances, there is nothing in the case to justify us in disturbing the verdict, unless some substantial error was committed by the court in admitting testimony, or in instructing the jury as to the law applicable to the issues. We are unable to determine these questions, since there is no record before us which properly brings them up for review. Whenever it is desired to attack a judgment, because it has been rendered upon improper or insufficient testimony, or because it is founded upon the verdict of a jury, who were not sufficiently and accurately instructed as to the law, it is indispensable that the parties who complain of such matters should preserve the evidence by a bill of exceptions, that this court may be able to see that the trial court disregarded the rules of evidence, or failed to properly instruct the jury. It has been repeatedly adjudicated by the supreme court that there is but one way to properly authenticate a bill of exceptions, to wit, by the signature and seal of the judge who subscribes it. The judicial signature, attested by his own seal, and not by the seal of the court, is a prerequisite to the proper authentication of the bill. *Morgenson v. Milling Co.*, 11 Col. 176, 17 Pac. 513. Many irregularities in such matters have been passed on by that tribunal, and the holding has been uniform in this direction. There is no bill of exceptions in this case, authenticated according to the requirements of the statute and the decisions. Since this is true, the assignments of error present no questions for determination, which can be settled according to the contentions of counsel. The record is free from defects, and the judgment has properly settled the rights of the parties, and it must accordingly be affirmed.

GARDNER v. RESUMPTION MINING & SMELTING CO.

(Court of Appeals of Colorado. Jan. 9, 1894.)

MINES AND MINING—LIENS.

Gen. St. 1883, Lien Act, § 7, as amended by Laws 1889, giving to persons who do work on mining property operated by leasees a lien for their labor, unless the owner files for record, "before the commencement of work under the lease," a notice that the property is being worked under a lease, does not apply where the lease was executed and the work performed before the passage of the act.

Appeal from district court, Boulder county.

work performed by plaintiff. There was judgment for defendant, and plaintiff appeals. Affirmed.

J. M. North, for appellant. Hugh Butler, for appellee.

BISSELL, P. J. The determination of this case is entirely dependent upon the construction of section 7 of the lien act, as contained in the General Statutes of 1883, and amended in the Session Laws of 1889. The matter is without importance, save for the parties in interest, because the amendment through which, if at all, the asserted rights are derived, was repealed by Sess. Laws 1891, p. 260. This repeal removes the necessity for an elaborate discussion of the statute, and relieves us of the labor of establishing a carefully prepared precedent, by which future contracts can be controlled. In 1888, the Resumption Company was the owner of the property on which the labor was performed by the plaintiff, Gardner. In July of that year, the company made a lease and bond of their property to one Tabor, who entered into possession thereunder, and began his work according to the terms of the agreement. Tabor remained in possession until May, 1889, when he assigned all his interest in the contract to the Ni-Wot Mines Company, Limited. The Ni-Wot Company appears to have gone into possession, and begun their work, and carried on the operations according to the scheme of their organization, and the terms of their interest in the property. The act of 1889, under which the plaintiff asserts his right, was passed in the session of that year, but, by its terms, took effect early in July, 90 days after its passage, under the general law. The particular work, of which the price is the subject-matter of the suit, was performed in the month of August and subsequently thereto. The amended section, as it stood in the act of 1889, gave to persons who did work upon mining property, which was being operated by lessees, or persons holding title under an option of purchase, a lien for their labor, unless the owner filed for record, in the recorder's office of the proper county, "before the commencement of work under the lease or option," a notice that the property was being worked under the terms of one of the agreements specified in the act. It is conceded that no notice was filed by the Resumption Company; that the work was done by the plaintiff, according to his allegations; that the price was not paid, and that the proceedings for the enforcement of the lien were entirely regular. The company answered, setting up, generally, the execution of the lease and bond, and the acts of the parties thereunder, substantially presenting,

against the owners of the property, the plaintiff demurred, and, from of the court sustaining the demurrer, an appeal to this court. The properly sustained. There is a principle of law which would entitle the plaintiff to recover by the plaintiff, and dependent for his remedy upon the lien conferred by the lien statute. The plaintiff fails to demonstrate the existence of a remedy thereunder, he must be remediless. It is wholly unnecessary for the plaintiff to put itself on either side of the question, whether lien statutes are of the common law, and thus strictly construed, or whether they are remedial in their character, and thus liberally construed. The rights upon a deserving class of persons, consequently are to be liberally construed to accomplish their evident purpose. The phraseology of the statute, and the general principles of statutory construction, commit us to reach a conclusion which justifies the action. It is a matter of common learning, as a general principle, that a statute cannot be given a retroactive effect, and be made operative to the detriment of interests vested prior to its passage. The construction for which the plaintiff contends would work a violation of a very well-settled principle. In the case of the Resumption Company, and Tabor, and those of his assignees, the terms of their contract, prior to the enactment of the statute under which the plaintiff sues, were fixed. The lessee took his estate, subject to the terms and conditions of the contract between the parties, and the plaintiff, with his possession and title, a right on the part of the lessee to reversion, save under and in accordance with their convention, and the plaintiff. To hold otherwise would be to take the estate of the reversioner to displace the acts of the lessee, to which he had neither impliedly nor expressly assented. But the language of the act does not permit this construction. It requires that the owner is required to file before the commencement of the lease. It was evidently intended for the owners to comply with the act, since, for 15 months prior to the commencement of the work which is the subject-matter of the suit, the lessee and his assignees had been in possession, carrying on the operations of the company. It is a forced construction to hold that "before the commencement of work" only to the doing of the part which is the subject-matter of the suit, the evident purpose of the statute was to protect the lease, the notice, and the s

concurrently executed, so that all the world should have constructive, if not actual, notice that the lease, under which the parties went into possession, was subject to the limitations of the statute, and that for nothing done under it could the property be held responsible. We are clearly of the opinion that the statute does not warrant the construction contended for, and that, under the conceded facts, the plaintiff was without a cause of action. The judgment of the court below was right, and will be affirmed.

FRIEL et al. v. PEOPLE.

(Court of Appeals of Colorado. Jan. 22, 1894.)

HIGHWAYS — PRESCRIPTION — ESTABLISHMENT BY STATUTORY PROCEEDINGS — SUFFICIENCY OF EVIDENCE.

1. The existence of a highway by prescription is not shown by evidence of an indefinite and indiscriminate use of a wide extent of open prairie and the various wagon tracks thereon during the prescriptive period.

2. Where the records of a county have been burned, the testimony of persons who are supposed to have participated in laying out a public highway is too indefinite to establish the legal formalities requisite to its legal existence.

Error to Prowers county court.

William Friel and others were convicted of obstructing a highway, and appeal. Reversed.

C. E. Gast and H. A. Dubbs, for plaintiffs in error. O. G. Hess and G. W. Butler, for defendant in error.

REED, J. Plaintiffs in error, who were servants or employes of the Atchison, Topeka & Santa Fe Railroad Company, while engaged in digging post holes on the line of the company's right of way for the purpose of fencing the same, were arrested. A criminal information was filed, charging that they did "unlawfully damage, interfere with, obstruct, and injure, and cause to be interfered with, obstructed, and injured, a certain road and highway in said county." Trial and conviction followed, resulting in judgment of fine of \$25 against each party convicted. Error is prosecuted from such judgment. It is assigned for error: (1) That the court denied the motion to quash the information. (2) In receiving the oral evidence of certain parties to establish the legal existence of a highway. (3) In refusing to admit in evidence a certain plat or map offered by the defendants. (4, 5) In refusing and giving instructions.

It will not be necessary to pass upon the first supposed error. The judgment must be reversed for failure of proof to establish the legal existence of a public road or highway at the point where the obstructions and interference are alleged to have occurred. It is impossible to determine from the record whether the supposed highway existed by

county authorities by virtue of the statute. If by the former, the proof signally failed. The proof showed an indefinite and indiscriminate use of a wide extent of country at the whim or caprice of the traveler during the time necessary to establish a prescriptive right, and various roads, either of which might have been claimed with equal propriety. In *Warren v. Town of Jacksonville*, 15 Ill. 241, it was said: "The use and occupation of this portion is only about seven years, without any proof of assent or dissent. It was over lands lying uninclosed and in common. While so much land lying in common in this country remains free to public uses and travel, until circumstances induce owners to inclose, we can deduce no strength of inference or conclusion from mere travel across it by the public without objection from the owner. It is neither the temper, disposition, fashion, nor habit of the people, nor custom of the country, to object to the community enjoying such privilege, until owners wish to inclose." In *Fox v. Virgin*, 11 Ill. App. 513, it was distinctly declared that the public could acquire no right to a road over vacant and uninclosed land by use alone for 20 years. See, also, *Kyle v. Town of Logan*, 87 Ill. 67. It was shown that the county records of the county of Bent, from which the county of Prowers was afterwards set off, were burned. Parol proof of the laying out and dedication of the ground in controversy as a highway by the county authorities was attempted. It is not necessary for the purposes of this case to determine what the evidence should be to establish the existence of a public highway, where the records were destroyed by fire. It is sufficient to say that evidence introduced from those who were supposed to have participated in laying it out was too indefinite and uncertain to establish any legal formality requisite to its legal existence. It was shown by the evidence that the Atchison, Topeka & Santa Fe Company acquired its right of way and constructed its road some years previous to the alleged illegal obstruction by its employes; that at the point in controversy its right of way had remained unfenced, and that the supposed obstruction and interference occurred by the entry of the corporation to erect a fence upon the line of its own territory. It is very doubtful if such act would bring its employes within the purview of the statute relied upon. In section 1156, 1 Mills' Ann. St., (Gen. St. § 689,) it is provided: "A crime or misdemeanor consists in a violation of a public law in the commission of which there shall be an union or joint operation of act and intention or criminal negligence." These conditions could hardly be supposed to exist where a party legally inclosing its own property erected a fence in a wagon track used by the public, on a very illy-defined way of travel on the prairie, where there was ample room for both, without greatly incon-

a highway, fenced and diked, so as to obstruct and impede the public travel. The conviction and judgment will be reversed, and the cause remanded. Reversed.

ORO MINING & MILLING CO. v. KAISER.¹
(Court of Appeals of Colorado. Nov. 27, 1893.)
GENERAL MANAGER—SCOPE OF EMPLOYMENT—LIABILITY OF CORPORATION.

The general manager of a mining and reduction company employed men to open a mine of his own, and to construct a wagon road and ore chute from such mine to the company's reduction mill, transferred miners and tools from the company's mine to his own, reduced his ore at the company's mill, and sold it mixed with ore from the company's mine. *Held* that, as he acted within the scope of his employment, though without the knowledge and in fraud of the company, the company was liable for the wages of men who were employed by him in the name of the company, and who believed that they were serving the company when working for him.

Appeal from district court, Summit county.

Action by Chris Kaiser against James P. Welch, J. H. Thompson, the Oro Mining & Milling Company, J. N. Casady, and J. J. Brown for work and labor. From a judgment for plaintiff against the Oro Mining & Milling Company, said company appeals. Affirmed.

The other facts fully appear in the following statement by REED, J.:

Kaiser, appellee, brought suit against James P. Welch, J. H. Thompson, the appellant, (a corporation,) J. N. Casady, and J. J. Brown, on claim of his own, and of 15 others assigned to him, for work and labor on the "Lucky Lode," claiming a lien on such mining property, and also judgments against the parties, respectively. Appellant was in possession of, owning, and operating a group of mines, called the "Oro Mines;" also, owning and operating a mill in the immediate vicinity for the reduction of the ores, and had been, some time prior to the creation of the claims upon which suit was brought. J. N. Casady and J. J. Brown, residing in Iowa, were the owners of the Lucky lode. James P. Welch was the manager of the Oro Mining & Milling Company, and its properties, and the only known and responsible officer in connection with such properties. About March 1, 1890, Welch, the manager of the Oro mining properties, in order to supply more ore to the mill and reduction works, went to Iowa and secured a purchase option, and a lease, in his own name, from Casady and Brown, of the Lucky lode. He paid \$1,000, purchase price was about \$20,000, balance of the payments were to be made at subsequent times, and in default of any of the payments property was to revert. Deeds and papers

of the property. Immediately after his return, Welch took possession of the property, commenced mining and producing ores from it, had a wagon road built for the transportation of ore, connecting it with the Oro mine, and a chute made, by means of which the ore was delivered at the mill of the Oro Company. The same mining foreman, whose business it was to employ labor, had charge of the mining on both mines, and miners and employes were changed by the foreman from one mine to the other, to suit his convenience, or the exigencies of the occasion. In June or July, Welch was removed as manager, and left the country, and Thompson succeeded him as manager of the Oro Company. At the time of Welch's retirement, there was due laborers, for work on the Lucky mine, some \$1,700 to \$2,000. Welch having made default in his payments under the contract with Casady and Brown, the property reverted. After Thompson became manager, work was not prosecuted upon the Lucky lode, and debts contracted by Welch in the prosecution of work on the lode were repudiated by him, as not being the debts of the company, but individual debts of Welch. Welch left the country, as claimed by the company, indebted to it in the sum of eight or nine thousand dollars. No service was had upon him, he was not accessible at the time of the trial, and his evidence was not obtained. The case was tried by a jury, resulting in a money judgment against the Oro Company for \$2,044.29, and in favor of the other defendants,—consequently no judgment for a lien upon the property. Several errors are assigned, a part on the admitting and rejecting of testimony; the principal errors relied upon being that the court erred in granting the judgment, because the contract of Welch, and his operations upon the Lucky mine, were his own individually, and not those of the defendant, the Oro Company. The giving of the following instruction by the court is assigned as error: "If you find from the evidence that the Lucky mine was being worked individually and solely for the benefit and profit of James P. Welch, notwithstanding that fact, if you further find from the evidence that he was the general manager of the Oro Mining and Milling Company, and employed men as such general manager, in the name of the company, although he may have set them to work on the Lucky mine, and in and about the performance of his own individual business, still, the company would be liable to the men so employed, unless the men themselves, when employed, or while rendering the services, knew that they were not working for the company, as a matter of fact, but were rendering the services for Mr. Welch, individually. The general manager of a mining

¹ Rehearing denied February 12, 1894.

company has the power to employ men, and has the power to direct where those men shall work, and it is immaterial, so far as the company is concerned, where they are directed to work. He may set them to work at business separate and apart from the business of the company, if such work is in the line of the business of the company, if the men are not aware such is the fact, but perform their services, believing they are rendering their services for the company; and, therefore, if you find from the evidence that he was general manager, and so employed the men in the name of the company, and that the men honestly, without notice, believed that they were performing their services for the company, the company is bound by that employment, and cannot escape liability by saying their general manager perpetrated a fraud, or entered into a contract not in their behalf, but for his individual benefit. It is the principal's duty to know what the agent or general manager does, and they are liable for all acts of their agent, performed within the general scope of his employment as manager."

Pattison, Edsall & Hobson and E. E. Whitte, for appellant. C. A. Wilkin, for appellee.

REED, J., (after stating the facts.) The errors assigned upon the admission of testimony do not appear to be urged or to be relied upon in argument. The ruling of the court may be liable to technical criticism, but no serious errors, sufficient to warrant extended examination, or the reversal of the judgment, occurred. The supposed lack of evidence to establish the respective claims of the different laborers will not be regarded. It clearly appears that subordinates under Welch were required to, and did, keep time books, and such time books were put in evidence, and proof of the respective claims, satisfactory to the jury, was made, nor were the claims controverted, or any attempt made to reduce them, by proof of payments or otherwise. In the trial of the case, as in the arguments of counsel, the defense was put upon the broad ground that, under the facts as shown by the evidence, Welch, the general manager, could not render his company liable for any debts contracted by him in prosecuting work upon the Lucky lode. All questions in regard to Welch's purchase, or contract to purchase, and his lease of the mine on behalf of his company, may be eliminated from the discussion. It cannot be successfully claimed that Welch, as general manager of the affairs of the company, had, by virtue of his office, authority to bind his company by purchase or lease of real property, either in his own name, or in the name of the company, without special authority. In determining the rights of the laborers employed, it is unimportant in whom the title to the property was, or whether pur-

chased or leased by the Oro Company or Welch, or whether by either. Other considerations and facts must control. Welch was the undisputed manager of the company, was the only responsible party in charge of the business of the corporation. The business of the company was the mining and reduction of ores. For the latter business it had its own mills in the immediate vicinity of its mines, was taking ores from its mines and reducing them at the mills. Both lines of business were under the control of Welch as manager. The mining of ores, their hauling and delivery, the employment of men in each and every department, and the furnishing of necessary supplies, were clearly incidental to, and within, his authority. No question can arise on this proposition, and within these lines and the scope of his authority, debts contracted by him would be the debts of the company. In his capacity of manager of the mill, it would, certainly, be his duty to supply it with ore, if available. These duties, and his authority in the premises, are so elementary, and so well established, no authority is needed in their support. Apparently in the discharge of his duty as manager, for the purpose of getting more ore for the mill, he commenced mining ore upon the Lucky lode, constructed a road and built a chute, employed men, took a portion of the men and tools from the company's mine, and transferred them to the Lucky, the ore was taken to and reduced at the company's mill, and shipped and sold to smelters, mixed with the ore from the company's mine, and, as far as shown, the proceeds applied to the wants of the company. It is shown by the evidence that, on several occasions, Welch, when asked by laborers who was responsible for the payment of wages on the Lucky lode, informed the parties that they need have no fears, that it was just the same as before, and that the Oro Company was responsible, and stood behind the whole thing, and paid the wages. The evidence shows that time books for labor upon the Oro mine and the Lucky lode were kept separate and distinct, that payments of both, when made, were made in the same manner, by the checks of Welch as manager, and that, in two or three instances the amounts due individuals for labor and supplies on the Lucky lode, and for the work on the Oro mine, were consolidated, and one check made embracing both payments. As the Law Dict. defines a manager to be "the person who really has the most general control over the affairs of a corporation, and who has knowledge of all its business and property, and who can act, in emergencies, in his own responsibility. He may be considered as the principal officer." "The term implies a general supervision of the affairs of the corporation, in all its departments." *Spangler v. Butterfield*, 6 C. 356; *Manufacturing Co. v. Lawson*, 57 W. 404, 15 N. W. 398. "He must be con-

the principal officer to whom is delegated the entire control and management of the corporate property, as far as operating the same is concerned. * * * In the absence of defined powers, the powers incident to the office and employment would embrace that of employing the necessary labor, opening, developing, and protecting the mine, the purchasing * * * of necessary tools and supplies, and mining and selling the ore, with power to bind the corporation for bills necessarily contracted in the prosecution of the work. * * * Other parties, in dealing with the corporation, have a right to assume, and act upon the presumption, that all the powers pertaining to the office, generally, are possessed by the individual in question, unless notified of restrictions and limitations." Robert E. Lee Silver Min. Co. v. Omaha & Grant, etc., Refining Co., 16 Colo. 118, 26 Pac. 326. It is contended that the acts of Welch were unknown to, and a fraud upon, his company. Admitting it, how could his employes be affected by it? The employment was directly in the line of his authority. Employes were not required, nor expected, to investigate the title, and ascertain the tenure by which the property was held, and, had they known the holding was in the name of Welch, such information, alone, would not affect the liability. The knowledge of the general manager is imputed to his corporation. The knowledge of a manager is, in respect to others, the knowledge of the company. In *Little Pittsburg Con. Min. Co. v. Little Chief Con. Min. Co.*, 11 Colo. 223, 17 Pac. 760, it is said: "A principal is bound to know what his agent does, in the course of his employment, and particularly so, when the profits of the conduct of such agent go in the pockets of the principal." This is in harmony with the general law of the subject. Had employes known the title to the property and right to mine was in Welch, and not in the corporation, they might reasonably suppose from the course of business, it was by design, and with full knowledge. They were never informed that it was a distinct and separate enterprise. As far as shown by the evidence, the only information was obtained directly from Welch, to the effect that the work was being prosecuted by the company, and it was responsible for it. These statements, made by him, were, in legal effect, those of the company. It is not shown whether the mining upon the Lucky was profitable or disastrous, presumably the latter. Imputing, as the law does, the knowledge of the manager to the company, we find it operating the mine for some months, and, according to its theory, occupying the equivocal position of being able to affirm the acts of the agent if profits resulted, and to disaffirm if disastrous. Such positions are not tolerated in law. It was only after Welch's connection with the company ceased, and he had left the country, that his successors attempted to

repudiate his transactions in the premises. In *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248, the leading case upon this branch of law in this state, it was said: "If an officer of a corporation is allowed to exercise general authority in respect to the business of the corporation, or a particular branch of it, for a considerable time, in other words, if he is held out to the world as having authority in the premises, the corporation is bound by his acts, in the same manner as if the authority were expressly granted." The same doctrine is declared in *Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 322; *Peyton v. St. Thomas' Hospital*, 3 Car. & P. 363; *Railroad Co. v. Coleman*, 18 Ill. 298; *Railroad Co. v. Dalby*, 19 Ill. 375; *Dougherty v. Hunter*, 54 Pa. St. 382; *Allegheny City v. McClurkan*, 14 Pa. St. 81; *Oil Co. v. Gllson*, 68 Pa. St. 150. This case is readily distinguishable from the case of *Mining Co. v. Fraser*, 2 Colo. App. 14, 29 Pac. 667, relied upon by counsel for the reversal of the judgment. In this, the debts were contracted clearly within the well-defined authority of the manager, in the line of his duty, which was the prosecution of the business of the company. In that, the purchasing of a reduction plant of machinery for the company was not in the defined limits of his authority, and, in order to bind the company for debts so contracted, proof of special authority, aside from that incident to his position of general agent or manager, must be shown. The instruction (No. 18) has been ably and vigorously assailed by counsel in argument. A careful and patient examination of it, in the light of the authorities, and the principles of law stated above, fails to show it faulty or erroneous. It appears to be a plain, clear, and intelligible statement of the well-established principles of law controlling the case. The questions of fact, and of the knowledge of the employes, were submitted to the jury in plain and unmistakable language, and were found against the appellant, and such findings appear to have been warranted by the evidence. The law given, as applicable to such a finding of facts, as shown by the foregoing discussion, and authorities cited, was an enunciation of well-established principles. The judgment must be affirmed.

DALLEMAND et al. v. MANNON.

(Court of Appeals of Colorado. Jan. 22, 1894.)

PUBLIC LANDS—RECORD OF RECEIVER'S CERTIFICATE—HOMESTEAD IN UNDIVIDED ESTATE—"RECORDED TITLE"—ABANDONMENT—LEASE.

1. The receiver's certificate of the entry and purchase of the land described therein is evidence of title in the person making the purchase, (Gen. St. 1883, § 1310,) and as such is entitled to record under section 215, which provides for the recording of "all deeds, conveyances, and agreements in writing of, or affecting title to, real estate."

est of the homestead act to enter the word "Homestead" in the margin of his "recorded title."

3. A deed of a homestead to secure a debt of the homesteader was a mortgage; and the quitclaim deed back to the homesteader on payment of the debt was a release of the mortgage, and not a part of the homesteader's "recorded title," in the margin of which the word "Homestead" should be entered.

4. Under the homestead act, (Gen. St. 1883, pp. 539, 540,) which provides that the homestead must not exceed \$2,000 in value, and is exempt only while occupied by the homesteader and his family, the homesteader may sell undivided portions of his homestead, and may claim his homestead in the undivided residue, as against all persons except his cotenants.

5. The lease of a part, or even the whole, of a homestead for a definite period, with reversion to the homesteader, will not affect his homestead rights.

Error to district court, Ouray county.

Action by Robert Dallemand, M. Oberfelder, and J. Edoff, as partners under the firm name of Dallemand & Co., against P. O. Hargis and Sam V. Mannon. To a judgment releasing the homestead of defendant Mannon from the levy of an attachment, plaintiffs bring error. Affirmed.

Story & Stevens, for plaintiffs in error. E. I. Stirman, for defendant in error.

THOMSON, J. On the 29th day of January, 1892, the plaintiffs in error brought their action against P. O. Hargis and S. V. Mannon, in which summons was issued and served on the defendant Mannon. On the 5th day of March, 1892, a writ of attachment was issued in the cause, which was levied upon certain real estate in Ouray county as the property of Mannon. On the 11th day of April, 1892, Mannon filed his petition in the cause, together with an affidavit supporting it, claiming the land levied upon as a homestead, and praying its release from the levy. On the 12th day of April, 1892, the plaintiffs answered the petition. From the petition, affidavit, and answer, the following facts appear: On the 4th day of September, 1884, Mannon entered the tract of land, of which that levied upon is a part, in the United States land office, and received, in pursuance of his entry, a receiver's duplicate receipt, which, on the 10th day of October following, he caused to be recorded in the office of the recorder of Ouray county. On the 6th day of December, 1884, by an instrument which was in form a deed, but was in fact a mortgage, he conveyed the tract to one Begole, to secure an indebtedness from him to Begole of \$1,000. On the 31st day of May, 1886, he paid this indebtedness, and received from Begole a quitclaim deed for the property. On January 14, 1887, Mannon caused the word "Homestead" to be entered of record on the margin of the record of the receiver's receipt, which marginal entry was signed by him, and attested by the clerk and recorder, together with the date and

made, Mannon sold and conveyed to different parties certain undivided interests in the tract, and made a lease of the residue for a term of years, excepting the dwelling house occupied by him, the land upon which it was situated, and another small portion of the tract. The attachment was levied upon the interest remaining in Mannon at the time of the levy, which was worth about \$500. At the time the homestead record was made, Mannon was the head of a family, living upon and occupying the land, and continued to live upon and occupy it, together with his family, down to the time of the levy. On the 10th day of March, 1892, Mannon sold and conveyed his entire remaining interest. Upon the hearing, the court granted the prayer of the petitioner, and discharged the attachment levy. This ruling is assigned for error.

The contention of plaintiffs is: First, that a receiver's duplicate receipt is not such an instrument as is authorized by law to be recorded; that, as Mannon had conveyed the land to Begole, who had afterwards reconveyed it to him, the recording of the deed from Begole was the first legal record of his title; that the homestead entry should have been made on the margin of the record of that deed; and that, the entry having been made on the margin of the record of the receiver's receipt, it was a nullity. And, second, that the several conveyances, and the lease made by him, subsequent to the record entry, constitute an abandonment of the homestead exemption. A receiver's duplicate receipt is simply a certificate of the entry and purchase of the land it describes, and is, by statute, made evidence of title in the person making the purchase, his heirs and assigns. Gen. St. § 1310. Section 215 makes provision for the recording of "all deeds, conveyances, and agreements in writing of, or affecting title to, real estate or any interest therein." A receiver's certificate is, in effect, an agreement on the part of the United States to issue to the purchaser a patent for the land purchased in consideration of the purchase price, and as such would, by the terms of the section, be entitled to record. The record of this certificate would therefore be the recorded title, upon the margin of which the word "Homestead" might be entered, so as to give the owner the benefit of the homestead act. Where a party, after acquiring title to land, conveys it in such manner that his title is extinguished, and it subsequently returns to him by independent conveyance, if he then desires to avail himself of the benefits of the homestead law, it is questionable whether he should not use the record of the later conveyance for that purpose. The language of the statute on the subject is entirely general, and its proper construction, with reference to the particular recorded title which should be

nion to Begole, although in form absolute, was in fact but a mortgage, and possessed only the attributes of a mortgage. It was given as security for a debt. It was not a relinquishment of title, but an incumbrance upon it. In like manner the quitclaim from Begole back to Mannon was only a release of the mortgage. Being a mortgage, although in form a conveyance, until forfeiture it was a security merely, which conferred no right of entry upon the mortgagee. *Drake v. Root*, 2 Colo. 685. This being the case, the release from Begole was no part of Mannon's recorded title, within the meaning of the law; so that, in so far as we are advised, the only title which he had, and upon the margin of which he could make the statutory entry, was the receiver's receipt. We are of the opinion that this receipt, as his evidence of title, was properly recorded, and that the entry made by him on the margin of its record was a fulfillment, on his part, of the requirements of the law, and entitled him to its benefits.

It appears that, at the time of the levy, the only interest in the land which remained in Mannon was an undivided one-fourth, and that he was then a tenant in common with the persons owning the other three-fourths. It is urged that by the sale of the undivided interests, and the making of the lease, the homestead exemption was destroyed. If this is true, it is because the acquisition of a homestead right in lands which the claimant does not hold in severalty is forbidden by the spirit and letter of the statute. Homestead rights and exemptions are statutory creations; but when we consider the humane and benevolent purposes, and the motives of public policy, which underlie the enactment of such statutes, they should receive a broad and liberal interpretation. We quote the following from the act concerning homesteads: "Section 1. Every householder in the state of Colorado, being the head of a family, shall be entitled to a homestead not exceeding in value the sum of two thousand dollars, exempt from execution and attachment, arising from any debt, contract or civil obligation entered into or incurred after the first day of February, in the year of our Lord one thousand eight hundred and sixty-eight. Sec. 2.¹ To entitle any person to the benefit of this act, he shall cause the word 'Homestead' to be entered of record in the margin of his recorded title to the same, which marginal entry shall be signed by the owner making such entry and attested by the clerk and recorder of the county in which the premises in question are situated, together with the date and time of day upon which such marginal entry is so made. Sec. 3. Such homesteads shall only be exempt as

shall be of the opinion that any homestead provided for in this act is of greater value than two thousand dollars, on filing an affidavit of that fact, with the clerk of the district court, such creditor may proceed against said homestead as in ordinary cases, and if the said homestead shall sell for more than two thousand dollars and costs, the excess shall be applied to the payment of the demand of such creditor; but in all such cases the sum of two thousand dollars, free of charge or expense, shall be paid to the owner of the homestead; and in case the said homestead shall not sell for more than two thousand dollars and costs, the person instituting the proceedings shall pay all costs of such proceeding, and the said proceeding cease and not affect or impair the rights of the owner of the homestead." Gen. St. 1883, pp. 539, 540.

It will be seen that the benefits of the act are extended to every householder, being the head of a family, without qualification, except as to value and occupancy. The homestead must not exceed in value \$2,000, and is exempt only while occupied by the owner or his family. As to the character or extent of his title the statute is entirely silent. It has been repeatedly, and, in so far as we know, uniformly, held that an ownership in fee is not essential; that an equitable title, a lease for a term of years, or any title which may be the subject of levy and sale may also be the subject of a homestead claim; and, on principle, in the absence of statutory limitation, we are unable to see why, as against any person except the cotenants, an exemption may not be predicated upon an undivided as well as a several interest, when the other essentials concur. Of course, the claimant cannot set up his homestead as against his cotenants; but, if they are satisfied, what right have third parties to complain?

There is a line of authorities holding that a homestead exemption can be claimed only in case of sole ownership of the land; but we think it will be found, upon an examination of the cases, that in most of them the decisions were controlled by some peculiar phraseology of the statutes which were the subjects of construction. The homestead act of Wisconsin provided that, when a levy was made upon the land of one whose homestead had not been selected and set apart by metes and bounds, he might then make the selection, and notify the officer what he regarded as his homestead; and that, if the plaintiff in the execution was dissatisfied with the quantity thus selected, the officer should cause a survey to be made, beginning at a point to be designated by the owner, and set off the proper amount in a compact form, including the dwelling house. In *West v. Ward*, 26 Wis. 579, the court held, constru-

¹ Gen. St. 1883, § 1632.

ed interest in real estate, and that it would be impossible to set off to the party any specific portion which might not, on a partition, fall to some of his cotenants. See, also, *Thurston v. Maddocks*, 6 Allen, 430; *Wolf v. Fleischacker*, 5 Cal. 244; *Kellersberger v. Kopp*, 6 Cal. 563. The difference between the Wisconsin statute and ours is patent. Our homestead act does not fix the quantity of land which may be held as a homestead. It is the value, and not the amount, which is limited; and, where a creditor is of the opinion that the value is greater than the debtor's right, he may, by taking the steps prescribed, have it all sold, and, if it brings more than \$2,000, he will get the excess; but there is no setting apart of any separate portion to the debtor, and calling that the exemption to which the law entitles him. The language of the statute throughout applies precisely as well to an undivided as to a sole ownership. There are nowhere any words which indicate an intention on the part of the legislature to distinguish between one and the other. It has never been disputed that a party who has acquired a homestead may sell integral portions of it without impairing his rights in the residue under the statute; and why may he not also sell undivided portions with the same result? If any reason exists, it certainly does not appear in the act. In the absence of any statutory obstruction, the courts generally seem to have found no difficulty in upholding a homestead claim upon an undivided estate. *Horn v. Tufts*, 39 N. H. 478; *McClary v. Bixby*, 36 Vt. 254; *Tarrant v. Swain*, 15 Kan. 146; *Thorn v. Thorn*, 14 Iowa, 49.

Neither would a lease of a portion of the estate, or even of the whole of it, of itself work an abandonment of the homestead. The question of abandonment is very largely one of intention. If Mannon had left the premises with the intention of never returning, his homestead rights would have been extinguished; but, if his removal was temporary only, accompanied by an intention to return and resume possession of his homestead at a future time, there would be no abandonment. *Thomp. Homest. & Ex. § 264 et seq.* And on the same principle a relinquishment of possession to a tenant for a definite period, the reversion remaining in the lessor, would have no effect upon his homestead rights. Mannon, although he leased a portion of the premises, still continued to reside upon the property. It would have made no difference if he had not. Notwithstanding the lease, his homestead exemption was intact. *Wiggins v. Chance*, 54 Ill. 175; *Potts v. Davenport*, 79 Ill. 455; *Stewart v. Brand*, 23 Iowa, 477.

The sale of the homestead subsequent to the levy cuts no figure in the case. The statute provides for such sale, and, if it was bona fide and for value, (of which there is no

the opinion that the judgment releasing the property from the levy was proper, and it is accordingly affirmed.

SPROAT v. DURLAND.¹

(Supreme Court of Oklahoma. Feb. 2, 1894.)

PUBLIC LANDS—SETTLEMENT RIGHTS—HOW TO ACQUIRE—INJUNCTION.

1. A purchase of the improvements of a settler on public lands confers no settlement right on the purchaser, as such right is not transferable.

2. A settlement on land covered by an existing entry, which is relinquished as the result of a contest begun before such settlement, confers no settlement right, as the contestant, by virtue of his contest, is entitled to a preference right of entry.

3. On proceedings by a homestead claimant to enjoin one claiming adversely to him from interfering with his possession, the court may, on defendant's answer and cross complaint, enjoin plaintiff from interfering with defendant's possession.

4. In such case the court has jurisdiction to give the injunction the force and effect of a writ of possession, as there is no adequate remedy at law, and as defendant should not be compelled to wait for possession pending the settlement of title in the land department.

Bierer, J., dissenting.

Appeal from district court, Oklahoma county; John G. Clark, Judge.

Proceedings by Samuel Sproat to enjoin Otto C. Durland from interfering with his possession of certain land claimed by plaintiff as a homestead. Defendant filed an answer and cross complaint, claiming the land as his homestead, and asked that plaintiff be enjoined from interfering with his possession. From a decree for defendant, plaintiff appeals. Affirmed.

Amos Green & Son, Harry St. John, and J. L. Brown, for appellant. Everest & Sanford and W. S. Field, for appellee.

DALE, C. J. May 1, 1893, appellant, Samuel Sproat, applied for and obtained from the district judge of Oklahoma county, sitting at chambers, a temporary restraining order against the appellee, Otto C. Durland, which order restrained said Durland, and all persons acting under him, from in any manner trespassing upon the N. E. $\frac{1}{4}$ of section 34, township 12 N., of range 3 W., or turning any cattle therein, or building any fence thereon, or in any wise interfering with the possession of Sproat in and to said land, except 20 acres, theretofore occupied by one Kate A. Woodruff, until the further order of the court; and that defendant be notified to appear before the court on May 3, 1893, at noon, or so soon thereafter as the court could hear the matter; and in said order also required Sproat to give bond in the sum of \$200 to the defendant in said proceeding. The above order was issued upon the ex parte showing

¹ For dissenting opinion, see 35 Pac. 886.

of action against the defendant states: (1) That upon the 21st day of April, 1893, the N. E. quarter of sec. 34, tp. 12 N., R. 3 W., was held by homestead entry thereon by one Kate A. Woodruff, and at that time the defendant, Otto C. Durland, had a contest pending in the United States land department against the said homestead entry of Kate A. Woodruff, upon the ground that Kate A. Woodruff was not qualified to make homestead entry of said land by reason of the fact that she had entered upon the same after March 2, 1889, and before noon of April 22, 1889. (2) That one Martin C. Lawrence had a contest pending against said homestead entry, upon the ground that he, Lawrence, was a settler at the time and before Kate A. Woodruff made homestead entry thereon. (3) That Kate A. Woodruff had a fence on the north side of said land, and owned one-half of the fence on the east side of said land; the other half of the fence on the east line being owned by one Clay Peters. Kate A. Woodruff owned the fence on the south line of said land, and the one on the west side thereof was built by the public for the purpose of obtaining a highway, which fences completely inclosed said quarter section of land. (4) That Kate A. Woodruff had inclosed and in cultivation, on the south side of said land, about twenty acres, separate from the other parts of said land, upon which she had a small dwelling house and well. (5) Said Lawrence had inclosed on the west side of said land about four or five acres, upon which he had a dwelling house, and within which inclosure he had a garden and well. (6) That upon the 24th day of April, 1893, the plaintiff purchased the improvements of said Lawrence, and peaceably entered into possession of the same, and Lawrence removed from said land. On the same day plaintiff entered on said land as a settler thereon, under the homestead laws of the United States, for the purpose of making the same his home, and claiming it under the laws of the United States as a homestead. (7) Upon the 28th day of April, 1893, this plaintiff peaceably and quietly entered into the possession of the said tract of land, except the twenty acres cultivated by Kate A. Woodruff, and upon which she had located her dwelling house; and such entry was made without objection or protest on the part of said Kate A. Woodruff; and that ever since said date this plaintiff has held possession of all of this tract of land, except the part so cultivated by Kate A. Woodruff. (8) On April 21, 1893, this plaintiff filed in the United States land office at Oklahoma City an affidavit of contest, duly corroborated, charging that said Kate A. Woodruff and Otto C. Durland had entered within the Oklahoma lands after the 2d day of March, and

lands. (9) On the 29th day of April, 1893, Kate A. Woodruff filed in the United States land office at Oklahoma City a relinquishment of her homestead entry on said land, and at the same time Otto C. Durland made homestead entry on said land, and at that instant of time this plaintiff was a settler on said land under the homestead laws of the United States, and was claiming the same as his homestead, and had valuable improvements on said land, consisting of a dwelling house, fences, and improvements of the value of \$150 or more, and was in possession of all of said land, and holding the same peaceably and quietly, except the twenty acres occupied by Kate A. Woodruff, and was claiming the whole of said land as his homestead. That the plaintiff was at that time qualified in all respects to take public lands under the homestead laws of the United States. (10) Upon the 1st of May, 1893, this plaintiff filed in the United States land office at Oklahoma City an affidavit of contest against the said homestead entry of Otto C. Durland, duly corroborated, charging that the said Otto C. Durland did, after March 2, and before noon of April 22, 1889, enter upon and occupy portions of the land described in and declared open to settlement by the president's proclamation of March 23, 1889, opening said lands to settlement; and further charging that said Otto C. Durland was within said lands before and up to the hour of twelve o'clock noon of April 22, 1889, in violation of law; and further charging that the plaintiff was a homestead settler on the said land at and before the time that defendant made homestead entry thereon; and that such contest is now pending in the United States land office at Oklahoma City. Said settlement was made and said contest filed by this plaintiff in good faith, and for the purpose of acquiring title to said land. (11) Upon the 29th day of April, 1893, the defendant, Otto C. Durland, went into possession of the twenty acres of land inclosed, cultivated, and occupied by Kate A. Woodruff until that time. On April 29th she surrendered to said Durland the possession of that part of the said land. (12) On the same day the defendant commenced invading the possession of this plaintiff, and drove his cattle onto that part of the claim held by the plaintiff, which cattle were by the plaintiff driven from said land, when defendant again, on Sunday, April 30, 1893, turned his cattle upon the possession of plaintiff, who again drove them out. Defendant again drove them upon the possession of the plaintiff, and is continuing to keep said cattle there. That defendant is now sharpening fence posts and getting wire upon that part of said claim formerly occupied by Kate A. Woodruff, and, as this plaintiff verily believes, and up-

on such belief alleges, is preparing to fence this plaintiff out of the possession of some part or all of the land so held by him on said quarter section, and, if not restrained, will continue to force his cattle upon the possession of plaintiff, and fence said land away from this plaintiff, and deprive him of the benefits thereof, and wrongfully appropriate such possession and benefits to the use of the defendant. (13) That plaintiff has no adequate remedy at law; that, if the defendant be not at once restrained, he will continue the repetition of his said wrongful acts, and deprive this plaintiff of the use and benefit of his possession; and there is an emergency for the immediate issuing of a temporary restraining order, or plaintiff believes said defendant will attempt at night to erect a fence on plaintiff's possession, thereby excluding him from all use of said land. Wherefore plaintiff prays that an immediate restraining order at once issue, restraining the defendant from in any manner interfering with or invading the possession of said plaintiff in and to all parts of said land, except the twenty acres, formerly occupied by Kate A. Woodruff, until such time as a hearing can be had thereon, and that at such hearing said restraining order be continued, and, on the final hearing thereof, that such restraining order be made a perpetual injunction, and that this plaintiff recover his costs."

The affidavit was duly verified, and the restraining order heretofore mentioned issued thereon. At the time fixed for the further hearing, Durland answered to the complaint, as follows: "First. That he denies that upon the 24th day of April, 1893, or at any other time, the plaintiff settled upon the land in dispute in said action, or entered upon the said land as a settler under the homestead laws of the United States; and he denies that on the 28th day of April, 1893, said plaintiff peaceably and quietly entered into the possession of the whole of said tract of land, except the twenty acres cultivated by Kate A. Woodruff. Second. That defendant denies that the said plaintiff, upon the 24th day of April, 1893, or at any other time, purchased the improvements of Martin C. Lawrence upon the land in dispute, and peaceably entered into the possession of the same. Third. The defendant denies that on the 29th day of April, 1893, at the time when Kate A. Woodruff filed in the United States land office at Oklahoma City, O. T., a relinquishment of her entry on said land, that the plaintiff herein was a settler on said land, under the homestead laws of the United States. Fourth. Defendant denies that upon the 29th day of April, 1893, or at any other time, he has invaded the possession of the plaintiff herein in any part of said land. Fifth. Defendant further shows the following facts concerning his right to and possession of the said tract of land, as follows: That your affiant was on the 22d day of

April, A. D. 1889, and has ever since been a duly-qualified homestead entryman for said tract of land. That on the afternoon of April 22, 1889, he made a personal settlement upon said tract of land by going upon the same, setting up a stake and a flag, cutting some poles and laying them together in a square form, and by camping on said tract that night. That on April 23, 1889, he surveyed out the lines of said tract, and then went to the United States land office at Guthrie, O. T., to make homestead entry of the same, leaving his baggage, tent, and equipage upon said tract of land. That upon entering the land office at Guthrie, O. T., your affiant was informed that said tract was entered by Kate A. Woodruff. That your affiant immediately began to take steps to protect his right to said tract of land, and filed a contest thereon on May 8, 1889, alleging that he was the first legal settler of said tract of land, and that said Kate A. Woodruff was not qualified to enter said tract of land, for the reason that she had entered upon and occupied a portion of the lands declared open to settlement and entry by the president's proclamation of March 23, 1889, prior to 12 o'clock noon of April 22, 1889, and after March 2, 1889, contrary to the act of congress approved March 2, 1889, relative to the Oklahoma lands; and in said contest your petitioner asked for a preference right to enter said tract, under the second section of the act of May 14, 1880. That hearing was had on said affidavit of contest, and decision duly rendered by the register and receiver of the United States land office at Oklahoma City, O. T., in favor of the defendant, and that said decision was duly affirmed by the honorable commissioner of the general land office at Washington, D. C. from which the said Kate A. Woodruff perfected an appeal to the honorable secretary of the interior department, Washington, D. C. That on November 2, 1892, defendant filed a suspended homestead application on said tract, and deposited the fees and commissions in said entry. That on the 24th day of April, 1893, said Kate A. Woodruff filed a relinquishment of her homestead entry, and a dismissal of her said appeal to the United States land office at Oklahoma City, and this defendant was at that time permitted, by virtue of his preference right by reason of the cancellation of the homestead entry of the said Kate A. Woodruff, under contest, and by reason of his suspended application aforesaid, filed November 2, 1892, to make homestead entry 6878 at said Oklahoma City land office, on the 24th day of April, 1893, for the land in dispute herein, said suspended application being that day placed of record, for which entry received receiver's duplicate receipt 6878, copy of which is hereto attached, and is a part hereof. That on said day, prior to execution of the relinquishment of the said Kate A. Woodruff, and his homestead entry

cultivated ground, well, fencing, and other improvements claimed by her. That on said day, and for a long time prior thereto, the said Kate A. Woodruff had the exclusive, peaceable, and lawful possession of all of said tract of land, save and except certain improvements claimed by one Martin C. Lawrence, situated about midway north and south on the west side of said land, and containing some five or six acres, and inclosed by a wire fence; and the said Kate A. Woodruff had all of said tract, save and except the tract above described, the possession of which was claimed by the said Martin C. Lawrence, inclosed by a good and sufficient wire fence, and used the same as a pasture, since the summer of 1889. That on the 29th day of April, 1893, this defendant made personal settlement upon said tract of land by going upon the same in person, taking possession of said house, moving a portion of his furniture therein, and establishing his residence thereon; that he immediately turned his cattle into the inclosure above mentioned, surrounded by fence, bought of the said Kate A. Woodruff. That he immediately started his team to plowing upon the cultivated land thereon, and assumed the control and possession of the whole of said premises, except the five or six acres heretofore mentioned, contained in the inclosure of Martin C. Lawrence, said settlement being prior to his said homestead entry of this defendant. Sixth. That on the 10th day of December, 1892, the above-mentioned Kate A. Woodruff leased to J. W. Sproat and S. G. Sproat, the sons of the plaintiff herein, said tract of land, and all improvements thereon belonging to her, excepting the dwelling house thereon, and including the pasture heretofore mentioned, from the possession of which the plaintiff seeks to exclude the defendant, all of which more fully appears by the articles of agreement between said parties, hereto attached, marked 'Exhibit B,' and made a part of this answer. That soon after said lease was made the said lessees went into possession of said premises, placed in said pasture a number of milch cows and other stock, and placed in charge thereof, as their agent, Samuel Sproat, the plaintiff in this action, who has remained in charge of said stock, and, as the agent of said lessees, in the possession of said premises, ever since said time, and still so remains in possession of said premises, by force, as the agent of said lessees, notwithstanding said lease was canceled, and all right surrendered thereunder, by the said S. G. Sproat and J. W. Sproat, in consideration of the payment to them of the sum of one hundred (\$100) dollars, on the 28th day of April, A. D. 1893, as will more fully appear by the written release executed by the said S. G. Sproat and J. W. Sproat, indorsed upon the articles of lease,

heretofore mentioned as composing this defendant's pasture on said tract, and drove his cattle therefrom into the highway. That again, on the 30th day of April, 1893, the plaintiff again drove said cattle of the defendant from said pasture, although requested by the defendant to desist from said unlawful acts; and that he threatens to wholly exclude the cattle of the defendant from said pasture, and, if necessary, to use force to that end. Eighth. That the said Samuel Sproat, plaintiff, has turned certain cattle and horses into the inclosed pasture of this defendant, on said tract of land, and now occupies and uses said pasture, and threatens to occupy and use the same, to the exclusion of this defendant, and to his great damage; that said plaintiff interferes with the peaceable use and possession of this defendant of said tract of land, inclosed in said pasture fence, by forcibly turning therefrom defendant's stock, and threatens to continue said acts of trespass; and that the said plaintiff is wholly insolvent; and that your defendant has no adequate remedy at law; and that an injunctive order against said plaintiff will avoid a multiplicity of lawsuits, and prevent a great and irreparable injury to this defendant. Wherefore the defendant asks that the prayer of the plaintiff herein be denied; that the temporary restraining order granted May 1, 1893, be dissolved; that an injunction may issue, directed against said Samuel Sproat, his agents, employes, and servants, and all persons acting through, under, or with him, restraining him, and each of them, from pasturing horses, cattle, or other stock, of any kind, upon said tract of land, within the inclosure of this plaintiff, herein set forth, from trespassing upon, using, or occupying in any manner, any part of said inclosure, or from interfering in any manner with the possession of the defendant in and to any part of said tract of land, or the improvements thereon, located and purchased, as heretofore set forth, from the said Kate A. Woodruff, and from driving out, removing, or interfering with cattle, horses, or other stock of the defendant, kept in the inclosure of said defendant, on said premises, from fencing, breaking up, plowing, planting, or in any manner using, any of the land on said tract of land in dispute, covered, occupied by, or surrounded by the improvements of this defendant, and comprising all of said claim, except said tract of five or six acres, herein mentioned as the improvements of Martin C. Lawrence, together with the costs of this action, and such other relief as equity may require."

Attached to the answer of defendant appears a copy of Receiver's Duplicate Receipt, No. 6,976, issued from the Oklahoma City land office, showing that Otto C. Durland en-

tered the land as a homestead, April 29, 1893. Also, appears an exhibit, setting forth a lease, executed by Kate A. Woodruff to Joe W. Sproat and S. Grimes Sproat, bearing date December 16, 1892, and leasing, to the parties named in said lease, all of the land, except that portion occupied by Martin C. Lawrence. The lease is for the term of one year, beginning on March 1, 1893. The instrument has the usual covenants found in leases, and, in addition thereto, a provision that the lessor reserved the right to use and occupy the house standing on that portion of the land leased; that the lessees should in no manner allow any persons, other than themselves, to establish a residence upon the land, nor to enter into possession of any portion of the land, nor sublet to any person, nor deliver them any portion of said tract; and a violation of such covenants, or entering into collusion with any person for such purpose, should render void the lease. Also, a further covenant appears, to the effect that the lease was in no way to be used for the purpose of affecting the homestead right of Kate A. Woodruff. On the back of the instrument, there appears the following indorsement:

"Oklahoma City, O. T. April 25th, 1893.

"For and in consideration of the sum of \$100.00, we hereby cancel this lease, and waive all settlement claims, of any nature whatsoever, under the same, to the tract herein described, and hereby deliver possession of said tract to first party, Kate A. Howe.

[Signed]

"S. G. Sproat.

"J. W. Sproat."

The reply of Sproat to the answer raises no new issues in the cause. Numerous affidavits are filed in support of the petition and answer, and, from the record as thus presented, we find the following to be the facts in the case:

(1) April 22, 1889, Otto C. Durland, Kate A. Woodruff, and Martin C. Lawrence settled upon and claimed as a homestead the N. W. $\frac{1}{4}$ of section 34, township 12 N., range 3 W., situated in Oklahoma county. (2) Kate A. Woodruff filed her homestead entry for said tract of land, at a time not definitely shown in the record, but prior to May 1, 1889. (3) On May 8, 1889, Otto C. Durland instituted contest proceedings against the entry of Woodruff, upon two grounds: First, that said Woodruff was disqualified from entering, as a homestead, lands in Oklahoma, for the reason that she entered upon a portion of the lands in Oklahoma prior to noon of April 22, 1889, and subsequent to March 2, same year; and, second, that he, Durland, was the first legal settler upon said tract. He prosecuted his contest to effect, and a decision was rendered in his favor, both at the local land office, and by the commissioner of the general land office, at Washington, D. C.; and, at the time of her relinquishment of her

homestead entry, April 29, 1893, her appeal was pending before the secretary of the interior. Immediately upon the filing of her relinquishment, as aforesaid, Durland filed his homestead entry for the land. It appears that Durland did not follow up his settlement upon the land, made April 22, 1889, and, at the time of his homestead entry, had only such an interest in the land as grew out of his contest, alleging that Woodruff was disqualified from entering the land as a homestead. (4) Martin C. Lawrence instituted a contest against the entry of Woodruff, and claimed prior settlement to that of Woodruff. The record does not disclose the nature and extent of his settlement, except that it appears that he was using a small tract of land, in extent about five acres, situated in the western portion of the tract, and separated from the main body of the same by a fence, which tract was so used until April 24, 1893. (5) That Samuel Sproat, appellant and plaintiff below, is the father of the two persons who executed the written lease from Woodruff, heretofore mentioned; that said Sproat was upon and about the premises leased, assisting and working for his sons, from December 16, 1892, until the sons surrendered and canceled the lease, on April 25, 1893. On April 21, 1893, Sproat filed, in the land office at Oklahoma City, an affidavit of contest against the entries of Woodruff and Durland, alleging that both Woodruff and Durland were disqualified from entering the land as a homestead; that, on the 24th day of April, 1893, Sproat purchased from Lawrence his improvements upon the land, and, on the same day, went into possession of such improvements. On May 1, 1893, Sproat filed in the land office a contest against Durland for the land, and, as grounds of such contest, alleged that Durland was disqualified from entering the same, by reason of having entered upon lands in Oklahoma, subsequent to March 2, and prior to April 22, 1889, and, further, that he, Sproat, was an actual settler upon said land prior to, and at the time, Durland filed his homestead entry; that on April 28, 1893, Sproat began occupying all that portion of the land, except the tract heretofore mentioned as the 20 acres used for cultivation by Woodruff. (6) Immediately after the filing by Durland of his homestead entry, to wit, April 29, 1893, Durland entered into possession of the house, formerly occupied by Woodruff, and began using all of the tract, except that formerly occupied by Lawrence, for pasturage and otherwise. Sproat claimed the right to the possession of all the tract, except the 20 acres referred to. Sproat drove Durland's stock off from the premises, and Durland insisted upon his right to hold the same upon the land, and to the control of all the tract, except that formerly used by Lawrence. (7) Upon the hearing, the judge dissolved the temporary restraining order, previously made, and granted an order restrain-

ing Sproat from the use or occupancy of all the land, except that portion previously used and occupied by Lawrence, and awarded possession of the same to Durland; the order so made to remain in operation until the final determination of the litigation between the parties, concerning the title to the land, unless otherwise ordered by the court. It appears, from the record, that an attachment for contempt of the foregoing order was issued against Sproat, and that he was brought before the judge below, to answer to such charge; that he was not punished for disobeying the order, because of his promise of obedience to the same.

The plaintiff below, Sproat, excepted to the order of the court, and brings the case here for review.

Assignment of errors: While numerous errors are assigned, those which bear upon the questions involved may be stated as follows: (1) Error in dissolving the temporary restraining order, made on appellant's complaint, and refusing, on the hearing of said cause, to continue said order. (2) In granting appellee an injunction and restraining order, on his answer and cross complaint, on the pleadings and evidence in the case. (3) In giving to the injunction and restraining order the force and effect of a writ of possession. (4) In giving judgment against appellant for costs, and in compelling appellant to remove his stock from the pasture described in his said complaint.

To fairly consider the first error assigned, it becomes essential to determine what possessory rights each party has in the land, by virtue of the settlement, contests, and the homestead entry of Durland. A conclusion upon these questions can only be reached by an examination of the acts of congress relating to contests, and entries under the homestead laws of the United States, and the decisions of the secretary of the interior, in construing such laws. We think that such laws and decisions must govern the status of the parties while the title to the land remains in the government, because congress, having the full power to dispose of the public domain, has, by appropriate legislation, vested in the interior department all powers necessary to convey public lands, until the title thereto passes from the government by patent. Under the head of "Homesteads," (page 419, Rev. St. U. S., beginning at section 2289,) will be found the law under which the title to the land in dispute must be obtained from the government, and it will appear that such law provides for filing an entry, and that such entry gives, by plain implication of law, a right of residence upon and occupation of the tract so entered. See section 2291, *supra*. In fact, unless residence upon and cultivation be made of the land, within six months from date of filing, the entryman cannot acquire title to the same. This law evidently intended to, and did, give to the entryman the exclusive right to the

use of the land entered. And, from the date of its adoption, until congress passed the act of May 14, 1880, which will be further noticed hereafter, the only way by which a person could secure an interest in a tract of land, under the homestead law, was by filing his homestead entry therefor. And the first person, in point of time, making homestead filing, had the right to the exclusive use of such land. The act of May 14, 1880, was passed for two purposes: First, to secure to a successful contestant a reward for his services in aiding the government to expose fraud, by permitting him to enter the land, if he prevailed in his contest; and, second, to permit an inceptive right to be obtained, under the homestead law, other than by filing an entry for the land. This later act was not intended to change the law relating to the use or occupancy of the land, except that an actual settler upon the land now has three months, from the date of his settlement, within which to file his homestead entry for such land, and his rights relate back to the date of his settlement; and it follows that, where a person has made an actual settlement upon land, if, within three months therefrom, another files an entry thereon, the settler having the prior right may institute his contest, within the time allowed him to file his entry, and, pending such contest, occupy the land. But, in such case, he would not be permitted to occupy the whole of the tract, because the entryman would have equally as great an interest in the tract, until the land department finally awards the land to the party entitled to the same. It will, therefore, be seen, by an examination of the statutes referred to, that a person claiming a legal settlement upon homestead land, and a right to occupancy, must base his claim upon either a filing for the same, or upon a settlement made within three months prior to such filing. This view of the law is, we think, fully sustained by the decisions of the interior department; such decisions uniformly holding that a homestead entry segregates the land from settlement, and that a person going upon the same, while a valid entry remains of record, is a mere trespasser. See the opinion of Attorney General McVeagh, found in 1 Dec. Dep. Int. 58; Oliver v. Thomas, 5 Dec. Dep. Int. 289; Gudmundson v. Morgan, Id. 147, and the cases cited in those decisions, and Sturr v. Beck, 133 U. S. 548, 10 Sup. Ct. 350. It is suggested that *Connager v. Dicks*, 1 Okl. 82, 28 Pac. 864, seems to establish a different rule; but an examination of that decision shows that each of the parties to that controversy was a bona fide settler upon the land, and that such settlements were made in accordance with the laws of congress above referred to.

Such being the law, let us examine the facts relative to Sproat's alleged settlement, and determine whether or not Sproat became a settler upon the land, in any manner known to the law. Kate A. Woodruff, hav-

ing filed her entry in April, 1889, and not relinquishing the same until April 29, 1893, any act of settlement made by Sproat, prior to her relinquishment, was the act of a mere trespasser, and gave him no rights whatever. His purchase of the improvements of Lawrence, on April 24, 1893, could give him no settlement rights, because a settlement right cannot be transferred. It is a personal act, and not the subject of sale. *Fox v. Railroad Co.*, 2 Dec. Dep. Int. 553, and cases there cited; *Pruitt v. Chadbourne*, 3 Dec. Dep. Int. 100; *Willis v. Parker*, 8 Dec. Dep. Int. 623; *Railway Co. v. Beal*, 10 Dec. Dep. Int. 504. Neither did the contest, filed April 21, 1893, against both Woodruff and Durland, initiate a settlement right to the land. As we have heretofore pointed out, such right must be based upon either a filing or settlement made within three months prior to an adverse filing. But it is contended that, because Sproat was actually upon the land as a settler, at the time Woodruff filed her relinquishment, his right attached between the time of such relinquishment and the filing by Durland. This would be true, if it were not for the fact that Durland was a contestant for the land, and entitled, by virtue thereof, to a preference right of entry. Many cases may be found, decided by the interior department, wherein it is held that the rights of a settler upon government land attach at the instant the entry upon the land is canceled; and, as between parties upon land covered by an entry, it may be said that the first settler, in point of time, will be permitted to enter such land. This doctrine, however, is predicated upon an entirely different state of facts than those presented in this case. In *Geer v. Farrington*, 4 Dec. Dep. Int. 410, the following language is used: "Conceding that, while an entry stands uncanceled upon the record, settlers upon the land covered thereby acquire no rights as against the record entryman, or the United States, yet, as between such settlers, priority of settlement may be properly considered." This rule has been adhered to in subsequent cases, but, in the case referred to neither party was a contestant for a preference right of entry, and, in discussing the question, the honorable secretary states that neither party had so secured any right as a preferred contestant. And, after a careful review of all the decisions of the interior department, we are of the opinion that nowhere will the doctrine be affirmed that a settlement made upon land covered by an existing entry confers any rights whatever, where such entry is canceled as the result of a contest for a preference right. If this were not true, the very purpose for which the law was passed, which gives to a successful contestant a preferred right of entry, would be defeated. The law intends that persons who go to the trouble, and, in many cases, the vast expense, of successfully contesting an entry, shall enjoy the fruits of their victory. All of the decisions

of the department are in harmony with this view. *Haskins v. Nichols*, 1 Dec. Dep. Int. 172; *Nichol v. Littler*, 3 Dec. Dep. Int. 224; *Ebbott v. Schaezel*, 4 Dec. Dep. Int. 587; *Hemsworth v. Holland*, 8 Dec. Dep. Int. 400; *Paulson v. Richardson*, Id. 597.

It will be observed, from an examination of the facts in this case, that Durland filed his contest against the entry of Woodruff on May 8, 1889; that he not only claimed in such contest to be the first legal settler, in point of time, but alleged that Woodruff was disqualified from making such entry; and, while it may be true that he lost whatever of settlement right he had, because he failed to follow up such settlement, yet, as shown by the record, he did follow up his contest for a preferred right, and procured a favorable decision in both the local office and before the honorable commissioner of the general land office. It is true that the case was still undetermined, by reason of an appeal from the general land office to the honorable secretary of the interior, but that is immaterial. The relinquishment by Woodruff, pending such appeal, must be presumed to have been the result of the contest. *McCall v. Molnar*, 2 Dec. Dep. Int. 265; *Glaze v. Bogardus*, Id. 311; *Hay v. Yager*, 10 Dec. Dep. Int. 105. While it is true that the presumption that the relinquishment was filed as a result of the contest may be overcome by proof, in some instances, yet the party upon whom such burden rests has no greater or higher interest in the land than a contestant for a preferred right. From the foregoing, it is plain that Sproat obtained no rights whatever as a settler upon the land, either by his contest, on April 21, 1893, his purchase of the improvements of Lawrence, on April 24, his alleged settlement, on April 28, at a time the entry of Woodruff remained intact; nor could his settlement, at the time such entry was canceled, avail him anything, because of the preferred right of Durland, by virtue of his prior contest. Sproat's subsequent contest against Durland, of May 1, can only be considered as having been commenced for a preference right, which will give him the occupancy of the land only upon its successful termination. This view of the law is, we think, fully supported by the acts of congress, and the decisions of the interior department, and is manifestly equitable to all persons seeking to acquire lands under the provisions of the homestead law. Such being true, it must follow that the court below committed no error in dissolving the temporary restraining order, by him previously granted, because Sproat had, under the law, no right to the occupancy of the land; and the restraining order was, therefore, improperly granted, and, upon issue joined, should have been dissolved.

The second allegation of error is not tenable. A court may undoubtedly make such an order, in an injunction proceeding, as will do equity between the parties to the action.

The appellant had brought the appellee into court. The answer and cross-complaint of defendant were as fully before the court as if the proceedings had been originally commenced by the appellee. High, Inj. c. 1, § 32.

In the third assignment of error it is also urged that the court erred in giving to the injunction and restraining order the force and effect of a writ of possession. The order of the court did operate to give Durland the use of land then in possession of Sproat, and, to that extent, had the same effect as a writ of possession; but, if the order was properly granted, the fact that it operated in the manner claimed would be immaterial. As a general rule, it may be said that injunction is a preventive remedy, and will only be used to prevent future injury, rather than to afford redress for wrongs already committed, and is, therefore, to be regarded more as a preventive, than as a remedial, remedy. But, while the jurisdiction of a court of equity, by way of mandatory injunction, is rarely exercised, it is, nevertheless, too well established to admit of a doubt. High, Inj. c. 1, §§ 2, 478; *Corning v. Nail Factory*, 40 N. Y. 191; *Webb v. Manufacturing Co.*, 3 Sumn. 190; *Webster v. Cooke*, 23 Kan. 637; 3 Pom. Eq. Jur. § 1359; *Cooke v. Boynton*, 135 Pa. St. 110, 19 Atl. 944; *Black Lick Manuf'g Co. v. Saltsburg Gas Co.*, 139 Pa. St. 448, 21 Atl. 432. And we entirely approve of the principle laid down in *Tucker v. Carpenter*, Hemp. 441, found in a note to section 41, c. 1, High, Inj., wherein the court says: "A writ of injunction may be said to be a process capable of more modifications than any other in law. It is so malleable that it may be moulded to suit the various circumstances and occasions presented to a court of equity. It is an instrument in its hands capable of various applications, for the purpose of dispensing complete justice between the parties. It may be special, preliminary, temporary, or perpetual, and it may be dissolved, reviewed, continued, extended, or contracted; in short, it is adapted and used by courts of equity as a process for preventing wrong between, and preserving the rights of, the parties before them." It will be found, upon examination, that the English authorities are almost uniform in supporting the doctrine of mandatory injunctions, and that, where an application for such injunction is denied, such refusal is based upon the fact that an adequate remedy may be found in the law, and while, in this country, the courts, generally speaking, refuse mandatory injunctions, yet, where it clearly appears that no relief can be had under the law, we know of no reason, sound in principle, which will justify a court in withholding its aid, by mandatory injunction, in favor of a person who seeks protection from a trespasser, or to be restored to possession of property which is wrongfully withheld from him.

In the case under consideration, the question of the jurisdiction of the court to grant restraining orders, pending the litigation in the land department, is not raised. In fact, it may be stated, as a well-settled proposition, that the courts have the right to deal with the question of possession, as between settlers upon the public domain, until such time as the government, by its issuance of a patent, puts forever at rest the title to the lands. It is the duty of the court, in dealing with such matters, to exercise its equitable powers, and see to it that possession is given to the person who, under the laws of congress, is entitled thereto; and, when it is ascertained that a person claiming the right to the use and occupancy of a tract of land, the title of which is still in the United States, is, under the laws of congress, a mere trespasser, it becomes the plain duty of the courts having jurisdiction to give to the proper party the possession of the land upon which the trespass is committed. A mere assertion of right is insufficient to deprive the rightful occupant of the quiet use of land, and, as between settlers upon the public domain, the courts should inquire into the status of the land far enough to determine whether or not a person asserting a claim of possession has a color of right to such possession, under the homestead law, and, if it be found that he is a mere trespasser, or that the law will not, under any fair construction, warrant his claim, it is the clear duty of the courts to issue a mandatory order in injunction, restraining him from the further unlawful occupancy. This question is one of vital importance in Oklahoma. All our lands are entered, and title procured therefor, under the homestead laws of the United States. The questions arising out of adverse possession, as between homestead claimants, daily confront our courts. To say that no relief can be granted, or that our courts are powerless to do justice between litigants in this class of cases, pending the settlement of title in the land department, would be the announcement of a doctrine abhorrent to a sense of common justice. It would encourage the strong to override the weak, would place a premium upon greed and the use of force, and, in many instances, lead to bloodshed and crime. Such a state of affairs is to be avoided, and the courts should not hesitate to invoke the powers inherent in them, and lend their aid, in every way possible, to prevent injustice, by preventing encroachments upon the possessory rights of settlers, or by equitably adjusting their differences. In the case under consideration, no adequate remedy at law is provided for relief. Ejectment will not lie. *Adams v. Couch*, 1 Okl. 17, 28 Pac. 1009. And, at the time this proceeding was instituted, the forcible entry and detainer act was insufficient in its provisions to afford a remedy. The appellee was entitled to speedy relief, and ought not to be compelled to await the final and tedious result of the

litigation in the interior department, before obtaining that which he clearly shows himself entitled to have.

The only remaining questions are the ones set out in the fourth assignment of error. No briefs were filed upon either side of the case, and we are at a loss to know why the contention is raised upon the question of costs. The appellant, having begun the case below, and having failed to sustain the same, we know of no reason why the costs should not have been taxed against him. As to the right of the court to compel appellant to remove his stock from the pasture, it follows that, if the court had the power to issue a mandatory injunction, he could, by order, compel appellant to remove his stock. Such removal was a necessary incident to a compliance with the order. And appellant, being at all times a mere trespasser upon the possession of appellee, the court could very properly compel him to undo all acts done in furtherance of such trespass. The judgment of the lower court is affirmed.

BURFORD and SCOTT, JJ., concurring.
BIERER, J., dissenting.

STATE v. STEPTOE.

(Supreme Court of Idaho. Jan. 11, 1894.)

Appeal from district court, Bingham county; D. W. Standrod, Judge.

F. A. Steptoe was convicted of vagrancy, and appealed to the district court. From an order dismissing such appeal, defendant appeals. Dismissed.

Geo. M. Parsons, Atty. Gen., for the State.

HUSTON, C. J. This is an appeal from an order of the district court of Bingham county dismissing an appeal to said court from the police magistrate's court for the city of Pocatello, in said county. The defendant was convicted of vagrancy in the police court of the city of Pocatello. An attempt was made to take an appeal, but it seems from the record none of the requisites of the statute necessary to the taking of an appeal were complied with. No appearance in this court is made by or on behalf of appellant. The appeal is dismissed.

MORGAN and SULLIVAN, JJ., concur.

ADAMS v. McPHERSON.

(Supreme Court of Idaho. Jan. 30, 1894.)

APPEAL—REHEARING.

When a case has been submitted for final determination, and the appeal is dismissed and judgment of the lower court affirmed, a rehearing will not be granted on an application to vacate and set aside the order dismissing the appeal.

(Syllabus by the Court.)

Appeal from district court, Lemhi county; D. Standrod, Judge.

Action by George N. Adams against M. M. McPherson, administrator of the estate of Charles A. Wood, deceased. A judgment for defendant was affirmed on dismissal of an appeal therefrom, (34 Pac. 1095,) and plaintiff now moves to vacate the order of dismissal. Denied.

R. P. Quarles, for appellant. Texas Angel, for respondent.

SULLIVAN, J. This appeal was dismissed at the November term, 1893, of this court, (34 Pac. 1095,) and this is an application to have the order dismissing said appeal set aside and vacated. This case was brought to this court at the September term, 1891, and the appeal dismissed because the record failed to show any final order or judgment from which an appeal could be taken. See *Adams v. McPherson*, 2 Idaho, 355, 27 Pac. 577. It was again brought to this court in 1893, and placed upon the calendar for hearing at the November term. The appeal was dismissed, and the judgment of the court below was affirmed on the 7th day of December, 1893, on the ground that the record failed to show that the notice of appeal had been served on the adverse party or his attorney. The transcript was filed in this court on the 3d day of July, 1893. Respondent's brief was filed on the 9th day of October, 1893. The November term of this court opened on the 13th day of that month, and this case was set for hearing on the 27th day of November. There was no appearance of counsel for appellant on that day, and the hearing was adjourned to the 5th day of December, 1893. On that day counsel for appellant failed to appear, and the case was submitted on the printed briefs of the respective parties. The first point raised by respondent's brief was that the record failed to show that the notice of appeal had been served on the adverse party or his attorney, and the record sustained the contention. The appeal was dismissed, and the judgment of the court below affirmed. If application had been made to amend the record before the dismissal, it, no doubt, would have been granted upon a proper showing. But, as the second appeal in this case was dismissed because of a defect in the record,—a defect pointed out by the brief of respondent, which was on file long before the case was called for hearing,—and this being the second dismissal for defect in the record, this application might indicate a trifling with the good humor of the court, when the various efforts to have this case heard on appeal are taken into consideration, and the further fact that this application shows a defect in the affidavit of service of the notice of appeal on the respondent's attorney. We do not think the facts shown by the application would warrant the vacation of the order dismissing the appeal, provided the

court had authority to do so. This court affirmed the judgment of the court below, and, if a rehearing was desired, a petition for that purpose should have been presented. The motion is denied.

HUSTON, C. J., and MORGAN, J., concur.

BOARD OF COM'RS OF LOGAN COUNTY v. McFALL.

(Supreme Court of Idaho. Feb. 9, 1894.)

POOR PERSONS — LIABILITY OF COUNTY TO SUPPORT—JURISDICTION OF JUSTICE OF THE PEACE.

1. A person who contracts to care for and maintain all of the county poor, under chapter 6, tit. 11, Rev. St. 1887, by the year, for a gross sum, cannot hold the county liable for the support of a person who does not come within his contract, although such person was committed to his care under a proper certificate of a justice of the peace.

2. A justice of the peace has no authority to commit a person to the county hospital for the indigent sick, except those who come within the provisions of chapter 6, tit. 11, of the Revised Statutes.

3. He cannot bind the county for the keeping and caring for the person who does not come within the provisions of said chapter.

4. One who has a contract for keeping all of the indigent sick of a county, for a gross sum by the year, is not required to keep any who do not come within the terms of his contract.

(Syllabus by the Court.)

Error to district court, Logan county; C. O. Stockslager, Judge.

Action by Matt McFall against the board of county commissioners of Logan county to recover compensation for keeping a poor person. There was judgment for plaintiff, and defendant brings error. Reversed.

H. S. Hampton, for plaintiff in error. P. M. Bruner, for defendant in error.

SULLIVAN, J. This case was brought to this court by the board of county commissioners of Logan county by writ of error. The facts are substantially as follows: The defendant in error entered into a contract with Logan county whereby he agreed to keep and maintain the indigent sick, or otherwise dependent poor, of said county for a term of one year, in accordance with the provisions of chapter 6, tit. 11, of the Revised Statutes, for the sum of \$1,350. That thereafter, upon the order of W. C. Hill, a justice of the peace of Shoshone precinct, said county, one Charles Stansbury was committed to the care of defendant in error as an indigent sick person, under his said contract. That thereafter the defendant in error presented his bill for keeping said Stansbury from May 12, 1892, to January 12, 1893, to the board of county commissioners of Logan county for allowance, and on the 19th day of April, 1893, said board refused to allow said bill,—from which order an appeal was taken by the defendant in error to the district court of Logan county, and, after a trial of the cause,

the district court made its finding of facts and conclusions of law therein, and judgment was duly entered in favor of the defendant in error. The trial court found, by its third finding of fact, that said Stansbury was not a resident of Logan county, but was a resident of the state of Washington, and that he was not entitled to the care, protection, and maintenance of Logan county as an indigent sick, or otherwise dependent poor, person of said county, and that neither at the time of said Stansbury's admission into said hospital, nor at any time thereafter, was he entitled to the care, protection, and maintenance of Logan county as an indigent sick, or otherwise dependent poor, person of said county; and as a conclusion of law found that the claim and demand of the defendant in error for \$510 for keeping said Stansbury from May 12, 1892, to January 12, 1893, was a legal claim against Logan county.

The contention of plaintiff in error is that said Stansbury came within the meaning of the term "indigent sick," as used in chapter 6, tit. 11, Rev. St., and that defendant in error was bound to keep and care for him, under his said contract, without any additional compensation above that named in said contract; while the defendant in error contends that said Stansbury does not come within the meaning of said term, and that, by the terms of said contract, he was not required to keep said Stansbury, but, because of a certificate issued by said justice of the peace, he was compelled to keep said person, and for that reason the county is liable for the sum claimed. It appears from the transcript that said Stansbury was a citizen of the state of Washington; that while in Logan county he became sick, and made application for admission to the county hospital, under the provisions of said chapter 6, as an indigent sick person, and that the proper certificate was issued by a justice of the peace for his admission to said hospital, and that he was admitted thereto; that he remained there for eight months, and then was removed to the state of Washington by the board of county commissioners. Thereupon defendant in error presented his bill for keeping said Stansbury for said eight months, and contends that, as said Stansbury was not a resident or citizen of Logan county, he was not required to keep him by the terms of his said contract. The trial court sustained this contention, and also held the county liable for the amount of said bill.

We think the court erred in its conclusion and judgment. The statute under consideration is one of mercy and benevolence, and must be liberally construed, with a view to carry into effect its beneficent objects and designs. We think the provisions of said chapter are broad enough to include all indigent sick within a county. The statute does not require that such persons reside within the county any certain length of time, or that they possess any particular qualifica-

tion, other than that of being indigent sick or otherwise dependent poor. A citizen of another state who comes into this state, and becomes sick, and is peculiarly unable to provide for himself proper medical aid, attendance, and support while so sick, comes within the provisions of said chapter. However, in a case of that kind it is the duty of the board of county commissioners to remove such sick person to the county or state of his residence as soon as practicable. If Stansbury did not come within the provisions of chapter 6, as a county charge, we are not aware of any law that would authorize the board of county commissioners to provide for his care and maintenance. If the contention of the defendant in error was correct, as to said Stansbury's not coming within the terms of said contract, we are not advised of any law that authorizes the board to allow bills for his keeping. It is urged, however, that defendant in error was compelled to keep said Stansbury because of the order of the justice of the peace, and for that reason the county should be held liable. The answer is that the defendant in error was not compelled to receive and keep any person who did not come within the terms of his contract. The jurisdiction of the justice of the peace is limited to the issuance of certificates for the admission of persons who come within the provisions of said law, and if he issues such certificate for the admission of a person not entitled thereto, he cannot bind the county by his unauthorized act. So, in either view of this case, the judgment of the court below must be reversed, and it is so ordered.

HUSTON, C. J., and MORGAN, J., concur.

WILLMAN v. DISTRICT COURT IN AND FOR ALTURAS COUNTY et al.

(Supreme Court of Idaho. Jan. 31, 1894.)

PROHIBITION—WHEN WRIT LIES.

Writ of prohibition does not lie to arrest the action of a district court upon a mere question of pleadings.

(Syllabus by the Court.)

Original petition by Alex Willman for writ of prohibition to C. O. Stockslager, judge of the court for Alturas county. Denied.

A. F. Montandon, (J. J. Burt, of counsel,) for petitioner.

HUSTON, C. J. Petitioner commenced an action in the district court for Alturas county against S. M. Friedman for the recovery of amounts alleged to be due and owing from defendant to plaintiff upon certain notes and accounts. Attachment was issued and levied upon property of defendant. A motion to dissolve the attachment was sustained by the court, and thereupon plaintiff amended his complaint, claiming to have it changed into

"a bill in equity for the foreclosure of what the court below held to be an equitable mortgage covering certain real estate." To the amended complaint of plaintiff, defendant filed an answer and cross complaint, claiming damages for the alleged wrongful and unlawful issuance and levy of the attachment aforesaid. To this answer and cross complaint of defendant, plaintiff filed a general demurrer, which was overruled by the court. Plaintiff now petitions this court for a writ of prohibition, to be directed to said district court, commanding said court to desist from further proceedings upon said cross complaint in said action. Section 4994, Rev. St. Idaho, defining the office and purposes of a writ of prohibition, says: "It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without, or in excess of the jurisdiction of such tribunal, corporation, board or person;" and section 4995 provides for its issuance "in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." It is claimed by counsel for petitioner that this is a proper case for the invocation of the extraordinary writ of prohibition, because the plaintiff in the pending action has not a speedy and adequate remedy by the provisions of law in appeal, and counsel have furnished us with quite a lengthy written argument in support of this theory. There is much of history and reminiscence in the brief of counsel, but we fail to find reference to a single precedent or principle, nor have we been able to find any, which would warrant this court in arresting the action of the district court upon a simple question of pleadings. The ruling of the district court may or may not be correct, but the law provides a "plain, speedy, and adequate" means of testing that question by appeal. It never was the intention or meaning either of the common law or the statute that writs of prohibition or habeas corpus should take the place of appeals. We are not at all in accord with counsel's idea of what constitutes an "adequate remedy." The adequacy of a remedy is not to be tested by the convenience or inconvenience of the parties to a particular case. If such a rule were to obtain, the law of appeals might as well be abrogated at once. As illustrative of the contention of counsel for petitioner, we quote the following from his brief: "Let us suppose again that his opponent, by unusual dexterity, should get a jury to give a verdict in the cross action against the plaintiff for the full amount of \$50,000, and that he would be unable to give a bond staying proceedings (a thing not unlikely) in the sum of \$100,000, would the right to appeal be adequate? In such cases the appeal is not adequate, and, even if it were adequate, it is not speedy." We would hardly be excused for assuming jurisdiction in this case upon a mere supposition that, in the event of our failing to do so, some litigant might be sub-

jected to inconvenience. If the law concerning appeals is not speedy enough to suit the convenience of litigants, it should be remedied by the proper authority. The petition is denied.

MORGAN and SULLIVAN, JJ., concur.

BELLEVUE WATER CO. v. CITY OF BELLEVUE.

(Supreme Court of Idaho. Dec. 28, 1893.)

WATER COMPANIES—VALIDITY OF CONTRACT.

1. Where, under and by virtue of powers granted in its charter, an incorporated city makes a contract with certain parties and their assigns to construct certain waterworks, and to furnish the city with water for fire purposes, upon the payment of a stipulated sum by the city, and the parties proceed to construct such works, and the same are accepted by the city, and the water supplied and paid for as stipulated for a series of years, the validity of the contract cannot be impeached or impaired by the enactment of a law by the legislature which went into effect some three months after the contract was made.

2. An ordinance of a city may be void in part, and valid as to other parts.

(Syllabus by the Court.)

Appeal from district court, Logan county; C. O. Stockslager, Judge.

Action by the Bellevue Water Company against the city of Bellevue for breach of contract. From the judgment of nonsuit, plaintiff appeals. Reversed.

Texas Angel and R. Z. Johnson, for appellant. S. B. Kingsbury, for respondent.

HUSTON, C. J. This is an appeal from a judgment of nonsuit. The plaintiff sues the defendant municipal corporation upon an alleged contract or agreement to furnish said municipal corporation with water for fire purposes. The following facts appear from the record: The city of Bellevue was chartered by an act of the legislature of the territory of Idaho, (February 8, 1883.) Among the powers conferred upon said corporation by its charter is the following: "Sec. 10. To make regulations for the prevention of accidents by fire; to organize and establish fire departments and provide for the government of the same; to provide fire engines and other apparatus, and a sufficient supply of water, and to levy and collect special taxes for those purposes, not to exceed one-fifth of one per centum annually upon the taxable property within the city," etc. On the 8th day of March, 1887, the common council of said city of Bellevue enacted and passed the following ordinance, being Ordinance No. 19 of said city:

"Ordinance No. 19. An ordinance granting to L. Young, N. C. De Lano, Matt. McFall, Geo. W. Wells, James L. Hogan, John Redding, James A. Lusk, George A. McCornick, S. B. Dilley, Henry E. Miller, and their as-

signs the right to construct, maintain, and operate a system of waterworks in the city of Bellevue, and the right of way through the streets, alleys, and highways thereof, and to provide a supply of water to said city for fire purposes. The city of Bellevue does ordain as follows: Section 1. The city of Bellevue hereby grants to L. Young, N. C. De Lano, Matt. McFall, George W. Wells, James L. Hogan, John Redding, James A. Lusk, George A. McCornick, W. H. Redway, S. B. Dilley, and Henry E. Miller, and their assigns the exclusive right to construct, maintain, and operate a system of waterworks in said city for the period of twenty-five years from the date of this ordinance, and for that purpose the right to use of fifty inches measured under a four-inch pressure of the waters of Seamonds creek out of the one hundred and fifty inches of said waters belonging to and under the control of said city: provided, that said persons or their assigns shall not use of said fifty inches of water a greater amount than is necessary to fill their pipe at the point where the same is taken out of the said Seamonds creek, all the surplus to be turned back into the creek or ditch for the use of said city; also, the right of way through all the streets, alleys, and highways of said city, with the right to excavate trenches, laying and maintaining pipes and pipe line, erecting and maintaining hydrants, fountains, and other water appliances therein for the necessity or convenience of said city or the inhabitants thereof, and all uses and purposes appurtenant or incidental thereto; to take and appropriate private property for such purposes on paying the damages therefor; and to charge and collect from each person, corporation, or association supplied by them with water such water rents or rates as may be agreed upon between said persons and assigns and such persons, corporations, or associations to be supplied with water. Sec. 2. Said city shall purchase from said persons or their assigns five fire hydrants, and pay to the said persons or their assigns the actual cost thereof, after same shall have been attached to the mains, and ready for operation in extinguishing fires; said costs to include the costs in putting in said hydrants, and connecting them with the mains; the pipe and hydrants to be put in and used by said company shall be such as shall be prescribed and approved by the mayor and common council of the said city of Bellevue. Sec. 3. Said city shall, in consideration of the erection, maintenance, and operation of said system of waterworks by said persons and assigns, and of supplying said city at all times with water for fire purposes, as the same shall be needed and required, pay to said persons or assigns, annually, during the twenty-five years, on the thirty-first day of December, in each year, a sum equal to one-fifth of one per centum of all the taxable property within the limits of said city, said water to be furnished through

hydrants to be put in as provided in section 2 of this ordinance; and, for the purpose of providing for the payment of said sum to said persons or assigns, the mayor and common council of said city shall levy and collect from the taxable property within said city, each year, during said twenty-five years, a tax of not exceeding one-fifth of one per centum upon the taxable property within the limits of said city. Sec. 4. In consideration of the franchises, powers, and privileges hereby granted to said persons and their assigns, said persons and assigns shall, on or before the first day of September, 1887, construct, erect, and complete a system of waterworks in said city, as follows: The line of main pipe shall commence at a point on Seamonds creek at an elevation of at least one hundred and twenty-five feet above the level of Main street, in said city of Bellevue, and shall take the water from said creek into said pipes at said point, and not at any lower point on said creek; the aperture of said pipe to be at least six inches in diameter at the head, and shall run in as direct a line as practicable from where said water shall be taken from said creek to the upper or easterly end of Pine street to its intersection with Main street; thence northerly, along Main street, to its intersection with Cottonwood street, and to a place on said line, connected with said pipes, and ready for use in extinguishing fires, five (5) fire hydrants, of such make and at such points as shall be designated by the mayor and common council of said city: provided, that said city shall pay to said persons or assigns the actual cost of said hydrants, and putting them in and connecting them with the water mains. Said persons and assigns shall bury said pipes, and shall not unnecessarily keep open any trenches or other excavations along said line in or along streets, alleys, or highways of said city longer than a reasonable time required for laying or repairing the same, and shall keep the same guarded at night with sufficient guards and lights, to prevent accidents from people passing along said streets, alleys, and highways, and shall at all times avoid unnecessary flooding of said streets, alleys, and highways with water from the pipes. Sec. 5. This ordinance shall take effect and be in force from and after its approval by the mayor, and due publication, as required by the charter. Bellevue, Idaho, March 8th, 1887.

"Approved March 10th, 1887.

"O. S. Glenn, Mayor.

"S. B. Dilley, Clerk."

The terms and conditions of said ordinance were accepted by the parties named therein, and they proceeded to construct certain works for the conducting of water into and through said city of Bellevue, in accordance with the terms of said ordinance. On the 18th day of June, 1887, the parties named in said ordinance assigned and transferred to the plaintiff corporation, for a

valuable consideration, all the rights, title, interest, franchises, and privileges granted to them by said ordinance, and all the property acquired by them thereunder. The plaintiff corporation then proceeded to complete said waterworks in accordance with the terms of said ordinance, and the same, when completed, were accepted by said city of Bellevue, through its mayor and common council; and said plaintiff corporation did during the years 1887, 1888, and 1889 comply with the exigencies of said ordinance on their part, and the service so rendered was accepted by said city of Bellevue, and was duly paid for by said city, as provided in said ordinance; but, for the service rendered and water supplied to said city under said ordinance for the year 1890, said city neglected and refused to pay, and it is to recover the amount claimed to be due and owing from said city to the plaintiff under and by virtue of said ordinance, and the compliance with and fulfillment of the terms and obligation thereof, by the plaintiff, that this action is brought. The answer denies all the material averments of the complaint; denies the authority of the common council to pass said ordinance; denies that said common council ever did or could accept said waterworks from plaintiff; denies "that said city has acted upon the said or any contract regarding the same waterworks;" "denies that there ever was any contract made by said city regarding the same waterworks;" "averts that the said pretended ordinance was never an ordinance in fact of the city of Bellevue, and was never binding upon the said city, or upon any other person or persons, and was and is illegal, null, and void, and of no force and effect whatever;" denies indebtedness of defendant to the plaintiff. The case was tried by the court, without a jury. After the proofs on the part of plaintiff were in, defendant moved for a nonsuit, which was granted, and from such judgment of nonsuit, this appeal is taken.

The plaintiff proved its incorporation under the laws of the territory of Idaho; the Ordinance No. 19; its passage by the common council, and approval by the mayor, and acceptance by the parties named therein; the assignment of the contract by said parties to plaintiff; the construction of the waterworks thereunder, by the said parties named, and by the plaintiff; the acceptance by the city of said waterworks; and the payment by the city of the sum stipulated for the years 1887, 1888, and 1889. The plaintiff having rested its case, the defendant moved for a nonsuit, upon the following grounds: "The defendant, by its counsel, then moved for a nonsuit, on the grounds stated in its written motion, as follows: (1) That the plaintiff's evidence is not sufficient to base a verdict upon in his favor. (2) That the plaintiff has not proved any contract. (3) That the plaintiff is not

shown to be a corporate body. (4) That the plaintiff has not shown any legal ordinance upon which to base the alleged contract. (5) Plaintiff has not shown any order of the city council for the making of the alleged contract, or the appointment of the clerk or any other person to sign said contract on behalf of the city. (6) The alleged contract and ordinance are illegal, and are opposed to the laws of the then territory, and to the charter of the city of Bellevue. (7) No contract has ever been made or signed by the city clerk or any other person on behalf of the city, or on behalf of the partners of the plaintiff. This motion will be made on each severally of the above grounds, and upon all of the above grounds,"—which motion was granted by the court, and the plaintiff, by his counsel, then and there excepted.

It is contended by appellant that, on this appeal, the respondent is confined, in his case in support of the judgment of nonsuit, to the grounds stated in his motion in the district court. This position, it seems to us, is well taken, and is supported by both principle and authority. We think the correct rule is given by Bennett, J., in *Mateer v. Brown*, 1 Cal. 222: "A party making his motion on one ground thereby impliedly waives all others. He cannot avail himself of a different position, on an appeal, from that assigned in the court below. This doctrine is well established, and is necessary to be sustained, in order that the plaintiff may not be misled in the course of the trial, and on the settlement of his bill of exceptions, in case the nonsuit should be ordered." 1 Hayne, New Trials & App. par. 116, and cases cited. With this view of the primary question presented by the appeal in this case, we will proceed to examine the grounds upon which the nonsuit was moved, and granted by the district court.

The first ground stated by defendant in his motion is "(1) that plaintiff's evidence is not sufficient to base a verdict upon in his favor." Now, what are the facts, as shown by the record? The plaintiff sued in its corporate capacity to recover a sum alleged to be due and owing to it from the city of Bellevue, under the terms of a certain ordinance enacted by said city. The plaintiff had proved its corporate character; the ordinance under which the indebtedness was claimed to have arisen; the compliance by the plaintiff with the terms of the ordinance, and the recognition and acceptance by the city of such compliance, by the payment for two years of the compensation provided for in the ordinance; the neglect and refusal of the city to pay in accordance with the terms of the ordinance for the year 1890, although accepting, without demur, all the benefits accruing to it under the ordinance. With these facts established by the evidence, and uncontroverted, or attempted to be, the proposition that "the plaintiff's evidence is not sufficient to base a

verdict upon in his favor" is one of those colossal assumptions which the mediocre intelligence of this court is entirely unable to cope withal.

The second ground of motion is "that the plaintiff has not proven any contract." It might very properly be, and is, urged against this ground, that it is not sufficiently specific. It raises a legal question by inference perhaps, although in the record it appears as a mere statement of fact. The contention of counsel would seem to be that proof of the ordinance, its due passage by the common council, and approval by the mayor, its acceptance by the assignees of the plaintiff, the construction of the works under and in accordance with the terms of the ordinance, the acceptance of the works by the city, and a user thereof for nearly three years, does not constitute a contract binding upon the city. It is contended by counsel for the respondent that as section 97 of the charter of the city of Bellevue provides that said city "is not bound by any contract or in any way liable therein, unless the same is authorized by a city ordinance and made in writing and by order of the city council, signed by the clerk or some other person in behalf of the city," the letter of said section must be strictly complied with; in order to bind the city or make it responsible. There is no distinction between a corporation and an individual in regard to liability under a contract. It is settled law that a corporation cannot avail itself of the benefits of a contract, and, when called upon to meet its obligations thereunder, set up a plea of ultra vires. To allow such a plea would not only be sanctioning rascality, but would be offering a premium therefor. The disposition on the part of corporations to reach desired ends by "ways that are dark and tricks that are vain" does not require the spur of judicial sanction. That Ordinance No. 19 was intended to be and operate as a contract, and was so accepted and acted upon by all parties,—by the plaintiff in the erection of the works therein provided for, at an expense of some \$12,000, and by the city in accepting said works, and by receiving and paying for the use thereof for two years and upward,—is clearly shown by the record. Notwithstanding the provisions of section 97 of the charter, it was undoubtedly within the authority of the common council to make the contract by means of an ordinance; and, when so made, accepted, and acted upon, it was as binding upon the parties as if the strict letter of the section had been complied with. 1 Dill. Mun. Corp. § 450 et seq.; *Argus Co. v. Mayor*, 55 N. Y. 501.

The third ground of the motion for nonsuit, as shown by the record, is "that the plaintiff is not shown to be a corporate body." This question, we think, we have already disposed of. The record shows that the plaintiff offered in evidence its articles of incorporation,

proved their due execution, filing, and recording, etc., under the laws of Idaho territory.

The fourth ground of motion is that the plaintiff has not shown any legal ordinance upon which to base the alleged contract. The fifth ground is to the same effect, as is also the seventh; and we think we have already sufficiently discussed them. The zeal of counsel may sometimes prompt the belief in their own minds that the repeated assertion of a proposition may give it potency, notwithstanding it has no predicate in legal principles, but this is a mistake, and error is error, despite continuous repetition.

The sixth ground of the motion for a nonsuit is: "The alleged contract and ordinance are illegal, and are opposed to the laws of the then territory, and to the charter of the city of Bellevue." The act of the legislature chartering the city of Bellevue was passed February 8, 1883. Ordinance No. 19, upon which this action is based, was passed by the common council of said city March 8, 1887, and approved by the mayor March 10, 1887, and accepted by the parties therein named. On the 18th day of June, 1887, the parties named in the ordinance assigned and transferred their interest and rights therein and thereunder to the plaintiff corporation, who proceeded to complete the works provided for in the ordinance, and said works were accepted by the city, and the use thereof appropriated by the city, to the extent provided for in said Ordinance 19, for the years 1887, 1888, and 1889. The legislature of the territory of Idaho, at its fourteenth session, which adjourned on the 19th day of February, 1887, adopted the Revised Statutes of 1887, to take effect on the 1st day of June, 1887. Section 2711 of the Revised Statutes provides as follows: "All corporations formed to supply water to cities or towns must furnish pure, fresh water to the inhabitants thereof for family uses, so long as the supply permits, at reasonable rates and without distinction of person, upon proper demand therefor; and must furnish water to the extent of their means in case of fire or other great necessity free of charge," etc. It is contended by counsel for the respondent that, as the corporation plaintiff became the assignees of the parties named in the ordinance after the Revised Statutes took effect, they took such assignment and transfer subject to the provisions of said section 2711, and are therefore compelled to furnish water to the city of Bellevue free of charge. The argument of counsel for the respondent in support of this proposition is extensive, profuse in illustration, and diffuse in rhetoric, and yet we find nothing in the argument, or the authorities cited in support of it, which tends to convince us that a contract made in March, 1887, can be invalidated or impaired by an act of the legislature which does not become a law until

June, 1887. The charter of the city of Bellevue was granted by enactment of the legislature, February 8, 1883. By the provisions of that charter, full power is given the corporation: "To make regulations for the prevention of accidents by fire; to organize and establish fire departments; to provide fire engines and other apparatus, and a sufficient supply of water, and levy and collect special taxes for those purposes," etc. Under and by virtue of the powers in the charter granted, the corporation, through its proper officers, on the 10th of March, 1887, made the contract expressed in Ordinance No. 19. That contract was fulfilled on the part of the parties therein named, to wit, the parties named and their assigns. The fulfillment of the contract was recognized by the corporation city by the acceptance of the works, the appropriation of the benefits under the contract, and the payment therefor by the city for the years 1887, 1888, and 1889. But in the year of our Lord 1890, it seems, a new ruler had come to preside over the destinies of the city of Bellevue,—“one who knew not Joseph,”—and it is deemed necessary to undo all that has gone before. Whether such a course is ever justifiable or excusable we will not stop to discuss, as with these matters courts have no concern. If improvident contracts have been made by corporations, municipal or others, it must not be expected that courts will relieve them by arbitrary judicial constructions, predicated upon any argument of *ex necessitate rei*. *Argenti v. City of San Francisco*, 16 Cal. 263; *Brown v. City of Atchison*, (Kan.) 17 Pac. 472; *Moore v. Mayor*, 73 N. Y. 238.

We have patiently and laboriously read the brief, and carefully examined all the authorities cited by counsel for respondent, (except the argument and authorities upon the question of hydraulics and hydrostatics, which, as we were entirely unable to see what bearing they had upon the case under consideration, and, furthermore, being painfully cognizant of the fact that “life is fleeting,” we have left unconsidered,) and we find ourselves compelled to set aside the order and judgment of nonsuit made and granted by the district court in this case. The objection that the ordinance gives an exclusive privilege will not support the contention that it is for that reason void. The ordinance may be void as to its exclusive grant, and valid as to the balance. That question can only be properly raised by some one directly interested therein. *Dodge v. City of Council Bluffs*, (Iowa,) 10 N. W. 888; *East St. Louis v. East St. Louis Gaslight & Coke Co.*, 98 Ill. 415. The judgment of the district court is reversed, and the cause remanded for further proceedings, at cost of respondent.

MORGAN, J., concurs. SULLIVAN, J., did not sit in the case, and took no part in the decision.

SMITH v. SMITH.

(Supreme Court of Idaho. Jan. 30, 1894.)

ACTION ON NOTE—CONSIDERATION.

A person who gives a note in consideration of the performance of a certain act by the payee, and by reason of certain representations as to the law of the case, which representations prove to be false, and such note runs three months, falls due, and a new note is given therefor by the maker of the original note, and the old note taken up, cannot plead want of consideration of first note as a defense to the second.

(Syllabus by the Court.)

Appeal from district court, Elmore county; C. O. Stockslager, Judge.

Action on a promissory note by W. F. Smith against Cy. V. Smith. There was judgment for plaintiff, from which, and an order denying a new trial, defendant appeals. Affirmed.

Wyman & Wyman and T. D. Cahalan, for appellant. E. M. Wolfe, for respondent.

MORGAN, J. On the 8th day of July, 1891, the defendant, Cy. V. Smith, gave his promissory note to G. W. Fletcher, Jr., for the sum of \$560.10. In consideration thereof the said Fletcher, who was then assignee of the estate of Jacob Ulrich, was to resign his position as said assignee, and procure the appointment to said position of the defendant, Cy. V. Smith. The said Fletcher was also to transfer a quantity of property which the said Fletcher then held as assignee aforesaid to the said Cy. V. Smith. Fletcher claimed that the estate of Ulrich was indebted to him for the foregoing sum for moneys advanced by him in the settlement of the estate, and that he would not deliver up the property to Smith unless defendant, Smith, would give him his note for the amount he had advanced. It is also stated, and is in evidence, that Fletcher had represented to Smith at the time of procuring said note that no other claims than this already presented to the assignee could be collected from the estate of Jacob Ulrich, which statement, it is alleged, is untrue, and that Fletcher knew it to be untrue. The note above mentioned fell due October 1, 1891. On that date defendant, Smith, not being ready to pay the note, gave a new one therefor, dated October 1, 1891, for the sum of \$560.10, due eight months after date, and payable to Fletcher & Fletcher, in which firm G. W. Fletcher is a partner; the latter note to draw 1 per cent. per annum. The old note was delivered up to him. The latter note was transferred to William F. Smith in the following words: "Pay to the order of William F. Smith, without recourse to us. [Signed] Fletcher & Fletcher." On the last-mentioned note, plaintiff, W. F. Smith, commenced suit September 12, 1892. To the complaint Wyman & Wyman, defendant's attorneys, interposed a demurrer, which was overruled by the court, and the ruling of the

court thereon excepted to. Thereupon the defendant filed his answer, alleging a want of consideration in the first of the above mentioned notes, and that it was obtained by fraud and false representation. The cause was tried before the Hon. C. O. Stockslager with a jury, resulting in a verdict for the plaintiff for the sum of \$560.10 and interest. Judgment was entered thereon for the sum of \$565.70. Defendant moved for a new trial, which motion was denied by the court, whereupon he appeals to this court from the judgment, and also from the order overruling the motion for new trial.

The order of the court overruling the demurrer was proper, as upon examination of the complaint we deem it entirely sufficient. The defendant contends that, because the representations that George Fletcher, Jr., made to the defendant, Smith, at the time the first note was executed were untrue, therefore the note was obtained by a fraud, and was without adequate or any consideration. It will be remembered that a part of the consideration for the execution of the first note was the agreement of Fletcher to procure the appointment of the said defendant, Smith, as assignee of the estate of Jacob Ulrich, an insolvent, and the further agreement to deliver possession of the property of the said Ulrich, so held by him as assignee, to the defendant, Cy. V. Smith, so that he, Smith, could be secure for the amount of money mentioned in the note, and which Fletcher claimed to have advanced in the settlement of said insolvent estate. This appointment was secured for him, and the property was delivered to him in accordance with said agreement. This was sufficient to form a part consideration for the note. The representation of Fletcher that no more claims could be proven against the estate of Jacob Ulrich was a statement of a proposition of law which the defendant, Smith, had just as good an opportunity to ascertain the correctness of as had Fletcher, and, whether true or false, cannot be used as a defense in an action upon the note. But, however this may be, the first note was given July 8, 1891, and was due October 1, 1891. The defendant, Smith, had all of this time—nearly three months—to ascertain the correctness of the report of Fletcher, if he desired to do so. When that note was due he voluntarily came forward and took up the old note, and gave a new one for the same sum. The delivery of the old note was a sufficient consideration for the giving of the new one, and the defense of the failure of consideration of the first note cannot be brought against the second; that is, the settlement of a claim which may be doubtful, and giving of a note therefor, will be a sufficient and valid consideration for said note. Story, Prom. Notes, § 186; Russell v. Cook, 3 Hill, 504; 1 Pars. Notes, 199; 2 Rand. Com. Paper, § 462, and cases there cited. See, also, Id. § 479; Bank v. Tisdale, 84 N. Y. 635.

With this view of the law it becomes unnecessary for us to examine the instructions of the court, or the exceptions taken by the defendant during the course of the trial, as we are of the opinion that a defense of want of consideration of the first note cannot succeed in defeating the second. The fact that this defense cannot be made also renders it unnecessary to inquire whether the plaintiff in this case is a bona fide holder for value. The note is indorsed to him in writing upon the back thereof, and this indorsement conveys the legal title to him for the purposes of this suit. The decision of the court below must be affirmed, and it is so ordered. Costs awarded to the respondent.

HUSTON, C. J., and SULLIVAN, J., concur.

DENNISON v. WILLCUT et al.

(Supreme Court of Idaho. Jan. 30, 1894.)

SUPPLEMENTAL COMPLAINT—WHEN PROPER—SUIT BY GUARDIAN—RECOVERY OF WARD'S PROPERTY.

1. Matters changing the relations of the parties to a suit, or either of them, which affect the matter in litigation, and which have transpired since the filing of the original complaint, are proper matters for supplemental complaint.

2. A guardian is not permitted to bring suit in his own name, and in his individual capacity, for money or property belonging to the ward.

(Syllabus by the Court.)

Appeal from district court, Kootenai county; J. Holleman, Judge.

Action by Lewis H. Dennison against O. Willcut and others. From the order denying a motion to file supplemental complaint, plaintiff appeals. Reversed.

R. E. McFarland and Albert Hagan, for appellant. Charles Heltman, for respondents.

MORGAN, J. In this case the plaintiff alleges that Estella E. Bradford was the owner and in possession of 15 head of cows and heifers, and other live stock. That she did, on or about the 29th day of November, 1887, lease to the defendant O. Willcut the said stock, upon the condition that he was to care for said stock, and have possession thereof, for the term of five years on and after the said 29th day of November, and to receive therefor one-half of the increase, the other half to go to and be retained by the said Estella E. Bradford. It was further agreed that, in case of the loss of any of the above stock, or the increase thereof, through or by neglect of the said party of the second part, then the said defendant Willcut should make good such loss to the said Estella. Included with said stock were five yearling steers. Said steers were to be sold by the party of the second part when they became three years of age. The proceeds of said sale were to be equally divided between the par-

ties of the first and second part. At the end of five years the said Willcut was to turn what might be left of the increase to the first part, and one-half of the increase to the second part. In pursuance of said lease, the said stock was duly transferred by the said Estella E. Bradford to said Willcut, and he at once took the control of same. That on or about the 1st day of July, 1889, the said Willcut sold the said stock to the plaintiff, for a valuable consideration, and transferred to the plaintiff, the said cows and other stock, and the said lease, and all of her rights and interests therein, and all of her rights and interests in the said agreement. Plaintiff further alleges that, in the year 1890, defendant sold the said steers for the sum of \$40 per head, and the defendant refused to pay plaintiff one-half of the money so received. That the defendant carelessly and negligently allowed the said stock to go without proper care, whereby five of the said cows died. The value of said cows was \$30 each, and the plaintiff claims judgment for the sum of \$150 thereon. On the 23d day of July, 1890, the said Willcut, before answering the plaintiff's complaint, made an affidavit that the same property is owned by Robert McCrea, by virtue of a certificate of sale, which was an execution issued out of a court of the peace, upon a judgment in favor of McCrea Bros. v. Willcut; that the defendant is in possession of the rights of said claimants, and that the defendant is ready and willing to return the said property to such persons as may be directed; that he is also ready to pay any amount that he may be liable for by this court in this case. The presentation of this affidavit caused the court to order Robert McCrea and others to be made parties defendant, and that a summons be issued against them, which was done. The defendant Willcut filed his answer to said complaint, which is a mixture of allegations of evidence, and of law, of such a character that it should be stricken out; but, together, there is, at least, an admission of the sale and transfer of said stock to plaintiff Dennison. McCrea answered the plaintiff's complaint, in one part admitting that on the 24th day of August, 1890, he and the defendant Willcut, as defendants, instituted an action in the district court of Westwood precinct, Kootenai county, Idaho, to recover a debt due to him and Estella Bradford, issued thereon, and levied the same upon the said stock, and obtained judgment thereon, and on the 20th day of November, 1890, an execution was issued thereon, to the plaintiff, to deliver the same stock, which was sold

said execution, and McCrea Bros. became the purchasers of all the interest of Edward and Estella Bradford in and to said stock, and received a sheriff's certificate for said purchase. The balance of the answer is very similar to the answer of the defendant Willcut, and a large part of it is surplusage. This answer, as well as that of Willcut, however, states that Lewis H. Dennison is not the real party in interest in said suit, but that the purchase of said stock was made, if made at all, by the said Dennison as guardian for Porter L. Dennison and Ida H. Dennison, and the transfer, if any, of said stock was made to plaintiff, if made at all, as guardian of the said Porter L. and Ida H.

Demurrer was interposed by the attorneys of the plaintiff to the answer of the defendant Willcut. The record, however, does not show that any action was taken on said demurrer. A motion was made by the plaintiff, also, to set aside the order making Robert and Charles McCrea defendants in said action. Upon consideration of this motion, the court overruled the same, and refused to set aside the order, to which the plaintiff excepted. We think this action of the court was proper, under the statement made in the affidavit of Willcut, defendant, that McCrea Bros. were proper parties to the action. Section 4109, Rev. St. Idaho.

Thereafter the plaintiff, Dennison, on the 3d day of August, 1892, moved the court for leave to file a supplemental complaint, setting up a bill of sale made by Estella E. Bradford and Edward Bradford, her husband, approving of the sale and transfer made by Estella Bradford on the 31st day of July, 1880, and again transferring the said stock to the said plaintiff. The second bill of sale between the same parties was dated 18th day of September, 1891. The said motion to file said complaint was denied by the court, to which ruling the plaintiff then and there excepted. We think this was error. The plaintiff should have been permitted to file his supplemental complaint, setting forth, as it did, a copy of the corrected bill of sale. It will be observed that, had no rights of third parties intervened, the corrected bill of sale would have made the title perfect in the complainant. It is true that the answer of McCrea Bros. alleges that the same property had been levied upon and sold, under a judgment and execution wherein McCrea Bros. were plaintiffs and Edward and Estella Bradford were defendants; but this was then simply an allegation, and awaited proof. Should McCrea Bros. fail in their proof, then title would be complete in plaintiff. Should they succeed in proving valid attachment and levy, judgment and execution, levy and sale thereunder, then the title of Dennison would seem to be defeated. The supplemental complaint set forth facts which would enable plaintiff to succeed in proving title, no right

of others intervening. He should have been permitted to place it on file. Then the plaintiff and McCrea Bros., successively, could have made such proof of title as they had, and the one having the better title must succeed.

Thereafter the cause proceeded to trial with a jury. Defendant was introduced as a witness on the part of the plaintiff. He identified the lease from Estella Bradford to himself, which was thereupon offered in evidence. It was objected to by defendant because it was signed only by Estella E. Bradford, a married woman. This objection was overruled by the court, and the lease permitted to go in evidence. This action of the court was entirely proper, as the defendant is estopped from denying the validity of an instrument by virtue of which alone he has obtained possession of property, which he still holds. Third parties might deny its validity, but he cannot.

It is again objected by the defendant Willcut, and also by McCrea Bros., that plaintiff, Dennison, could not bring the suit for the recovery of the money alleged to be due by reason of the sale of a portion of said cattle, and the loss, by neglect and carelessness, of another portion thereof. It appears from the two bills of sale that the stock was transferred to Lewis H. Dennison as guardian for Porter L. and Ida H. Dennison. The guardian for a minor is not permitted to bring suit in his own name for money or property belonging to the ward, and which he has a right to the possession of as such guardian, but must bring suit as guardian. *Fox v. Minor*, 32 Cal. 116; *Emerie v. Alvarado*, 64 Cal. 529, 2 Pac. 418. He might, however, show, if the fact, that the money used for the purchase of the stock was his own, notwithstanding the recital in the bill of sale. *Kelly v. Leachman*, (Idaho,) 34 Pac. 813; *Miller v. McKenzie*, 95 N. Y. 578; *Browne*, Par. Ev. § 18. The refusal of the court to permit the filing of the supplemental complaint shut out both the original and the supplemental bill of sale. If the supplemental complaint had been permitted to be placed on file, both of these bills of sale would have been proper evidence. While the one dated July 31, 1889, was not executed in accordance with the law, and was therefore not, by itself, admissible, it would, however, be properly admissible with the second bill of sale, under the supplemental complaint.

The decision of the lower court must be reversed, and a new trial granted, for the reasons stated above, with permission to the plaintiff to file his supplemental complaint, and to the defendants to file amended answers, and it is so ordered. Costs awarded to appellant.

HUSTON, C. J., and SULLIVAN, J., concur.

**RUMPEL v. OREGON SHORT LINE &
U. N. RY. CO.**

(Supreme Court of Idaho. Jan. 31, 1894.)

**APPEAL—BILL OF EXCEPTIONS—CONTRIBUTORY
NEGLECT.**

1. Exceptions taken during the trial to the rulings of the trial court may be settled and saved in accordance with the provisions of section 4426, Rev. St., or they may be settled after the trial, in accordance with section 4430, or in statement on motion for new trial, and when so settled and saved will be reviewed by supreme court on appeal.

2. Where the plaintiff, in passing along a street which was blocked by a railroad train with an engine thereto attached, belonging to and then being operated by the defendant, passed under one of the cars of said train five times within an hour and a half, and was caught, and his leg crushed, by the moving of the train in an attempt to pass under the sixth time, he is guilty of such contributory negligence as bars a recovery, and this, even though the servants of the company failed to ring the bell or sound the whistle before starting.

3. Every person in the possession of his senses is bound to use ordinary care and prudence to protect his own person in crossing railroad tracks, and he is not relieved of such necessity although the company is guilty of negligence, or a violation of the statute, in failing to ring the bell or sound the whistle before starting.

4. Evidence of a railroad company blockading streets at any other time than that at which the accident is alleged to have occurred, or of custom of people to crawl under cars so blockading streets at other times than that at which the accident occurred, is not proper, and should be excluded from the jury.

(Syllabus by the Court.)

Appeal from district court, Ada county; Edward Nugent, Judge.

Action for personal injuries by Victor Rumpel against the Oregon Short Line & Utah Northern Railway Company. There was judgment for plaintiff, from which, and from order denying a new trial, defendant appeals. Reversed.

The other facts fully appear in the following statement by MORGAN, J.:

Plaintiff brought suit against defendant corporation to recover damages alleged to have been sustained by plaintiff by reason and on account of negligence of defendant. The complaint alleges the corporate character of defendant, and "that on the 20th day of June, 1890, while defendant owned, controlled, and operated a railroad in Ada county, in the state of Idaho, and in the town of Nampa, in said Ada county, Idaho, said defendant negligently, carelessly, etc., allowed, permitted, and caused freight cars and locomotive steam engine to stand, to be, and to remain on their railroad track in said town of Nampa, county and state as aforesaid, in such manner as to block a public highway, commonly known as the 'Boise City, Nampa and River Wagon Road,' designated on plat of Nampa as 'Street F,' at a place or point where the Oregon Short Line and Utah Northern Railway and its switches cross said street, about 175 yards west of the passenger depot of defendant, in said

town of Nampa, for the period of one and one-half hours,—from about the hour of nine o'clock to about the hour of nine o'clock of the 20th day of June, 1890, and on the 20th day of June, 1890, that plaintiff was a resident of the territory of Idaho, and of said town of Nampa, and employed as a day laborer by defendant in said town of Nampa. That plaintiff, a laborer, and in the course of the performance of his duties, plaintiff was required and compelled to cross the railroad at a place and wagon-road crossing, wagon road, highway, and wagon road, and was up and blockaded as aforesaid, and that, in order to cross the railroad at the time and place aforesaid, herein, this plaintiff was compelled to pass under one of the defendant's freight cars so blockading and stopping the highway, and wagon road as aforesaid, and under a freight car aforesaid. That while this plaintiff was so endeavoring and attempting to pass under said railroad track at the place aforesaid, and by passing under said freight cars blockading said crossing, said plaintiff carelessly, negligently, and without warning this plaintiff, without ringing any whistle, without ringing the bell, and without any warning or notice, suddenly, carelessly, and unintentionally, in quick motion, and to moving a freight motive steam engine and freight cars so blockading said street, and public highway as aforesaid, in such manner as to knock this plaintiff, and to pass the wheels of one of the freight cars over the left leg of this plaintiff, causing the mangle, mangling, breaking, and bruising of said leg in such a way and manner as to cause the amputation of said leg so mangled and bruised, just below the knee, and the loss of said leg, and the loss of said leg was caused or brought about by the negligence, negligent, or unlawful act or omission of the contributory negligence of this plaintiff, and claims damages in the sum of \$10,000. To this complaint defendant filed a general demurrer that complaint stated facts sufficient to constitute a cause of action. This demurrer was sustained, and this ruling defendant excepted, and then filed its answer, which admitted "each and every allegation of the complaint except what is hereinbefore denied; denies that it permitted, allowed, permitted, and caused freight cars and locomotive steam engine to stand, to be, and be upon its track, in the town of Nampa, in such manner as to blockade the highway, wagon road, and street, commonly known as the 'Boise City, Nampa and River Wagon Road,' designated on plat of Nampa as 'Street F,' or as a public highway, wagon road, or street, at a place or point where there is a public highway, street at a point 175 yards west of defendant's depot, in the town of Nampa, Idaho, denies that it did carelessly, negligently, etc.,

edly, criminally, and unlawfully start its locomotive steam engine and freight cars in motion without warning this plaintiff by ringing its bell and blowing its whistle;" and as a further cause of defense, "that at the time and place this plaintiff alleges he was injured he was a trespasser upon defendant's railway tracks;" "that the injuries complained of by the plaintiff were occasioned by his own carelessness and negligence." Upon the issues thus made up the case went to trial before the court with a jury. The plaintiff having rested his case upon the proofs made in support thereof, defendant moved the court for a nonsuit, upon the ground that "the plaintiff has failed to prove the allegation of his complaint, and failed to make out a cause of action against the defendant; and for the further reason that the evidence in this cause produced on behalf of the plaintiff shows that he was guilty of contributory negligence, and therefore not entitled to recover;" which motion was overruled by the court. The defendant declining to offer any evidence, the case was submitted to the jury under instructions from the court, and a verdict was returned in favor of the plaintiff for the sum of \$10,275. A motion for a new trial was made, which was overruled by the district judge, and from the order overruling said motion, as well as from the judgment, this appeal is taken.

Edgar Wilson, for appellant. T. D. Cahalan, for respondent.

MORGAN, J., (after stating the facts.) The record presents to us a "statement on motion for new trial," which contains what purports to be a statement of all the evidence in the case, together with the objections to the admission of evidence, the rulings of the district court thereon, and the exceptions thereto. Appended to the statement is the following certificate: "State of Idaho, County of Ada—ss. At chambers, this statement settled and allowed in the presence of Edgar Wilson, attorney for defendant, and T. D. Cahalan, attorney for plaintiff, to which ruling and action of the undersigned the plaintiff, by his said counsel, then and there excepted, for the reason that the alleged exception to errors of law as alleged occurring during the trial of said action were not taken in accordance with section 4426, Revised Statutes of Idaho. September 21, 1893. E. Nugent, Judge." It would seem that upon the trial of said cause a stipulation was entered into by the counsel for the several parties "that any exception taken during the trial of said cause may be settled at any time within twenty days subsequent to the termination of said trial, without reducing the same to writing, and settling the same at the time they are made in said trial." It is claimed by respondent that, as no bill of exceptions was ever served or settled on the part of the defendant, such exceptions can-

not now be considered or reviewed by this court, although they appear in the statement on motion for a new trial, and settled by the district judge, and were heard, considered, and passed upon by said judge upon said motion. Section 4426, Rev. St. Idaho, contains the following provision: "Except as provided in the next section, the exception must be taken and settled at the time the decision is made, and no order of court shall be made for the settlement of such exception at any other time, except by the agreement of both parties. When an exception is taken, the court, judge, tribunal, or judicial officer shall allow sufficient time for the reduction to writing, and settlement of the same, and in case such time shall not be allowed, or such exception shall not be fairly settled, the facts may be shown by affidavit, and the party taking such exception may apply to the court, or tribunal, to which an appeal lies, in the action or proceeding, to settle the same fairly, according to the facts, and when so settled, the same shall become a part of the record in such action or proceeding." The paragraphs above quoted were interpolated into section 4426 by an act of the territorial legislature of January 31, 1887. The statutes, as they stood prior to this amendment, were amply sufficient to preserve all the rights of litigants. But nevertheless it is the statute, and so long as it remains, and counsel see fit to avail themselves of its provisions, the court must recognize and enforce it. By the provisions of section 4426, as above cited, where all exceptions are settled at the time they are made, it would seem that nothing further is required at the hands of the trial court, as to the settlements of exceptions. Each exception, when so settled, is a "bill of exceptions," and as such may be embodied in the statement on motion for a new trial, or may be the sole basis of a motion. The view that the amendment of January 31, 1887, was a mere act of expediency is apparent when we consider that section 4430, which provides for the settlement of bills of exceptions was allowed to remain undisturbed. We cannot say that there is necessarily any conflict between sections 4426 and 4430. The contention of counsel for the respondent would seem to be that, as no exceptions were settled as provided in sections 4426 or 4430, therefore none can be reviewed by this court. We think counsel are wrong in this contention. Section 4820, Rev. St. Idaho, provides what papers it is requisite for the party appealing to furnish the court upon an appeal from an order granting or overruling a motion for a new trial, to wit, "the papers designated in section 4443 of this Code." Referring to section 4443, we find that the papers designated therein are: "The judgment roll and the affidavits, or the records and files in the action, or bill of exceptions, or statement, as the case may be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal from the order

in damages for such injury. Thus stated, the rule is supported by innumerable authorities. Pat. Ry. Acc. Law, pp. 46, 47, and a large number of cases there cited. The reason for the rule seems clearly to be as follows: The reason why, in cases of mutual concurring negligence, neither party can maintain an action against the other, is not that the wrong of the one is set off against the wrong of the other; it is that the law cannot measure how much of the damage suffered is attributable to the plaintiff's own fault. If he were allowed to recover, it might be that he would obtain from the other party compensation for his own misconduct. Pat. Ry. Acc. Law, 47; *Hell v. Glanding*, 42 Pa. St. 493, 498. Contributory negligence is therefore defined to be that want of reasonable care upon the part of the person injured which concurred in the negligence of the railway in causing the injury. Pat. Ry. Acc. Law, 48. The number of authorities that might be quoted in support of this doctrine leaves no doubt that it is founded upon correct principles. In *Rauch v. Lloyd*, 31 Pa. St. 370, the court say that, if the plaintiff is an adult of ordinary prudence and discretion, he would have no right of action; for, however blameworthy the defendants may have been in leaving their cars on the crossing, common prudence would have restrained him from attempting to pass under them, and an adult would be bound to use common prudence. 2 Ror. R. R. 1018.

The fact that it was attempted to be proven, over the repeated objection of defendant, that it was the custom of the people of the town of Nampa to crawl under the cars when they blockaded the streets, if fully proven, could not have the slightest effect upon the plaintiff's right to recover, as a custom of the people in putting themselves daily in imminent danger of their lives in passing under cars blockading the streets with an engine attached thereto could not excuse the plaintiff in his indulgence in conduct so reckless and so wanting in ordinary prudence and care. While it is improper and unlawful for a railroad company to unnecessarily blockade a street of a town or city with its cars, yet every man is bound at his peril to use ordinary care to preserve his own life and limbs, however unlawful the conduct of the agents and servants of the company may be; therefore all evidence of the custom of the people in passing under the cars so blockading the streets was irrelevant and incompetent, and should have been excluded. The failure of the plaintiff—an adult in the full possession of his faculties of seeing, hearing, and reasoning—to exercise ordinary care to protect himself from danger so imminent will bar his recovery. The plaintiff cannot be relieved from the effects of his own negligence by the fact that there is a statute prohibiting the railroad company from obstructing the streets with their cars, or requiring the bell to be rung, or whistle

sounded. *Hudson v. Railway Co.*, (Mo.) 14 S. W. 15. See, also, decisions cited above. *Railway Co. v. Pinchin*, (Ind. Sup.) 13 N. E. 677; 2 Thomp. Neg. 1175; *Reynolds v. Hindman*, 32 Iowa, 148. When, by law, bell ringing and sounding the whistle are required in approaching and passing over public road crossings, the omission thereof amounts to actual negligence; but such omission and negligence do not render the company liable for injuries received at such crossings unless the omission be the cause thereof or contribute thereto without contributory negligence of the injured party. 2 Ror. R. R. 1006; *Reynolds v. Hindman*, supra; *Pennsylvania Co. v. Rathgeb*, 32 Ohio St. 66; *Krauss v. Railroad Co.*, 23 N. Y. Supp. 432, 69 Hun, 482; *Railway Co. v. Wallace*, 19 Amer. & Eng. R. R. Cas. 359; *Schofield v. Railroad Co.*, 114 U. S. 615, 5 Sup. Ct. 1125. The omission of the railway company to give statutory or other signals does not render it liable for injuries to one who, in crossing its track, fails to observe care on his own part. *Krauss v. Railroad Co.*, 23 N. Y. Supp. 432, 69 Hun, 483; *Railroad Co. v. Morgan*, (Kan.) 1 Pac. 298. A railroad company and a traveler on the highway have correlative rights. Neither has a superior right, except as it results from the difficulties and necessities of the case. *Railway Co. v. Dill*, 22 Ill. 264. But, a traveler approaching a crossing at the same time as a train, the traveler must give way as a matter of prudence, and because the necessities of the public are greater than those of any one person. Proof that the railroad company had blockaded the streets of Nampa at any other time than the time when the accident occurred does not prove nor tend to prove that the street was blockaded at the time the accident occurred, nor does it excuse the plaintiff for not exercising ordinary care and prudence in protecting his own person, and such proof should have been excluded. *Gahagan v. Railroad Co.*, 1 Allen, 187. As to custom. Neither habit of railroad company in blockading the streets of Nampa, nor habit of people in creeping under cars so blockading streets, can have anything to do with the case at bar. These are not such customs as the law recognizes and enforces. Customs such as are contemplated in the law must be certain, reasonable, and ancient, and then in some cases have the force of law. It is true that a railway company running through the streets of a crowded city, where many people are passing and repassing across railroad tracks intersecting the streets, are held to greater care in running their trains, and guarding the crossings; and it is held that railway companies must take notice of the fact that such streets are frequently crowded, and therefore exercise greater care. So, if F street, in the town of Nampa, was much frequented by the people, and many were accustomed to cross and recross the railroad tracks on said streets, and such facts were

known to the company, greater care and prudence would be required of the company in running its trains across said street, as human life is more valuable than the business or time of any individual; but, because greater care would be required of the railway company, this would not authorize the individual to relax one jot or tittle of the care and prudence necessary to protect his own life or limb. Therefore any negligence of the company in failing to comply with statutory requirements, or in failing to exercise reasonable care and prudence, does not absolve the plaintiff from the necessity of exercising necessary care and prudence. We are of the opinion, therefore, that plaintiff, in passing under the cars of defendant five times on the morning of the accident, and attempting to pass under them the sixth time, was guilty of contributory negligence of an extraordinary character, and that such negligence bars recovery. The motion for nonsuit should have been allowed.

This opinion sufficiently indicates the errors in the instructions, and, as this decision holds that the nonsuit should have been granted, which practically ends the case, we do not deem it necessary to further notice the instructions. The judgment of the lower court is reversed, and the cause remanded, with directions to the lower court to enter a judgment of nonsuit. Costs awarded to defendant.

HUSTON, O. J., and SULLIVAN, J., concur.

GRIFFITH v. MONTANDON.

(Supreme Court of Idaho. Feb. 13, 1894.)

TAXATION OF COSTS—FEES OF OFFICERS AND WITNESSES.

1. When the items of a cost bill are denied by the affidavit of the party against whom such costs are claimed, the onus of proof is on the party claiming the costs.

2. When the record contains the statement that it contains all of the evidence considered on the hearing of a motion to tax costs, there is no presumption that the judge took into consideration certain facts, of which he had actual knowledge, in the determination of such motion.

3. An elisor appointed to execute powers and orders of the court is invested with the powers, duties, and responsibilities of the sheriff in the performance of such duties, and is entitled to the compensation allowed the sheriff for performing them, when he demands the same.

4. If an officer or witness expressly says he makes no charge for services rendered, the successful party cannot tax against the losing party the fees which such persons would have been entitled to if they had charged therefor.

5. If a party procures the attendance of a witness who does not testify, the expense of such witness is not chargeable to the losing party unless some sufficient reason is shown that would legally excuse his failure to testify.

6. Section 4912, Rev. St., restricts the recovery of costs to those necessarily incurred.

(Syllabus by the Court.)

Appeal from district court, Alturas county; C. O. Stockslager, Judge.

Action by John C. Griffith against A. F. Montandon. From an order taxing costs, defendant appeals. Modified.

A. F. Montandon, in pro. per. Kingsley & Parsons, for respondent.

SULLIVAN, J. This is an appeal from an order of the trial judge taxing costs. The plaintiff filed his memorandum of costs, verified by his attorney, whereby it was shown that his total necessary costs and disbursements amounted to \$356.80. Thereafter the defendant (who is the appellant) moved to tax said costs. Said motion was heard by the judge, and said costs reduced from \$356.80 to \$249. From said order taxing costs, this appeal is taken.

The following is an itemized memorandum of the costs as allowed by said order:

Elisor's fees.....	\$ 14.4
Clerk's fees, including stenographer's fees.....	21.1
Witness fees:	
Mrs. Caroline Griffith.....	9.4
Mrs. Ella Griffith.....	9.4
Mrs. C. Haile.....	9.4
Herman Vorberg.....	9.4
Roy White.....	9.4
J. O. Swift.....	9.4
W. H. Watt.....	9.4
L. Price.....	9.4
J. S. Whitton.....	9.4
W. T. Riley.....	9.4
C. Haile.....	9.4
C. J. Selwyn.....	9.4
B. M. Mallory.....	9.4
Larry Farrell.....	9.4
Henry Warning.....	9.4
J. H. Beamer.....	9.4
Charles Berkin.....	9.4
George Romaine.....	9.4
E. Daft.....	9.4
G. Richardson.....	9.4
C. S. Smith.....	9.4
G. A. Sawyer.....	9.4

Total \$249.00

Every item of said cost bill is challenged. The record purports to contain all of the evidence considered on the hearing of the motion to tax costs, and the only evidence contained in the record is the memorandum of costs, with the verification thereto attached and the affidavit of the appellant. Section 4912, Rev. St., provides that the successful party may present a memorandum of items of his costs and necessary disbursements, and that such memorandum must be verified by the oath of the party, or his attorney or agent, or by the clerk of the court, stating that, to the best of his knowledge and belief, the items contained in said memorandum are correct, and that the disbursements have been necessarily incurred in the trial or proceeding. It further provides that a party dissatisfied with the costs claimed within three days after the filing of a bill of costs, file a motion to have the costs taxed by the court in which the judgment was rendered, or by the judge in the chambers. The statute does not provide for the procedure in the hearing of a motion to tax costs, but the hearing is usually taken

on such pertinent evidence, by affidavit or otherwise, as either party may offer as to the allowance or disallowance of the items objected to. It appears from the record that this motion was heard upon the memorandum of costs filed by respondent and the affidavit of appellant. Appellant contends that the affidavit attached to the memorandum of costs is made on "the best knowledge and belief of affiant" that the items therein are correct, and that the disbursements have been necessarily incurred, and that, as said affidavit is met by the positive affidavit of appellant setting forth the facts showing that many of said items were not necessarily incurred, said items should not have been allowed without further proof of the fact that they were necessarily incurred. But it is argued by respondent that the affidavits on which the motion to tax costs was heard are conflicting, and that some of the items relate to facts of which the trial court had actual knowledge, and for that reason his ruling should not be disturbed; and cites *Fanning v. Leviston*, 93 Cal. 186, 28 Pac. 943, as an authority. That decision is very meager upon the point in question, but it appears that, as the motion to tax costs was heard upon conflicting affidavits, and, further, that some of the items in controversy referred to matters of which the court had actual knowledge, it was held that the ruling of the lower court would not be disturbed. The transcript in the case at bar contains no intimation that the court or judge took into consideration any facts of which he had actual knowledge in his decision in this case, and the record negatives that idea. It contains the following statement: "On none but the foregoing facts and record the motion to tax costs was heard on July 27, 1893." The record thus shows that it contains all of the evidence considered on the hearing of such motion, and it cannot be presumed that the judge took into consideration certain facts of which he had actual knowledge in the decision of said motion. Courts must take judicial knowledge of certain facts, but we are not aware of any law that requires them to take judicial notice of the fact whether a certain witness was present at the trial, or the number of days present. If a court or judge has actual knowledge of a fact which he takes into consideration in the taxation of costs, and an appeal is taken from his decision, if the record does not contain the fact of which the court did take notice, this court must not consider it. We can only consider the evidence contained in the record.

A proper disposition of this case will require an examination of the items of said cost bill.

The appellant objects to the allowance of elisor's fees on the ground that said fees are not chargeable under any law, and on the further ground that the elisor informed the defendant that he wished no pay for the services rendered. The first ground of ob-

jection is not well taken. An elisor appointed to execute process and orders of the court is invested with the powers, duties, and responsibilities of the sheriff in the performance of those duties, and is entitled to the compensation allowed the sheriff for performing such duties. The second ground is well taken. If an elisor makes no charge for the performance of his duties, and demands no pay therefor, the successful party cannot tax any costs for such services against the losing party. It is true that respondent's attorney made the affidavit attached to the cost bill, and swore that, to his best knowledge and belief, the items in said bill were correct; but this affidavit is met by the affidavit of appellant stating that the elisor informed affiant that he made no charge, and wished no pay, for his services. The burden of proof was then on respondent, and he should have presented further proof than the cost bill that the elisor charged and demanded said fees, to authorize the court to tax the same.

The appellant objects to the allowance of per diem compensation and mileage to the mother and wife of the plaintiff, but admits that they were in actual attendance three days. Section 6139, Rev. St. 1887, provides that witnesses in civil actions are entitled to receive \$3 for each day's actual attendance, and 25 cents per mile one way. No exception is made because a witness may happen to be a wife or mother of the party calling them.

Objection is made to the claim of per diem compensation and mileage for the witnesses Mrs. C. Halle and Roy White because they were constantly within reach of the court, and only testified a few minutes. It appears that said witnesses were in actual attendance three days. They are entitled to the per diem compensation and mileage allowed. It is not to be presumed that the business of the court will be delayed by having to send out for witnesses.

It is shown by the affidavit of the appellant that witnesses W. H. Watt, J. S. Whitton, C. Halle, Larry Farrell, Henry Warning, Charles Berkin, and George Romaine were not sworn, and did not testify. The fact that said witnesses did not testify in said case would indicate that they were not necessary witnesses, especially when the record shows that, "all issues were tendered and made up on the 2d day of December, 1892, were never charged, and were litigated to the end." Under the facts of this case the per diem compensation and mileage of said witnesses should not have been taxed as a part of the necessary costs and disbursements of this case. If a party procures the attendance of witnesses who do not testify, the expense of such witnesses is not recoverable from the losing party, and should not be taxed against him, unless some sufficient reason is shown that would legally excuse their failure to testify. There is nothing in

the record that indicates that said witnesses were necessary witnesses.

The affidavit of appellant states that witness J. O. Swift was present but one day. Per diem compensation and mileage should have been taxed for the attendance of that witness for but one day and one mile.

The affidavit of appellant shows that witness Riley informed him that he had stated to respondent that he made no charge for witness fees. That being true, the charge for three days and one mile for said witness should not have been allowed.

In the same manner it is shown that witness C. J. Selwyn was in actual attendance on the trial but one day. The allowance for said witness should have been reduced to \$3.25. The same facts are shown as to witnesses E. Daft and George Richardson, and the allowance for their services should be reduced to \$3.25 each. The affidavit of appellant shows that witnesses C. S. Smith and G. A. Sawyer were in actual attendance but three days, and traveled but three miles. Said witnesses are only entitled to per diem compensation for the number of days in actual daily attendance. The winning party cannot charge in his cost bill more for such witnesses than they are entitled to under the provisions of the statute providing for their compensation.

When an item of a cost bill is denied by the affidavit of the party against whom such fees are claimed, the burden is then on the claimant to produce further proof. If the judge who tried the case has actual knowledge of certain facts that he takes into consideration in the decision of such motion, and an appeal is taken therefrom, the record should show such facts, so that this court may have such facts before it, with other evidence considered. Section 4912, Rev. St. 1887, restricts the recovery of costs to those necessarily incurred, and, where the items of a cost bill are contested, none of such items should be allowed unless the court or judge is satisfied, from the evidence produced on the hearing of the motion, that such contested items have been necessarily incurred. Where a motion to tax costs is made, supported by an affidavit showing that certain witnesses, for whose attendance costs had been taxed, were not sworn and did not testify on the trial, the burden of proof is then on the claimant of such costs to show that the attendance of such witnesses was necessary at the time they appeared, but, by reason of some unforeseen event or other sufficient cause, the testimony of the witnesses became unnecessary. Under the provision of section 6139, witnesses are allowed per diem compensation for actual attendance only. When a trial lasts for more than one day, and a witness is subpoenaed to be present at the trial, and makes arrangements to be called when needed, and is not in actual attendance on the trial except on the day he testifies, such witness is entitled to per diem compensation

for one day only. The necessities of litigation are sufficiently burdensome to litigants, and courts should not tax costs or disbursements but the actual costs incurred. It is not necessary that the cost of an action, or that the per diem of a witness, should be taxed for the successful party before the trial, but the same from the losing party, if they were necessarily claimed or demanded by the party performing the services for which the costs were incurred.

The following items of costs were allowed in this case:

Clerk's fees.....	.....
Witness fees:	
Mrs. Caroline Griffith.....	.....
Mrs. Ella Griffith.....	.....
Mrs. C. Haile.....	.....
Roy White.....	.....
J. O. Swift.....	.....
C. J. Selwyn.....	.....
E. Daft.....	.....
Geo. Richardson.....	.....
C. S. Smith.....	.....
G. A. Sawyer.....	.....
Herman Vorburg.....	.....
L. Price.....	.....
B. M. Mallory.....	.....
J. H. Beamer.....	.....

Total

The order of the judge taxing costs in this case is modified as set forth above, and the cause remanded to the district court with instructions to enter judgment in accordance therewith.

HUSTON, C. J., and MORGAN, J.

STATE v. REED

(Supreme Court of Idaho. Judgment affirmed.)
HOMICIDE—CHANGE OF VENUE—JURY.

1. A motion for change of venue must be predicated upon facts existing at the time the motion is made. Where a motion for a change of place of trial, once granted, is renewed at a subsequent term, after that at which such motion was made, it will not be presumed, in the absence of showing to that effect, that the grounds still existed.

2. Where, upon the trial of a criminal case, a view of the premises is directed of the defendant, and no request is made upon his part to be excused from such view, his absence from the view is made, his absence from the view is not ground for a new trial.

3. While the permitting of a view of the premises is a right to be furnished to a jury trial of a criminal case is strong, except in cases of actual necessity, the exercise of such discretion therein to a limited extent, in the discretion of the judge of the trial, is not, in the absence of evidence of overindulgence or effect from, the use of such liquor by any member of the jury, deemed error.

(Syllabus by the Court.)

Appeal from district court, &c. Judgment affirmed. J. Holleman, Judge.

Frank Reed was convicted of manslaughter, and, a new trial having been denied, he appeals. Affirmed.

Albert Hagan and Hawley & Reeves, for appellant. Geo. M. Parsons, Atty. Gen., for the State.

HUSTON, C. J. The defendant was indicted at the September term, 1892, of the district court of the first judicial district of Idaho in and for Shoshone county, for the crime of murder in the killing of one Robert Stevens at Murray, in said county, on the 16th day of July, 1892. On October 3, 1892, defendant was arraigned, and filed a demurrer to the indictment, which was overruled. Defendant thereupon entered his plea of not guilty, at same time giving notice of application for a change of venue. The motion for change of venue was based upon affidavits filed on the part of defendant, wherein are set forth the condition of the county at the time of the homicide, as well as at the time of the holding of the term of the district court then in session, the alleged prejudices existing in the community against the defendant, etc. The motion for the change of venue was denied, which action of the district court was brought to this court for review on writ of error. We held that, not being a final order, neither a writ of error nor an appeal would lie from an order overruling a motion for a change of venue in a criminal case, under the Code of Idaho. Upon the overruling of the motion for a change of venue, the cause was continued to the next ensuing term of said court,—January, 1893. On the calling of the case at the January term, 1893, the motion for a change of venue was renewed and submitted upon the same showing made at the September term, the state having filed counter affidavits at the hearing in October, and was again overruled by the court. The case then proceeded to trial, and resulted in a verdict against defendant for manslaughter. Defendant moved for a new trial, which was refused, and from the judgment of conviction, as well as the order overruling his motion for a new trial, and the order overruling his motion for a change of venue, this appeal is taken.

The following are the errors relied on by appellant for a reversal: "First. The court erred in denying the motion for a new trial on account of the misconduct of the jury in drinking liquor during the trial, and while considering their verdict. Second. The court erred in denying the motion for a new trial on account of the jury viewing the premises where the crime was alleged to have been committed, in the absence of the defendant and his counsel and of the judge of the court, and also that the court erred in allowing the jury to view said premises in the absence of the defendant, his counsel, and the judge of the court. Third. The court erred in refusing defendant's motion for a change of

venue, and also erred in denying the motion for new trial on that ground. Fourth. The court erred in overruling the demurrer to the indictment. Fifth. The court erred in overruling the motion in arrest of judgment. Sixth. The court erred in modifying instructions asked for by defendant, and numbered 2, 6, 7, and 8. Seventh. And in refusing instructions 14 and 19, asked for by defendant." We will consider the assignment of errors chronologically, as they were presented upon the argument.

The demurrer to the indictment was properly overruled. The indictment complied with the requirements of the statute.

The next error assigned is the denial of the defendant's motion for a change of venue, and incidental to this is the objection that the court permitted affidavits in rebuttal to be filed by the state. Section 7768 of the Revised Statutes of Idaho is as follows: "A criminal action prosecuted by indictment, may be removed from the court in which it is pending, on the application of the defendant on the ground that a fair and impartial trial cannot be had in the county where the indictment is pending." Section 7769: "The application must be made in open court, and in writing, verified by the affidavit of the defendant, a copy of which must be served upon the district attorney at least one day before the application is made. * * *" Section 7770: "If the court is satisfied that the representation of the defendant is true, an order must be made for the removal of the action to the proper court of a county free from like objection." The criminal statutes are not enacted solely to protect violators of the law. The tradition is that the primary object of statutes against crimes is to protect the citizen, and to punish the guilty infractor of the law. When the statute speaks of "a fair and impartial trial," it does not mean a trial that shall merely open to the accused every avenue of escape which the ingenuity of counsel may devise; it means a fair and impartial trial, both for the defendant and the state. If the application for a change of venue were to rest entirely upon the showing made by the defendant, the trial would be relegated to a period too remote for the jurisdiction of any earthly tribunal. The court must be satisfied of the truth of the representation of the defendant. How satisfied? By the ex parte statements of a man who is swearing for his life or liberty? The statement of the proposition is its best refutation. Counsel for appellant, in their brief, say: "The statute must be strictly construed, and in favor of the rights of the defendant, and the order must be made if the representations of the defendant are true." We cannot agree with this proposition. It is radically wrong. The statutes and "all proceedings under them [the statutes of Idaho] are to be liberally construed, with a view to effect their objects, and to promote justice." Rev. St. Idaho, §§ 4, 8236. It is a mistake which com-

sel engaged in the defense of persons charged with crime are prone to fall into, that criminal statutes, or at least such as are enacted for the government of criminal trials, must be construed always most favorably to the defendant. Such a construction would negative the very purpose of the law, to wit, the punishment of those guilty of a violation of the law. The law gives protection enough to the party accused of crime when it says that all presumptions of fact are in favor of the innocence of the accused, and requires proof of his guilt by competent evidence, beyond a reasonable doubt, to warrant conviction. It is going too far to say that all laws enacted for the punishment of criminals must be liberally construed in favor of the party accused of crime. Such a rule would hardly tend to the promotion of justice. To whatever cause or influence it is attributable, the fact is becoming daily more apparent that conviction for crime is, in this country, becoming one of the most problematical of all the "glorious uncertainties of the law." There seems to be a morbid sentiment in favor of criminals obtaining, the exhibition of which upon every favorable opportunity is, we think, a provocative to crime, and the recognition by the courts of every flimsy, technical pretext which the cultivated acuteness of counsel enables them to suggest for the protection of a client charged with crime is a practice with which we are not in accord. We think it eminently proper that counter affidavits should be permitted upon an application for a change of venue in criminal cases. At the time the homicide charged in this case was committed, a most unhappy condition pervaded the county of Shoshone. On account of the labor disturbances, and the violations of law incident thereto, the county had been placed under martial law, and this condition continued to, and existed at, the time the September term of the district court for said county convened. Now, although it is a fact that the homicide of which the defendant was charged did not arise out of, and was in no way attributable to, the disturbed state of the community, or the causes from which that state arose, still we think it would have been injudicious, at least, to have entered upon the trial of such a case under those circumstances. The defendant did not insist upon a trial at the time. The case was put over the term upon motion of the prosecution, and without objection, as appears from the record, on the part of the defendant. Had the defendant been put upon his trial at the September term we should have considered the refusal of a change of venue at that time reversible error. But the case was continued without objection, as it seems, on the part of the defendant. At the succeeding January term, on the call of the case, the defendant renewed his motion for a change of venue, and in support thereof presented the same affidavits pre-

sented at the September term, affidavits were not resworn or It is contended by counsel that, they having established of certain conditions by the a in support of the motion made of venue at the September term presumed that such conditions ing at the time of the renewa tion at the January term. We cept this conclusion. If we ar tice of the disturbed condition county in July and October, v take notice of the fact that in conditions had ceased or chang county was no longer under that the troops had been re so far as the condition of the concerned, the statu quo ante been resumed. We are convin examination of the record th onstrations hostile to the defe fested at the time of the occu homicide, were largely attrib then condition of affairs in tha and we are confirmed in this we consider the verdict rend light of the evidence as show ord. Certainly, the district cou able to judge of the condition at the time of the trial than w we are not prepared to say th was an abuse of discretion.

The next question in the orde tion, which we are called upon is the alleged error of the dis allowing the jury to view the pr the homicide was alleged to ha mitted, without the presence o ant. This question has been m exhaustively presented by th both sides, and the authorities diverse as the arguments of tion 7878 of the Revised Statu is as follows: "When in the court, it is proper that the jury the place in which the offence have been committed, or in wh material fact occurred, it may c to be conducted in a body, in t the sheriff, to the place, wh shown to them by a person app court for that purpose; and th be sworn to suffer no person communicate with jury, nor t self, on any subject connected and to return them into cour necessary delay or at a spe There is no provision in the st defendant shall, or may, accom upon such view. The request the premises in this case was defendant; and while there is in the record "that neither t nor the court, nor the judge accompanied the jury or wen any time during the view of by said jury," etc., "and no on

jury and the officers who had them in charge were permitted in said saloon during said time," it does not appear that the defendant or his counsel made any request that either should be allowed to accompany the jury upon this view. We have examined with much care the cases cited by counsel upon this question, both in their briefs and on the argument, and we are constrained to hold that the weight of reason and authority are against the contention of appellant. While we think it advisable, in all such cases, to permit the defendant to be present at such view if he so desires, we think, where neither the defendant nor his counsel expressed such desire, and where the view was had on motion of defendant, and the record does not disclose that anything improper, or that can be construed as prejudicial to the defendant, took place at or during the view, no such error has been committed as would justify a reversal. Highly respectable authorities have held a doctrine contrary to that which we accept, but authorities equally respectable in number and standing have held the same. We are not in accord with those authorities which hold that a view of the premises is the taking of evidence in the case. It is a means provided by the statute to enable the jury more satisfactorily to weigh the evidence. *Sasse v. State*, 68 Wis. 530, 32 N. W. 849. In the case under consideration the defendant took no exception to the manner in which the view was had. In view of the fact that there is nothing in the statute indicating that the presence of the defendant was intended or required, it was at least incumbent upon him to make any desire he had in that behalf manifest to the court; and by his failure to do so we think he clearly waived any right, constitutional or otherwise, he might have to be present. *State v. Ah Lee*, 8 Or. 214; *State v. Moran*, 15 Or. 262, 14 Pac. 419; *State v. Adams*, 20 Kan. 311.

The next error assigned by appellant is the misconduct of the jury during the trial. It seems that during the trial, and before the case was submitted, the bailiff in charge of the jury furnished them, by direction of the district judge, with whisky to the amount of one quart each morning. It does not appear—in fact, the contrary is averred by affidavit of one or more of the members of the jury—that any liquor was furnished to or had by the jury after the case was submitted to them, and before they had agreed upon a verdict. After the jury had agreed upon a verdict, it seems some beer was furnished them by the bailiff. It is not alleged nor intimated that any member of the jury was in the slightest degree overcome by liquor. While a free or unlimited indulgence in the use of intoxicating liquors by a jury, or any member thereof, while engaged in their duties as such, cannot be tolerated, still, such a limited use as may be had under and by direction of the trial court cannot, in

our views, in the absence of any claim or assertion of overindulgence on the part of any member of the jury, be considered reversible error. The generally accepted rule seems to be as expressed by Thompson and Merriam in their work on Jury Trials, (section 378.) "But the courts generally have adopted the more reasonable rule that the fact that the jury did, during the trial of a cause, or while deliberating on their verdict, drink intoxicating liquors, will not be ground for a new trial, unless there is some reason to suppose that such liquors were drunk at such time, or in such quantities, as to unfit them for the performance of their duties." At the same time we must express our decided disapproval of the practice of allowing jurors to indulge in intoxicating liquors while in the performance of their duties, except in cases of actual necessity.

Exception is taken by appellant to the modification by the court of certain instructions asked by the defendant, and to the refusal of the court to give certain other instructions requested by defendant. We have carefully and critically examined the instructions referred to, as they appear in the record, and we fail to find any error that can reasonably be said to have been prejudicial to the defendant therein. As we find no error in the record justifying a reversal, the judgment of the district court is affirmed.

MORGAN and SULLIVAN, JJ., concur.

On Rehearing.

A petition for a rehearing has been filed in this case, wherein it is alleged that this court, in passing upon the question of alleged error in the district court "in allowing the jury to view the premises in the absence of defendant and his counsel and the judge of the court, stated that the defendant waived any right, constitutional or otherwise, he might have to be present, by his failure, in the court below, to object to such view being had in his absence, and respectfully requests that further consideration be had in this regard upon the question herein involved,—as to whether a defendant in a criminal action can waive any right guaranteed him by the constitution of the state."

We thought we had stated our position on this question clearly; but, that there may be no doubt as to the holding of the court upon this question, we now state that no such right as is contended for by defendant is guaranteed by the constitution of Idaho.

As to the other point raised by the petition for a rehearing, to wit, that this court did not pass upon the question as to whether affidavits in opposition to a change of place of trial should be filed upon leave of the court first obtained, and permission given, upon such leave, to the defendant to file rebutting affidavits, we would say that we expressly decided that it was proper to admit counter affidavits on the part of the state

tions which do not affect the substantial rights of the parties. *State v. Reed*, (decision rendered by this court, Nov. Term, 1893,) 35 Pac. 706. It is contended, under the second error assigned, that the depositions do not contain the certificate of the magistrate, required by subdivision 5, § 7576, Rev. St. The record does show before whom the preliminary examination was had; the date of such examination; the presence of the defendant in person and by counsel; that the complaint was read to the defendant, and his plea; that each witness stated his name, age, residence, and occupation. It also contains the questions put to each witness, and the answers thereto, and each deposition is signed by the witness, and the jurat to each signed by the magistrate, and shows that said depositions were the basis of the information filed by the district attorney. There was a substantial compliance with the law. However, the motion under consideration was not made before plea or trial, and was therefore too late. When the motion to quash the information is made in proper time, upon the ground that the law had not been complied with in the arrest and preliminary examination of the defendant, he does not waive a substantial compliance therewith, and the trial court should see that the law in that respect has been substantially complied with before putting defendant upon his trial. But, unless the motion is made to quash or set aside an indictment or information, the objection that the law in regard to the preliminary examination of a defendant has not been complied with, and all objections to the indictment, enumerated in section 7730, Rev. St., are waived. *Washburn v. People*, 10 Mich. 385; *People v. Jones*, 24 Mich. 215; *Hodgkins v. State*, (Neb.) 54 N. W. 86; *People v. Williams*, (Mich.) 53 N. W. 779; *Bailey v. State*, (Neb.) 55 N. W. 241; *Ex parte McConnell*, 83 Cal. 558, 23 Pac. 1119; *People v. Bawden*, 90 Cal. 196, 27 Pac. 204. Section 4 of "An act providing for prosecution of offenses on information," etc., approved March 13, 1891, (1 Sess. Laws Idaho, p. 186,) provides that all provisions of the Criminal Code in relation to indictments shall, in the same manner, apply to informations.

The appellant relies upon *State v. Braithwaite*, 2 Idaho, 857, 27 Pac. 731, as supporting his contentions. In that case the question decided was the jurisdiction of the court to try the defendant by information before he had first had a preliminary examination, as provided by law, and rests upon the facts of that case. It was not claimed in that case that the defendant had waived his right to such examination, and the court held that the provisions of section 8 of the act therein referred to, and those of section 7576, Rev. St., were mandatory, and that the district court had no jurisdiction to try the defendant by information until the provisions of said statute had been complied with. In our

view of that case, the defendant had not had such a preliminary examination as the law requires, and had raised his objection in proper time, while in the case at bar the provisions of the statute in regard to preliminary examinations have been substantially complied with. An information is based upon preliminary examination, unless such examination is waived, or the defendant is a fugitive from justice. If the provisions of the statute are not complied with by the committing magistrate in every particular, in such examination the defendant waives all irregularities or defects therein if he does not move to quash the information before plea or trial. No regard should be given to mere technical errors or defects unless they prejudicially affect some substantial right of the defendant. We find no error in the record. The judgment of the court below is affirmed.

HUSTON, C. J., and MORGAN, J., concur.

HAWKINS v. POCATELLO WATER CO., Limited.

(Supreme Court of Idaho. Jan. 13, 1894.)

VARIANCE IN PLEADING AND PROOF—CONFLICT OF EVIDENCE.

1. Variance between allegations of complaint and proof must be disregarded, unless such variance actually misled the adverse party to his prejudice in making his defense.

2. When there is a substantial conflict in the evidence, the verdict of a jury will not be disturbed by the appellate court, unless it is plainly contrary to the decided weight of evidence.

(Syllabus by the Court.)

Appeal from district court, Bingham county; D. W. Standrod, Judge.

Action by W. C. Hawkins against the Pocatello Water Company, Limited, to recover on a contract for labor performed. There was judgment for plaintiff, and defendant appeals. Affirmed.

Eden & Terrell, for appellant, H. V. A. Ferguson and S. C. Winters, for respondent.

SULLIVAN, J. This action was brought by the respondent to recover \$1,842.25, alleged to be due upon contracts for certain work done and performed upon a certain ditch, designated as "Indian Ditch," and for the further sum of \$1,050, damages alleged to have been sustained by reason of appellant's failure to perform the conditions to be performed by it under one of said contracts. The cause was tried by the court with a jury, and a verdict and judgment rendered and entered in favor of respondent for the sum of \$1,658.07. Thereafter the appellant interposed a motion for a new trial, which was denied by the court. This appeal is from the order denying the motion for a new trial, and from the judgment.

Appellant's first contention is that the court erred in permitting a certain contract

signed by one F. D. Toms to go to the jury. It is urged that the respondent alleged in the complaint, in his second cause of action, that the contract sued on was signed by James A. Murry, J. J. Cusick, and F. D. Toms, and that it was reversible error to admit a contract signed by F. D. Toms, only, in support of that allegation. The allegations of the complaint that, immediately after the execution of said contract by Toms, Cusick, and Murry, said Toms, Cusick, and Murry, and other persons unknown to the plaintiff, incorporated the defendant company and became the stockholders thereof; that appellant company adopted said contract, and that the plaintiff continued to, and did, perform the work to be performed by him thereunder; that said contract was in writing, and in possession of appellant; and that the plaintiff could not produce it, and therefore could not attach a copy thereof to his complaint,—are not denied by the answer, and were therefore admitted, and required no proof. *Lillenthal v. Anderson*, 1 Idaho, 673. The contract was admitted in evidence to prove undenied allegations of the complaint, and in no wise misled or prejudiced the defense of appellant. The substantial rights of appellant were not, and could not have been, affected by the alleged error. Section 4231, Rev. St. 1887, provides that all errors or defects in pleadings or proceedings which do not affect the substantial rights of the parties must be disregarded, and no judgment should be reversed because of any such errors or defects. The only error made in this matter was the admission of evidence to prove a fact which was admitted by the answer.

The second error assigned is that the evidence is not sufficient to support the judgment; and under this head it is contended that there is a conflict between the testimony of respondent, Hawkins, as a witness on his own behalf, and the testimony of F. J. Mills, also a witness on behalf of respondent; that, as Mills was a witness for respondent, the jury was bound to take his testimony as true, and reject that of Hawkins, in case of conflict. We cannot concede this contention. The jury are the judges of the credibility of the witnesses, and may determine the weight to be given to the testimony of each witness. From the record of this case it appears to us that the jury did just what appellant contends they should have done, to wit, rejected Hawkins' testimony as to the estimates introduced, and accepted as true the estimates of witness Mills. The respondent, Hawkins, testified that the work done by him under said contract was of the value of \$1,940.50, and Mills testified that said work was of the value of \$1,131.50 only. Hawkins also testified that he had sustained damages in the sum of \$1,050 by reason of appellant's failure to perform its part of said contract. Mills did not testify on the question of damages, and it does not appear from the record that the appellant introduced any evidence

on the trial of this case. From the the jury rendered a verdict for plaintiff the sum of \$1,658.07. So far as appears from the record, the jury took Mills' estimate as correct, and, in addition thereto, sufficient damages to respondent to make the amount of the judgment. It is contended that the jury did not render a verdict in accordance with the testimony of Hawkins, as he testified that there was due him, for labor, \$1,940.50, and also \$1,050 for certain damages sustained by him, making a total, \$2,990.50, less a payment of \$1,332.43. There is nothing in the record to show that the jury gave more weight to Hawkins' testimony than to Mills'. If they did, it was their right to do so. They were to judge of the credibility of witnesses and to give to the evidence the weight they thought proper. The established rule that, when there is a conflict in the evidence, the verdict of the jury will not be set aside unless the weight of evidence is against it, is applicable to this case, regardless of the fact that Mills was called as a witness by respondent. The record shows that the estimates made by Mills were made under difficulties, and were made for and on behalf of the corporation, and not for the respondent. This, however, makes no difference in the record we are unable to say that the verdict is against the weight of evidence.

Respondent contends that this appeal is for delay, and demands the penalty provided by rule 9 of this court; but we do not warrant in holding that this appeal is manifestly for delay, and allowing delay at the rate of 12 per cent. upon the amount of the judgment, as prescribed by rule 9 of this court, but it evidently is very close to the line. The judgment of the court is affirmed, with costs in favor of respondent.

HUSTON, C. J., and MORGAN, J.

MELLER v. BOARD OF COMMISSIONERS OF IDAHO COUNTY et al.

(Supreme Court of Idaho. Feb. 1907.)

COUNTIES—POWERS OF COUNTY BOARD OF COMMISSIONERS—POINT COUNSEL.

1. The appointment of one to be the legal adviser of the board of county commissioners for a period of two years, and to execute the duties of such appointment by the board with such appointment, and fixing his compensation, is within the power of the board, and is not in violation of the constitution of this state.

2. The boards of county commissioners have no authority to devolve upon any other person the duties and functions of their own, but they may, under the law, have already affixed to another person.

3. All orders of the boards of county commissioners are reviewable by the court.

4. Before a board of county commissioners can employ counsel, as provided in the constitution and the statutes, the necessity for such employment must be apparent, and their action in making such appointment is reviewable by the court.

(Syllabus by the Court.)

Appeal from district court, Logan county; C. O. Stockslager, Judge.

Action by John W. Meller against the board of county commissioners of Logan county and H. S. Hampton. There was judgment for plaintiff, and defendants bring error. Affirmed.

N. M. Ruick and H. S. Hampton, for plaintiffs in error. P. M. Bruner, for defendant in error.

HUSTON, C. J. This case is before us on a writ of error to the district court for the county of Logan. The facts as they appear by the record are as follows: That on the 3d day of January, 1893, the board of county commissioners for Logan county made, and caused to be entered upon their records, the following order: "Ordered that H. S. Hampton be, and he is hereby, appointed and retained as legal adviser of the board of commissioners for Logan county." On the 13th day of January, 1893, the board of commissioners for Logan county made the following contract with said H. S. Hampton:

"Ordered, that the following contract, made by the board with H. S. Hampton, for legal services, on the 13th day of January, 1893, be spread upon the minutes:

"This agreement, made the 13th day of January, in the year of our Lord 1893, between H. S. Hampton, of Bellevue; Logan county, state of Idaho, party of the first part, and Logan county, the party of the second part, witnesseth: That the said party of the first part, in consideration of the covenants, promises, and agreements on the part of the said party of the second part, hereinafter contained, hereby covenants with the said party of the second part that the said party of the first part will act as attorney and legal adviser for said party of the second part for the term of two years, ending on the first day of January, 1895, and will prosecute or defend all actions or suits to which the said party of the second part may or shall be a party, in any of the courts of this state. And the said party of the second part, in consideration of the said covenants on the part of said party of the first part hereinbefore contained, agrees to and with the said party of the first part that the said party of the second part will pay said party of the first part, for his said services within Logan county, and in the courts of said county, the sum of two thousand dollars per annum, payable quarterly, five hundred dollars to be paid at the regular meeting of the board of county commissioners held in April, 1893, and five hundred dollars every three months thereafter, and in addition thereto to pay said party of the first part a reasonable fee for any legal services required of him to be performed outside of said Logan county, and his actual and necessary expenses while away from the county seat, attending to business

of said party of the second part. And, for the true and faithful performance of all and every of said covenants, the said parties to these presents bind themselves each unto the other in the penal sum of — dollars, of the United States of America, as fixed, settled, and liquidated damages, to be paid by the failing party to the other, his heirs, or assigns.

"In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

"H. S. Hampton. [Seal.]

"J. C. Cunningham, [Seal.]

"James Otterson, [Seal.]

"Joshua W. Winters, [Seal.]

"Board of County Commissioners of Logan County, State of Idaho.

"Signed, sealed, and delivered in the presence of —."

"The foregoing contract is hereby recognized, ratified, and confirmed, as unanimous action of the board of county commissioners of Logan county, Idaho, at their regular session in January, 1893. * * * The Board here adjourned to October 21, 1893, at 9:30 A. M.

"Approved: J. C. Cunningham, Chairman.

"W. B. George, Clerk.

"State of Idaho, County of Logan—s.: I, W. B. George, clerk of the board of county commissioners of Logan county, state of Idaho, hereby certify the above and foregoing to be a true and correct copy of the record of said board of commissioners, as shown on pages 429, 430, 431, 432, 433 and 434, of the commissioners' Minute Book, concerning the said order. Witness my hand and the seal of said office, this 9th day of November, 1893. W. B. George, Clerk. Filed, Nov. 9, 1893."

On the 20th day of October, 1893, the said board of county commissioners, being in regular session, ordered the said contract of January 15, 1893, to be spread upon the minutes of the proceedings of said board, and made the following order in relation thereto: "The foregoing contract is hereby recognized, ratified, and confirmed, as the unanimous action of the board of county commissioners of Logan county, Idaho, at their regular session in January, 1893." From this order of the board of October 20th, defendant in error appealed, under the provisions of section 1776, Rev. St., to the district court for said Logan county.

The district court, after finding the facts as hereinbefore set forth, finds, as conclusions of law: "(1) That the action of the board of county commissioners of Logan county, in entering into the said contract with said Hampton, was unauthorized, illegal and void; (2) that the said contract was and is unauthorized, illegal, and void, and that the county of Logan was not, and is not, bound thereby or thereunder; (3) that the action of said board of county commissioners, in ordering said contract to be spread upon

their minutes, and in recognizing, ratifying, and confirming the same, was and is, and each of said acts were and are, unauthorized, illegal, and void,"—and ordered judgment to be entered in accordance with said findings. Respondent brings the action of the district court here for review on writ of error.

The only question presented by this record is, had the board of county commissioners of Logan county authority to make the contract set out in the record? Plaintiff in error contends that such authority is given in express terms, both by the constitution and by the statute. Section 6 of article 18 of the constitution of Idaho, after designating the various county officers, for the election of whom the legislature shall provide, contains this further provision: "No other county offices shall be established." Said section also contains the following provision: "The county commissioners may employ counsel when necessary." Subdivision 13 of section 1759 of the Revised Statutes of Idaho, (1887,) defining the duties of county commissioners, gives them power "to direct and control the prosecution and defense of all suits to which the county is a party in interest, and employ counsel to conduct the same, with or without the district attorney, as they may direct." Under the laws of the territory, as they existed at the time of the adoption of the state constitution, and the admission of Idaho as a state, district attorneys were provided for each of the several counties of the state. The constitution changed this system, and provided (section 18, art. 5) for the election of a district attorney for each judicial district of the state, who should "perform such duties as may be prescribed by law," and fixed the salary of such district attorney at \$2,500 per year, and the term of office at four years. At the first session of the legislature after Idaho became a state, an act was passed, amendatory of the law as it then existed, defining the duties of district attorneys. Sections 2 and 3 of said act provide as follows: "Sec. 2. That section 2051 be amended to read as follows: Where there is no district attorney for the district, or where he is absent from the court, or where he has acted as counsel or attorney for a party accused in relation to the matter of which the accused stands charged, and for which he is to be indicted or tried, or when he is near of kin to the party to be indicted or tried on a criminal charge, or when he is unable to attend to his duties, the district court may, by an order entered in its minutes, stating the cause therefor, appoint some suitable person to perform for the time being, or for the trial of such accused person, the duties of such district attorney; and the person so appointed has all the powers of the district attorney while so acting, and may receive such compensation as the court may allow, out of the salary of the district attorney, for all services by him performed.

Sec. 3. That section 2052 be amended to read as follows: It is the duty of the district attorney: 1. To prosecute criminal actions, applications or motions for writs, in the district court of the county in which the people of the state, counties of his district, are parties; and when the place of trial is in any such action or proceeding in any other county he must prosecute in that county. 2. To give advice to the board of county commissioners and other public officers of his district, when requested in writing, in all public matters in which the people or the state, or counties of his district are interested, or in the discharge of the official duties of such officers. 3. To attend with and advise any grand jury, for the purpose of examining witnesses before them; to give advice in any legal matter before the court, in the bills of indictment, information, or subpoenas, and requiring the attendance of witnesses. 4. On the first Monday in each year, with the auditors of the various counties of his district, and to pay over to them the moneys collected or received by him during the preceding month belonging to the various counties of his district or state to the county of the proper county, and take his receipt therefor, and to file on the first Monday in each year in the office of the auditor of the proper county an account of the moneys received, of all money received during the preceding year, by him, or by his office, for fines, forfeitures, or other moneys, costs, specifying the name of the person from whom he received the same, and the amount received from each and the date when the same was paid. 5. To perform such other duties required of him by law.

That it was the intent of the framers of the constitution to change the county attorney system to a district attorney system, and by the election of the district attorney to limit and curtail the duties of the said office, is quite apparent from this conclusion supported by the address of the committee on the constitution, which accompanied the report of the committee of the constitution, wherein it is stated as one of the advantages to the people from the adoption of the new constitution, was the greatly-reduced cost of county government. And in the said address that, in the matter of the compensation of district attorneys, it was stated that, according to the people under the system provided for by the state constitution, the salary of \$21,700 per annum. This would hardly be reached, if the board of county commissioners of each county is to obtain through the district attorney for that board has not only no authority to, and prohibited from attaching to the constitution, but they have attached

pensation only limited by the modesty of the incumbent and the liberality of the board. Under the contract set forth, the party of the first part thereto is to do and perform only such acts and services as are already provided for by law, to be performed by the district attorney and attorney general. "The legislature cannot take from a constitutional officer a portion of the characteristic duties belonging to the office, and devolve them upon an office of its own creation." Cooley, Const. Lim. p. 831, note 2, and cases there cited. And if this cannot be done by the legislature, will it be seriously contended that it can be done by a board of county commissioners?

Counsel for defendant in error contends that "the framers of the constitution, evidently foreseeing the necessity which would arise under the changed conditions, provided, in section 6, art. 16, that "the county commissioners may employ counsel when necessary." If this was the view the framers of the constitution took of the question, they certainly very studiously avoided giving it expression, either in the constitution, or in the accompanying "Address to the People" in behalf of its adoption. We are unwilling to believe that it was the purpose of the framers of our constitution to "pluck the muzzle of restraint" from the boards of county commissioners throughout the state, and leave them with the sole limit of the vagaries of their own sweet wills in imposing burdens upon the taxpayers of the state.

In the contract under consideration, the board of commissioners have not only provided for the performance by their employe of the duties of the district attorney, but they have gone further, and invested him with the functions, and imposed upon him the duties, which the law assigns to the attorney general. Are boards of county commissioners within the law, and amenable to its provisions, or are they, as would almost seem to be assumed by some of them, at least, "a law unto themselves?" The system of district attorneys, as contradistinguished from county attorneys, had existed from the organization of the territory to 1883, and, while the authority of the board of county commissioners to employ counsel, whenever a necessity therefor arose, was never questioned, it was never assumed or claimed that such board had the power to employ an attorney generally, and pay him such compensation as they saw fit. That the position to which Mr. Hampton was appointed, by the order of the board of January 3, 1893, was an "office," we think is established by an overwhelming weight of authority. Bac. Abr. 280; *Shelby v. Alcorn*, 72 Amer. Dec. 169, and note; *Vaughn v. English*, 8 Cal. 39; *State v. Stanley*, 8 Amer. Rep. 498; *Com. v. Evans*, 74 Pa. St. 124. The subsequent contract of January 13, 1893, enumerating the duties and fixing the compensation to be paid to the appointee, in

no way changed the nature or character of the position. All the duties mentioned in the contract, to be performed by the said appointee, are included in the duties of other officers provided for by law, to wit, the attorney general and district attorney. The contention of counsel for plaintiff in error, that the exercise of discretion by the board of county commissioners is not reviewable by the courts, is not only unmaintainable; it is directly opposed to the plain provisions of the statute. Rev. St. § 1776. The recognition of such a rule would leave the people of the state entirely in the hands of the boards of county commissioners. While we recognize the right of the board of county commissioners, as expressed in the constitution, "to employ counsel when necessary," we do not assent to the construction of that provision claimed by the plaintiff in error,—that it gives to the boards unbridled license to establish a new office, and to devolve upon an officer unknown to the constitution and the statutes the functions and duties which the law has already affixed to another officer or office. The board of county commissioners may, when the necessity exists, employ counsel, but that necessity must be apparent, and the action of the board in each case is subject to review by the courts. To hold otherwise would, as we have already stated, be to leave the taxpayers of the state at the mercy of the boards of county commissioners, without remedy. The judgment of the district court is affirmed, with costs.

MORGAN and SULLIVAN, JJ., concur.

COFFIN et al. v. BRADBURY et al.

(Supreme Court of Idaho. Jan. 26, 1894.)

SALE—ACTION FOR PRICE—STATUTE OF FRAUDS—CONFLICTING EVIDENCE—APPEAL—REVIEW.

1. On appeal by defendants, the appellate court will not review errors alleged to have been committed against the respondent.

2. When none of the things are done, at the time the bargain is made, required to be done and performed under the provisions of section 6009, Rev. St. 1887, to take a contract of sale out of its provisions, the contract cannot be enforced against the purchaser, unless he thereafter receives and accepts the property purchased. A receipt and acceptance takes the contract out of the provisions of said section.

3. Said section is applicable to executory contracts, and not executed ones.

4. When the questions of sale, delivery, and acceptance were submitted to the jury, under proper instructions, by the court, the verdict will not be disturbed, when there is a substantial conflict in the evidence.

5. When, from the entire evidence, different minds might honestly reach different conclusions as to the sale and acceptance of the property claimed to have been sold, the sale and acceptance are questions for the jury, and their verdict will not be disturbed.

6. Time is not necessarily a controlling element or principle in the matter of *res gestae*.

7. When an attempt is made to show a partnership, and there is no evidence whatever

showing the same, it is not error for the court to so decide, in the presence of the jury.

8. Exceptions will not be considered unless saved.

9. Statements and admissions, made by a party to a suit, may be put in evidence by the opposing party, without calling the party's attention to them or laying any foundation for impeachment.

10. Where the material issues are fairly submitted to the jury by proper instructions, the verdict of the jury, or the order of the court overruling a motion for a new trial, will not be set aside by the appellate court, on the ground of the insufficiency of the evidence to justify the verdict, where the evidence in such issues is conflicting, and no exceptions taken by appellants to the instructions given.

(Syllabus by the Court.)

Appeal from district court, Ada county; Edward Nugent, Judge.

Action by Frank R. Coffin and others against W. C. Bradbury and others to recover the price of goods sold. There was judgment for plaintiffs, and from the order denying a new trial, defendants appeal. Affirmed.

Texas Angel and S. L. Tipton, for appellants. Geo. H. Stewart, W. E. Borah, and Edgar Wilson, for respondents.

SULLIVAN, J. This action was brought to recover the value of five New Era ditchers, alleged to have been sold to, and received and accepted by, appellants, who were defendants in the court below. The answer is a general denial of the allegations of the complaint. The action was tried by the court with a jury, and a verdict rendered in favor of respondents for the sum of \$6,052.91, together with interest, amounting to \$1,659.21, on which verdict judgment was duly entered against appellants. A motion for a new trial was interposed and overruled by the court. This appeal is from the order denying the motion for a new trial, and from the judgment.

Respondents contend that the errors alleged to have occurred on the trial were not properly saved and preserved, so as to authorize this court to consider them on this appeal. Their contention is, that under the provisions of section 4426, Rev. St. 1887, each exception taken on the trial must be settled at the time the decision is made, (other than those deemed excepted to by the provisions of section 4427, Rev. St.) unless a different time is agreed upon by the parties; that no exceptions were settled during the trial, and no time agreed upon by the parties for their settlement. The record contains a stipulation, in which it is agreed that, at the trial of this case in April, 1892, which resulted in a disagreement of the jury, the following entry was made in the minutes of the court, to wit, "The parties here stipulated that they might prepare a bill of exceptions after trial,"—and upon this stipulation the appellants rely, and contend that it remained in force and effect at the trial that resulted in the judgment from

which this appeal was taken; while respondents contend that said stipulation applied to the trial then in progress, and not to the trial then in progress, and not applied to a settlement of the exceptions, under the provisions of section 4430, Rev. St. 1887, and not to the trial then in progress. This contention is overruled by the trial court, and no exception thereto, and no appeal has been taken therefrom. The plaintiff cannot be allowed to have been committed against himself reviewed on defendant's appeal. The appeal of either party brings up only the errors alleged to have been committed by himself. If the respondent in an appeal desires to have errors against himself reviewed, he must present them to this court on his own appeal. *Jones v. Irrigating Co.*, 58, 3 Pac. 1.

The first error specified is the insufficiency of the evidence to justify the verdict of this specification of error, the validity of the contract sued on was tested by the statute of frauds. It is contended that, as the value of the property sued for is shown to have been \$200, the contract, or some memorandum thereof, must be in writing, and by the party charged, or by his agent, the buyer accepted and received the said property, or paid, at the time of the purchase, or some part of the purchase price, as none of these requirements were complied with, said contract comes within the provisions of section 6009 of the Revised Statutes of 1887. The provisions of said section claimed to be applicable to this case are as follows: "In the following cases a contract is invalid unless the same is in writing, and subscribed by the party charged, or by his agent. Evidence therefore of the contract cannot be received without the original, or secondary evidence of its contents." Subd. 4. An agreement for the sale of goods, or things in action, at a value less than two hundred dollars, is not valid unless the buyer accept and receive part of the goods, or the evidences, or some of them, of such things in action, or some time some part of the purchase price. It is sufficient, under this section, if the chattels, goods, or things in action are delivered to and accepted by the purchaser, at any time after the purchase is made. But, under the provisions of said section, above recited, the seller could not compel the buyer, at any time after the contract was made, to accept the goods, and compel an acceptance of the goods. However, if the goods are received by the purchaser, the contract is taken out of the statute of frauds, and can be enforced against the buyer, for the full purchase price. It is alleged in the complaint that said ditchers were sold to appellants on the 14th day of March, 1890, and after they accepted and received

It is not claimed, by respondents, that they aver or prove a delivery and acceptance, at the time the contract of sale was entered into, or that the contract, or some note or memorandum thereof, was in writing, signed by appellants, or by their agents, or that any part of the purchase money was paid at the time the contract was entered into. It is the receipt and acceptance of the machines, some 15 days after the contract of purchase was made, that respondents rely upon as taking this contract out of the provisions of said section, and, we think, with reason. If a contract of sale is made, and the property subsequently received and accepted by the purchaser, it is then too late to escape liability thereon, because of the provisions of said section. Had the purchaser refused to receive and accept the property, and suit been brought to enforce the contract, said statute would have been a complete defense to such action, but, after the receipt and acceptance of the property, the virtue of said section, as a defense to an action to recover the purchase price, is gone. This section of the statute of frauds only relates to executory contracts, and not to executed ones. Receipt and acceptance of the property sold, at any time after making the contract, takes the contract out of the statute of frauds. *Hinkle v. Fisher*, (Ind. Sup.) 3 N. E. 624; *King v. Jarman*, 37 Amer. Rep. 11; *Cartan v. David*, 18 Nev. 311, 4 Pac. 61; *Dodge v. Crandall*, 30 N. Y. 294; *Brown v. Trust Co.*, 117 N. Y. 266, 22 N. E. 952.

The second contention is, that said ditchers were not delivered to, or received and accepted by, appellants. The evidence of respondents shows that, at the time said ditchers were ordered, J. M. Bray informed Sherman M. Coffin that a man by the name of Jessop was going to use the ditchers in the construction of a certain ditch, which appellants were constructing under the supervision of J. M. Bray. It also shows that, when the ditching machines arrived at Nampa, Jessop appeared, and assisted in setting them up ready for use; that he took possession of them, and took them out upon the aforesaid ditch, and went to work thereon with them; that, while taking them out on the ditch, he met Mr. Bray; that he used them on said ditch, under the immediate supervision of Mr. Bray, for two months, at least. It was conceded, on the trial, that the ditchers were delivered to Jessop, who was a subcontractor of appellants, and the question of acceptance does not appear to have attained special prominence during the trial of the case. Upon a careful review of the entire evidence, I think it tends to show that the ditchers were purchased for the use of Jessop, and that he received and accepted them, and that his receipt and acceptance was the receipt and acceptance of Bradbury & Bray, and bound them.

The questions of sale and delivery were submitted to the jury, upon an instruction by

the court, at the request of appellants, whereby the jury was instructed that, to entitle the plaintiffs to recover, they must establish, by a preponderance of evidence, the sale and delivery of the ditchers to the defendants, and, by their verdict, they found those points in favor of respondents. When, from the entire evidence, different minds might honestly reach a different conclusion, as to the acceptance of the property sold, the question of acceptance is one of fact, for the jury, and their verdict thereon will not be disturbed. Nor will the order of the court, denying a motion for a new trial, be reversed when the aforesaid conditions exist. See note to *Shindler v. Houston*, 49 Amer. Dec. 316; *Gray v. Davis*, 10 N. Y. 291; *Baker, Sales*, § 302a; *Thielen v. Rath*, (Wis.) 50 N. W. 183; *Galvin v. MacKenzie*, (Or.) 27 Pac. 1039; *Garfield v. Paris*, 96 U. S. 557; *Hinchman v. Lincoln*, 124 U. S. 39, 8 Sup. Ct. 369.

Considerable authority is cited on the question as to what acts constitute an acceptance, under said section 6009. The correctness of the rule established by the authorities cited is not questioned. The case of *Shindler v. Houston*, 49 Amer. Dec. 316, is cited as a case in point. It was held, in that case, that delivery and acceptance of goods, such as will take it out of the statute of frauds, cannot be shown by mere words. Some acts transferring possession are necessary. That case is not in point, for the reason that it is not claimed nor shown that the transfer of the possession of said machines was made by mere words, but that the machines were set up and possession of them given; that respondents parted with possession, and thereafter exercised no rights of possession or ownership over them; that the person for whose use they were intended took them, and put them to the very use for which they were purchased. The case of *Hinchman v. Lincoln*, 124 U. S. 38, 8 Sup. Ct. 369, is cited as a case very similar to the one at bar. That is a case where the facts, in relation to the contract of sale, alleged to have been within the statute of frauds, were admitted. There was no dispute as to the facts on which appellant relied, showing, as he claimed, sale, delivery, and acceptance. The court held that, as there was no dispute as to the facts, it belonged to the court to determine their legal effect. It was also held that, to take an alleged contract of sale out of the operation of the statute of frauds, there must be acts of such a character as to place the property unequivocally within the power and under the exclusive dominion of the buyer, as absolute owner, and that, when anything remained to be done by the seller to perfect the delivery, such fact would be, generally, conclusive that there was no receipt by the buyer. This case is very different from the one under consideration. The facts of sale, delivery, and acceptance were in dispute, and nothing is shown which would

indicate that anything remained to be done by the seller to perfect the delivery of said machines. It is earnestly contended by appellants, and with apparent confidence, that all of the evidence, taken together, shows that the sale of said ditching machines was made by Stearns to Jessop a day or two before Sherman Coffin met Bray at Nampa. It is claimed that Stearns testified that he sold said machines to Jessop. Mr. Stearns, as a witness for appellants, on direct examination, did testify that he sold four ditchers to Jessop. He afterwards testified as follows, to wit: "Q. Why did you telephone for Coffin to come up? A. Because I wanted him to sell those ditchers, so that I could make a little money. That is what I did it for." Further on, he testified as follows: "Q. And you assisted Coffin all the way through the negotiations? A. No; I don't think I did; all the way. Q. Did you hear anything, or all that was said, on that day, in relation to the sale of those ditchers to Jessop? A. I don't know whether I did or not. The sale was not consummated in my presence. Q. Then the sale was not consummated until Sherman Coffin came up? A. No, sir. It might have been at that time, but I don't remember. Q. And Jessop was in Utah? A. Jessop was in Utah." This evidence needs no comment. It is too plain to be misconstrued, or misunderstood. It clearly shows that no contract or bargain for the sale of the machines was made between Jessop and Stearns, and that, if any bargain was made, it was made between Coffin and Bray, at a time when Jessop was in Utah. Sherman Coffin testified that no sale was made until he met Bray at Nampa, in response to a dispatch from Stearns. He also testified that he never met Jessop until the ditchers arrived at Nampa; that John M. Bray was the man who gave the order for the ditchers, and who agreed to pay for them as a member of the firm of Bradbury & Bray. This was denied by Mr. Bray. He denied that he made any contract for the purchase of said machines, and denied that he had any authority from Jessop to purchase said machines. He testified as follows, to wit: "I says: 'No, sir, Mr. Coffin; I will have nothing to do with those machines, whatever. I have no authority to buy machines for Jessop.' * * * This evidence shows that Bray did not purchase them for Jessop. Mr. Bray also testified to a conversation, alleged to have been had with Frank R. Coffin, about the middle of May, 1890, in which he stated to Coffin that he had nothing to do with the machines whatever; "that the entire sale of those machines was between Sherman Coffin, Stearns, and Jessop." The testimony of Stearns shows that he had a conversation with Jessop, in regard to ditching machines, in the presence of J. M. Bray, a day or two before Sherman Coffin met Bray; that thereafter Jessop left Nampa for Utah, and Stearns telephoned Coffin to come

to Nampa, and, on his arrival, to talk with him about those ditching machines. The evidence shows that they did not purchase them. It may be true, as testified by Mr. Bray, that he then and there informed Sherman Coffin that he would have nothing to do with the machines, whatever, and that he had no authority to purchase them for Jessop; but, regardless of those statements, the testimony tends to show that there was some conversation about them, and that Sherman Coffin to have then and there used the name of Bradbury & Bray. Coffin afterwards requested Coffin to not use the name of Bradbury & Bray in the contract, and that the contract was made in the name of Stearns' testimony is to the effect that Mr. Bray testified that it was made between Stearns, Coffin, and Jessop. And conflicting evidence, and other evidence, the jury found against appellants. The testimony of Charles Stewart tends to corroborate the testimony of Sherman Coffin. He testified as follows: "I rode up to Nampa, who was out on the ditch, where the contract was. I rode up to Nampa, and I think he wasn't using very good language towards Jessop, because Jessop was behind. He says, 'I am in the ditch with Coffin Bros. for those damned ditchers.' This testimony is not contradicted by Birdsall, a witness for respondents, that he met Bray, at Nampa, on May 27 and 30, 1890, and had some conversation with him about selling him safety powder, and he informed Bray that he was agents for said powder, and he supplied Bray with said powder. Bray informed Birdsall that he had some conversation with Coffin Bros., and did not do business with them. After some further conversation, Birdsall informed Bray that he was going to Caldwell to see Sherman Coffin, and Bray thereupon requested Birdsall to Coffin that he (Bray) did not want any trouble with him, (Sherman Coffin), and that he would see that they (Bray and Coffin) were paid for the ditchers. This testimony is contradicted by Bray. Birdsall and Stewart were disinterested witnesses, and the jury no doubt gave some weight to their testimony, as corroborating that of Sherman Coffin. But it is urged by appellants that if said statements were made by Birdsall, they would be perfectly consistent with the testimony that Bradbury & Bray were only agents and not purchasers. There might be some point in this contention if J. M. Bray testified that he was simply guaranteeing the machines, and denied that they were guaranteed by Jessop. There is no evidence tending to show that they were, except that contained in a letter written by Sherman M. Coffin to Jessop, dated May 24, 1890. If the defendant had been, that appellants were not liable because such a contract was not in writing, then the case

appellants would be of some weight; but, as that is denied, and the issue was as to whether the appellants were original purchasers, the evidence of Stewart and Birdsall tends to corroborate the testimony of respondents on that issue. The issue as to whether Bradbury & Bray were simply guarantors is not in this case. It would appear that said statements were made by Bray to Stewart and Birdsall, not upon the theory that Bradbury & Bray were guarantors, but upon the theory that they were purchasers. C. W. Moore's testimony also corroborates Sherman M. Coffin, as to the sale. He testified that he had no knowledge of the sale of any goods at the time a certain telegram was sent, except the ditchers to Bradbury & Bray. By what means the witness became possessed of that knowledge, the record fails to disclose. The testimony of Sherman M. Coffin and Mr. Bray is so unsatisfactory, and conflicting in substantial matters, that it is impossible for this court to say how much of said testimony is true, and how much is false, and, as the jury are the exclusive judges of the weight to be given to the testimony of any witness or witnesses, and they having found on the purchase, delivery, and acceptance of the machines, this court, under the conditions, would not be justified in disturbing the verdict.

Appellants contend that the court erred in permitting Sherman M. Coffin and Frank R. Coffin to testify in regard to a certain telephone message, sent by the former to the latter, inquiring as to the responsibility of appellants. The evidence shows that, on the day the ditchers in controversy were ordered, Sherman M. Coffin waited at Nampa, for a reply to a telegram sent to Jessop, until late in the day; that he finally informed Mr. Bray that he must return to his home, at Caldwell, some nine or ten miles from Nampa; that thereupon Bray requested him to order five ditchers, and stated that, if Jessop could not use the fifth ditcher, Bradbury & Bray would use it themselves; that witness got his team, and drove to his home, at Caldwell, and put his team out, and immediately thereafter, and before ordering said machines from Chicago, he telephoned his partner, Frank R. Coffin, at Boise City, and asked him if Bradbury & Bray were good for five ditchers, at \$1,100 each, and requested him to find out, and let him know; that this all occurred within two hours after he left Nampa. This telephone communication, and Frank R. Coffin's testimony in regard to receiving the same, was objected to, and the admission thereof is assigned as error. It is urged that the same is no part of the *res gestae*, that it took place after the agreement for the sale of the ditchers had been entered into, and was a communication from one of the plaintiffs to his partner, and not in the presence of the defendants, or either of them; that said testimony is self-serving, and too remote to be a part of the *res ges-*

tae. Counsel for appellants contend that the rule applicable to this class of testimony is, that such declarations, to become competent evidence, as part of the *res gestae*, must accompany the act which they are supposed to characterize, and must so harmonize with it as to be, obviously, a part of the same transaction, and in support of this rule cite: *Moore v. Meacham*, 10 N. Y. 207; *Enos v. Tuttle*, 3 Conn. 250; *Cherry v. Butler*, (Tex. App.) 17 S. W. 1090; *Tisch v. Utz*, (Pa. Sup.) 21 Atl. 808; *Conlan v. Grace*, (Minn.) 30 N. W. 880; 1 Whart. Ev. § 265; 2 Whart. Ev. § 1174; *Dawson v. Pogue*, (Or.) 22 Pac. 640; *State v. Daugherty*, 17 Nev. 376, 30 Pac. 1074; *People v. Dewey*, (Idaho,) 6 Pac. 103; *Binns v. State*, 57 Ind. 46. In *Moore v. Meacham*, *supra*, the court, in passing upon the question of the admission of certain declarations, said that "the general rule is that declarations, to become a part of the *res gestae*, must accompany the act which they are supposed to characterize, and must so harmonize as to be obviously one transaction,"—and held that the general rule applicable to the admission of such declarations, as a part of the *res gestae*, was the rule which should govern in that case. *Enos v. Tuttle*, *supra*, was a case where a plaintiff undertook to introduce declarations of an absconding debtor as evidence against a garnishee, and the court held that such declarations were not evidence for the plaintiff. *Cherry v. Butler*, *supra*, held the declarations of payee on draft, narrating the fact that he had twice paid it, were self-serving, and error to admit them. In *Tisch v. Utz*, (Pa. Sup.) 21 Atl. 808, it was held that declarations of a judgment debtor were not admissible in evidence for the purpose of impeaching the judgment. In *Conlan v. Grace*, (Minn.) 30 N. W. 880, it is held that "declarations of a party, to be admissible as a part of the *res gestae*, must be contemporaneous with, or at least so connected with, the main fact in issue as to constitute one transaction." *Dawson v. Pogue*, (Or.) 22 Pac. 640, holds: "Ordinarily, acts and declarations of parties to an action are not competent evidence in their behalf. There are, however, exceptions to the rule." *State v. Daugherty*, *supra*, holds: "It is impossible to tie down to time the rule as to declarations. We must judge from all the circumstances of the case. We need not go to the length of saying that a declaration made a month after the fact would, of itself, be admissible, but if, as in the present case, there are connecting circumstances, it may, even at that time, form part of the whole *res gestae*," and that the declaration was simply a narration of past events or occurrences, and was incompetent. In 1 Whart. Ev. § 265, it is held that such declarations are inadmissible, if made so far prior to the act sought to be characterized as to give opportunity for their correction in way of preparation, or, if made so long afterwards, as to leave an interval—which interval should not be measured by time, but by

the circumstances of the case—in which excuses, explanations, or aggravations could be got up. 2 Whart. Ev. § 1174, is applicable to the admissions of agents in matters of tort, and not in point. *Binns v. State*, supra, holds that "a declaration which is simply a narrative of past events * * * is inadmissible in evidence."

The authorities cited state the general rule applicable to the admission of declarations made by a party, as evidence in his own behalf, and some of them recognize that there are exceptions to the general rule. In some of them time is considered a controlling element, and in others, not. They hold that such declarations, to become competent evidence for the party making them, must be a part of the *res gestae*, or at least so considered. The term "*res gestae*" is used in one class of cases to indicate the very matter in issue, the ultimate thing itself, the thing controverted; and in others the term is used to indicate the surrounding facts of a transaction, which explain or characterize the main fact. In 1 Greenl. Ev. § 108, it is held that the surrounding circumstances, constituting parts of the *res gestae*, may always be shown to the jury, along with the principal fact, and their admissibility is determined by the judge, according to the degree of their relation to that fact, and in the exercise of his sound discretion. Whether declarations made after the occurrence of the litigated issue should be admitted as evidence in behalf of the party making them, rests in the sound judicial discretion of the court. *O'Connor v. Railway Co.*, 27 Minn. 173, 6 N. W. 481; *State v. Ah Loi*, 5 Nev. 82; 1 Greenl. Ev. § 108. In 1 Tayl. Ev. §§ 525, 526, it is stated that "in all these cases, the principal points of attention are, whether the circumstances and declarations offered in proof were so connected with the main fact under consideration, as to illustrate its character, to further its object, or to form, in conjunction with it, one continuous transaction. It was, at one time, thought necessary that they should be contemporaneous with it, but this doctrine has of late years been rejected, and it seems now to be decided that, although concurrence of time must always be considered as material evidence to show the connection, it is by no means essential. * * *" In *Insurance Co. v. Mosley*, 8 Wall. 397, which was an action on an accident insurance policy, the declarations of the deceased as to the cause of the injury from which he died, made shortly after the injury, was held competent evidence, and a part of the *res gestae*. The court, speaking through Mr. Justice Swayne, in regard to certain declarations being part of the *res gestae*, says: "To bring such declarations within this principle, generally, they must be contemporaneous with the main fact to which they relate, but this rule is by no means of universal application,"—and quotes with approval from *Rawson v. Haigh*, 2 Bing. 99, as follows: "It is

impossible to tie down to time as to such declarations. We must look to all the circumstances of the case, and need not go to the length of requiring a declaration made a month after the fact would, of itself, be admissible; in the present case, there are circumstances, it may, even at this time, be a part of the whole *res gestae* to the doctrine applicable to the admission of such declarations, the court has a tendency of recent adjudication rather than to narrow, the scope of the doctrine." "Rightly guarded in its application there is no principle in the law more safe in its results. There is no rests on a more solid basis of authority." In *Board v. Keenan*, Justice McKee, in delivering the opinion of the court, said: "Wharton defines the *res gestae* as those circumstances which are the incidents of a particular litigation. These incidents may be separated from the main fact by a lapse of time more or less considerable. They may consist of speeches or acts, or of things done, or of things perceived, whether participant or not. They may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be the incidents of the litigated act; in this sense, that they are part of the immediate preparations for, or emanate from, the act, and are not produced by the policy of the actors." In *People v. Jones*, 35 Cal. 49, it is held that "declarations which are a part of the *res gestae*, are not required to be precisely concurrent in point of time with the principal fact. If they spring from the principal transaction, if they testify to it, are voluntary and spontaneous, and made at a time so near it as to show an idea of deliberate design, then they may be regarded as contemporaneous with the fact." See, also, *State v. Horne*, 1 N. W. 905; *Augusta Factory v. Insurance Co.*, 8 Pick. 56; *State v. Jones*, (Iowa), 911; *State v. Ah Loi*, 5 Nev. 82; *Bank, 15 Amer. Dec. 664*. In *Mosley*, 8 Wall. 397, it was held for the plaintiff, for the purpose of introducing upon whose credit goods sued for, to introduce in evidence a letter written by plaintiff to his agent, asking him to inquire, as to the financial condition of the defendant, of a person who was a person receiving the goods had been sold for that purpose. The plaintiff said letter that the defendant was the purchaser of said goods. And it was held that the jury might look to the letter, and although, in itself, it did not prove the truth of the fact, it might be considered as corroborative of the plaintiff's version of the transaction. Ev. (Redfield's Ed.) § 108a. Law Dictionary, (Ed. 1888,) under the heading of *res gestae*, the following state-

"In the United States the tendency is to extend, rather than narrow, the scope of the doctrine of *res gestae*. Although, generally, the declarations must be contemporaneous with the event sought to be proved, yet, where there are connecting circumstances, they may, even when made some time afterwards, form a part of the *res gestae*. *Insurance Co. v. Mosley*, 8 Wall. 397; *Railroad Co. v. Coyle*, 55 Pa. St. 402; *Harriman v. Stowe*, 57 Mo. 93; *Brownell v. Railroad Co.*, 47 Mo. 239; *Com. v. Eastman*, 1 Cush. 189. And, in England, the decision of Cockburn, C. J., in *Beddingfield's Case*, 14 Oox, Crim. Cas. 341, is directly contrary, holding that the declarations must be contemporaneous with the event, to be admissible. This decision has been vigorously opposed by Mr. Taylor and others. See 14 Amer. Law Rev. 817; 15 Amer. Law Rev. 1, 71; *Field v. State*, 34 Amer. Rep. 479." From a review of the authorities, I think the decided weight is that time is not necessarily a controlling element or principle in the matter of *res gestae*, and that declarations made, under circumstances to warrant the court in presuming that they grew out of the litigated issue, and illustrate the true character of the transaction, and were dependent upon it, were not designedly made, or devised for a self-serving purpose, are evidentiary facts, and are not within the general rule applicable to hearsay testimony. Such declarations are admissible, although not made at the exact time of the occurrence of the principal fact in issue. I think the evidence referred to comes within the rule laid down in many of the authorities above cited. The declaration or communication was not a narrative of past events, or of the contract of sale. It was an inquiry, which any prudent business man would naturally make, before he would feel safe in ordering upwards of \$6,000 worth of machinery for a customer whose financial condition was not known to him. He would very naturally want to know the ability of the purchaser to pay. It is true the order for the ditchers had been given and received some two hours before the inquiry under consideration was made, but it was made before the ditchers were ordered, and, as I view it, was made in the midst of the transaction, and before all the conditions were performed which were required to be performed, before the contract became binding upon either party. It was a pertinent inquiry, and I think it one of the reasonable emanations arising out of the contract of purchase, and dependent upon it, that it was not deliberately devised or contrived by the parties, for a self-serving purpose, that it was spontaneously, and not designedly, made, and tends to explain to whom the credit was given. Its truth or falsity was for the jury. The question litigated was, whether the ditchers were sold to Bradbury & Bray, and on their credit. Bray testified that they were sold to Jessop, and he alone became liable for the payment of

the purchase price, while Sherman M. Coffin testified that they were sold to Bradbury & Bray, and on their credit. I think the testimony under consideration tends to show to whom the credit was given, and was properly admitted.

Error is alleged because the court held that, under the evidence, no partnership, for the sale of said machines, existed between Stearns and Sherman M. Coffin. Appellants undertook to show that there was a partnership between Stearns and Coffin, in the sale of said ditchers. Stearns and Coffin both testify that no such partnership existed, and there is not a scintilla of evidence tending to show a partnership. That being true, it was not prejudicial error for the court to so hold.

The fourth error assigned is that the court erred in admitting the testimony of Sherman M. Coffin, in explanation of the sense in which he used the word "guaranty" in his letter of May 24, 1890, to John M. Bray. The letter was introduced as an admission of said respondent, to show that, at the time of writing it, he considered Bradbury & Bray as guarantors, and not as original purchasers. Under this contention, appellants cite several authorities upon the proposition that, when the language of a written contract is neither ambiguous nor technical, parol evidence is not received to explain it. These authorities are not in point, for the reason that said letter is not a written contract, nor a part of one. I understand the rule to be that, when a writing is introduced as an admission, and not as a part of the contract between the parties, it is always permissible for the party who wrote it, and against whom it was introduced, to explain the meaning that he intended to convey. The rule applicable to oral admissions is the proper one to be applied to the evidence under consideration. *Duncan v. Matney*, 77 Amer. Dec. 575; *Smith v. Crego*, 54 Hun, 22, 7 N. Y. Supp. 86; *Bingham v. Bernard*, (Minn.) 30 N. W. 404; *Auzerals v. Naglee*, (Cal.) 15 Pac. 371; *Browne*, Parol Ev. § 6; *Morris v. Railroad Co.*, 21 Minn. 91; *Burke v. Ray*, (Minn.) 41 N. W. 240.

The fifth error assigned is the refusal of the court to strike out that portion of Sherman M. Coffin's testimony in explanation of the word "guaranty," to wit: "We have dozens of entries in our books, at this time, which could show that fact." We cannot consider this objection, for the reason that no exception appears to have been saved in the court below.

The sixth error assigned is that the court erred in permitting Charles Stewart, a witness on behalf of plaintiff, to testify as follows: "I rode up to Bray, who was out on the ditch, where Jessop's contract was. I rode up to Bray, and think he wasn't using very good language towards Jessop, because Jessop was getting behind. He says, 'I am in the soup with Coffin Bros. for those damned ditchers.'" Appellants contend, (1) that

If this evidence was introduced for the purpose of establishing plaintiffs' case, as an admission of the contract sued on, it should have been introduced as a part of the testimony in chief, and not in rebuttal; (2) if it was introduced to impeach Bray, it was error to admit it, for the reason that Bray's attention was not called to it when he was on the witness stand. The first objection does not appear to have been taken in the court below, and cannot be considered for that reason. The second is not well taken, for the reason that statements and admissions, made by a party to a suit, may be proved without first calling the party's attention to them. The rule that the attention of the witness must be called to the statement made, and the time and place of making the same, in order to lay the proper foundation for impeachment, does not apply to this case. 1 Thomp. Trials, § 497; Collins v. Mack, 31 Ark. 685, 694; Lucas v. Flinn, 35 Iowa, 9.

After a careful review of all the evidence, I find a substantial conflict on the material issues, and, where the material issues are submitted to the jury, on instructions of the court not excepted to by appellants, the verdict of the jury will not be disturbed by the appellate court; nor will the order overruling a motion for a new trial be reversed, on the ground of insufficiency of the evidence to justify the verdict, when there is a substantial conflict in the evidence. Ainslie v. Printing Co., 1 Idaho, 641; Du Brutz v. Jessup, 54 Cal. 118; Campe v. Meierdiercks, 87 Cal. 290, 25 Pac. 419; Lynch v. Welby, 87 Cal. 441, 25 Pac. 584; Garrard v. White, (Ky.) 14 S. W. 966; Ketcham v. Barbour, (Ind. Sup.) 26 N. E. 127.

I find no reversible error in the record. The judgment of the court below is affirmed, with costs of this appeal in favor of respondents.

HUSTON, C. J., took no part in the hearing or decision of this case.

MORGAN, J. I concur in the affirmance of the judgment, but disagree with the opinion in regard to the admission of the telephone message of Sherman Coffin to his partner Frank Coffin, which was as follows: "I asked him (Frank Coffin) if Bradbury & Bray were good for five ditchers, at eleven hundred dollars each, or for fifty five hundred dollars." This was 1½ hours after his conversation with Bray, and after he had driven home, a distance of nine miles. It is precisely like a private conversation between the partners, at home, to determine whether it would be safe, as a business venture, to order the ditchers. I do not think it a part of the res gestae, and think it should have been excluded. I do not deem it necessary, now, to give the reasons for my opinion. It is evident, however, that it could have had no weight with the jury. It was an inquiry that would be equally as applicable if Sher-

man Coffin considered Bradbury & Bray guarantors, or purchasers, or if he expected to get their names as sureties on a note signed by Jessop. It proved nothing, and tended to prove nothing, and therefore was not prejudicial error.

ELLISON et al. v. BARKER et al.

(Supreme Court of Montana. Feb. 12, 1904.)

SALE—FRAUDULENT REPRESENTATIONS—EVIDENCE.

A verdict that a sale was not induced by fraudulent representations as to the purchaser's financial condition is supported by evidence that, at the time of such representations and sale, the seller, after full examination and with full knowledge of the buyer's financial condition, compromised his claims against the buyer at 50 cents on the dollar, and agreed to extend future credit.

Appeal from district court, Lewis & Clarke county; Horace R. Buck, Judge.

Action by William P. Ellison and others against James W. Barker and others. Judgment for defendants. Plaintiffs appeal affirmed.

Thomas J. Walsh, for appellants. A. I. Barbour, for respondents.

PEMBERTON, C. J. This is an action for the recovery of the possession of personal property, and for damages for the alleged wrongful detention thereof. The complaint alleges "that on the 3d day of January, 1903, at the city of Philadelphia, state of Pennsylvania, the defendant James W. Barker for the purpose of inducing plaintiffs to sell him certain goods, represented to the plaintiffs that he was worth the sum of \$50,000 over and above all debts and liabilities; that he was indebted for borrowed money in the sum of \$1,300 only, and that his liabilities amounted to but \$3,400, including \$2,100 due for merchandise; that the plaintiffs were thereby induced and did sell and deliver to the defendant James W. Barker goods, wares, and merchandise of the value of one thousand dollars; that said representations were false, and the said defendant James W. Barker was not worth at that time seven thousand eight hundred dollars over and above all his debts and liabilities or any other sum whatever, but at said time was insolvent, and had not sufficient property with which to pay his debts, and the facts were then known by the said defendant to be so; that at the times said representations were made the said James W. Barker was indebted to the First National Bank of Helena, as plaintiffs are informed by the officers of said bank, in the sum of \$3,134.43 and accrued interest, borrowed money; that he was then indebted to E. H. Reynolds, as plaintiffs are informed by said Reynolds, in the sum of \$500 more, for borrowed money, and that he was then indebted to the Thomas Cruise State Bank in the sum of \$180, for borrowed

money,—all of which indebtedness the said James Barker then well knew;" that defendant Barker afterwards transferred a certain part of said goods, of the alleged value of \$565, (which are described in the complaint,) to defendant Davidson; that plaintiffs have demanded of said Davidson the possession of said goods; that he refused to deliver the same, and now unlawfully and wrongfully withholds and detains the same. Plaintiffs ask judgment for the possession of the goods, or their value, and \$500 damages for the detention thereof. Defendant Barker does not answer, the cause having been dismissed as to him. Defendant Davidson's answer denies all the material allegations of the complaint, and alleges affirmatively as follows: "First. Upon information and belief, defendant alleges that the goods, wares, and merchandise sold and delivered by plaintiffs to defendant James W. Barker, is set forth in plaintiffs' complaint herein, were sold to said Barker in pursuance and in accordance with a certain agreement of settlement made and entered into by and between said plaintiffs and said James W. Barker on the 2d day of January, 1891. Second. That, upon the 2d day of January, 1891, he said James W. Barker was indebted to plaintiffs in the sum of forty-five hundred and seventy-five and 99/100 dollars; that according to the terms of said agreement the said defendant James W. Barker was to pay the said plaintiffs, in cash, the sum of twenty-seven hundred and twenty-eight dollars, and the remaining sum of eighteen hundred forty-seven and 99/100 dollars in five promissory notes, four of which said promissory notes were to be for the sum of three hundred fifty dollars each, and the fourth of said promissory notes was to be for the sum of four hundred forty-seven and 99/100 dollars; and that the plaintiffs thereupon agreed to sell, and did sell, to said Barker, upon said agreement, goods, wares, and merchandise of the value of one thousand six hundred and eighty-one and 81/100 dollars, the said goods including the goods, wares, and merchandise mentioned in plaintiffs' complaint herein. Third. That the said Barker, in pursuance of the terms of said agreement, did on or about the — day of February, A. D. 1891, pay to the said plaintiffs the sum of twenty-seven hundred twenty-eight dollars in cash, and on the 2d day of January, 1891, did make, execute, and deliver to the said plaintiffs the four promissory notes as hereinabove mentioned and described; and that in pursuance of said agreement the said plaintiffs did ship and deliver said goods, wares, and merchandise to the said James W. Barker. Fourth. And defendant alleges, on information and belief, that said goods and merchandise were sold and delivered in pursuance of said agreement, and in consideration thereof, and not upon any representations or statements made by the said James W. Barker upon the 3d day of January,

1891, or at any other time or place, or upon any other statement." The affirmative matter of this answer is denied by replication. The case was tried by the court with a jury, and resulted in a verdict and judgment for the defendant. Plaintiffs move for a new trial, which was denied. From the judgment and order denying a new trial this appeal is prosecuted. It will be observed that the plaintiffs raise two issues: (1) Did Barker, by making said alleged false statement, induce the plaintiffs to sell him the goods involved in this controversy? (2) Were said goods sold by plaintiffs to said Barker under and in accordance with the agreement of compromise set up in the answer?

The appellant's principal contention in this court is that the verdict of the jury in the court below is not supported by the evidence. The statement made by Barker as to his financial condition, and alleged to be false, is in writing, dated January 3, 1891, and signed by himself, and is in evidence in the case, and is substantially as alleged in the complaint. R. B. Ellison, one of the plaintiffs, testifies that he sold the goods to Barker on the faith of said statement, believing it to be a correct statement of his financial condition, and that he would not have so sold the goods to him without said statement having been given. His evidence supports the material allegations of the complaint. Samuel W. Lambeth, who swears that he has been for 30 years an assistant in the collection and credit department of the plaintiffs' firm, testifies that he was present when Barker made and signed the said statement, and his evidence is substantially to the same effect as R. B. Ellison's. These are the only witnesses on the part of plaintiffs to the facts attending the sale of the goods. Barker testifies that the goods in controversy were ordered by him in October or November, 1890, of John W. Moore, a salesman of the plaintiffs' firm; that at that time he ordered of said Moore \$2,000 worth of goods; that he did not purchase them in fact in January, 1891, the date of said financial statement; that at the last date he changed the order he had given Moore in October or November, 1890, by cutting it down to the amount of \$1,000, the amount mentioned in the complaint; that he did not purchase the goods in controversy under and by virtue of the financial statement made by him; that when he made said statement he was in Philadelphia, without his books, or any data from which he could make a correct statement; that he told the plaintiffs he could not make a correct statement; that they insisted that he make it as best he could, that no trouble would ever come of it, that it was the custom of the firm; that prior to his making the statement he had made a contract or agreement with plaintiffs by which he had compromised his indebtedness then existing to them at 50

cents on the dollar, and for future credit; that the purchase of the goods in controversy was completed as a result of said compromise; that this compromise agreement was made on the 2d day of January, 1891; that, in pursuance and in accordance with the terms thereof, he paid plaintiffs \$2,728 cash, executed and delivered to them his four promissory notes, and delivered to them \$25,000 in shares of mining stock as security for said notes, and for future credit for goods; that said goods were sold and delivered under and in pursuance of said compromise, and not on account of said financial statement; that said plaintiffs well knew his financial condition on the 2d day of January, 1891, the date of said statement, and prior thereto; that in December, 1890, Lambeth, witness for plaintiffs, the credit man of the plaintiff firm, came to Helena to examine, and did examine, his financial condition; that Lambeth took an inventory or account of his stock in Helena; that the compromise above mentioned was entered into verbally with said Lambeth, for said plaintiffs, at that time; that in accordance therewith he went to Canada to raise the necessary money to carry out said compromise on his part; that Lambeth was with him in Canada; that from Canada they went to Philadelphia, where said compromise agreement was reduced to writing, and signed by plaintiffs and Barker; that said contract is in evidence in this case; that the sale and delivery of the goods in controversy was the result of said compromise, and was not induced, and did not in any way result from, said financial statement mentioned in the complaint; that plaintiffs have never returned or offered to return the money paid, and the notes and mining stock, or any part thereof, delivered by Barker, in pursuance of said compromise. The evidence in relation to this compromise is not disputed. That Lambeth was in Helena in December, 1890, and examined the financial condition of Barker for plaintiffs, is not questioned. It being undisputed that plaintiffs, after a full examination of Barker's condition, and with full knowledge thereof, in writing, compromised their claim against Barker at 50 cents on the dollar, and agreed to extend future credit on the 2d day of January, 1891, how can they now consistently say that they relied on his statement of his financial condition made at the same time, as they say, and were induced thereby to part with the goods in controversy? Lambeth, the credit man of the firm, knew Barker was insolvent. The very contract of compromise signed by the plaintiffs is a showing that Barker was insolvent at the date thereof. Do these circumstances and proofs not tend to show that plaintiffs did not rely upon the financial statement made by Barker as a controlling inducement to part with their goods? Do these facts and circumstances, taken in connection with Barker's evidence,

not tend to show that the plaintiffs delivered and parted with their goods under and in accordance with the terms of the written agreement of compromise and for future credit in evidence in this case? From the facts and circumstances, were not the goods authorized to believe and find that the goods were not obtained by fraud, as alleged in the complaint, but that they were delivered under the terms of the compromise between plaintiffs and Barker? We think so. We are therefore of the opinion that the contention of appellants that the verdict of the jury is not supported by the evidence is untenable.

The appellants assign other errors in the instructions of the court, and the admission of certain evidence. We have examined the instructions, and think they are clearly and fairly declared the law governing the case. We think there was no error in admitting the evidence complained of. We are of opinion that the holding in regard to the sufficiency of the evidence to support the verdict is decisive of this appeal. The order and judgment appealed from are affirmed.

HARWOOD, J., concurs.

LEGGAT v. LEGGAT et al

(Supreme Court of Montana. Feb. 12, 1913.)

SETTING ASIDE CONVEYANCE — FRAUD AND MISFEASANCE OF ATTORNEY IN FACT AND PURCHASE.

A conveyance by plaintiff to her brother-in-law, J., through her brother-in-law, R., who was appointed her attorney in fact at the suggestion of J., will be set aside for fraud and collusion, they having, with full knowledge, grossly misrepresented to her the value of the land and the state of its title, she being ignorant of the facts and trusting them, the sale being for a small fraction, only, of the value of the land.

Appeal from district court, Silver Bow county; John J. McHatton, Judge.

Action by Ruth F. Leggat against John A. Leggat and Roderick D. Leggat. Decree for plaintiff. Defendants appeal. Affirmed.

Forbis & Forbis, for appellants; Scallion, for respondent.

HARWOOD, J. Through this action the plaintiff sought and obtained a decree setting aside the sale, and canceling the conveyance whereby defendant John A. Leggat sold and held title to one-third interest in the Glory mining claim, situate near Butte, in Silver Bow county, Mont., with prayer for the restoration of said property to plaintiff, together with the rents and profits retained therefrom by said defendant, and held the title thereto. The annulled conveyance were made by defendant John A. Leggat, acting as attorney in fact for plaintiff. The grounds for such relief

leged in the complaint, and affirmed by the decree, were false and fraudulent representations and concealments by defendants, acting in collusion, concerning the value, and conditions affecting the value, of said property, whereby they betrayed the trust and confidence which plaintiff had been led to repose in them, and induced plaintiff to accept a grossly inadequate price for said property. From the decree, and the order of the court overruling defendants' motion for new trial, this appeal is prosecuted.

Appellants assign in their brief, and urge in argument, two propositions on which they insist the judgment is not supported by the evidence, and for which reasons it should be reversed: First, because the alleged fraud is not proved as charged in the complaint; secondly, because the proof shows that plaintiff acquiesced in, approved, and ratified said sale and purchase, and received the price paid with full knowledge of all the facts in relation to said property on which she now predicates fraud, and seeks to avoid the transaction. The pleadings and proof must therefore be reviewed from the standpoint of these assignments.

During the times mentioned in these proceedings, plaintiff resided in the state of Missouri, while defendants, her brothers-in-law, resided at Butte city, state of Montana, very near the location of the property in question. Plaintiff sets forth in her complaint that on the 5th of May, 1888, and for two years prior thereto, she was seised in fee and possessed of an undivided one-third interest in and to a certain quartz lode mining claim, known as "Old Glory Mining Location," situate in said county, etc., giving particular description thereof. That on December 15, 1887, by power of attorney executed and delivered, she appointed and empowered defendant Roderick D. Leggat as her attorney in fact to manage and sell certain of her real estate situate in Silver Bow county, Mont., and particularly her interest in said Old Glory mining claim, which power was accepted by Roderick D., and continued in force until revoked, in 1888. That such appointment was made because so advised by defendant John A., who, through his correspondence with plaintiff, had pretended to act as her friendly and confidential adviser in respect to her property and affairs in Montana, and particularly her interest in said lode claim, both before and after such appointment, whose statements she believed, and whose counsel she trusted and relied upon, and because of her trust and confidence in both defendants as brothers of her late husband, Alexander J. Leggat. That on or about May 5, 1888, Roderick D., acting as plaintiff's said attorney, sold and conveyed plaintiff's one-third interest in said Old Glory mining claim to defendant John A. for \$1,000, a greatly inadequate consideration, for said property was worth at least five times said amount, and was constantly increasing

in value. That about the 23d of April, 1888, a short time prior to said sale to John A., a small portion of the surface, only, of said claim, without conveying any rights to the mineral therein, was sold and conveyed to Adam Farrady for \$3,000, of which plaintiff's share was \$1,500; and both defendants were parties to that conveyance, Roderick D. signing it as plaintiff's attorney in fact. That such fact was concealed from plaintiff by both defendants, and plaintiff discovered the same only within about two weeks before instituting this action. That none of her share of the proceeds of said sale to Farrady was accounted for or paid to her; that a large portion of the town of Centerville, in Silver Bow county, Mont., is built on said mining claim, and all, or nearly all, of the occupants thereof were paying, or had agreed to pay, ground rent to the owners of said claim, which ground rent was worth several thousand dollars per annum; and many valuable buildings are erected on said claim, which, as plaintiff is advised, become part of said property belonging to the owners thereof. That, in addition to the value of the surface ground, the vein of said mining claim is of considerable value. That, until a few weeks prior to the commencement of this action, plaintiff was in complete ignorance of the value of said property, its condition and title. That defendants were plaintiff's only source of information. That they, as plaintiff is informed and believes, and therefore alleges, confederated together for the purpose of concealing from plaintiff the value of said property, and misleading her concerning the same, and thereby to fraudulently induce plaintiff to accept for her interest a grossly inadequate sum; and that, pursuant to such collusion and conspiracy, defendant John A. several times wrote to plaintiff that said claim was the source of much annoyance and expense, was involved in litigation, and the title thereto was doubtful, and that he was compelled to devote much time, labor, and money to protect the plaintiff's interest therein; and that defendant Roderick D. concealed the true facts in regard to said property from plaintiff, and gave her no correct information thereof. That such statements made by John A., and each and all of them, were false, and known by him to be false, except the statement that he pretended to manage said claim; for in fact, when plaintiff's interest in said property was conveyed to John A., the title to said claim was good and uncontested, and the ground rents for the occupied portions thereof were of great value, as aforesaid, besides the value of the claim itself, and the value of said property was constantly increasing, as defendants well knew. That such sale of plaintiff's interest was made by Roderick D. to John A. without the knowledge or consultation of plaintiff; but afterwards plaintiff was informed of such sale by letters received from each of the defendants,

wherein they stated that \$1,000 was all that plaintiff's interest was worth, and that the title thereto was doubtful and in litigation, or threatened with litigation, which statements were false, as both defendants well knew; but plaintiff then relied upon and believed said statements, and, being deceived thereby, was induced to accept one thousand dollars for said property, whereby defendants defrauded plaintiff, and deprived her of many thousands of dollars of value in said property. That plaintiff only discovered such fraud a few weeks prior to the commencement of this action. That she then tendered back to John A. the sum paid for her interest in said property, with interest since payment, and demanded a reconveyance thereof to her, all of which was refused. That while defendant John A. has held title to said property he has received rents and profits thereof to a large amount, for which plaintiff asks an accounting and judgment, together with a decree compelling the restoration of said property to her.

Defendants made separate answers to the complaint, but very similar in substance. There is no denial of the transfer of said property by Roderick D., acting as plaintiff's attorney in fact, to John A., for \$1,000 consideration; nor denial that plaintiff's interest in said property was worth upwards of five times that sum; nor that defendants were unacquainted with its value, or the circumstances which enhanced its value. As to the alleged sale of a small portion of the surface of said claim to Farrady, it is denied that the proportion of the proceeds of that sale due to plaintiff's interest amounted to \$1,500, or any sum greater than \$1,000. But defendants specifically deny all the material allegations of the complaint charging them with false representations and fraudulent concealments in reference to said property; and by way of new matter of defense, in support of the good faith of the transaction, defendants allege that John A. Leggat was in fact the equitable owner of said interest during all the time the legal title thereof was held by plaintiff and her late husband, Alexander J. Leggat; that, in the year 1882, John A. conveyed the legal title to said interest to Alexander J. to secure a loan of \$200 which the former had borrowed from the latter; that such conveyance was in fact a mortgage, and so considered and intended by the parties thereto, to secure repayment of said sum of \$200; that the title to said property was afterwards conveyed to plaintiff, Ruth F., in consideration of her husband's love and affection for her, and for no other consideration; and defendants allege, on information and belief, that plaintiff was "fully aware of the character of said transaction between John A. and her husband, Alexander J., and knew, or ought to have known, that the title which she had to said property was intended as security for the amount due from defendant

John A. to Alexander J. Leggat. Defendant John A. paid the sum Ruth F. through her attorney, to redeem said property from as security, and to procure its return to him; that said sum was grossly in excess of the amount due for such property, but on account of his relationship to plaintiff, and his desire to relieve her, John A. paid such liberal sum in redemption of said interest. All the matter of defense is specifically denied by plaintiff's replication.

The trial ensued, whereat the parties introduced their evidence, and submitted the case to the court, asking special findings, and withstanding that the court, after deliberation, would determine the case by its general finding in favor of the effect that all the allegations of the complaint had been established by the evidence; whereupon judgment was rendered accordingly, as aforesaid.

Passing to an examination of the facts bearing in mind the assignments of error, it must be ascertained—First, whether the fraud was proved as alleged; secondly, whether plaintiff acquiesced in the sale in question without ratified the sale in question without knowledge of the facts.

There appears to be no dispute as to the conduct of Roderick D., as the attorney in fact for plaintiff, in reference to the interest in question, was a fraudulent sale of the trust reposed in him by plaintiff as to John A. It is contended that he was in collusion with Roderick D., or guilty of any false representations or deceptions to the plaintiff in this action. We find ourselves unable to place that interpretation upon his conduct, or his representations in this action. We find in the evidence, giving a reasonable interpretation towards John A. Leggat, abundant support for the conclusion reached by the trial court. The conduct assumed by John A. towards plaintiff, as shown in his letters to her after the decease of her husband, Alexander J., to have been calculated to lead to place confidence in him, and to induce him to adopt his counsel in relation to his property in Montana. There is in the appearance and expression of his conduct, kindness, and earnest solicitude in the care of plaintiff, yet perfect impartiality and disinterestedness; even more, a spirit of chivalrous generosity; the unanimity of one, strong, well experienced, towards the weak and inexperienced, mingled with occasional expressions of affection towards the widow and children of a deceased brother. In his luminous letters written in the year 1882 to plaintiff, subsequent to her husband's decease, and during the year prior to his

to said interest in the Old Glory claim, John A. dwells at great length upon the condition of plaintiff's property in Montana; advised the appointment of an attorney, with full power in reference thereto, and suggested Roderick D. as a proper person for that commission; and, withal, assured plaintiff repeatedly of his desire and intention to aid her and her attorney, to the best of his ability, by his counsel and information in respect to said property. In this respect he wrote, in a letter of February, 1887: "I have some knowledge of everything connected with all your property here, and will do, aid, help, and advise, to the uppermost of my power, to assist whoever you appoint, when requested or consulted in regard thereto, for your interests." And again, speaking, evidently, of his own appointment as such attorney, in a letter of July, 1887, he said: "I inclose you power of attorney to sign and acknowledge before a notary public; or, if you think of or desire any one else to act as such, do so at once, and I will help and advise them all I can." And again, in a letter of October, 1887, he observed: "Mining property, especially, needs watchful care and promptness of action. I have suggested, time and time again, that you appoint some one with authority to act for you in matters out here. I have assumed it as far, and as long, as I could. Your property is being trespassed upon continuously, and no one to say stop." Again, in the same letter, he said: "Now, for the last time, I would suggest that, if you care about the property in this territory, give Rod, or some one, full power to act for you in these matters, or come yourself and look the situation over. Something should be done at once. You can rest fully assured that I will render all the help and do all I can to protect and assist your interests, no matter who you have to represent you." Plaintiff appears to have adopted, relied upon, and carried out all these suggestions, to her ultimate disadvantage and loss, and, as it happened, with all his protestations of good faith, kind intentions, and his great solicitude for plaintiff's welfare, her loss was his gain. But his suggestions in reference to the appointment of an attorney, and the good offices he promised to volunteer for the aid and benefit of plaintiff, but never fulfilled, was not all of his conduct which tended to the disadvantage of plaintiff. He accompanied these suggestions with a narration of facts and circumstances tending to depreciate, in plaintiff's estimation, the value of her property in Montana, and especially the Old Glory mining claim. That claim seems to have been the central point of calamity, vexation, menace, and expense in the gloomy picture drawn by defendant John A. in his letters to plaintiff. In this regard he writes, in a letter of June, 1887: "I had a talk with Mr. Foster in regard to the purchase of your interest here in Silver Bow county in the properties. He did not

want to buy, but has concluded, on my urging the matter, to do as I wish should be done. He owns interests in some of it, and, as I have all the work, trouble, time, and expense to stand to maintain the title and possession, I feel that I am about weary of it; and I will sell what interest I have in the whole matter at what I can get, and let those that remain in take the responsibilities and worry that I have so long borne without recompense, or hardly thought of thanks from my partners, whose interests I have maintained and protected so long. Mr. Foster declines to buy any of my interests, as he deems me a safeguard to his title. All the properties which are embraced in the deed which I inclose are more or less in litigation. The Old Glory especially had a heavy dose of trouble,—an unpaid cost of suit in the supreme court, of over two years' standing, and a pending suit against over one hundred people who have squatted on, and now occupy, the ground. None of the properties embraced in deed are producing any revenue, and will not, unless after the expenditure of considerable money to develop them." Again, in his letter of July 24, 1887, having drawn a very discouraging picture in reference to the property in which plaintiff was interested in Montana, and having said, "None of this property is really of any value," he continued: "The Old Glory claim, the title of which is not received from the government, is squatted on by over a hundred houses, on certain claimed titles thereto, which may involve possible bloodshed, or at least a long and troublesome lawsuit, to remove." Again, he says, in a letter of October 25, 1887: "Some of the property is valuable, but no one that I know of can do a d— with it, and it will cost time, money, work, to settle difficulties which have already arisen in regard to much of it. Rod will possibly tell you how easy it is to guard mining interests here from the encroachments of designing and dishonest sharpers. Two instances in cases I will mention, in which Rod is cognizant of. The Old Glory has had two expensive lawsuits to maintain to defend its right. The last one, which went to the supreme court, I fought, I defended, and won, without the shadow of authority to do so from either you or Alex. Had this fact been discovered by the opposite parties' attorneys, the case would have been beaten. And now there is another lawsuit looming up, dark and ugly, as the whole claim has been squatted on and built over, there being upward of one hundred houses with families thereon. Suits of ejectment will have to be entered. Trouble, money, and maybe worse, will have to be expended, ere the end is reached." His letters constantly reiterate such depressing and discouraging statements in reference to plaintiff's interests in Montana in general, and as to the Old Glory claim in particular; and these statements are either wholly false, or gross ex-

aggravations. It is true, there was some litigation in respect to said claim, but it does not appear to have been of a very formidable character. The main case, which he speaks of as having gone to the supreme court, was determined in 1885, *Leggatt v. Stewart*, 5 Mont. 107, 2 Pac. 320. This case grew out of an adverse claim to the same property, under a location known as the "Raven Lode Location." Such litigation in respect to mining claims of known or promised value is not uncommon. But the claimants of the Old Glory prevailed in said case in both the trial and appellate courts; and their title seems to have been regarded thereafter as so firmly established that, of the 100 occupants who had built residences thereon, it being in a populous mining district, more than two-thirds of them made terms for ground rent without litigation. Some, however, were recalcitrant, and in 1888 one ejectment suit was instituted against some 23 of them as defendants; but they made no appearance to dispute the right of the owners of the Old Glory claim to assert dominion over the ground they occupied for residences. It is admitted that no other litigation occurred in reference thereto. The fact that the claim was so situated as to make its surface desirable for residence purposes greatly enhanced its worth to the owners; and the presence of these occupants, about which so much doleful malediction went forth from John A. to plaintiff, was in fact a source of value and income, for the ground rent they paid is shown to have been six to eight hundred dollars per quarter. But this false and discouraging presentment in respect to said interest, coming from one assuming to act as friend and confidential adviser, and relied upon as such by plaintiff, residing at a great distance therefrom, with no other source of information, was calculated to prepare her mind to gratefully accept a small price for her interest in such unpromising and expensive property. The view he presented is shown by the testimony to have been false. The truth was that said property was valuable, was salable, was yielding a good income, and the title of the owners was practically uncontested.

Was there collusion between John A. and Roderick D. in this affair? The facts admit of no other conclusion. The appointment of the latter as plaintiff's attorney to manage and sell her property was suggested by John A. It is true, he was not the only person mentioned for such appointment. Other names were mentioned, but accompanied with some suggestions of doubt as to their availability or willingness to act in that behalf. But the suggestion of the appointment of Roderick D. goes for very little in determining the question of collusion between defendants to mislead or defraud plaintiff, in the respect alleged. That determination proceeds upon the showing of alliance between them, and the co-operation

of Roderick D. with John A. to the end that he acquired title to said interest of plaintiff for a grossly inadequate consideration. Acting against the interest of plaintiff, and contrary to his trust and duty as her agent, Roderick D. appears to have espoused the claim of John A. that he was the equitable owner of the interest held by plaintiff in said Old Glory mining claim, on his assertion that he had conveyed it to plaintiff's husband to secure a loan of \$200, according to John's "information and belief" as he alleges in his answer, and thereby the legal title ought to be conveyed back to him, on payment of a mere fraction of its value, by way of redemption. Having thus subversively allied himself with John A., and subscribed to his demands against plaintiff's interest without even consulting plaintiff, Roderick D., through his power of attorney from her, proceeds to invest John A. with the legal title to plaintiff's interest in the Old Glory claim for the payment of \$1,000. This was a most convenient and effectual service of Roderick D. to John A. in aid of the consummation of his purpose. But, apparently not satisfied with that service to John A., Roderick D. undertakes to smooth the way for the effectual operation of the scheme by writing false statements to plaintiff in respect to the value of the property, tending to lull her into the belief that she had received all her interest in the property was worth, thus seeking, by falsehood, to aid John A. in quietly holding said interest without remonstrance from plaintiff. To this end, in his letter reporting the transaction to plaintiff, Roderick D. tells her of her title in said claim "was extremely shaky and doubtful; besides, John A. had charge of it, and was doing all the fighting at his own expense;" that he "could not have realized the same amount from any one else, nor from John A. "the day after, for I would not have had the money;" and continuing, Roderick D. says: "So, I think was a wise and prudent act, for it saved both you and myself considerable trouble and expense, for, even with a clear title, few men would take it at half the figure." When Roderick D. wrote these false statements he knew that the title of the owners of the Old Glory claim was good and practically uncontested; that it was valuable and salable in the market for a sum greatly exceeding \$1,000; was yielding rents that plaintiff's portion for one year would amount to about as much as the price at which the whole interest was sold to John A.; moreover, that practically, through perfidy and collusion between himself and John A., the latter was paying the purchase price with plaintiff's own money derived from her interest in said property; and John A. knew the same while was availing himself of the fraudulent conduct of Roderick D. to work out the deft design of John A. to get said property for an inadequate price. The conduct

each defendant operated harmoniously and directly with that of the other to accomplish the end ultimately achieved. The acts of each supplemented and combined with the acts of the other to effect the result attained. We think there is ample showing of collusion; or possibly the more proper designation is that Roderick D. was the pliant instrument and agent used by John A., along with his own efforts, to work out his will and purpose of obtaining said property for an inadequate consideration.

The averment that John A. Leggat was the equitable owner of the interest held by plaintiff in said mining claim, he having conveyed it to Alexander J. Leggat as security for a loan of \$200, is contradicted by an array of facts and circumstances which fully supports the implied finding of the trial court that such claim is fictitious. This proof comes principally from the letters of John A. to plaintiff, and her husband, Alexander J., during his lifetime. It is shown that Alexander J. acquired an interest in the mining claim in question, together with interests in other mining property in Montana, through John A. Leggat, by payment of several thousand dollars; and thereafter, during several years, Alexander J., and plaintiff after his death, paid one-third of the expense of annually representing and otherwise protecting the Old Glory claim, which expense amounts to more than \$200, and includes items for personal services by John A. These facts are shown in letters of, and in bills rendered by, John A. It is not likely that, if John A. was the real owner, and Alexander J. held that interest for security of the small sum of \$200, John A. would have demanded, or Alexander J. have paid for, personal services of John A. in respect hereto. Besides these facts, John A. repeatedly referred to that interest as "your interest in the Old Glory," in his letters to Alexander and to plaintiff, wherein he speaks of the representation, the sale, development, or protection of that claim or interest; and just prior to the death of Alexander, and when that event was imminent, Alexander conveyed said interest in the Old Glory claim to John A., and he immediately conveyed it to plaintiff, with no assertion, reservation, or arrangement showing that John A. was the real owner thereof, and the legal title was held by the others as security for repayment of a small loan; and John A. afterwards, in letters to plaintiff, refers to said interest as her interest, and in no wise intimates that he claimed it, until his letter informing plaintiff that he had bought her interest. The proposition that plaintiff acquiesced in, ratified, or approved said sale with full knowledge of the facts is not supported by the record. This is argued from the fact that, immediately after said sale, John A. wrote plaintiff, and having mentioned that there were 28 ejectment suits against squatters and tres-

passers on the Old Glory alone, said: "I bought from Rod, your attorney in fact, your title to this Old Glory claim, paying one thousand dollars cash for your title of one-third interest therein. For the past four years this claim has been in lawsuits, and I the only one of all interested that fought the fight. The other parties are useless and indifferent, and I had got my blood up to beat the attempted swindle, and carry the war on;" and, after saying more about lawsuits involving said claim, he observes: "The third interest I bought from you I deeded to Alex. for a loan of \$200, which I sorely needed." Thereafter Roderick D. sent plaintiff \$800 of said price paid, reserving \$200 to pay expense in relation to some other interests of plaintiff in Montana. Plaintiff received said money, and did not then repudiate said sale, although she was in possession of the letters of John A. to Alexander J. and herself which tended to show that John A. was not the equitable owner of said interest. From these facts it is argued that plaintiff was cognizant of all the facts which showed the fraud and imposition, if any was practiced on her, when she received, and retained for several months, the consideration for conveyance of said interest to John A. This conclusion is much broader than the facts disclosed by the record justify. With all the information and sources of information which plaintiff had in the letters of John A. and Roderick D., there was no showing that she had been imposed upon or defrauded. They had informed her to the contrary. And what difference did it make to her that John A., without just ground therefor, asserted that he was the equitable owner of said interest, if he had bought her interest, and paid plaintiff all it was worth, and more than any other one would pay? It was through subsequent investigation, outside of the information which plaintiff had when she received said purchase price, that she discovered the fraud and imposition which she had suffered. Her main enlightenment was in the discovery of the fact that her interest in said claim was worth several thousand dollars more than that represented by Roderick, and paid by John A. therefor; that it was yielding a large revenue; that a small part of her interest had been sold, before the conveyance to John, for all that he paid therefor; that the statements that a large number of lawsuits were pending, and others were threatened, and looming up "dark and ugly;" of "war;" danger of "bloodshed;" of large expense to defend; of "shaky title," etc.,—in respect to said claim, were false statements or gross exaggerations. But when said purchase price was sent her, accompanied and preceded by such false statements, she did not know they were false, but it appears she believed them, and was misled and deceived by them. It cannot be maintained that plaintiff received and re-

tained such purchase price, for some time, with full knowledge of the facts.

The exceptions saved in the record as to the admission of certain evidence were not insisted on in the argument by appellants' counsel. Our investigation of the record finds abundant support of the decree. It will therefore be affirmed.

PEMBERTON, C. J., concurs.

BURKHARDT et al. v. HAYCOX.

(Supreme Court of Colorado. Feb. 5, 1894.)

SPECIAL APPEARANCE — WRITS — STATEMENT OF CAUSE OF ACTION—PLEADING.

1. Dilatory motions, based upon special appearances, are not favored under the present practice. They are against the policy of the Code.

2. According to amended section 34 of the Code, the summons is not rendered void or erroneous by reason of a defective statement of the relief demanded, provided such statement be not manifestly misleading.

3. Failure to file complaint in time does not necessarily require the dismissal of the action. *Knight v. Fisher*, 25 Pac. 78, 15 Colo. 176, approved.

(Syllabus by the Court.)

Error to district court, Arapahoe county.

Action by Samuel L. Haycox against Charles Burkhardt and others for conversion. Plaintiff had judgment, and defendants bring error. Affirmed.

The other facts fully appear in the following statement by ELLIOTT, J.:

Amended section 34 of Code: "The summons shall state the parties to the action, the state, county and court in which it is brought, and require the defendant to appear and answer the complaint within twenty days after the service of the summons, if served in the county in which the action is brought; or if served out of such county or by publication, within thirty days after the service of the summons, exclusive of the day of service, or that judgment by default will be taken against him according to the prayer of the complaint, and shall briefly state the sum of money or other relief demanded in the action; but the summons shall not be considered void or erroneous on account of an insufficient statement of the relief demanded, unless the same is manifestly misleading. If a copy of the complaint be not served with the summons, or if the service be made out of the state, ten days additional to the time specified in the summons shall be allowed for appearance and answer, but the form of the summons shall be the same in all cases." *Sess. Laws 1889*, p. 71. The summons in this action contained, inter alia, the following: "To —, the defendants above named—Greeting: You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of Arapahoe county, state of Colorado, and answer the complaint therein

within * * * or judgment be taken against you according of the complaint. * * * This is brought to recover damages for taking and conversion by of certain goods and chattels * * *, [describing the property as in the complaint,] as appear from the complaint in which reference is here made. hereby notified that, if you and to answer the said complaint required, the said plaintiff will move against you by default according to the prayer of the complaint." The alleged, inter alia, that plaintiff is entitled to the possession of personal property, describing it; was "of the value of \$300;" that he wrongfully converted said property to his own use. The conclusion of the court is as follows: "That by reason of the facts aforesaid this plaintiff has suffered loss, to his damage of three hundred dollars. Wherefore the plaintiff asks judgment against the defendants for three hundred (\$300.00) dollars, and costs of this action." Defendants, by their appearance, moved to set aside the summons upon the following cause said so-called summons demanded the sum of money or other relief in said action, nor the value of the goods and chattels alleged to have been taken and converted by the plaintiff. This motion was denied, and judgment was allowed defendants to plead in answer to the action. Defendants failing to do so otherwise plead, judgment was given in favor of plaintiff for the sum of three hundred dollars. Defendants prosecute this writ.

G. P. Blair, for plaintiffs in error.
Waybright, for defendant in error.

ELLIOTT, J., (after stating the facts and assignments of error assailed by the defendant, and that the court below upon two grounds held that the summons does not comply with the requirements of the Code; and that the complaint was not filed within the time prescribed by law.

1. Mere dilatory motions, based upon special appearances, are not favored under the present practice. It is the policy of the Code that all its provisions shall be construed, with the view to ascertaining the true facts in pleadings or proceedings, and that defects in pleadings or proceedings affecting the substantial rights of the parties shall not be disregarded by the courts. *See* *Smith v. Smith*, 443; *Higley v. Pollock*, (Nev.)

2. The foregoing observation is equally applicable where, as in this case, a special appearance was for the purpose of quashing the summons upon each of the defendants.

a summons is to notify the defendant that an action has been brought against him, and by whom, the place, and court in which, the same is brought, the relief demanded, and the time within which he must appear and answer in order to escape a judgment by default. It is no longer necessary that the summons shall state "the cause and general nature of the action," as was required by the Code of 1877; nor is it necessary that the summons shall "state the nature of the action," as was required by the Code of 1887 before the amendment of 1889. It is true, section 34 of the Code still requires that the summons "shall briefly state the sum of money or other relief demanded in the action;" but the amendment of 1889 provides that "the summons shall not be considered void or erroneous on account of an insufficient statement of the relief demanded, unless the same is manifestly misleading." Sess. Laws 1889, p. 71. The summons in the present case does not state, in so many words, the sum of money or other relief demanded, but it states that the action is brought to "recover damages for the wrongful taking and conversion by the defendants of certain goods and chattels * * * owned by plaintiff," describing the same as set forth in the complaint, and stating that, if defendants fail to appear and answer, judgment by default will be taken against them according to the prayer of the complaint. The complaint states the value of the property alleged to have been converted by defendants, and the sum of money demanded in consequence thereof. The summons in this case cannot be considered manifestly misleading in respect to the statement of the relief demanded. The statement was correct as far as it went. Besides, it pointed directly to the complaint, where the relief demanded was fully stated. The want of a more definite statement in the summons did not, therefore, render the summons void or erroneous. The statement was not misleading. The opinions in *Smith v. Aurich*, 6 Colo. 392, and *Railroad Co. v. Nicholls*, 8 Colo. 188, 6 Pac. 512, and other cases, are cited by counsel for plaintiffs in error. These decisions were based upon objections and Code provisions different from section 34, as amended in 1889, and are not, therefore, in point in the present case. The questions presented in *Farris v. Walker*, 2 Colo. App. 450, 31 Pac. 231, were also different from those considered in this opinion. In the *Farris* case the summons contained no statement of the relief demanded. Whether the amendment of 1889 would avail to save such a summons, we express no opinion.

3. The objection that the court erred in not dismissing the action below, because the complaint was not filed within the time prescribed by the Code, (section 32,) is not well taken. The provision that the complaint must be filed within 10 days after the summons is issued, or the action may be dis-

missed, is not mandatory. The authority to dismiss rests in the sound legal discretion of the court, and should not be arbitrarily exercised. *Knight v. Fisher*, 15 Colo. 176, 25 Pac. 78. The complaint in this case was not filed until 17 days after the summons was dated, but it was filed within 5 days after the last defendant was served. Besides, it does not appear that any motion to dismiss the action for failure to file the complaint in time was interposed in the trial court, and the question cannot be raised here for the first time. The judgment of the district court must be affirmed.

PEOPLE ex rel. DARBY v. DISTRICT COURT OF EL PASO COUNTY et al.

(Supreme Court of Colorado. Feb. 5, 1894.)

CONTEMPT—VIOLATION OF INJUNCTION—EJECTMENT—NOTICE OF LIS PENDENS.

1. A person who has actual notice of an injunctive order violates it at his peril.

2. Although section 277 of the Civil Code, with reference to filing notice of the pendency of actions, applies to the action of ejectment, adverse proceedings under the acts of congress are not affected thereby.

3. A purchaser pendente lite of the premises in controversy in an adverse suit is bound by the result of the litigation.

4. Section 149 of the Civil Code has reference only to proceedings before a judge at chambers for the violation of a writ of injunction, and has no application to contempt proceedings by the court when regularly convened for the transaction of business.

(Syllabus by the Court.)

Original action at the relation of Thomas L. Darby for writs of certiorari and prohibition to the district court of El Paso county, and John Campbell, district judge. Denied.

The other facts fully appear in the following statement by HAYT, C. J.:

Petitioner was adjudged guilty of contempt in the court below, and sentenced to pay a fine of \$25 and costs, and to stand committed until the same should be fully paid. Afterwards the execution of this sentence was stayed for a brief period, and this application presented. The contempt for which judgment was entered consisted in the alleged violation of certain writs of injunction issued in actions then pending. This proceeding was instituted by the filing of an affidavit as follows: "The People, etc., v. Thomas L. Darby and ——— Bradford. Samuel S. Bernard, being duly sworn, on oath says that heretofore an injunction was issued out of said court in a certain suit wherein Samuel McDonald and others were plaintiffs and the Elkton Mining and Milling Company was defendant, and also another injunction in a certain other suit wherein Thos. L. Cathcart was plaintiff and said company defendant, and also another injunction in a certain other suit in said court wherein Hull and others were plaintiffs and said company defendant; that each of said injunctions was issued on behalf of said company restraining

the plaintiffs in each of said cases, their agents and employes, and all persons acting for them, and all persons claiming under any contract or agreement into which the plaintiffs, or any of them, after commencement of said suits, and all persons in privity with said plaintiffs, or any of them, from removing and from mining and selling any of the ores or minerals of or within the boundaries of the Walter lode mining claim in Cripple Creek mining district, in the county of El Paso, and from disposing of any of said ores already mined, or the proceeds thereof. Deponent says that defendant Darby was present in court, and had full knowledge of the granting of said injunctions, and that defendants have, as deponent is informed and believes, full knowledge of the issuance thereof; that said injunctions are still in force. Upon information and belief deponent says that each of said defendants claim the right to work, mine, and remove ores of said Walter lode under some agreement made between them and plaintiffs since the commencement of each of said suits, and that whatever rights said defendants have in or to the ores of said Walter lode have been acquired since the commencement of said suits. Deponent further says that a large force of men have been since the issuance of said writs of injunction, and still are, as deponent is informed and believes, engaged in mining and removing the valuable minerals from said Walter lode under and by direction of defendants, the property of defendant company; that at the time of granting of said injunctions and the issuance of said writs there was already mined and in transit to mills or smelters large quantities of said Walter ores and minerals, and that said defendants have since that time, and after full knowledge of said injunctions, disposed of such ores and the proceeds thereof. Wherefore deponent says that defendants are guilty of a violation of said injunction, contrary to the laws and the statutes, and against the peace and dignity of the people of the state of Colorado. Deponent says that he is secretary of said mining company, a corporation, and prays that defendants be required to show cause why they should not be punished for contempt for violation of said injunctions." The defendant, after service upon him, appeared, and moved to quash the citation. This motion was overruled, answer filed, and proofs taken, upon which the defendant was adjudged guilty of contempt as charged.

Fleming & Marshall, for plaintiffs.

HAYT, C. J., (after stating the facts.) Did the district court exceed its jurisdiction in the contempt proceedings? This is the only question presented for consideration upon this application. Undoubtedly that court had jurisdiction of the adverse proceedings in which the writs of injunction were issued,

and, the court being one of jurisdiction, we must assume in this case that the injunctions were in all respects properly issued, nothing appearing to the contrary. The injunctions were issued against the plaintiffs, "their agents and all persons acting for them, and all persons claiming under any contract into which the plaintiffs, or any of them, after commencement of said suits, and all persons in privity with said plaintiffs, or any of them, from removing and selling any of the ores or minerals of or within the boundaries of the Walter lode mining claim in Cripple Creek mining district, in the county of El Paso, and from disposing of any of said ores already mined, or the proceeds thereof." That the defendant violated the terms of these injunctions is admitted. His defense is based upon the alleged purchase of the property after commencement of suit, but he asks for affirmative relief had been asked of the court. It is sufficient for this application to know that the defendant acted within the very terms of the injunction orders; that he was present in court and had full knowledge of the nature and effect of those orders. If he had any doubt as to the scope of the mandate, he might have taken steps to have had the matter clarified. In any event, it was his duty to obey. He violated it at his own peril. He now looks only to the court for relief. The injunction issued for relief. The defendant's petition cannot be bound by the proceedings in the adverse cases. The court, in the proceedings of the filing of a notice of application for writs. While it is true that by section 2323, Code of 1887 the filing of such a notice made applicable to actions for the recovery of real property, this cannot be applied in adverse proceedings under the Code. The defendants having no patent at the proper land office, and notice of such application having been given, and proof thereof made, all persons claiming in the territory covered by such application were required to file their claims. That their rights might be preserved was also necessary for such adverse proceedings to commence proceedings in a court having jurisdiction within 30 days to determine the right of possession of the property in controversy, and the same with reasonable diligence. The defendant's failure to do so was a failure, and as a failure of such adverse case is made the duty of the land office to be governed by the final judgment in such cases, and to issue a patent. The defendant's claim was not chased during the pendency of the suits, after the application for writs, the property had been made, when it was too late to file an application. Unless he took the proper steps, the rights of the parties in litigation

no claim thereto. In *Hunt v. Mining Co.*, 14 Colo. 451, 24 Pac. 550, the following language of Mr. Justice Brewer is quoted with approval upon page 455, 14 Colo., and page 550, 24 Pac.: "Publication of notice is process bringing all adverse claimants into court, and, if no adverse claims are presented, it is conclusively presumed that none exist, and that no third parties have any rights or equities in the land." This is the settled doctrine of both the land department and the courts, and it necessarily follows that the conclusive effect of the judgment in this class of cases is in no way dependent upon the filing of a notice of lis pendens.

It is contended that the judgment in the contempt proceedings was premature, and that the court had no power to render the same at the time at which it was rendered. In support of this contention, section 149 of the Civil Code of 1887 is relied upon. This section has reference solely to proceedings before a judge at chambers for the violation of a writ of injunction, and has no application to this case. These proceedings were all had and done by the court when regularly convened for the transaction of business. The court was as fully empowered to enter a final judgment at the term then pending as it could have been at the next or any succeeding term. The petitioner's application will be denied. Writ denied.

SCOTT et al. v. LLOYD et al.

(Supreme Court of Colorado. Feb. 5, 1894.)

REAL-ESTATE AGENTS—COMMISSIONS—AGREEMENT TO DIVIDE WITH PURCHASER—EFFECT ON RIGHT TO RECOVER.

1. An agreement by real-estate agents to divide their commissions with the purchaser of land, made without the knowledge of their principal, does not affect their right to recover the commissions which such principal agreed to pay.

2. The facts that the land was in the hands of other agents, who first showed the land to the purchaser, and that by such agreement the agents effecting the sale induced the purchaser to make the purchase through them, do not subject the principal to liability for commissions to the former agents, and relieve him of liability to the latter.

Error to Pueblo county court.

Action by G. R. Scott and W. M. Gunnell, partners doing business as Scott & Gunnell, against Thomas P. Lloyd and A. B. Baldwin, to recover commissions for selling certain land for defendants. There was a judgment for defendants, and plaintiffs bring error. Reversed.

The other facts fully appear in the following statement by GODDARD, J.:

This action was commenced before a justice of the peace in Pueblo county to recover the sum of \$150 commission for the sale of certain real estate in the city of Pueblo. It was appealed to the county court, and tried to the court without formal pleadings, and judgment rendered for defendants. From

the evidence it appears that the plaintiffs were real-estate agents in the city of Pueblo; that the defendants were the owners of lots 4 and 5, in block 11, in the county addition to that city, and that they placed said property in the hands of plaintiffs for sale at the fixed sum of \$3,000, one-third cash, and the balance to suit purchaser, with the express agreement to pay 5 per cent. commission upon sale of the property. The defendants also placed the property in the hands of Chew & Crow, another real-estate firm of that city, for sale at the same price. The plaintiffs finally negotiated a sale to Mrs. Mary McGowen, through her husband, for the sum of \$1,400 cash, purchaser assuming the payment of an incumbrance of \$1,600 on the lots. This change of terms was acceptable to defendants, and the sale was consummated by the execution of a deed by the defendants to the purchaser upon the receipt by them, through the hands of plaintiffs, of the cash payment of \$1,400. The firm of Chew & Crow, at the time of these negotiations, was also attempting to sell the property, and had first shown the lots in question to the husband of the purchaser, and with the consent of the defendants had offered the lots to him at the reduced price of \$2,950, with the understanding that they would remit the difference between that sum and the original price from their commission. The plaintiffs, on being informed by McGowen of this offer, agreed to give him one-half of their commission, to induce him to purchase the lots through them.

B. D. V. Reeve and A. F. Gunnell, for plaintiffs in error. John H. Mitchell and John W. Sleeper, for defendants in error.

GODDARD, J., (after stating the facts.) The principal defense relied on in the court below, and the one most strenuously urged in argument before us, is the alleged misconduct on the part of plaintiffs in agreeing to divide their commission with the purchaser; and the admission of the evidence of this fact, and the effect given to it by the court, constitutes the principal error assigned by plaintiffs in error for a reversal of the judgment. It is manifest from the examination of the evidence disclosed in the record that this fact was regarded by the court below as sufficient to defeat the plaintiffs' recovery, since, aside from this, the right of plaintiffs to recover is clearly shown. It is ingeniously argued that the agreement on the part of plaintiffs to pay the purchaser one-half of the commission reduced the purchase price of the property, and that the sale, though apparently, was not in fact consummated in accordance with the terms prescribed by defendants; and that in so depreciating the price, and procuring the execution of the deed by defendants without informing them of the fact, plaintiffs perpetrated such a fraud on the defendants as precludes them from recovering the commission. We think

this position is untenable. The defendants received \$3,000, the sum fixed by them as the purchase price, and that amount is recited in the deed as the consideration paid for the property. It is difficult to see how any disposition that the plaintiffs might make of their commission, whether they paid one-half or the whole of it to the purchaser, could in any manner depreciate the consideration so paid. While the law is strict in requiring good faith and fair dealing on the part of an agent towards his principal, and will not permit him to assume a double capacity whereby his personal interests may in any manner conflict with the interests of his principal, we are unable to see wherein the conduct of plaintiffs infringes this rule in the remotest degree. Why may not an agent, in competition with other agents, make any personal sacrifice he may choose to make in order to achieve success? May he not do what he pleases with the commissions that he is to receive from his principal? And if he deemed it necessary to successful competition to even pay a bonus to procure a purchaser, may he not do so, if in so doing he contravenes no duty he owes to his principal? Is not such an act an evidence of good faith and zeal in behalf of his principal, rather than of fraud or misconduct prejudicial to his principal's rights? We can see nothing reprehensible in plaintiffs' agreeing to divide their commission with the purchaser, but regard it rather as a personal sacrifice on their part to further the interests of the defendants.

It further appears that Chew & Crow asserted some claim to the commission, and it is at their instigation that defendants contest the right of plaintiffs to compensation. While the defendants themselves do not predicate their refusal to pay plaintiffs on account of any supposed liability to Chew & Crow, it is insisted by counsel that by reason of plaintiffs' alleged fraud the defendants are placed in a position where there is a dispute, and may be subjected to a double liability. If such a defense was asserted and relied on by defendants, it would be without merit, upon the facts of the case. It is beyond question that plaintiffs produced the purchaser to whom they sold and conveyed the property, and they were not bound to inquire what part, if any, other agents had in the transaction. They could remain neutral as between competing agents, and by paying the commission to the one who brought the purchaser to them be relieved from liability to any other. As was said in the case of *Vreeland v. Vetterlein*, 33 N. J. Law, 247: "Where the property is openly put in the hands of more than one broker, each of such agents is aware that he is subject to the arts and chances of competition. If he finds a person who is likely to buy, and quits him without having effected a sale, he is aware that he runs the risk of such person falling under the influence of

his competitor, and in such case his labor. This is a part of the risk of the business he has undertaken. * * * Now, in this competition of the property is to remain interested only in the result. Whether of the agents thus employed purchaser to him, and a bargain for the required price, on what ground he refused to complete the bargain to the successful competitor: whether he was first approached by you, or you should have refused to treat with the subject? There is no legal principle on which such a position could be maintained. And if, therefore, it should be held that the vendor of the property that introduces a purchaser to him is not subject to the usual arts of competition, taking the purchaser out of the hands of his competitors, not aware of anything in the matter, would justify such vendor in completing the contract. * * * In the absence of all collusion on the part of the vendor, the agent through whose hands the sale is carried to completion is entitled to the commissions." It is evident, upon the uncontroverted facts of this case, that defendants can be held liable to Chew & Crow for their commission for the sale of the property. We think the court below acted erroneously in its view of the law in the case, and the evidence complained of, and in the effect that it evidently did, and in the result the judgment must be reversed.

SWEM et al. v. NEWELL

(Supreme Court of Colorado.)

NEGOTIABLE INSTRUMENTS—ASSIGNMENT TO JOINT MAKER—ACTION AGAINST MAKER—WHEN WILL LIE—SUMMONS

1. Where one of two joint makers pays the holder the amount thereof, and is satisfied, though the transaction is in the form of a purchase, and the note is payable to the payor.

2. Where a summons need not state the nature of the act complained of, if the complaint is served the day after the date of the act (see *1887, § 34*.) the service of a summons in the form prescribed by section 35 for a copy of the complaint is served, a copy of the complaint, as shown by the return, gives the court jurisdiction to enter judgment against defendants.

Error to Arapahoe county court.

Action by Metta S. Newell against M. Swem and J. T. Younker on promissory note. There was judgment for defendants bring error. Reversed.

The other facts fully appearing in the statement by GODDARD, J.

Metta S. Newell, the plaintiff, the sole heir of Henry Sparnick, instituted this action in the county of Arapahoe to recover from M. Swem and J. T. Younker, the defendants,

low, upon a certain promissory note. Her complaint is, in substance, as follows: That on the 28th day of April, 1883, the defendants, together with Henry Sparnick, now deceased, by their promissory note, promised to pay to the order of Robert A. Young \$300, 60 days after date. That the said Robert Young sold and delivered said note to Henry Sparnick on the 2d day of August, 1883, for a valuable consideration. That a true and exact copy of this note is as follows: "\$300. Denver, April 28, 1883. Sixty days after date, we promise to pay to the order of Robert A. Young three hundred dollars, at the Colorado National Bank, value received, with interest at one per cent. per month. [Signed] J. M. Swem. Henry Sparnick. J. T. Younker. No. ——. Due June 28-30." Upon the back of the note were the following indorsements: "Denver, Colorado, Aug. 2, 1883. For and in consideration of the sum of \$309.60, being principal of this note, and interest to date, I hereby assign the same to Henry Sparnick. [Signed] R. A. Young." "August 2d, paid on within note, by J. M. Swem, \$100." That plaintiff is the sole heir and distributee of the said Henry Sparnick, deceased. That the amount of said note, together with the rate of interest therein specified, computed up to date, is \$352.35. Wherefore, plaintiff demands judgment against the defendants, and each of them, for the full sum of \$352.35 and her costs. The summons issued was in the following form: "[Title of case. Names of defendants.] You are hereby required to appear in an action brought against you by the above-named plaintiff in the county court of Arapahoe county, state of Colorado, and answer the complaint therein, within twenty days after the service hereof, * * * or judgment by default will be taken against you according to the prayer of the complainant. Return of sheriff certifying service of summons and complaint at Denver on defendants Swem and Younker." Swem failing to appear, default was entered against him. Defendant Younker appeared, and filed a general demurrer on the ground that the complaint did not set forth a good cause of action. The demurrer was overruled, and, Younker failing to answer, judgment was rendered upon the complaint against the defendants, jointly, for the balance of the principal of said note, together with interest, amounting to the sum of \$326.56. To reverse this judgment, defendants below prosecute this writ of error.

Sam P. Rose, for plaintiffs in error. Horn & Cassidy, for defendant in error.

GODDARD, J., (after stating the facts.) It is urged on the part of Swem that the summons served was insufficient to confer jurisdiction upon the court to enter a judgment by default against him, for the reason that it contains no statement of the nature of the action. This objection is without merit. By

the express provisions of section 34, Code 1887, in force at the time this action was commenced, a summons need not contain such statement if a copy of the complaint was served therewith; and by section 35 the form of summons that may be used in case a copy of the complaint is served is prescribed. The summons in this case is in exact conformity with the form so prescribed, and, it appearing by the return of the sheriff thereon that a copy of the complaint was served therewith, the court acquired jurisdiction to enter default on his failure to appear.

The error assigned upon the overruling of the demurrer of defendant Younker, and the entering of judgment on the complaint against both defendants, presents, in our opinion, an objection fatal to the judgment. From the face of the note sued on, and the allegations of the complaint, it appears that Henry Sparnick was a joint maker, and the payment by him to Young, the payee, on the 2d of August, 1883, of the amount of the principal and interest then due, operated as a full satisfaction, and ended the life and existence of the note. It was thenceforth functus officio, and could not be enforced against the other joint makers. *Fitch v. Hammer*, 17 Colo. 591, 31 Pac. 336; *Edgerly v. Emerson*, 23 N. H. 555; *Sprague v. Ainsworth*, 40 Vt. 47; *Lenoir v. Rittenhouse*, 61 Miss. 400; *Adams v. Drake*, 11 Cush. 504; 3 Rand. Com. Paper, § 1426. "Payment by one of several joint debtors, although it be made by him in the form of a purchase, and be accompanied by an assignment of the debt, is still a discharge of the debt." *Institution v. Hathaway*, 134 Mass. 69.

It is contended in argument that Sparnick was an accommodation maker, and that the assignment of the note to him by Young evidences that fact. We are unable to see wherein such inference is deducible from the assignment, or that it constitutes any evidence of such fact, especially as against Swem and Younker. If such an inference could be indulged in, it would not enable the plaintiff below to maintain an action on the note. As was said in *Fitch v. Hammer*, supra: "An indorsement or assignment of the note cannot serve to keep the note itself alive, so as to be made the basis of a suit. Where the payment is made by a surety, he is, in equity, subrogated to the right of the creditor, as against the maker of the note, so far as the securities given by the maker are concerned. This is an equitable exception to the rule that payment by one joint debtor discharges the debt as to all. Under it, the obligation is still held in force for the purpose only of permitting the surety to avail himself of such securities as have been given by the principal debtor." The right of plaintiff to sue the defendants, as joint makers of the note, for a contribution, is undisputed; and if they are both principals, and Sparnick merely a surety, she is entitled to recover the full amount of the money paid by him, from them both, either jointly or severally. On

Such is the chain of title under which appellee, Brisbane, claims in this action. The chain of title upon which appellant, Rittmaster, relies, is as follows: While the deed from Bush to Richner was held by the bank as an escrow, Richner, having made certain payments on account of the property, was permitted to take possession of the same in November, 1879. On February 24, 1880, Richner finished paying for the property, and received the deed previously held as an escrow. He thereupon executed and delivered a warranty deed of the property to Alexander Rittmaster (appellant) and Levi and Abram Rachofsky, and thereupon the grantees under the latter deed went into possession of the property. Both of these deeds were recorded March 8, 1880. On June 1, 1886, the Rachofskys gave a quitclaim deed of the premises to appellant, which deed was recorded June 5, 1886.

From the foregoing it is clear that, to entitle Brisbane to recover, two questions must be resolved in his favor,—that is, in the affirmative: First. Was the deed of October 21, 1879, from Richner to Van Natta, actually delivered by Richner, and accepted by Van Natta, before Rittmaster and the Rachofskys acquired their deed to the premises? Second. If the Richner-Van Natta deed was thus delivered and accepted, was it effectual to convey to Van Natta the fee-simple title afterwards acquired by Richner?

In respect to the second question, it will be observed that the deed is a mere quitclaim and release. It does not purport to convey "an estate in fee simple absolute," nor does it purport to convey the land at all, but merely the right, title, or interest which Richner had in the premises at the time of its execution. Counsel concede that section 4 of the statute of conveyances (Gen. St. § 201; Mills' Ann. St. § 430) "has no application except in cases where the deed purports to convey an estate in fee simple absolute." But they contend that, as Richner had some right and title to the premises when he executed the deed to Van Natta, his deed, if delivered and accepted in time, was effectual to convey such right and title as he then had, and that, when he subsequently acquired the legal title, it immediately inured to the benefit of Van Natta by virtue of the delivery and acceptance of the deed of October 21, 1879, to the exclusion of the intermediate purchasers. It is also urged that, in determining the effect of the deed, the following provision must be considered: "It is hereby expressly covenanted and agreed that the grantee herein shall pay to William H. Bush, of Leadville, Colorado, the balance of the purchase money due on said property." It may be conceded that a voluntary acceptance of the deed by Van Natta would, by reason of such covenant, have rendered him liable for the balance of the unpaid purchase money. But the covenant is a mere personal covenant. It is not a covenant running with the land. It is not a

covenant of seisin, nor for quiet and peaceable possession, nor of general or special warranty. Counsel for appellee have presented an elaborate brief, based upon common-law authorities, in support of their views; but we need not now determine the questions of law thus presented, since they depend upon questions of fact, to be determined from a consideration of the evidence as disclosed by the record: Did Richner deliver his deed of October, 1879, to Van Natta? and did Van Natta accept the same?

1. This cause was tried by the court without a jury, and it is urged that, as delivery and acceptance are questions of fact, the appellate court should consider itself bound by the findings of the trial court. The general rule undoubtedly is that the appellate court will not disturb the findings of the trial court upon an issue of fact, where the court tries the issue upon evidence given orally, by living witnesses, in its presence, provided there is a substantial conflict in the evidence bearing upon such issue. But when the issue is determined upon testimony taken and reported to the trial court in writing the rule is different. In such case, as was said by Chief Justice Thatcher in *Jackson v. Allen*, 4 Colo. 268, the "appellate court will not sustain the decree of the court below, merely on the ground that it is not unsupported by evidence, but will examine the entire record—sift all the evidence adduced—with the view of arriving at the truth." The reasons for this distinction have been so often pointed out that they need not be repeated. *Miller v. Taylor*, 6 Colo. 41; *Sieber v. Frink*, 7 Colo. 148, 2 Pac. 901; *Bank v. Newton*, 13 Colo. 250, 22 Pac. 444; *Kimball v. Lyon*, 19 Colo. —, 35 Pac. 44. At the second trial of this cause, in April, 1890, (the trial now under review,) all the direct testimony bearing upon the question of Van Natta's alleged acceptance of the Richner deed was the testimony of Richner and Van Natta themselves, and perhaps the testimony of William H. Bush. None of these witnesses gave their testimony orally before the court on that trial. The testimony of Richner was read from the stenographic notes of his testimony as given on the first trial, February, 1888. His deposition taken in January, 1890, was also read. The testimony of Van Natta consisted of two depositions,—one taken in January, 1888, and the other taken in May, 1889. The testimony of Bush was read from his deposition. More than two years elapsed between the two trials. The testimony of Richner on the second trial, read from the stenographic notes, must on this review be considered the same, in effect, as if taken by deposition.

2. From the foregoing it follows that upon this appeal this court must sift and weigh the evidence bearing upon the question of the alleged delivery and acceptance of the Richner-Van Natta deed, with the view to a just determination of the controversy, uninfluenced by the finding of the trial court.

Not only the direct evidence, but all the facts and circumstances throwing light upon such question, must be thus considered; and in arriving at a conclusion it is to be borne in mind that the burden of proof is upon appellee (plaintiff below) to establish such delivery and acceptance by a preponderance of the evidence. It must be admitted that there is some inconsistency between Richner's testimony, as first given, and his deposition afterwards taken. The same is true of the two depositions of Van Natta. The testimony of Richner, as given in 1888, indicates that within a week after executing and recording the quitclaim deed of October, 1879, he wrote to Van Natta about the deed, and sent the same to him; but in his deposition, taken in 1890, he states that, in testifying at the first trial about sending the deed to Van Natta, he referred to his correspondence with Van Natta in the fall of 1886, when he wrote and asked Van Natta to redeed the property,—that is, to deed it back to Richner. The explanation of Richner upon this point is corroborated by Van Natta by his first deposition, as well as by his second. The following is from the first deposition of Van Natta: "Q. 4. Did you know of the execution of a deed by Herman Richner to you of lot No. 6, in block No. 5, and lot No. 5, in block No. 3, of the Leadville Improvement Company addition to the city of Leadville, and dated October 21st, 1879, and, if so, when did said deed come into your possession, and from whom did you receive it? A. There was a deed from Herman Richner to me of the lots in Leadville mentioned in the above question, but the date of the deed and date of reception, and from whom received, I cannot say; but subsequent transactions show that such deed was made October 21st, 1879, conveying to me the lots mentioned in the question No. 4. The transaction referred to was the reception of a deed and letters from Herman Richner or his agent, or from both, asking me to sign and return. The written portion of the deed contained, as it struck me, such strange and extraordinary explanations, (and being no part of the conveyance,) that I did not consider it, and, there being no consideration offered or accompanying it, I refused to make such deed." The following is from the second deposition of Van Natta: "Q. 3. Have you heard of a deed, made by Herman Richner to you, of lot No. 6, in block No. 5, and lot No. 5, in block No. 3, of the Leadville Improvement Company's addition to the city of Leadville, which deed contained a condition that the grantee shall pay the purchase money? If yea, did you ever see the deed? A. Yes, I have heard of it in this way: Several years (it now seems to me) after the alleged making of deeds from Richner to myself, Richner or his attorney, or both, wrote to me, and requested me to sign and return a deed to the lots it was alleged he had conveyed to me. On the reception of this deed for my signature, with letter of

request to sign and return, I believe, nor do I now believe, from Richner conveying these seen or received by me, or any I had not, at the time of the receipt of the letter and deed to convey, the impression that I ever received from Richner for these lots, or any in Leadville. The deed sent me contained matters foreign to a deed, which I knew nothing. This led me to convey said lots, as I have since learned was the first intimation or knowledge I had either directly or indirectly, that Richner conveyed them to me. After the receipt of the deed, I paid no more for the lots in question than if they had remained in existence, until C. C. Joy came on the farm. I did not then know, now know, anything of the contents of the deed referred to that the grantee should pay purchase money." The first deposition of Van Natta is somewhat vague, perhaps evasive. Some may be construed as indicating the existence of the deed at the time of the execution of the deed, and considered that he had acquired the property by means of it; but he was indebted to him for profits, and that he considered the deed as part payment. It is very easy for a man to consider some right or title to property as having been offered for \$100 for it, and asked to execute a quitclaim deed. The following is the style of Van Natta's testimony in his second deposition: "Q. 8. Was it not understood between you and Herman Richner that the execution of said deed, that he execute the same to you? A. Of course, it was understood between me and myself that he was to convey the lots to me, and I was satisfied to do so in such way as he could pay." The following is the style of Van Natta's second deposition. Van Natta's second deposition is different. Therein he testified that he received the deed from Richner to him in his possession, and that he had received, or in any manner accepted, the deed. He also further testified: "Q. 9. Did you ever any contract, agreement, or understanding between you and said Richner, or any one for him, that he would or was to convey said lots to me, neither before nor after the receipt of that said lots were conveyed to me? A. I do not know whether or not you would have accepted this deed if you had seen

that by the terms of the deed you would have become liable to pay the purchase money that Richner was to pay, and whether you ever did accept such deed. A. Again I say I do not now remember, nor can I now recall, nor have I ever been able so to recall or remember, the slightest impression that I ever then, or at any subsequent time, received from Richner the deed conveying said lots to me, and when he wrote me, and asked me to reconvey, I believed then, and do now, that he was mistaken when he said that he had made the deed and sent it to me; and of course I could not accept a thing that, to me, had no existence, and had I, at that time, received the deed with the condition of paying the balance of the purchase money as therein named, I never would have accepted such deed had one been tendered me under any circumstances."

When there is conflict between the testimony of different witnesses, and especially when the same witness makes inconsistent statements, it often becomes necessary to consider the undisputed facts and circumstances connected with the matters to which the conflicting and inconsistent statements relate, in order to arrive at the truth; and this is the more necessary when the tribunal charged with the responsibility of weighing the evidence and determining the issues does not see or hear the living witnesses. The accuracy and value of a witness' testimony may often be determined by comparing his statements with known facts and circumstances pertaining to the matter or transaction under investigation. Truth is consistent; error is inconsistent. The real facts and circumstances of every transaction will always be found consistent with each other when the whole truth is known. As expressed by an eminent author: "All facts and circumstances which have really happened were perfectly consistent with each other, for they did actually so consist." Starkie, Ev. *842. Truth appears clearer the more it is examined in the light of its surroundings. Truth courts the fullest investigation. Error shrinks from investigation because its surroundings reveal its inconsistencies. The untruthful witness seeks refuge in the obscurity of general assertions; he avoids the statement of particulars. What are the undisputed facts and circumstances pertaining to this transaction? The more important are as follows: In 1879, Richner entered into a contract with Bush for the purchase of the property in controversy, the deed therefor being held as an escrow by a third party until the purchase money should be paid. Before Richner acquired the legal title to the property,—before he paid for or took possession of the same,—he executed and recorded the quitclaim deed of the property to Van Natta. This deed was executed and recorded without any negotiation, contract, agreement, or understanding whatever in respect to the matter between Richner and Van Natta. No consid-

eration was paid, or agreed to be paid, for the property by Van Natta at the time the deed was executed, or afterwards. Thus far there is no dispute, though Van Natta testifies that Richner owed him about \$200 when the deed was executed. Richner denies owing Van Natta anything at that time, and says he executed the deed because a man in Kansas was asserting a claim against him. In respect to this conflict it is sufficient to say that there is no evidence of any agreement between Richner and Van Natta that this deed was delivered or accepted, or was to be delivered or accepted, on account of the supposed indebtedness of Richner to Van Natta. Again, the undisputed facts are that, about a month after executing the quitclaim deed to Van Natta, Richner took possession of the property, and in February, 1880, sold and conveyed the same, by warranty deed, to appellant, Rittmaster, and the Rachofskys, they having no actual knowledge of the deed to Van Natta. They paid the sum of \$5,000 cash for the property, part of which sum was paid to Bush, as the balance of the purchase money, and the residue to Richner. The escrow deed from Bush to Richner, and also the deed from Richner to Rittmaster and the Rachofskys, were thereupon delivered, accepted, and recorded, and the latter parties went into possession of the property. They held the property more than seven years before any claim to the premises was asserted under the Richner-Van Natta quitclaim deed. During that time, Rittmaster and the Rachofskys occupied the property, kept it in repair, redeemed it from the taxes of 1880, and paid the taxes on it for the years 1881, 1882, 1883, 1884, and 1885. What did Van Natta do during all this time? He neither paid, nor offered to pay, the balance of the purchase money to Bush, though the quitclaim deed contained an express covenant that he should pay the same; and it is conceded that, by an unqualified acceptance of the deed, he would have become obligated to make such payment. Van Natta neither paid, nor offered to pay, any taxes upon the property at any time. He never collected, or attempted to collect, any rents therefrom. He never asserted any title or claim to the property, never inquired after it, and did not visit Leadville during all of said time. He has never produced the quitclaim deed nor any letter from Richner advising him about the property. Not until May, 1887, when he was visited by Joy, did he give the quitclaim deed of the property to Bush. It is admitted that Joy paid Van Natta the sum of \$100, only, for the quitclaim deed, and that this deed was procured to strengthen a claim to the property which Joy was attempting to maintain, based upon a tax title. The tax-title suit was afterwards determined in the United States circuit court at Denver in favor of Rittmaster. Bush testified that he procured the deed from Van Natta for the purpose of perfect-

ing the title of Joy. The following is from the deposition of Bush: "Q. What, if any, consideration was paid by you to Van Natta for the deed referred to, and what consideration, if any, was paid by Brisbane to you for said lots? A. There was no consideration from me to Van Natta. I made the deed to Brisbane at the request of C. C. Joy, to whom I was under many obligations for work done." There is no other evidence relating to the interest of appellee in the property. The equitable cross complaint of Rittmaster alleges that the deed from Bush to Brisbane was without consideration. Appellee's reply alleges that his deed from Bush was "based upon and supported by a valuable consideration," but the amount of the consideration is not named, as good equity pleading requires. The reply was not verified. Besides, appellee did not testify in the case, and no proof was offered in support of his averment that there was a valuable consideration for the deed. Under the circumstances, the conclusion must be that the consideration was no more than nominal.

3. A deed must be delivered before it becomes operative as a conveyance, and, in general, acceptance is essential to complete the delivery and pass the title. In respect to persons *sui juris*, acceptance as well as delivery is a matter of intention. Intention may be manifested by some act or declaration, or it may be presumed from circumstances, but will not be lightly presumed, where the grant imposes a burden or obligation upon the grantee, and the recording of a deed by the grantor without the direction or knowledge of the grantee is not, of itself, to be regarded as evidence of acceptance. Van Natta, as he testifies, was a practicing attorney when the transactions under consideration occurred. He must be presumed to have been conversant with the law. Actions speak louder than words; so, sometimes, does inaction; and silence is often stronger than speech. In 1879, when Richner executed the quitclaim deed to Van Natta, and in 1880, when he executed the warranty deed to Rittmaster and the Rachofskys, Leadville was a prosperous, growing mining town. Its reputation as such was widespread. There was a rapid rise in the price of real estate during that period. It appears that the property in controversy, which was bought in July, 1879, for \$1,300, was sold in February, 1880, for \$5,000. If Van Natta received a deed to this Leadville property in October or November, 1879,—if he accepted or intended to accept such deed,—why did he not do something to manifest his acceptance? It is impossible to believe that he would have done nothing in respect to the property during the succeeding seven years and more, if he considered he had acquired a good title to it. Even his execution of the quitclaim deed to Bush, at the instance of Joy, for the sum of \$100, indicates the relinquishment of mere color of title,—the removal of a cloud from title,—rather

than the conveyance of an interest. It does not indicate that he received or accepted the deed, Van Natta's whole conduct, his positive testimony, indicates that he never received nor heard of the deed, or intended to convey to him Richner's interest in the property, for years and years after the deed was executed and recorded.

Upon a careful review of the evidence, our finding must be that the deed from Bush to Van Natta is not sustained. The part of appellee is not sustained. The preponderance of the evidence is in favor of the contrary, our conclusion, from the evidence and circumstances of the case. The quitclaim deed executed by Van Natta was never delivered to Richner. It is probable that Richner intended to deliver it, and that he was simply as a blind to his credit, if it was sent by Richner, we think that it was never received, accepted, by Van Natta. This conclusion is well sustained by the direct evidence, the opposite theory. It accords with undisputed facts and circumstances of the case. It is consistent with common experience, and in harmony with the which ordinarily influence and govern man conduct. Moreover, this conclusion protects those who purchased the property in good faith for a large consideration, have occupied and improved the property, paid the taxes thereon, for years. It upholds the title of bona fide purchaser against a claim founded upon a deed without consideration, and asserted by a party who has done little or nothing in respect to the property. In short, the conclusion is in the ends of justice and equity, and does not work wrong and injury. The judgment of the district court is reversed, and a new judgment is commanded, with directions to render judgment in favor of defendant, Rittmaster.

GODDARD, J., was not present at the argument of this cause, and did not participate in the decision.

RICHNER v. BRISBANE

(Supreme Court of Colorado.)

APPEAL—SCOPE OF REVIEW—EJECTMENT—PROOF—DELIVERY OF DEED.

The decision in *Rittmaster v. Richner*, 35 Pac. 736, was followed in this case, and facts involved being the same. (Syllabus by the Court.)

Appeal from district court, Leadville.

Action by W. H. Brisbane against C. C. Joy and Richner for the possession of the property. There was judgment for plaintiff in the district court. Appeal sustained.

A. F. Gunnell, for appellant; W. H. Sayre, for appellee.

PER CURIAM. The title in this case depended upon the deed of conveyance and other evidence. The title of appellee in the case of

¹ Rehearing denied.

Brisbane, (just decided by this court,) 35 Pac. 736. The two causes were tried together at nisi prius, and it is conceded that their determination must be the same upon appeal. The judgment of the district court is accordingly reversed, and the cause remanded, with directions to render judgment in favor of the defendant, Richner. Reversed.

GODDARD, J., was not present at the argument of this cause, and did not participate in the decision.

CORTHELL et al. v. MEAD, Justice of the Peace.

(Supreme Court of Colorado. Feb. 5, 1894.)

JUSTICE OF THE PEACE—PRACTICE—NUMBER OF JURORS—ATTACHMENT—ENTRY OF JUDGMENT—MANDAMUS.

1. In the trial of a civil case by jury before a justice of the peace, the jury may consist of any number of jurors the parties agree upon, or accept without objecting to the number.

2. Where the property of a third person is attached under a writ issued by a justice of the peace, the owner may intervene in pursuance of the statute, and have his property released, even though its value exceeds \$300, and a verdict and judgment in his favor in such proceeding will be valid, provided the damages do not exceed the justice's jurisdiction.

3. A justice of the peace under the laws of this state has no authority to entertain or grant a motion in arrest of judgment. The jurisdiction of the justice is purely statutory; and when a verdict is rendered by a jury, if the verdict is within the jurisdiction of the justice, it is his duty to enter judgment upon it. His duty in that behalf is ministerial, not judicial; and if he assumes to set aside the verdict, or to render judgment contrary to the verdict, such proceeding may be regarded as a nullity.

4. A justice of the peace may be compelled by writ of mandamus to enter judgment when the proceedings in the case have reached such stage that there is nothing to be done but the clerical work of entering the judgment.

(Syllabus by the Court.)

Error to district court, Rio Grande county.

Action by John L. Corthell and another, as Corthell Bros., against Marvin Mead, a justice of the peace, for mandamus. The writ was denied, and plaintiffs bring error. Reversed.

The other facts fully appear in the following statement by ELLIOTT, J.:

Petition for writ of mandamus to compel respondent, as justice of the peace, to enter judgment in accordance with the verdict rendered by a jury in a certain proceeding before said justice. The district court denied the writ. Petitioners seek a reversal of the district court judgment by writ of error from this court. The facts out of which the application for mandamus arises are, in substance, as follows: Certain persons, doing business as copartners under the firm name of the La Jara Hardware Company, brought suit before a justice of the peace against one E. S. Corthell. A writ of attachment was issued, and a stock of goods was levied on of the value of \$477.67, as stated in the return of the constable. Before the trial of the attachment, John L. and Elmer L. Corthell, doing business as Corthell Bros., filed affidavits

before the justice, claiming the attached property as their own. A trial of the right of property was had by a jury of three, no greater number being demanded by either party. The jury, after hearing the evidence, returned a verdict as follows: "We, the jury, find judgment in favor for the Corthell Brothers, and assess the damages at \$300." The justice of the peace received and recorded the verdict, and discharged the jury. Three days afterwards, upon motion of the plaintiffs in the attachment suit, (defendants in the trial of the right of property,) the justice made an order purporting to arrest the judgment. He also refused to enter judgment upon the verdict of the jury, and dismissed the case; that is, the proceeding for the trial of the right of property. In the main case, plaintiffs recovered judgment against the defendant for the full amount of their demand,—\$105.60.

O. M. Corlett, for plaintiffs in error. Ira J. Bloomfield, for defendant in error.

ELLIOTT, J., (after stating the facts.) Plaintiffs in error (claimants of the attached property, and petitioners for the writ of mandamus) contend that they were and are entitled to have judgment rendered in the justice's court in accordance with the verdict of the jury. They insist that the action of the justice of the peace in assuming to arrest the judgment upon the verdict, and in dismissing their claim to the property, was and is void; that his refusal to enter judgment in their favor was the refusal to perform an act which the law specially enjoins upon him as a duty resulting from his office; and that they have no plain, speedy, and adequate remedy in the ordinary course of law, etc. Defendant in error (the justice of the peace, and respondent in this mandamus proceeding) claims that the trial of the right of property was a nullity; that a jury of three was not a lawful jury; that, as justice of the peace, he had no jurisdiction of the attached property, the value thereof being in excess of \$300; that petitioners had a remedy by appeal from the judgment dismissing their claim to the property; and that mandamus is not a proper remedy, under the facts and circumstances of the case.

1. Was the trial of the right of property by a jury of three a nullity? Trial by jury in civil cases is not guaranteed by the constitution of this state. In an attachment case before a justice of the peace, if any person other than the defendant claims the attached property, the statute provides for a "trial of the right of property." Such trial is placed upon the same footing as other trials; that is, either party (the plaintiff or the claimant) may demand a jury trial, or the trial may be by the justice. Gen. St. §§ 1958-1962, 2011. Formerly, section 1958 stated a jury of six as the minimum number, but, as amended, (Sess. Laws 1889, p. 221,) it states three as the minimum number. Conceding that this

amendment does not affect section 1959, we are of opinion that neither section is so far mandatory in respect to the number of jurors as to vitiate a trial in a civil case by any number that the parties may agree upon, or accept without objecting to the number. The answer of respondents sets forth a copy of his docket entries, showing that, at the time appointed for the trial of the right of property, the parties (claimants and plaintiffs) appeared with their attorneys, respectively, and thereupon the claimants demanded a jury of three. Plaintiffs made no objection to this demand. A venire was accordingly issued, and three persons were summoned as jurors, and sworn without objection to try the case. After the jury was sworn, not before, the attorney for plaintiffs "objected to any jury in the case." The objection was to any jury, not the jury. No objection was made on account of the number of jurors, either before or during the trial; nor was any greater number demanded by either party at any time. Under such circumstances, both parties must be held to have accepted the jury composed of three persons. Plaintiffs, having had due notice and opportunity, should have objected to the number of jurors, if at all, before the claimants were put to the expense of summoning, impaneling, and swearing the jury. Not having done so, they must be held to have voluntarily acquiesced in the usual jury of three, as provided by amended section 1958, and to have waived their right to insist upon a jury of six, under section 1959. In civil cases, where private interests only are involved, it is well settled that a party may waive his statutory rights. *Proff. Jury Trials*, § 110; *Thomp. & M. Juries*, § 8 et seq.; *Irwin v. Crook*, 17 Colo. 16, 23 Pac. 549. The case of *Moore v. State*, 72 Ind. 358, cited by counsel for respondent, is not in point. It relates to a criminal case, in which a verdict rendered by a jury of six persons was held to be a nullity. In other respects the decision fully confirms the views hereafter expressed in this opinion.

2. Was the trial of the right of property a nullity, and was the verdict void by reason of the value of the attached property? The value of the attached property was stated by the constable in his return to be \$477.67. The levy may have been somewhat excessive; but an officer must, as a rule, levy upon property of somewhat greater value than the amount stated in his writ, else sufficient money may not be realized on forced sale to satisfy the judgment to be rendered, with costs. If a justice's writ should specify \$300 as the amount of a plaintiff's demand, and the officer should levy upon property in excess of that sum, it is not contended that the levy would be invalid because of such excess. Why, then, may not a third party claim such attached property, and have his claim thereto tried and determined as provided by the statute? Must he necessarily be driven to an action by replevin? To hold

that the claimant may not avail himself of the special statutory proceeding, that the justice of the peace has jurisdiction over property in excess of \$300, in the purpose of satisfying the claim of a creditor, but not for the purpose of restoring such property, and restoring it to the owner in case it has been wrongfully attached. *Thornilly v. Pierce*, 10 Pac. 335, is cited by counsel for respondent. That was an action of replevin, and not before a justice of the peace. On appeal to the county court, the property was valued at the value of \$365. The plaintiff did not offer to remit, the execution and judgment was rendered for the full amount. On error, this court held that the county court should have determined the value of the property in case it was in excess of the jurisdiction of the justice of the peace where the action was originally brought. There is a distinction between a replevin and a trial of the right of property upon a claim made by a third party in an attachment case. A replevin suit is a proceeding. The plaintiff sues the defendant and causes the property to be released from the *tota legis*. He invokes the jurisdiction of the court in a matter wherein the property is attached, and the value thereof is in excess of the very gist of the controversy. The statute limiting the jurisdiction of the justice of the peace to \$300 is applicable. But the filing of an attachment is not an original proceeding. It is already within the jurisdiction of the court in a suit of which the justice of the peace has jurisdiction. The property is attached, we have seen, to exceed the value of \$300, but the claimant does not sue for the value of the property. He contests the levy by claiming the property is his, and asks that the claim be determined. If the claim is in his favor, he gets the property released and recovers judgment for the value of the property. The incidental and collateral to the main issue. It is an ancillary proceeding, to which the claimant is entitled in lieu of a direct action. The proceeding before the justice of the peace will result in the release of attached property of greater value than \$300, though the damages could not be legally recovered in excess of that sum. In this case, the damages were assessed at \$300 only. The claimant has noticed proceedings of this kind in other civil actions, but has not decided the question now presented. The court of Missouri has, however, held that a claimant may by this proceeding recover the attached property in a justice's court if the value be in excess of the jurisdiction of such court in a direct proceeding. *Thompson*, 61 Mo. 415; *Klinner*

17 Colo. 13, 23 Pac. 327; Schluter v. Jacobs, 10 Colo. 451, 15 Pac. 813; Brasher v. Holtz, 12 Colo. 203, 20 Pac. 616; Cornforth v. Maguire, 12 Colo. 433, 21 Pac. 191. We feel constrained to hold that, where the property of a third person is attached under a writ issued by a justice of the peace, the owner may intervene in pursuance of the statute, and have his property released, even though its value exceeds \$300, and that a verdict and judgment in his favor in such proceeding will be valid, provided the damages do not exceed the justice's jurisdiction.

3. It is scarcely necessary to say that a justice of the peace, under the laws of this state, has no authority to entertain or grant a motion in arrest of judgment. Motions of that kind are for courts of record having common-law as well as statutory jurisdiction. The judges of superior courts of record are presumed to be learned in the law, and hence capable of entertaining and disposing of such matters in furtherance of justice. The jurisdiction of a justice of the peace is purely statutory. In respect to jury trials the statute provides: "The jury, when impaneled, shall be sworn by the justice to try the cause according to the evidence, and the justice shall enter judgment upon their verdict according to the finding thereof." See Sess. Laws 1889, p. 221, amending Gen. St. § 1958. This provision has existed without change in this jurisdiction for more than a quarter of a century. See Rev. St. 1868, p. 402. When a cause has been tried, and the verdict returned by a jury, in a justice's court, the verdict being within the jurisdiction of such court, the justice has no discretion in the premises. It is his duty to enter judgment upon the verdict. He is to enter the judgment, not render it. His duty in that behalf is ministerial, not judicial. The judgment being entered according to the verdict, the aggrieved party may appeal; but the justice has no authority to render any judgment contrary to the verdict, and, if he does so, such judgment may be regarded as a nullity. Any other doctrine would involve proceedings in justices' courts in troublesome, expensive, and vexatious delays, and would greatly hinder and embarrass the administration of justice. *Freem. Judgm.* § 53a; *High, Extr. Rem.* §§ 235-242. The verdict in this case being in favor of the claimants, they were entitled to have judgment entered to the effect that the property be released from the attachment, and that they recover of plaintiffs the damages assessed, together with costs. In *Schluter v. Jacobs*, supra, it is held that, where the claimant succeeds in establishing his claim to the attached property, the attaching creditor must be held liable for the damages occasioned by the levy, on the ground that, by contesting the right of property asserted by the claimant, the attaching creditor ratifies the act of the officer in levying upon the property.

4. Did petitioners have a plain, speedy, and adequate remedy, by the ordinary course of law, for the action of the justice in refusing to enter judgment upon their verdict? It is urged that their remedy was by appeal, but this view is not sustained by sound reason, nor by the weight of authority. As we have seen, the justice, in assuming to arrest judgment upon the verdict, and in dismissing the case against claimants, acted wholly without authority. Even if the claimants could have appealed from the entry of such orders, such a remedy would not have been adequate. They had tried and won their cause, and were entitled to the fruits of their victory. Why should they be required unnecessarily to assume the expense, trouble, and hazard of another trial? Judgment should have been entered upon the verdict; and then the burden of an appeal, if any had been taken, would have fallen upon the plaintiffs. The taking of an appeal is a matter of some inconvenience and hardship. It involves the giving of a bond with surety, and the advancement of costs, as well as the hazard of another trial. A remedy, therefore, which required the claimants, rather than the plaintiffs, to take an appeal, was not adequate. Besides, if judgment had been entered for the claimants, it is not certain that any appeal would have been taken. Furthermore, when a writ of mandamus is asked for against an officer, to compel him to perform a duty resulting from his office, which duty he has wrongfully neglected and refused to perform, to the manifest injury of another, it does not come with very good grace for him to plead that the injured party has another remedy, and certainly not unless such other remedy is fully adequate. The authorities are clear to the effect that a justice of the peace may be compelled by mandamus to enter judgment when the proceedings in a case have reached such stage that there is nothing to be done but the clerical work of entering the judgment; and this remedy has also been applied to courts of record, under certain circumstances. The following are some of the many authorities cited by counsel, and considered by the court, as bearing upon the various questions involved in this controversy, in addition to those heretofore cited: *Forman v. Murphy*, 3 N. J. Law, 577; *Felter v. Mulliner*, 2 Johns. 181; *Matthews v. Houghton*, 11 Me. 377; *Smith v. Moore*, 38 Conn. 105; *Lloyd v. Brinck*, 35 Tex. 1; *Insurance Co. v. Wilson's Heirs*, 8 Pet. 292; *Overall v. Pero*, 7 Mich. 315; *Lynch v. Kelly*, 41 Cal. 232. We recognize the doctrine that the writ of mandamus cannot properly be employed to control official discretion, nor permitted to usurp the office of a writ of error. This court has repeatedly expressed such views. See *Union Colony v. Elliott*, 5 Colo. 371; also *People v. District Court*, 14 Colo. 396, 24 Pac. 260. But see *People v. Graham*, 16 Colo. 347, 26 Pac.

new matter in the answer, and upon these issues the cause was submitted in the court below upon the evidence introduced by plaintiff, supplemented by a stipulation of counsel. A verdict and judgment having been rendered for the plaintiff, the defendant again brings the case here by appeal.

Feller & Orahood, for appellant. Browne & Putnam, for appellee.

HAYT, C. J., (after stating the facts.) This case is before the court for the second time. Upon the former appeal the sufficiency of the complaint was inquired into and upheld, and the case remanded for further proceedings. *Bayles v. Railway Co.*, 13 Colo. 181, 22 Pac. 341. The conclusions then reached, and the reasons therefor, are set forth in an exhaustive opinion by Mr. Commissioner PATTISON. It is unnecessary to repeat the reasoning of the learned commissioner, or to do more than restate such of his conclusions as bear directly upon the questions now presented. These may be summarized as follows: First. Freight charges must be reasonable, and when the circumstances and conditions are the same they must be equal. Second. An agreement for a rebate from the published tariff rates does not, of itself, necessarily constitute unjust discrimination, within the meaning of the law. Third. The contract set forth in the complaint is *prima facie* legal, and binding upon the parties, and the burden is upon the defendant to establish facts showing its illegality. Fourth. It being expressly alleged that the receiver operated the railway and controlled the business of the company, it cannot be assumed, in the absence of evidence, that the contract was in violation of his authority. These conclusions are, upon the present appeal, *res adjudicata* of the points decided, and must be accepted as the law of this case. *Lee v. Stahl*, 13 Colo. 174, 22 Pac. 436; *Johnson v. Bailey*, 17 Colo. 59, 28 Pac. 81; *Routt v. Land Co.*, 18 Colo. 132, 31 Pac. 858; *Israel v. Arthur*, 18 Colo. 158, 32 Pac. 68.

At common law, all shippers stand on an absolute equality with reference to transportation by common carriers, and no such carrier has the right to discriminate in favor of one, as against another. In obedience to this universally recognized principle, the framers of our constitution have provided, in section 6, art. 15, as follows: "All individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager or employe thereof, shall give any preference to individuals, associations or corporations in furnishing cars or motive power." Neither the common law nor the

constitutional provision inhibits the making of contracts by a common carrier to transport either persons or freight at less than its schedule rates, but an agreement not to allow the same rates to others is void. To this extent the law is well settled, as will appear by the copious extracts from adjudicated cases, and the citation of numerous authorities to be found in the former opinion in this case. The foregoing views are based upon sound public policy. To permit a railroad company to unjustly discriminate in the carriage of either freight or passengers, in favor of one shipper as against another, or in favor of one locality as against others, would be destructive of common right, and allow private and public enterprises to be built up or pulled down at the will or caprice of a common carrier deriving its franchise from the people.

It is contended, however, that unreasonable discrimination can be best prevented by declaring all contracts for rebates void, but this rule has the disadvantage of allowing a common carrier to profit by its own iniquity. It would tolerate the acquisition of business by means of a promised reduction in rates, and at the same time place it in the power of the carrier to retain the higher rate by denying redress to the shipper. It would seem that the public interest would be equally as well subserved, in cases of this character, by saying to the carrier: "You may contract for a less rate than that provided by the published tariff sheets, but you must give all parties shipping under like conditions and similar circumstances like reduced rates." This is in accordance with the result reached in the case of *Railway Co. v. Goodridge*, 149 U. S. 680, 13 Sup. Ct. 970, but the conclusion in that case is based upon a statute of this state. The cause of action in the present case having arisen before the passage of any statute on the subject by the federal congress or the state of Colorado, this case must be determined independently of statute law.

It is contended that Ainsley's authority to execute the contract on behalf of the receivers is not sufficiently shown, and that the contract was not sufficiently established to render the same admissible in evidence. The evidence shows that the contract was executed by Mr. S. R. Ainsley, he being at the time the freight agent at Denver of the receivers, Villard and Greeley, then operating the railroad; that he (Ainsley) occupied the same position with reference to the company prior to the appointment of the receivers; and that he continued in the same position after the resignation of Villard and Greeley, and the appointment of S. T. Smith as receiver. The evidence also shows that the existence of the contract was well known to the general officers of the road, and that they undertook to carry out its provisions until Receiver Smith assumed control. It is not to be expected that the receiver of an

extended line of railroad, traversing several states, and doing a general business, will be personally consulted with reference to all contracts made in the management of the business of the corporation. He must necessarily act through others in many matters of importance; and, in the absence of evidence to the contrary, the court had a right to assume that Ainsley's authority under the various receivers was the same as that exercised by him while occupying a similar position before the management passed into the hands of the court. We do not think that any order of court is necessary to authorize the making of contracts with reference to freight rates. Such matters are usually left to the officers of the freight department of a railroad company. In the case of *Railroad Co. v. Headland*, 18 Colo. 477, 33 Pac. 185, it is said: "The manner in which railroad companies conduct their business has been so long followed, and with such a degree of uniformity, that courts are bound to take judicial notice of its general features." Under the circumstances, we think the contract was properly admitted in evidence.

The agreement being to carry goods from New York, Chicago, and St. Louis to Denver, while the appellant's road did not extend east of Kansas City, it is urged that the making of the contract was beyond the power of the receivers. We do not think this contention is well founded. The receivers, subject to the orders of the court from whom their authority emanated, had full power to conduct the business of the corporation according to approved methods of operating such enterprises; and no reason is perceived why such officers should not be permitted to make contracts for the carriage of freight and passengers beyond the limits of the road immediately under their control. Such contracts are usual, and perhaps necessary, in many instances, to the successful operation of the business of common carriers, and are also a great public convenience.

By the former opinion of this court in this case, the burden of showing the illegality of the contract by pleading and proof was placed upon the defendant. The answer thereafter filed contains no allegation to the effect that the enforcement of the contract would inflict any injustice upon any other shipper. It is, however, alleged in the answer that Smith, from the first, refused to receive or transport merchandise under the contract, or for less than schedule rates,—and from the evidence adduced, and the stipulation entered into at the trial, it is shown that upon several occasions, while Smith was operating the road as receiver, merchandise of plaintiff was refused transportation at less than schedule rates, but the exact date of such refusals does not clearly appear. Although the contract be established as a valid contract of the receivers Villard and Greeley, it does not follow that it was binding upon their successor, Smith.

As receiver, he cannot be held to a contract, but became liable, if at all, by reason of his own acts. *Turner v. Fran- son*, 7 East, 335; *Com. v. Fran- son*, 115 Mass. 278. Mr. Beach, in *Receivers*, at section 299, says: "The duty or obligation on his successor cannot be recovered at law by a succeeding receiver for refusing to perform the contracts of his predecessor." In the case of *Lehigh Coal & Nav. R. Co.*, 38 N. J. Eq. 175, it is said: "The present receiver is not bound to perform the contracts. He neither negotiated nor assented to them. He has not been authorized by the chancellor to perform them, and it is not possible, therefore, for me to say that he is under the least legal duty to perform them, nor under what legal rule he can be held liable at law for not performing them." It cannot be said to have broken the contract, as he was under no obligation to perform it. He had promised nothing, and was not, therefore, bound to perform it. He is not the representative of the predecessor. In his character as receiver, the predecessor can have no representative character in the legal sense of that term. He was not a mere agent or instrument; and when he died, his power died also, and he left nothing behind him, as receiver, or with any authority or power, in which he can be held liable so as to make his acts binding upon his successor. It may be that the contract of the first receiver bound the trust. *Express Co. v. Railroad Co.*, 9 N. J. Eq. 175; *Com. v. Franklin Ins. Co.*, 100 Mass. 1; *Receivers N. J. & N. Y. Ry. Co.*, 29 N. J. Eq. 167, 3 Atl. 134; *Ellis v. Lehigh Coal & Nav. Co. v. Cent. R. Co.*, 107 Mass. 1. Receiver Smith was not a party to the contract, nor the legal representative of a party, and he was not bound to carry out its terms, but the court from which his appointment was made, in the exercise of its equitable powers, may have entertained an application from him to do so. He cannot be held to have ratified the contract from the fact that a portion of the rebates accruing thereunder were entered upon the discharge of the receiver were paid after he assumed the management of the business. It was insisted for him to say that, in such case, the merchandise had been transported under the contract during the management of the receivers, the terms of the contract were under control, and at the same time the contract as not binding upon him as to the shipments; that for the carriage of the merchandise thereafter offered for transportation at schedule rates should control. It was relied upon a ratification of the contract by Smith, the evidence introduced was insufficient to establish such ratification by him or his subordinate officers in the management of the road with knowledge of the terms

ment, received and transported freight under it, or did any other act tending to show ratification, the record fails to disclose such fact.

Under the proof adduced, it was error to allow a recovery upon the claim for rebates for freight shipped during Smith's administration of the affairs of the company. It was likewise error to include in the judgment the amount claimed under the second cause of action pleaded. Our conclusion upon the case, as now presented, is that the contract imposed an obligation upon the receivers Villard and Greeley to refund the rebates, as specified therein, in so far as plaintiff's merchandise was received and transported during the time they were operating the road as receivers, and that appellant, having received the benefit of the excess paid, is liable to plaintiff in this action therefor, but that the evidence neither justified a recovery for rebates upon merchandise shipped during the time that Receiver Smith was operating the road, nor upon the second cause of action. As the judgment is for a gross sum, and the evidence furnishes no test by which the correct amount may be ascertained, the judgment must be reversed.

FOSTER v. CRAMER, Sheriff, et al. 1

(Supreme Court of Colorado. Feb. 5, 1894.)

CHATTEL MORTGAGE—ERRONEOUS RECITALS—RECORD—EFFECT ON THIRD PERSONS—ACTUAL NOTICE.

A chattel mortgage was dated March 14, 1886,—the day after it was in fact executed, acknowledged, and recorded,—and was given in lieu of a prior one of record, for the same amount, on the same property, which expired the next day, which was Sunday. It was intended to secure payment of a certain note of even date therewith, payable on or before March 14, 1887, but by mistake it recited that the sum of money secured was payable on or before March 14, 1886, according to the tenor of a certain note "bearing even date with this deed." Held, that the facts were sufficient to put third persons on inquiry.

Appeal from district court, Arapahoe county.

Action by H. E. Foster against Fred Cramer, sheriff of Arapahoe county, and the Solls Cigar Company, to recover possession of certain personal property. From a judgment for defendants, plaintiff appeals. Reversed.

A. B. Seaman and O. B. Liddell, for appellant. Reddin & O'Hanlon, for appellees.

GODDARD, J. The facts disclosed by the record which are pertinent to the questions presented for our consideration are in brief as follows: On the 13th day of March, 1886, one J. D. Scott conveyed to plaintiff, by a chattel mortgage, the personal property in controversy to secure the payment of a certain promissory note of even date therewith for the sum of \$5,000, payable on or before

March 14, 1887. This chattel mortgage was dated March 14, 1886, but as a matter of fact was executed, acknowledged, and filed for record in the recorder's office on the 13th. This note and mortgage was given in lieu of a prior mortgage between the same parties, covering the same property, and to secure the payment of the same amount, executed on March 14, 1885, which by its terms fell due on March 14, 1886, and would expire on Sunday. The mortgage in question was prepared late Saturday afternoon in the recorder's office, and copied from this prior mortgage; and in so copying it by mistake the note to be secured was described as payable on the 14th of March, 1886, instead of the 14th of March, 1887. This mistake also appears in the recorded mortgage, and it is therein recited that the sum of money thereby secured was payable "on or before the 14th day of March, A. D. 1886, with interest on the same according to the tenor and effect of a certain promissory note given by the said party of the first part to the said party of the second part, bearing even date with this deed," etc. The mortgaged property remained in the possession of Scott until the 10th day of November, 1886, when the defendant Cramer, as sheriff, seized and took the same into his possession by virtue of a writ of attachment sued out of the district court of Arapahoe county in an action against Scott brought by the Solls Cigar Company, a corporation duly organized and doing business under the laws of Colorado. The plaintiff below claims the right to the possession of the property by virtue of the chattel mortgage in question. Upon the trial the plaintiff introduced the original mortgage in evidence, which at that time had been corrected in the particular aforesaid by writing the figure "7" over the figure "6."

The principal question of fact controverted on the trial was as to whether such correction was made before or after the same had been recorded. The testimony upon this point was conflicting, and, the court having found against plaintiff upon this issue of fact, we are bound by such finding, and upon this review we must assume that the mortgage was correctly recorded. We think this conclusion must also prevail by force of our chattel mortgage act. It is therein provided that any chattel mortgage properly certified "shall be admitted to record, * * * and shall thereupon, if bona fide, be good and valid from the time it is so recorded," etc. The recording of a chattel mortgage being necessary to validate it as to parties not having actual notice thereof, it follows that if the chattel mortgage is incorrectly recorded, and the record omits or changes its material provisions, then such original is clearly not recorded, and the record is not constructive notice of that instrument. "Any material omission or alteration will certainly prevent the record from being a constructive

¹ Rehearing denied.

notice of the original instrument, although it may appear, on the registry books, to be an instrument perfect and operative in all its parts." 2 Pom. Eq. Jur. § 654. The record, is however, constructive notice of the mortgage as recorded, and is equivalent to actual notice to defendants of what appears upon its face, whether in fact they saw it or not. The court below held that the record failed to give sufficient notice of a valid and existing mortgage upon the property attached at the time the same was seized by the sheriff, and was insufficient to put defendants upon inquiry. The correctness of this decision is the important question presented for our consideration. It is to be borne in mind that the validity of the chattel mortgage in controversy is not questioned upon the ground of its bona fides, but simply upon the technical ground that the recital in the record made the same past due at the time of the attachment. From the face of the record of this mortgage, therefore, does there appear such a state of facts as should put a reasonable man upon inquiry as to whether there was not some mistake in its recital? In other words, was there on the face of this record sufficient to put a reasonable person upon inquiry as to whether the note thereby secured became due on the day therein recited, or to raise a reasonable inference that there was a mistake in the recital in relation thereto? We think the question must be answered in the affirmative. The mortgage was dated as of the day it expired, was acknowledged and filed for record as of a date prior to its execution. The note, which was not attempted to be set out in the mortgage in *haec verba*, but merely described therein by way of recital, was made to fall due on the day of its date, and on the day following the record of the mortgage given to secure its payment. It also appears from the record that a prior mortgage for the same amount, covering the same property, and between the same parties, executed a year previous, would expire on the same day. These circumstances and facts we think constitute a transaction so at variance with the ordinary course of business as to excite a doubt of the correctness of such recital in the mind of any reasonable person. There was also testimony, which the court seems to have entirely overlooked, tending to show actual knowledge on the part of Solis, the president of the defendant company, of the existence of the mortgage itself. He admits that he knew of the mortgage, but claims it had expired. In addition, therefore, to the notice that the law conclusively presumes from the record, he might well have been held to have had such actual knowledge of the existence of the mortgage itself as to have put him upon inquiry. As was said in the case of *Bailey v. Calpin*, 40 Minn. 319, 41 N. W. 1054: "Where the attention of an interested party is directed to a defective deed or the record-

ed copy thereof, he may get an edge of the facts sufficient to put him upon inquiry, and charge him with notice, whether or not otherwise he be legally attributable to the record only." The prosecution's inquiry on the part of defendant would have disclosed the existence of the mortgage, and the fact that the mortgage was not due until March 14, 1891. It is not necessary that the mortgagee have ascertained that the mortgage was not due until March 14, 1891, in order to stand the misrecital thereof. The mortgagee, standing the misrecital thereof, and existing security at the time of attachment was levied. We think the error in its view of the law is not sufficient to reverse the judgment. It therefore becomes unnecessary to discuss the other objections urged by the defendant. The judgment must be reversed. Reversed.

LAY v. BENNETT

(Court of Appeals of Colorado.)

EVICION OF TENANT—RENTING TO LEWD PERSONS.

A tenant may abandon his tenancy by leaving himself as evicted, where his conduct in the adjacent rooms to lewd women's purposes for which they will be used, after, on complaint as to their conduct, takes no step to remove them.

Appeal from Arapahoe county. Action by Bennett & Meyer against Lay. Judgment for plaintiff affirmed. Reversed.

Thomas H. Hardcastle and John H. Benedict, for appellant. Benedict & Phelan, for appellees.

THOMSON, J. This is an appeal from a judgment of the district court of Arapahoe county, Colorado, in favor of the plaintiff, F. H. Lay, and against the defendant, Bennett & Meyer. On the 19th of August, 1890, Bennett & Meyer leased to F. H. Lay certain rooms on the second floor of their three-story building at the corner of Seventeenth and Spruce streets, in the city of Denver, for the term of one year. Lay occupied the rooms with his wife and children, consisting of his wife and children, on the 19th day of July, 1891, when they were evicted from them, and never returned. The rent which accrued between the 19th day of July and the 5th day of October, 1891, was \$10.00. The defense is, conduct of plaintiff in evicting Lay from the rooms, and an eviction. The evidence is that the building was occupied by a large number of disorderly female tenants, who were in the habit of receiving and entertaining visitors; that the occupants of the building indulged in boisterous conduct, jumping upon the floors, singing, and using profane language, until a late hour in the night, thus depriving the sleep of defendant and his family, and depriving them of the benefit of the premises, and giving to the building a bad and unsavory reputation. The de-

frequent complaints to the plaintiffs of the character and conduct of these tenants; and in January, 1891, the plaintiffs caused them to remove, and supplied their place with men. While the rooms were so occupied, there was no noise, and the defendant was undisturbed; but in March, 1891, the men vacated the building, the women were restored, and the unseemly noise and disturbance recommenced, and continued until the defendant, unable longer to endure the invasion of his peace, abandoned the premises. During this last period he repeated his complaints several times to the plaintiffs, who promised again to eject the obnoxious characters, but nothing in that direction was ever done. The foregoing facts are undisputed, and, if they constitute a defense to the action, judgment should have been for the defendant. If they are not a defense, the plaintiffs were entitled to judgment for \$220.50, which was the exact amount due. The judgment should have been for this amount or for nothing; but the court, by some process peculiar to itself, arrived at the conclusion that the plaintiffs ought to have \$130, and accordingly rendered the judgment from which this appeal is taken. There is nothing in the record to justify this judgment. It is absolutely without support from any evidence in the case, and is clearly and unmistakably erroneous. The evidence gives rise to a question which it is necessary to dispose of, to the end that upon a retrial of the case the rights of the parties may be intelligently settled. The answer to this question will determine whether the facts in evidence may be shown in bar of the action for rent. The authorities are all agreed that the eviction of a tenant from the demised premises by title paramount or by the landlord is a bar to any demand for rent, because it deprives him of the consideration for which rent was to be paid. In many of the cases in which this doctrine was announced there was an actual dispossession of the lessee by the lessor; but there is also an agreement among the cases that to constitute an eviction which will bar or suspend rent a direct or physical expulsion is not necessary, and that any act willfully done by the landlord, which has the effect of driving the tenant from the premises, amounts to, and may be treated as, an eviction. As to what conduct on the part of the landlord will justify the tenant in abandoning the premises and interposing the plea of eviction to an action for the recovery of subsequently accrued rent, there has been considerable adjudication; and an examination of some of the leading cases will materially aid us, not only in ascertaining the law, but in applying it to the facts before us.

In *Dyett v. Pendleton*, 8 Cow. 727, the facts, as stated by Cray, Senator, were that the plaintiff introduced into the house, certain rooms in which had been leased to the defendant, divers lewd women, who made

a great deal of indecent noise and disturbance, disturbing the defendant and other persons sleeping in the house, bringing odium and infamy upon the house as a place of ill fame, and compelling the defendant, as a consequence of such practices, to leave the premises, to which he did not return. The court held that proof of these facts ought to have been received, because they tended to prove a constructive eviction, which would exonerate the defendant from the payment of rent. This case gave rise to considerable discussion, and was the subject of more or less comment in a number of adjudicated cases. In *Royce v. Guggenheim*, 106 Mass. 201, Gray, J., holding that it was unnecessary to rest the judgment of his court upon that case, remarks concerning it that it has since been considered, even in New York, an extreme case, and refers to *Etheridge v. Osborn*, 12 Wend. 529; *Ogilvie v. Hull*, 5 Hill, 52; *Gilhooley v. Washington*, 4 N. Y. 217. And in the opinion in *De Witt v. Pierson*, 112 Mass. 8, the following occurs: "The case of *Dyett v. Pendleton*, 8 Cow. 727, is relied upon by the defendant. This has been called an extreme case, and it has been modified, if not overruled, by later decisions in New York; and this court declined to rest its judgment upon it in *Royce v. Guggenheim*. In *Etheridge v. Osborn* the court, referring to the case of *Dyett v. Pendleton*, say that it carried the doctrine of eviction to its extreme verge. In *Ogilvie v. Hull*, Nelson, C. J., says, speaking of the same case, that it shows only an application of the doctrine of eviction to an extreme case; and the court, in *Gilhooley v. Washington*, say that it has been regarded as an extreme case. These criticisms, if they may be so called, are certainly not very severe, and would hardly seem to justify the language of the Massachusetts court. But in the later New York cases the doctrine of *Dyett v. Pendleton* has met with distinct and unqualified approval. *Cohen v. Dupont*, 1 Sandf. 260; *Edgerton v. Page*, 20 N. Y. 281; *Insurance Co. v. Sherman*, 46 N. Y. 370. In *Edgerton v. Page*, Grover, J., delivering the opinion of the court, says: "Whether this eviction must be actual, by the forcible removal of the tenant by the landlord from the demised premises or a portion thereof, was not settled in this state until the case of *Dyett v. Pendleton*. In that case the principle was established by the court for the correction of errors that when the lessor created a nuisance in the vicinity of the demised premises, or was guilty of acts that precluded the tenant from the beneficial enjoyment of the premises, in consequence of which the tenant abandoned the possession before the rent became due, the lessor's action for the recovery of rent was barred, although the lessor had not forcibly turned the tenant out of possession. Ever since that case this has been considered as a settled rule of law, binding upon all the courts of this state. Such act of the lessor,

Robinson & Love, for appellant. Frank J. Annis and E. A. Ballard, for appellee.

THOMSON, J. This is a suit by William T. Bransom for compensation as keeper of the county jail of Larimer county. The cause was submitted to the court, without a jury, upon the following agreed statement of facts: "It is expressly agreed, by and between the said William T. Bransom and the board of county commissioners of Larimer county, that at the time herein mentioned the said Bransom was the duly elected, qualified, and acting sheriff of said Larimer county, and that, in the discharge of his duties as said sheriff, he had duly appointed a jailer of said Larimer county, who had charge of the county jail. That, for the purpose of determining whether the said county of Larimer is liable for the payment of the services of said jailer, it is agreed that this cause shall be submitted upon the following statement of facts: First. That between the 1st day of May and the 1st day of September, 1892, one C. M. Pulliam was the duly appointed and qualified deputy sheriff and jailer of said Larimer county in charge of the county jail, and that he performed services of said jailer during said period; that the value of the services so rendered for said period was \$240.00; and that a claim for the same was duly presented to the said board of county commissioners at the September, 1892, session of said board, and disallowed. The question to be determined is: Is the county of Larimer liable for the payment of the compensation heretofore stated for the services of said jailer? Second. If said county is liable to pay such money, out of what fund should it be paid?" Plaintiff had judgment for the amount of his claim, payable out of the general fund.

The right to recover in this action is based upon section 1815 of the General Statutes of 1883. That section, and the one immediately following, read as follows: "Sec. 1815. The sheriff of the county, in person or by deputy for that purpose appointed, shall be the keeper of the county jail. He shall be responsible for the manner in which the same is kept; he shall see that the same is kept clean, safe and wholesome; and the expense of keeping the jail in good order and repair, of lighting and warming that part thereof wherein prisoners are confined, and the office in the jail, shall be paid by the county wherein the jail is situated. * * * Sec. 1816. The keepers of the several county jails in this state shall receive and safely keep every person duly committed to such jail for safe-keeping, examination or trial, or duly sentenced to imprisonment in such jail upon conviction for any contempt or misconduct, or for any criminal offense, and shall not without lawful authority let out of such jail, on bail or otherwise, any such person. And it shall be the duty of every such keeper to supply proper food and drink for the prisoners committed

to his custody in such jail at his own expense; and the board of county commissioners of the county where such jail is situated shall allow the keeper of the jail for dieting prisoners such reasonable compensation per day as shall be just." The claim presented to the board of commissioners, and which was disallowed, is in the following form: "County of Larimer, to William T. Bransom, Dr. As jailer for 4 months, commencing May 1st, 1892, and ending September 1st, 1892, @ \$60 per month, \$240.00." The duties of the jailer, prescribed by the statute, are to safely keep every person duly committed to the jail for safe-keeping, to see that the jail is kept clean, safe, and wholesome, and to supply the prisoners with food and drink. The expense of keeping the jail in good order and repair, and of lighting and warming the part where the prisoners are confined, must be paid by the county; but the liability of the county is on account of expense, and not of service. So, also, the keeper is entitled to an allowance for food furnished by him to the prisoners, which, by another law, is limited to a certain amount per diem. All charges, for the payment of which the county is liable, are particularly and distinctly specified, and among them is no charge for the compensation of the keeper for his general services. As to that the statute is silent. Section 1825 of the same statute is as follows: "Whenever the safe-keeping and detention of persons lawfully committed to any jail in this state shall, in the opinion of the board of county commissioners, require the employment of one or more guards, the said board of county commissioners of the county where such jail is situated, shall authorize the sheriff of such county to supply such guard or guards at the expense of the county, at such reasonable compensation as such board shall allow, which guard or guards shall be under the command of the keeper of the jail." This authorizes the employment of guards when such measure is deemed necessary, and provision is expressly made for their remuneration; but there is still no mention of any compensation to the keeper. It would seem to be clear from this, in connection with the other portion of the statute, that it was not the intention of the legislature that payment for his services should come from the county. Prior to the act of April 6, 1891, (which will be considered later,) the revenues of the sheriff were derived from certain fees, fixed by law, which he was authorized to receive for the performance of his various official duties. He was empowered to select and appoint his deputies; but there was no statutory provision for the payment of any of them, so that they must have been compensated by the sheriff out of the emoluments of his office. He accepted the office burdened with the charge of the county jail. He might perform the duties of keeper personally or by deputy; but in either case we are unable to find any law,

and the plaintiff has pointed out none, which would entitle him to special or extra compensation for such services. Section 15, art. 14, of the constitution is as follows: "For the purpose of providing for and regulating the compensation of the county and precinct officers the general assembly shall by law classify the several counties of the state according to population, and shall grade and fix the compensation of the officer within the respective classes according to the population thereof. Such law shall establish scales of fees to be charged and collected by such of the county and precinct officers as may be designated therein for services to be performed by them respectively; and where salaries are provided, the same shall be payable only out of the fees actually collected in all cases where fees are prescribed. All fees, perquisites and emoluments above the amount of such salaries shall be paid into the county treasury." Pursuant to this constitutional provision, the act approved April 6, 1891, providing for the payment of salaries to certain officers and the disposition of certain fees, was passed. Sess. Laws 1891, p. 307. From this act we excerpt the following: "Sec. 11. The sheriffs in the several counties in this state shall receive as their only compensation for their services rendered, an annual salary, to be paid quarterly out of the fees, commissions and emoluments of their respective offices, and not otherwise." The section then fixes the salaries of sheriffs in the various classes of counties. "Sec. 17. Deputies and assistants may be employed by the sheriffs, county clerks, county treasurers, and county assessors under the direction of the board of county commissioners for said counties respectively, and shall be paid salaries out of the fees, commissions and emoluments of the office wherein employed, (except employes of county assessor who shall be paid out of the county treasury,) to be fixed by the board, the selection of said deputies and employes to be made by the officer authorized to employ them." "Sec. 22. All fees collected by county officers shall be paid over to the county treasurer, and shall be kept by him in separate funds to be known as the 'County Judge's and Clerk of County Court Fee Funds,' the 'Sheriff's Fee Fund' and the 'County Clerk's Fee Fund' the 'County Treasurer's Commission and Fee Fund,' the 'Justice of the Peace Fee Fund,' the 'Constable's Fee Fund,' and all salaries or compensation of county judges, clerks of county courts, sheriffs and county clerks and their deputy or assistant clerks, and deputy sheriffs, county treasurer and employes under them, the justice of the peace and constables, shall be paid out of said funds and no others. Any balance left to the credit of said funds, in any year, after all the salaries and compensation provided for in this section shall have been paid to the end of such year, shall be placed to the credit of the general county fund."

"Sec. 26. All acts and parts inconsistent with the provisions hereby repealed." The service compensation is sought in the act all performed after the force of the act. If, prior to its passage, in existence which might be as to authorize a sheriff to receive from the county special law was repealed by the act. The salaries of sheriffs must be paid out of the fees, if that should prove insufficient in so far, remain unpaid. No sheriff may perform in his official duty can be made a charge to the county, except in so far as the treasury is sufficient for his salary. The statute requiring to pay the expense of lighting the jail and keeping it in repair is still in force. But this statute is for services pure and simple as it formerly stood made no charge the county with such by the last act the salaries to be received by the sheriff full for the performance of duties. A county might be the whole, or a portion, of the sheriff or his deputy; but such arise only in case of sufficient treasury to meet the demand of the board of commissioners to apply them; and it would upon the plaintiff, in a proceeding to set forth and which give him the right of does not purport to be such and bears no resemblance to the ment of the court upon the is erroneous in toto, and must be Reversed.

COCHRANE v. JUSTICE

(Court of Appeals of Colorado.)

SPECIFIC PERFORMANCE—DECREE—ACCOUNTING.

1. A decree of the supreme court for specific performance of a contract by the defendant's mining properties, them by the names of the lodges, consisting of 26.8 acres," is not sustained by the subsequent decree, on remand to the district court, ordering the making of a lease of the properties "as owned by them under the contract to lease, without any consideration of the quantity of land.
2. Where a decree for specific performance of a contract to lease property for a term of years, the expiration of the term for which the lease was to run, the lessee cannot be ordered to execute a new lease under the contract of the same length, and also deny the plaintiff for the term it was illegally obtained.

Error to district court, Lakewood.

Action by Frank T. Cochrane against the Justice Mining Company to compel specific performance of a contract to lease. There was judgment for defendant, and plaintiff appealed. The supreme court reversed the judgment, and directed the trial court to enter a decree of specific performance. A decree was entered, and plaintiff brings error.

For former report, see 26 Pac. 780.

The other facts fully appear in the following statement by REED, J.:

Suit was brought by the plaintiff in error against the defendant company to compel the performance of a contract for a lease of the mining property of the defendant to the plaintiff. Upon the hearing in the district court a decree was entered dismissing the bill. Appeal was prosecuted to the supreme court, where the decree of the district court was reversed, and a decree of specific performance ordered. See 16 Colo. 415, 26 Pac. 780. After the district court again acquired jurisdiction, on June 12, 1891, a final decree of specific performance was made. That portion of the decree ordering the lease is as follows: "All of the Justice Mining Company's properties, as owned by it on the 18th day of March, A. D. 1889, consisting of the Justice, Marlin, Monte Cristo, and Western Union lode mining claims, together with all improvements and buildings thereupon, belonging on said premises, and all machinery and tools which were thereon on the 18th day of March, A. D. 1889; all of said premises being located in the Roaring Fork mining district, county of Pitkin, and state of Colorado,"—followed by a form of lease the defendant was required to execute. Exceptions were taken to the decree for causes hereafter discussed, and an appeal taken from the decree. The decree contains the following paragraph: "It is further ordered and decreed that plaintiff has leave to make application to the court for an accounting in this case any time within the first ten days of the next term of court." Prior to the making and entering the decree no supplemental bill or petition had been filed asking for an accounting by the plaintiff. On the 21st day of August a petition was filed asking an accounting from April 15, 1890, to date, alleging, upon information and belief, that "the Justice Mining Company has ever since said time, and now is, engaged in mining said property, and extracting valuable silver and lead bearing ore therefrom; * * * that it is impossible for the plaintiff to state the amount and value of the said ore so extracted and mined from said property. * * * Plaintiff alleges that the same was of the value of many thousands of dollars." On the 24th day of August, 1891, the petition was denied by the court, and an exception taken, as shown by the journal entry of the clerk of the court. The errors assigned are: (1) That the court failed to follow the supreme court; (2) that the decree, instead of ordering a

lease for the property contracted to be leased, decreed that the company should execute a lease of all the mining property owned by it on the 18th day of March, 1889; (3) that the court erred in not requiring a covenant in the lease, deducting from the term of the lease all time during which the lessee might be prevented from work by reason of injunction or stoppage of work by legal proceedings against the lessor; (4) that the court erred in decreeing that the lease should be executed and work commenced by the lessee before an accounting was had.

Decker & O'Donnell, for plaintiff in error.
A. W. Rucker, for defendant in error.

REED, J., (after stating the facts.) The first question to be determined is whether the decree of the district court is sufficiently broad to cover the contract of the parties as construed in and required by the supreme court. The subject-matter of the contract of lease and the extent and area of the property cannot be misunderstood. The public published offer to lease, made by the company, was as follows: "Bids will be received at the office of the Justice Mining Company, up to noon on March 18th, 1889, for lease or leases on the properties of the Justice Mining Company, consisting of the Justice, Marlin, Monte Cristo, and Western Union, situated in Tourtelotte park, and consisting of 26.8 acres." The language of the supreme court (16 Colo. 423, 26 Pac. 780 et seq.) is as follows: "The question is comparatively free from embarrassment. The offer of defendants to lease by its terms contained the entire mining property. The respective claims were named, and their aggregate is given as twenty-six and eight-tenths acres. The offer of plaintiff was for the entire property. No lease of the entire mining property was ever tendered. The 'Crowe shaft,' with surface ground, was excepted and reserved for a part of the term. It is conceded that it had at the time of the contract been leased to other parties. It is claimed by defendants that the fact was known to plaintiff at the time of making the contract. This fact cannot prevail as a defense. The knowledge on the part of plaintiff, if it existed, would not relieve defendants from the necessity of complying with their contract. It is also contended that the suit could not be maintained because of the inability of defendants to perform by reason of having leased the Crowe shaft previous to the contract with plaintiff. It appears that, between the date of the advertisement for bids and the awarding of lease to plaintiff, defendants had leased part of the property to other parties, and had also leased the boarding house used with the property. It would be sufficient answer to this contention to say that, having already leased to other parties, the exception and reservation

of those portions should have been made at the time of making the contract with the plaintiff. Another sufficient reason why it cannot prevail lies in the fact that plaintiff offered to adjust the matter by receiving the rent which was to be paid to the defendants, which offer was refused. The law is well settled that a lessor who cannot fully comply with his contract will not be allowed to set up his own inability to perform as a defense when the lessee is willing to take what can be demised, and compensation for the balance. See *Pom. Spec. Perf.* § 388, and cases cited." It will be observed that one great obstacle to the execution and acceptance of the lease at the time of the contract was that the company, between the time of advertising and making the contract with plaintiff, had disposed of some of the property by lease, and was unable to comply. The supreme court held that plaintiff was entitled to the entire property, or to have it adjusted, and receive the proceeds, or compensation. In other words, the company was held to specific performance of its contract as made. The decree made fails to conform to the decision of the supreme court. It attempts to compel the plaintiff to accept a lease of "all the Justice Mining Company's properties as owned by it on the 18th day of March, 1880," enumerating the lodes, and giving their names. The quantity and parts remaining at that time are not shown or known. Plaintiff was entitled to a decree for a lease of the "Justice, Marlin, Monte Cristo, and Western Union, * * * consisting of 26.8 acres."

It is ably contended by the defendant in error that the statement of 26.8 acres must be disregarded; that monuments, courses, and distances must control as to quantity. Such is undoubtedly the law when a discrepancy exists, and one must give way; but where there is no discrepancy the authorities and arguments of counsel can have no place. No discrepancy or error is shown to exist. In all grants of mineral lands made by the government two fees are granted,—one of the lode as principal, and one of the surface ground as ancillary. Both, taken together, constitute the "claim," which is required by law to be established by courses, distances, and monuments. The superficial area is definitely established, and is sold by the acre and fractions of an acre to the purchaser, and, unless some error is shown to exist, is the "claim." The plaintiff was, by the terms of this contract, entitled to a lease of the entire four lodes to their full extent as located, and surface ground to the extent of 26.8 acres, or to an adjustment and compensation for such parts as could not be delivered. Hence the decree is defective in not being as broad as the decision of the supreme court. No definite quantity of ground or lodes is decreed to be leased. The quantity is not that contained in the advertisement nor embraced in the contract. By the

decree, any remnant remaining, regardless of the extent, was required.

It is urged that the court in giving a decree for specific performance out an accounting having been refused, plaintiff was entitled to the property after the 18th day of March. From the time of the commencement of the suit by the plaintiff until the 18th day of April, 1880, when the decree was entered, the court dismissing the bill was in error. The defendant company was restrained from mining and mining the property. After such decree, it is alleged that the plaintiff entered into the mine, and disposed of the ore, from the 18th day of April to the 12th day of June, 1880, and that the decree was entered,—a period of about two months. The general rule in cases of specific performance is that there has been delay or change of circumstances, and that there should be an accounting. In *Story, Eq. Jur.* § 512, where there is a trust estate, and the trustee comes upon his title to the estate, he will be decreed to have an accounting. In *See Worrall v. Munn*, 38 N. Y. 215, it is said: "The general rule of law is that the decree of specific performance is laid down by the elements of equity will, so far as possible, be made to conform to the same situation as would have been if the contract had been made according to its terms; and the vendor will be regarded as having conveyed the land for the benefit of the vendee, and liable to account to him for the profits." By the terms of the contract and the decree of specific performance, the lease should have borne date the 18th day of March, 1880; for the term of 18 months, from the time of the decree over and above the time elapsed. The term having expired, neither party could comply with the decree. The lessor could not be required to execute a lease of the date of the decree, for a term of 18 months, nor the lessee, without a new contract. If the lessor had a lessee could not enter the property under a lease made at the date of the decree, for a term of 18 months, and an accounting for the term it was decreed. By such a course the plaintiff would have the benefit of two terms for one. It follows that the decree for specific performance was barren, except in so far as it specially established the rights of the plaintiff, and allowed him, by proper proceedings, to require and recover damages for the term. Before the entry of the decree, had plaintiff filed a supplemental petition praying an accounting, it would have been the duty of the court to grant it, and proceed to adjust a

the entire matter. The power was inherent in the court, and should have been exercised to end the controversy, and prevent a multiplicity of suits. No supplemental bill or petition was filed before the final decree, which was entered on June 11th. On August 21st a petition was filed, and denied by the court, and very properly. The decree provided for a lease running 18 months from the 22d of June, 1891. If executed and accepted, the lessee could not have the term and damages for the former term. A very marked and obvious distinction exists between a decree of specific performance for the conveyance of an estate in fee and the decree for a lease for a limited time. In the former the vendor is required to convey the title, and is liable to account for the use of the property while wrongfully detained; in the latter, if the term expires while the lessor retained the possession, the only remedy of the lessee is for the damages. In this case both court and counsel seem to have been led into a mistake by following the law in regard to the sale of real property. The court having refused an accounting, the plaintiff was relegated to his action at law for the mesne profits for the expired term. On the 24th of August, when the court denied an accounting, an exception was taken, as shown by the court journal, and error is assigned upon such denial; but such exception is not embraced in the bill of exceptions, consequently could not be a basis upon which error could be predicated, under the rules. This, had we seen fit to avail ourselves of it, would have been sufficient to dispose of the question of accounting; but, court and counsel having evidently fallen into an error in regard to the nature and effect of the decree of specific performance, it was thought necessary to discuss the questions involved, to aid in their solution, and, as far as possible, hasten the final conclusion of the controversy. In our view of the case, it will be unnecessary to remand it to the district court. This court will amend the decree by striking out the following: "This agreement of lease, made and entered into this 22d day of June, A. D. 1891," and inserting: "This agreement of lease, made and entered into this 18th day of March, A. D. 1889;" also by striking out, "All the Justice Mining Company's properties as owned by it on the 18th day of March, A. D. 1889, consisting of the Justice, Marlin, Monte Cristo, and Western Union lode mining claims," and inserting in its stead: "The properties of the Justice Mining Company, consisting of the Justice, Marlin, Monte Cristo, and Western Union, situated in Tourtelotte park, and consisting of 26.8 acres,"—all the balance of the decree to stand as entered. All costs since the case was remanded from the supreme to the district court to the present time will be equally divided between the parties. Decree modified.

TACOMA LUMBER & MANUF'G CO. v. WOLFF et al.

(Supreme Court of Washington. Feb. 6, 1894.)

MECHANIC'S LIEN—PERSONAL JUDGMENT AGAINST CONTRACTOR—VALIDITY.

A personal judgment against contractors in a suit to foreclose a mechanic's lien is absolutely void. Per Stiles and Anders, JJ., dissenting.

Dissenting opinion. For majority opinion, see 35 Pac. 115.

STILES, J., (dissenting.) So far as this was a special proceeding under Code Proc. § 1393, subd. 4, to vacate a judgment "for fraud practiced by the successful party in obtaining the judgment," it was governed entirely by the statute; and thus far it was equitable in its nature, and triable by the court. But the judgment was also attacked on the ground that the court had no jurisdiction to enter it, because it was money judgment entered against contractors in a suit to foreclose a mechanic's lien, and as to that portion of the proceeding it was nothing but a naked question of law.

I maintain, in the first place, that the case presented by the petition on the ground of fraud has never, as yet, been tried, and that the judgment was therefore erroneous. Id. § 1395, provides for the filing of a verified petition stating the facts constituting a cause to vacate, and, if the party asking the vacation is a defendant, the facts constituting a defense to the action. Such a petition was filed; the defenses being the want of jurisdiction in the court, and a settlement of all matters of account with the judgment plaintiff. Id. § 1396, provides that in such a proceeding all things shall be done, as near as can be, "as in an original action by ordinary proceedings," except that the facts stated in the petition shall be deemed denied without answer. Now, in this case, an answer was filed, and with it a lot of ex parte affidavits, which were answered by like ex parte affidavits for the petitioner; and they, in turn, were replied to. These affidavits, with the record in the original foreclosure suit, constitute the material facts, according to the statement. Not a witness was sworn, nor any opportunity given to cross-examine the makers of the affidavits, nor is there anything to show what or how many of the affidavits were considered by the court. But, granting that all of the affidavits were considered, there was no trial of the question of fraud "as in an original action by ordinary proceedings." On the contrary, the whole matter was treated as though it were a mere motion, which, under the statute, it is clearly not. But, whether a motion or not, I hold that the personal judgment rendered against the contractors in the mechanic's lien case was absolutely void. This was the main point presented to this court, although the opinion does not notice it. The proceeding

to secure and foreclose a mechanic's lien is a purely special and statutory one, and there is not an intimation in the law that there shall be any result, except the ascertainment of the amount due and the decree of sale. The contractor may be a proper party, but he is not a necessary party, and if he is not made a defendant a decree would not be disturbed. The owner alone can be prejudiced by an omission of that kind. The general rules governing the joinder of causes of action absolutely forbid that a suit in rem against the land of one party should be joined with another for a money demand on contract against a different party. On this point I shall only cite *Phil. Mech. Liens*, § 397. The case of *Hildebrandt v. Savage*, 4 Wash. 524, 30 Pac. 643, and 32 Pac. 109, furnishes no precedent for such a judgment. That was a foreclosure of the contractor's lien against the owner,—a case where there would be some logical reason in determining all the matters at issue between these parties, growing out of the building contract, in one suit, the fact that the owner may be tricked out of his right to a jury trial being the main objection to such a proceeding. In *Mill Co. v. McDonald*, 5 Wash. 496, 32 Pac. 108, this court directed a judgment against Contractor McDonald to be affirmed, and the same judgment made to include his partner, Docking. Whether this would have been done had the court's attention been called to the point, I am unable to say; but the fact is that that case was heard mainly upon the sufficiency of the lien notice, the respondents contenting themselves, so far as the personal judgment was concerned, with the citation of *Eisenbels v. Wakeman*, 3 Wash. 534, 28 Pac. 923, in support of the position that a jury trial was the contractor's right. There was certainly no intention in the *Stetson Case* to overrule the *Eisenbels Case*, and when, in the latter, it was said that there was no power in the court to render a personal judgment against the contractor, I think it was understood that want of jurisdiction was at the basis of the want of power; and, if there was no jurisdiction to render a personal judgment in the special proceeding, then the judgment entered was void. We might just as well say that jurisdiction could be acquired to compel the delivery of specific personal property in a summary proceeding in forcible entry as to sustain this void judgment.

ANDERS, J., concurs in the above.

STATE v. MYERS.

(Supreme Court of Washington. Feb. 12, 1894.)

CRIMINAL LAW—FAILURE OF DEFENDANT TO TESTIFY—INSTRUCTIONS.

Though Code Proc. § 1307, requires the court to instruct that no inference of defendant's guilt shall be drawn from his failure to testify, error cannot be predicated on the court's failure to so instruct where defendant neither

asked for such instruction nor requested the court's failure to give it. *Per Seabright, J.*, dissenting.

Dissenting opinion. For majority see 35 Pac. 580.

SCOTT, J., (dissenting.) I agree with the majority of the court as to the effect of section 1307 of the Code of Criminal Procedure. It seems to me that the purpose of this section is to make the failure of the defendant to question a part of the law of the case a ground for error. It would not be otherwise. For it is a general rule that points up error is sought to be founded upon the first opportunity. It appears in this case, not only that there was no objection to the part of the defendant for such a question, but that he took no exception to the failure of the court to give the instruction. The aforesaid is strengthened here by the fact that (section 399 of the Code of Criminal Procedure) in giving to new trials, the eighth section of the Code, which provides that a new trial may be granted for error in law occurring at the trial and excepted to at the time of making the application. See *Seabright v. State*, 1893, p. 113, § 7. If the instruction was error, it was a legal error occurring at the trial, and the defendant should have availed himself of it, and should have excepted thereto. The first time the point was called to the attention of the court was in the new trial, and, there having been no objection taken to the failure of the court to so instruct, there was no foundation for error thereon in said motion. It is a matter of doubt whether such a question is of any benefit to the defendant, especially calling attention to the failure of the defendant to testify at the trial. Anyhow, it is contended that such instruction is for his benefit, and he should have said as to whether the same should be given. If the court is compelled to give the instruction, it would impose upon the defendant of notifying the court to give such instruction if he did not. While the rights of defendant in criminal actions are jealously guarded, the law is nevertheless to secure technicalities with no legal foundations should not be allowed. There is reason in the rule requiring questions on which error is called at the first opportunity, and the opportunity was presented here by the charge of the court to the jury. An exception to the failure of the court to so instruct at that time would have given the court an opportunity to recall the instruction and to instruct them with reference to the expense of a second trial and delay incident thereto, would have preserved the rights of the defendant. In other instances, if the court fails to instruct as to any particular

law of the case, it is a well-settled rule that error cannot be founded thereon unless the court has been requested to give such instruction; and I can see no good reason why the same should not apply to the instruction in question. Nor do I think that the statute intended to lay down any different rule with regard to this particular matter. If the case of *Linbeck v. State*, 1 Wash. St. 336, 25 Pac. 452, is to be interpreted as holding that it is unnecessary for the defendant to except to the failure of the court to give this instruction, it should be modified as authority. In fact, the better practice would be not to require the court to give the instruction unless a request is made therefor by the defendant. But, in any event, there should be an exception to such failure, in order to lay any foundation for error. I find no error elsewhere in the record, and am of the opinion that the judgment of the court below should be affirmed.

HOYT, J., concurs.

PARMETER v. BOURNE et al.

(Supreme Court of Washington. Feb. 1, 1894.)

ELECTIONS AND VOTERS—COUNTY SEAT—ELECTION TO REMOVE—LEGALITY—INJUNCTION—WHEN LIES.

1. Under Const. art. 6, § 1, giving each male, 21 years or over, possessing enumerated qualifications, the right to vote at all elections, and article 11, § 2, providing that no county seat shall be removed unless three-fifths of the qualified electors of the county shall vote in favor of such removal, and that three-fifths of all votes cast on the proposition shall be required to relocate a county seat, the right of such elector to vote on such proposition is independent of statutory enactments. Per Stiles and Hoyt, JJ., dissenting.

2. Even in the absence of statutory authority, equity may inquire into the legality of an election held to determine the question of the removal of a county seat, and enjoin its removal for fraud in the election. Per Stiles and Hoyt, JJ., dissenting.

3. A taxpayer owning large property interests in such county seat has such interest in the subject-matter as entitles him to institute proceedings to enjoin such removal. Per Stiles and Hoyt, JJ., dissenting.

Dissenting opinion. For majority opinion, see 35 Pac. 586.

STILES, J., (dissenting.) "An adequate remedy will always be found, either at law or in equity, for frauds perpetrated against the purity of elections. If a result has been secured by fraud, and the statute has provided no mode of redress, it by no means follows that no redress can be had. The right of any person claiming to exercise any public function or authority under a fraudulent election may be tested by quo warranto, under the principles of common law." *McCrary, Elect. § 354*. The context of the foregoing quotation concerns the removal of county

seats. "When a statute requires a county office to be located at the county seat, mandamus will lie to compel the officer to open and hold his office there. And it is no answer to such a proceeding to show that there is a dispute as to which of two or more places is the county seat. The court is bound to inquire and determine where the county seat is, even if, in order to do this, it may be necessary to determine as to the legality or result of an election held to settle the question of the location or removal of the same." *Id. § 366*; *State v. Commissioners of Hamilton Co.*, 35 Kan. 640, 11 Pac. 902. The term "political question" has been made, in the opinion of the court deciding this case, to perform a very large and imposing, but, it seems to me, at the same time, misleading, part. I think it is shadow without substance. Titles to office have been from the earliest times proper matters for judicial inquiry, and the writ or information of quo warranto was invented for that purpose. *High, Extr. Rem. c. 14, pt. 2*. From the use of this writ the power to inquire into every step of an election has been but a necessary corollary. Statutes providing for contests, unless they are clearly made exclusive, are only cumulative remedies, (*Id. § 624*; *McCrary, Elect. § 334*;) and the returns of canvassing officers are merely prima facie evidence of the facts they certify, (*High, Extr. Rem. § 638*; *Reynolds v. State*, 61 Ind. 392; *State v. Shay*, 101 Ind. 36; *Kane v. People*, 4 Neb. 509.) But I fail to comprehend wherein an election to determine the location of a county seat differs in its "political" character from that of any other election; and, as the founders of the common law found a way over the technical objection that there was no jurisdiction to inquire by what right a usurper occupied an office, and extended their investigations when elections came to be the method of selecting officers, so I deem it not only the right, but the duty, of modern courts of general jurisdiction to further extend these well-established powers to other cases where public and private rights are affected by elections. My associates have cited the cases which oppose this doctrine, from courts which have declared themselves to be unable to find any remedy for frauds on the ballot unless there is an office at stake, or the statute makes some express provision, and these few cases are credited with overwhelming authority, but to me they are far from satisfactory. To begin with, all but two of them come from southern states, where the tendency has been to sustain election officers and returning boards at all hazards. The principal case cited from Louisiana is *State v. Police Jury*, 41 La. Ann. 846, 6 South. 777, and the language quoted is very strong; but at page 850, 41 La. Ann., and page 778, 6 South., some light is thrown upon the matter, for it is there said: "Courts of common law undoubtedly claim an inherent right to entertain jurisdiction over contested

elections under proceedings in the nature of quo warranto; but, referring to the provisions of our Code of Practice on that writ, it will be seen that they confine that remedy to disputes between parties in relation to offices in corporations, and expressly declare that, "with regard to offices of a public nature,—that is, which are conferred in the name of the state by the governor or by election,—the usurpations of them are prevented and punished by special laws." This common-law jurisdiction is therefore expressly excluded by our statute." In fact, the cases cited from Michigan, Georgia, Texas, and Tennessee are the only ones which hold squarely that there is no remedy at all. In *McWhirter v. Brainard*, 5 Or. 426, the point here in issue was disposed of in these words: "There is no special statutory provision for contesting an election for location of county seat; but we think that when the question in such a case is the qualification of the voter, the conduct of the judges, or the legality of the canvass, the proper remedy is by mandamus, and not by injunction in equity,"—showing no disposition on the part of that court to cut off absolutely all inquiry into the merits of the election. Mr. High yields approval to the remedy by mandamus, where the retention of offices at county seats, or the removal of them to a new location, is in issue. High, Extr. Rem. § 79.

As opposed to the cases cited by the majority, two Illinois cases alone are referred to, and of these it is said that they neither assume nor intimate that they followed the weight of authority or any authority at all. Now, these Illinois cases occurred in 1863, when there was no constitutional provision concerning the relocation of county seats anywhere but in that state; and it is worthy of remark that both of these cases antedate in time all of the cases holding that there is no remedy without a statute which are now produced in support of that rule. We have precisely the same constitutional prohibition as that construed by the supreme court of Illinois, reading: "No county seat shall be removed unless three-fifths of the qualified electors of the county voting on the proposition at a general election shall vote in favor of such removal, and three-fifths of all votes cast on the proposition shall be required to relocate a county seat." Const. Wash. art. 11, § 2. The supreme court of Idaho recently sustained an injunction against the removal of a county seat as the result of an illegal election. *Doan v. Board*, 26 Pac. 167. In *Sweatt v. Faville*, 23 Iowa, 321, an injunction case, it was said: "Our law does not provide any method for contest in these cases. . . . That the legislature should make some provision on this subject, and give a speedy, plain, and summary method for settling these most warmly contested, and, to the public, important, controversies, each day renders more and more manifest. Our courts should not be required to pass upon them in

the first instance, but a tribunal provided where the whole matter should be speedily tried and determined. The sense of such legislation, can equity afford relief asked? The case of *Rice v. Board of Supervisors*, 10 Iowa, 570, is an authority for the proposition that the power as prayed for in this case is one which we are content to there leave to the courts. All the decisions, and especially those of the duties and powers of the board of supervisors under the writ of mandamus, where no other adequate remedy in these cases is shown, a decision was rendered in 1867, marks there made concerning the powers of the board of canvassers. It is extremely pertinent here, since, under the constitution, no grade of election officer has the power to investigate or pass upon the returns, but the returns which are made by the clerical officers. In *Kansas v. Marston*, 6 Kan. 326, the supreme court held that mandamus would lie to investigate frauds in a canvass, notwithstanding the statute provided that the canvass should be allowed 20 days after the date of the election to contest the result; and the opinion is a strong one, especially upon the point of any person who is beneficially interested in a particular place for the canvass to maintain the suit. The same principle was upheld in *State v. Stevens*, 2 Kan. 326. In *State v. Commissioners*, 35 Kan. 902. In *Calaveras Co. v. Board of Supervisors*, 326, decided in 1866, although the supervisors in California constitute canvassing boards of the counties, and that the determination of the board of supervisors that a certain town had a majority of all the votes cast in that location as the county seat is evidence only of the fact so determined, that, if the fact were otherwise determined by the board, it would be a denial of the right of the electors to shut the door against all redress of the wrong. Mandamus would lie to contest the result. In 6 Enc. Law, p. 392, is this statement: "The court will not enjoin the election, or the canvass of the result of the election is held to determine the result, such as the removal of a county seat, or the scribbling to capital stock of corporations, there is no provision for contesting the election, it has been held that an injunction cannot be granted to prevent the officers from doing the act authorized by the election law, although alleged that the majority was fraudulent or illegal voting;" and it is evident that, although the cases cited in the notes, the text, in the judgment of the compiler, states the correct law. Michigan has been mentioned in the notes, states which upheld the doctrine of intervention by the courts in the removal of county seats, on the ground that such removals were purely political in character, over which the courts had no jurisdiction.

Yet that court has recently gone so far as to interfere by injunction with the secretary of state in the matter of calling an election for state senators and representatives, one of the grounds for its action being that the act of the legislature making the apportionment violated the portion of the constitution which required each senatorial and representative district to contain as nearly as might be the same number of inhabitants as the others. Now, the constitution of that state provided for a census, and it might be supposed that the legislature would have equal means with the supreme court for ascertaining the population of the state and its location in the various counties and cities; and the apportionment of senators and representatives is certainly the very highest exercise of political power of which a legislature is capable. Yet in this case the court went behind the face of the law which contained the finding of the legislature as to what the census showed to be the population, and where it was located, and inquired into the facts; and, finding that gross errors had been committed in the matter of putting an immense population in one district and a meager population in another, held the law, by reason of the facts, to be unconstitutional, and compelled the secretary not only to refrain from issuing his notice of election under the unconstitutional law, but also directed him to issue the call under a previous statute which had been expressly repealed; and this was done in one case, at least, at the instance of a private citizen, who merely alleged that he was an elector of the seventh district. The court said, in *Giddings v. Blacker*, (Mich.) 52 N. W. 944: "The basis upon which relief is sought is that the power delegated by the above provisions of the constitution to rearrange the senatorial districts is limited; that this limitation was wholly disregarded by the act in question, and the act is therefore unconstitutional and void. It appears conceded by the learned attorney general that the legislature is not in the exercise of a political and discretionary power when acting under these constitutional provisions, for which it is only amenable to the people, and that this court has jurisdiction, in a case properly before it, to determine the constitutionality of the act in question." See, also, *Board v. Blacker*, Id. 951. Now, if the legislature, in the matter of an apportionment, was not acting under political and discretionary power by reason of the constitutional mandate, so, in the matter of relocation of county seats, where the prohibition is, as in this state, absolute and unqualified, the power must be also taken to be limited; and the conclusion would be forced upon us by this argument that, if it be a fact that the legislature has passed an act for the relocation of a county seat, which provides for no means by which frauds can be detected, and the actual validity of the election determined, then the law must be an unconstitutional law in itself. The proposition is re-

duced to this, under the decision of the court: that the bare dictum of the county commissioners, asserting that a vote upon the removal of a county seat has resulted in a certain way, is incontestable by any power on earth. This court says that the courts cannot look into it, and the constitution prohibits the legislature from doing so, because it can pass no special act on the subject, and no resubmission of the question can be made at an earlier period than four years. Such a delegation of power to a purely ministerial body is otherwise unheard of under the system of state governments prevailing in this country, and the plain spirit of the constitution is clearly against it.

The case of *State v. Jones*, (Wash.) 34 Pac. 201, has no bearing upon or relation to this subject. The legislature is a co-ordinate, independent, legislative branch of the state government, set up by the constitution for the purpose of passing laws. Certain restrictions are by the constitution laid upon it as to the method in which it shall operate, and the case above cited merely holds that when it has, by its constituted officers, certified that it has passed a certain law, the courts, recognizing its equal supremacy with themselves in its own department, will not go back of the certificate, and enter upon a practically impossible inquiry as to whether or not the forms prescribed by the constitution were followed in procuring the enactment. But the board of county commissioners is nothing but the ministerial hand of the legislature, provided for the convenient execution of the law which has been passed. It has no sanctity attached to its action, and its proceedings have no more finality than those of any other municipal or executive officer upon whom the duty is cast of executing the laws of the state. In my judgment, the only question which a court, with the allegations of this complaint before it, should consider, is, what is the proper remedy? To refuse any relief because the legislature has failed to make a complete election law is to nullify the constitutional right of each elector to vote and have his ballot counted; for it is error to declare, as does the decision, that the right of the plaintiff to vote upon this proposition depended to any extent upon the act of the legislature. Const. art. 6, § 1; Id. art. 11, § 2. At the time this action was brought the county seat had not been removed from Oysterville, but the removal was imminently threatened. Mandamus, under the highest authority, would have lain to compel the retention of the officers at that place, and the alleged frauds could have been inquired into in that proceeding. Why not by injunction as well? The sole difference between the pleadings under the two remedies would have been the prayer of the complaint. As filed, the prayer is that the defendants be restrained from moving their offices from Oysterville; in mandamus it would have been that they keep them at

Oysterville. The difference between the remedy by mandamus and the remedy by injunction would be so infinitesimal in such a case as this that I hold that all regard for the old formal technicalities should have been brushed aside, and the relief demanded by the facts alleged promptly applied.

The briefs of counsel state that the motion to dismiss was granted by the court below upon the ground that the plaintiff had a complete remedy by a direct appeal from the order declaring the county seat removed, wherefore the action would not lie. In treating of that disposition of the case it would be necessary to consider the law under which the order removing the county seat is made. By the general law governing elections in this state, (Gen. St. tit. 8, "Of Elections,") boards of county commissioners have nothing to do with general elections, except that they appoint the local election officers. Elections are called by the auditor, and the returns are made to him. The canvass is made by the auditor, the judge of probate of the county, and one other county officer, who is summoned to that duty by the auditor; and when the canvass has been made, and the canvassing officers have certified the result, it is the duty of the auditor to issue certificates of election to the candidates having the highest number of votes. The election returns remain in the custody of the auditor, and at no time reach that of the commissioners. The statute governing the removal of county seats (Gen. St. tit. 38, c. 3) provides that the board of county commissioners, upon the receipt of the proper petition, must, at the next general election of county officers, submit the question of removal to the electors of the county. Section 2459. No method is provided by the statute by which the order of the board submitting the question of removal is to be officially transmitted to the auditor who calls the election. But supposing that hiatus to be bridged over, and the election to be called, section 2462 reads as follows: "When the returns have been received and compared, and the results ascertained by the board, if three-fifths of the legal votes cast by those voting on the proposition are in favor of any particular place, the board must give notice of the result by posting notices thereof in all the election precincts of the county." Now, the language quoted above implies as plainly as language can that the board itself shall in some way pass upon the sufficiency of the vote, and here occurs the most serious difficulty in the matter, for we have seen that the election returns, including the poll books and the ballots, all rest finally with the county auditor, and no means is furnished by which the commissioners can acquire legal or official possession of them for any purpose. Therefore it is impossible to see how the board can, as required, either receive or compare the returns or ascertain the result. This matter seems to have been

entirely overlooked by the court in passing the act in question, and is therefore radically deficient. The act of February 2, 1888, providing for the present location of county seats, avoids this difficulty by providing that the vote cast at the election for the county seat should be certified and returned in the same manner as at general elections, and that the county auditor should return the result of such election to the county commissioners, who must meet and declare the result and enter it upon their records." Section 2454. This law furnishes the auditor with an official basis for the result, viz. the return of the result to the auditor; but the statute relating to the location of county seats furnishes no means of ascertaining the result of the election. At bar it appears from the state pleadings that the county commissioners have obtained the poll books, and pretended to canvass themselves,—a thing which is not of elections in no way authorized by the constitution. Probably this course was taken because the officers found nothing in the statute directing them how to proceed, and they resorted to the method under which the returns are made as a reasonable method. The statute governing elections do not depend upon any reasonable methods, but upon express provisions. That the method of canvassing by a particular board is not necessary is shown by the fact that the method is shown by the fact that the case now pending before this court. The board pursued the method of canvassing the county auditor to certify to the result made on the question of relocation of the county seat by the official canvass of the vote had been taken under the act of 1888. It is needless to say that none of these methods was provided for. Much has been said with a view to showing that, while an appeal from the order of the board might bring before the court the clerical of the proceedings taken, it would not by any means be a remedy sought to be arrived at. The act for the board is not authorized by the statute to enter into any election. The board has it any authority whatever to canvass ballots or poll books or certificates. For these reasons the appeal is dismissed. The remedy by appeal would have been an entirely inadequate remedy. Possibly the court, in granting the appeal, might have come to that, for the reason that the board of county commissioners is charged with the duty of canvassing election returns, and no time is furnished no means by which it can acquire the possession of the returns to investigate or consider the whole statute is rendered nugatory by the proceedings under it void. In granting the remedy by appeal would have been since the injunction would have

lowed such a finding; but the point does not seem to have been raised or suggested.

There only remains to consider the question whether a private citizen can interfere. The court says that he cannot, because he shows no interest in the subject-matter. Every case that I have cited holds to the contrary, and the reason of the thing is to the contrary. In this case it is shown by the complaint that the plaintiff has a large property interest in the former county seat. Moreover, the county is there possessed of property in the shape of county buildings, which are practically useless for any other purpose, and will have to be abandoned by the county. At the new county seat new buildings must be provided. All this must be at public expense, and plaintiff, as one of the taxpayers of the county, must help to pay the cost. Moreover, every citizen of a county has a personal interest in the location and place of business for the county officials with whom he has to deal. The courts do not hesitate, when a board of county commissioners, under the law, authorize the issuance of bonds, whether for the incurring of new indebtedness or for the funding of old, to inquire, at the petition of any citizen, into the legality of the election held for the authorization of bonds. This court has passed upon many such cases, and not a term passes that one or more of them is not before us covering either county or municipal bonds. The logic of this decision would be to deny the jurisdiction of this court in all such cases, and leave it wholly to the unbridled determination of purely ministerial officials to determine whether or not the law has been complied with. I cannot subscribe to any such doctrine, and believe that the adoption of it would be wholly mischievous and confusing. In *Todd v. Rustad*, 43 Minn. 500, 48 N. W. 73, the court said: "An action for a permanent injunction restraining the removal of a county seat, or the expenditure of public funds, or the creation, unlawfully, of public indebtedness for the erection of county buildings, may, however, be maintained on the ground of an entire absence of legal authority to do the acts complained of; as where the proceedings threatened are under a statute which is unconstitutional, and are wholly unauthorized and void. We see no reason why a citizen and taxpayer should not, in such case, have the same right to his remedy by injunction, in a proper case, to restrain the unlawful removal of county offices, as to his remedy by mandamus to compel their restoration to the county seat." The injunction was refused in that case only because the statute had provided a summary, adequate mode of procedure for contesting the regularity and validity of the election. To the same effect was *State v. Weld*, 39 Minn. 426, 40 N. W. 561. In the celebrated Wisconsin apportionment case, *State v. Cunningham*, (Wis.) 51 N. W. 724, cited and relied upon in the Michigan cases,

Pinney. J., after arguing that the apportionment by the legislature, under the direction of the constitution, was the exercise of legislative, rather than political, power, closed the question of the court's power to interfere in this language: "But if it is not strictly a legislative power,—if, as counsel contend, it is a mere act of political power,—upon what possible ground can it be maintained, in the face of the plain provisions of the constitution, by which it is limited and restrained, that the delegate, in the performance of his trust, becomes superior to his creator, and may transcend the terms of his commission, and disregard its conditions and limitations, and still his act be deemed valid and conclusive? To so hold would be to declare that the conditions and restraints placed by the constitution upon the exercise of its power, vital to the maintenance and preservation of a popular representative form of government, are only of optional obligation, and that the very guaranties of its perpetuity may be so wrested from their purpose and perverted as to become the speedy and certain instruments to subvert and destroy it. It is clear to my mind that the restraints and conditions annexed to the power abide with it, and, when disregarded, it is the right and duty of the court to declare the act void." Applying this principle to the case before us, I must dissent from the conclusion that the courts can apply no remedy to this confessed wrong.

HOYT, J., concura.

GODFREY v. MONROE et al. (No. 19,217.)
(Supreme Court of California. Feb. 6, 1894.)

ATTACHMENT—MORTGAGED PROPERTY.

E. conveyed land to H., in trust to sell, and from the proceeds pay E.'s debt to L. Thereafter H. conveyed it to L. by deed absolute, an agreement between E., H., and L. being executed at the same time, reciting that the property was conveyed to secure payment of an indebtedness of E. to L., and providing that, when it was paid by a sale of the land, L. should deed to E. the balance of the land. While the title was in this condition, the land was attached in an action against E. Before judgment was recovered in the action, E. deeded the land to plaintiff and L. quitclaimed it to E. Held, that title under execution sale in the attachment suit related back to the time of the attachment, E.'s interest as mortgagor being subject to attachment.

Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by Godfrey against Monroe and others. Judgment for defendants. Plaintiff appeals. Affirmed.

P. W. Dooner and E. H. Bentley, for appellant. Wells, Monroe & Lee, for respondents.

PATERSON, J. Action to quiet title. In September, 1886, Ellis, the owner of the land in controversy, by deed of trust conveyed the

land to Edward A. Hall, authorizing the latter to sell the property in said deed described, and out of the proceeds pay the indebtedness due from Ellis to the Los Angeles Improvement Company. On December 30, 1886, Hall executed and delivered to said improvement company a deed, grant, bargain, and sale in form, but, as a part of the same transaction, an agreement was entered into between Ellis, party of the first part, Hall, party of the second part, and the Los Angeles Improvement Company, party of the third part, the terms of which state that the party of the first part, by and with the consent of his trustee, to secure payment of an indebtedness amounting to the sum of \$11,866.55, evidenced by notes and orders, had caused to be conveyed to the third party the property described in the deed of trust of September 24, 1886. It was provided therein that as soon as said improvement company "shall have received their pay in full, as above stated, and shall be fully reimbursed for such payments as the said J. W. Ellis shall cause them to expend under his orders during the continuance of this contract, which sums shall be payable out of the receipts of the sale of said lands, then the Los Angeles Improvement Company shall deed to said J. W. Ellis the balance of the property remaining unsold." On April 25, 1887, the defendant J. P. Monroe, in an action against Ellis, caused an attachment to be levied upon the property in controversy. On September 29, 1887, Ellis conveyed the land to the plaintiff's grantor, and, on the day following, the Los Angeles Improvement Company executed and delivered to Ellis a quitclaim deed of the property. On October 12, 1887, the defendant Monroe recovered judgment against Ellis in the attachment suit, and a sale of the property upon execution followed in February, 1888.

It is claimed by appellant that the sale under the judgment recovered by the defendant against Ellis did not relate back to the time of the attachment, because, at the time said attachment was levied, the legal and equitable title of the property was in a trustee of Ellis; that an attachment can operate only upon the interest of a defendant at the time the attachment is levied, and not upon any interest he subsequently acquires in the property affected by it. Inasmuch, as under our Codes, any interest, legal or equitable, which a defendant has in lands is subject to attachment, (sections 683, 542, Code Civ. Proc.,) and notwithstanding the fact that every express trust in real property vests the whole estate in the trustees, subject only to the execution of the trust, the author thereof may prescribe to whom the real property to which the trust relates shall belong in the event of the failure or termination of the trust, and may transfer or devise such property, subject to the execution of the trust, it would seem that the contention of the appellant is unsound; but we do not deem it nec-

essary to consider the question discussed in the briefs, as to whether, after the execution and delivery of a deed of trust, the grantor retains any attachable interest. The deed from Hall to the Los Angeles Improvement Company and the agreement accompanying the same, constituted a mortgage with a power of sale; the transaction was consummated by a deed with a separate defeasance, authorizing the improvement company to sell so much of the land as might be necessary to pay the amount of the loan, interest, and charges, and to reconvey to Ellis the property remaining unsold. This form of security is no longer looked upon with disfavor and our statutes expressly authorize mortgages conferring the power of sale upon the mortgagee or other person. Civ. Code, § 292. The power given is merely a cumulative remedy, and does not in any way affect the right to foreclosure in chancery. *Combs v. Genella*, 22 Cal. 116. If there be no doubt as to whether an instrument was intended as a mortgage or a deed of trust, such doubt should be resolved in favor of a mortgage with the power of sale. The intervention of a trustee is not always, but generally, a serious inconvenience and a expense. "The mortgagor is apt to suppose that in placing the exercise of the power in the hands of a disinterested third party whose position in relation to it is merely that of a trustee, he secures for himself the protection of fair dealing. It generally happens, however, that the debtor has to pay for the services of a trustee whose disinterestedness is no more than that of the creditor himself. * * * This form of security has come into very general use in several states, and in Virginia and West Virginia, in particular, has come into universal use for securing debts upon real estate." 2 *West. Mortg.* §§ 1725, 1764, 1769, 1770. The defendant's title under the sheriff's deed, we conclude, relates back to the time of the levying of the attachment.

We see no merit in the claim that the property attached on the 25th of April is not the same property that was conveyed to plaintiff on the 29th of September. The only variance between the descriptions in the attachment proceedings and in the deed is in the reference as to the number or name of the block. The lots should have been described in the attachment proceedings as being in block D, instead of block 9; but upon reference to the map of Ellis' subdivision, which map was referred to in the conveyances, it appears to the court that nobody could have been misled. All the lots referred to in the attachment description are on the map. There is no block on the map which is known as "block 9." There are but two blocks on the map, namely, block T and block D. All the lots on the map in block T were levied on by the sheriff, and his return shows that all the property, outside of block D, was left of the property, outside of block D. All of the

n controversy fronted on Belmont avenue. The court did not err, therefore, in holding that the description in the return was sufficient to notify a purchaser of the lots, and to enable the sheriff to identify the same. Judgment and order affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

GOULD v. MONROE et al. (No. 19,218.)
Supreme Court of California. Feb. 6, 1894.)

Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.
Action by Gould against Monroe and others. Judgment for defendants. Plaintiff appeals. Affirmed.

P. W. Dooner and E. H. Bentley, for appellant. Wells, Monroe & Lee, for respondents.

PER CURIAM. On the authority of Godfrey v. Monroe, (this day filed,) 35 Pac. 761, the judgment and order are affirmed.

RASKIN v. ROBERTS et al. (No. 19,263.)
Supreme Court of California. Jan. 31, 1894.)

EXECUTORS—ACCOUNTING—APPEAL—REVIEW OF FINDINGS.

1. An appeal from a decree, not taken within a year from its entry, will be dismissed.

2. Where an executor stated in his petition or the probate of the will that a part of the estate consisted of a sum of money in his hands, and he died without rendering an account, a finding that such sum came into his hands while acting as executor is justified.

3. Where there is no specification in the statement on motion for a new trial that a finding of fact is not justified by the evidence, and counsel do not make that point, the question whether it is justified cannot be considered on appeal from an order denying a new trial.

4. The question whether a conclusion of law is supported by the findings of facts cannot be considered on appeal from an order denying a new trial.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Charles Raskin, administrator with the will annexed of Jean Leonis, deceased, against John Roberts and another, executors of Miguel Leonis, deceased. From an interlocutory decree for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Appeal from decree dismissed. Affirmed on appeal from order denying new trial.

S. M. White, Brosseau & Thomas, and John Roberts, for appellants. Reymert & Orfila and Wells, Munroe & Lee, for respondent.

VANCLIEF, C. Jean Leonis, plaintiff's testator, died March 6, 1888, leaving his last will, by which he gave and bequeathed to his son, Miguel Leonis, (defendant's testator,) all and singular, his property, "real, personal, and mixed, of whatsoever nature, and wheresoever the same may be, of which I

may be the owner, or of which I may be possessed, or of which I may be entitled to perfect the title thereto, at my death," and nominated said Miguel as the executor of said will, to act as such without bond. On April 16, 1888, the will was admitted to probate in the superior court of Los Angeles county, and said Miguel duly appointed executor thereof, and thereupon Miguel qualified as executor, and continued to act as such until September 20, 1889, when he died testate; and the defendants were appointed executors of his will on October 11, 1889, and on October 24, 1889, first published notice to the creditors of the estate of Miguel, and the term of 10 months within which claims against the estate should have been presented expired on August 24, 1890. On September 3, 1890, the plaintiff, Charles Raskin, was appointed administrator with the will annexed of the estate of Jean Leonis, to fill the vacancy caused by the death of Miguel Leonis, which vacancy had continued from the death of Miguel (September 20, 1889) until September 3, 1890. On September 23, 1890, the plaintiff presented to the executors of Miguel's estate the claim upon which this action is based, which is as follows:

"March 19, 1888. Estate of Miguel Leonis, deceased, to Charles Raskin, Adm'r of the estate of Jean Leonis, deceased, debtor:

To recover the sum of two thousand dollars, United States gold coin, with interest, from March 19, 1888, to date, at the rate of 7 per cent. per annum.....	\$2,350 00
Fifty head of cattle.....	1,000 00
	<hr/> \$3,350 00

"Said property having been intrusted to Miguel Leonis, deceased, by his brother, Jean Leonis, in his lifetime, and being part and parcel of the estate of Miguel Leonis, deceased."

This claim was rejected by the executors of Miguel on the day of its presentation, and thereafter this action was commenced.

The substance of the complaint, in addition to the facts above stated, is that the money and cattle described in the above claim came to the possession of Miguel Leonis, as executor of Jean Leonis, while he was acting as such, it being then the property of the estate of said Jean Leonis, and that he continued to hold the same in his possession, as such executor, in trust for the benefit of the estate of Jean Leonis, until his (Miguel's) death, and that neither Miguel nor his executors have accounted for or delivered said money and property, or any part thereof, to plaintiff, or to the probate court. The prayer of the complaint is that defendants be required to render an account of said money and cattle, and all other property of the estate of Jean Leonis which came into the possession of their testator, Miguel Leonis, and that plaintiff have judgment against them for the recovery of all such money and property as, upon such accounting, may be found to

belong to the estate of Jean Leonis, deceased. The defendants, by their answer, deny all allegations of the complaint relating to the property of the estate of Jean Leonis, and, as a further and separate defense, aver that plaintiff's alleged cause of action is barred by section 1493 of the Code of Civil Procedure. On August 27, 1891, the cause was brought to trial, and the respective parties introduced evidence touching the issues; and the court made written findings in favor of plaintiff, upon which it based the following interlocutory decree: "Wherefore, by reason of the law and the finding aforesaid, it is ordered and adjudged that the said defendants, John Roberts and George L. Mesnager, executors of the last will and testament of Miguel Leonis, deceased, do, within twenty (20) days after the filing of this decree, render to this court in this action a full, just, and true account of the property received by the said Miguel Leonis in his lifetime, as executor of the estate of Jean Leonis, deceased, and particularly of the sum of two thousand dollars, (\$2,000,) with interest thereon from the 19th day of March, 1888, at the rate of 7 per cent. per annum, received by the said Miguel Leonis as such executor of the estate of Jean Leonis, deceased, and that said defendants do, in said account, justly, fully, and truly account for all the dealings of the said Miguel Leonis, deceased, with the estate and property of the said Jean Leonis, deceased, including such items as may be claimed by the said defendants to have been paid out by the said Miguel Leonis, as such executor aforesaid, as expenses of administration, and for claims allowed and proven by creditors against the estate of the said Jean Leonis, deceased. It is further ordered, adjudged, and decreed that, when said account is filed as herein ordered and adjudged, that a day shall thereupon be set in this court for the hearing of the same, and that thereupon the said defendants shall fully, justly, and truly account to the said plaintiff for all of said property and matters aforesaid, and a settlement of said account be then had in this court, and that thereupon and thereafter a final decree shall be entered herein." The defendants have appealed from this interlocutory decree, and also from an order denying their motion for a new trial.

The appeal from the interlocutory decree should be dismissed; for, conceding that the decree was appealable, (which is, at least, questionable,) the appeal was not taken within a year after entry of the decree.

The appeal from the order denying a new trial was taken in time, but the only point made by appellants on this appeal is that the evidence is insufficient to justify that part of the sixth finding, "that there came to the possession of the said Miguel Leonis, as such executor aforesaid, and while he was acting as such," \$2,000 in money, "bearing interest," which was then and there "the property of the estate of said Jean Leonis," and that

said Miguel never rendered thereof to the probate court. The question whether a motion was proper before final judgment had not been raised, (*Harris v. R. Cal.* 394.) I think this finding of the evidence. In his petition for the will, Miguel stated that the estate left by Jean was \$2,000. "In the hands of Miguel Leonis," it appears that Miguel died without having rendered any account to the probate court.

The court found, as a conclusion of law, that the action "is not barred by the provisions of section 1493 of the Code of Civil Procedure." Conceding this to be a finding of the fact or facts, it is not an alleged bar, notwithstanding it may be a conclusion of law, yet the finding in the statement on motion for a new trial that it is not justified by the evidence, nor do counsel for appellant insist that it is not sustained by the evidence. Therefore, the question whether it is a finding of fact cannot be considered. Nor can the question whether it is supported, as a conclusion of law, be considered from the order. *Jenkins v. Mason*, 595; *Mason v. Austin*, 46 Cal. 54; *son v. Patterson*, 54 Cal. 54; *Eldred*, 73 Cal. 398, 15 Pac. 1. It has been held, even, that the error in a judgment on an insufficient finding cannot be corrected on appeal by denying a new trial. *Hellbrock*, 76 Cal. 8, 17 Pac. 932; *Shepherd*, 38 Cal. 74. I think the appellate court's order should be affirmed, that the order denying a new trial be affirmed.

We concur: SEARLS, C. J.

PER CURIAM. For the reasons stated in the foregoing opinion, it is ordered that the appeal from the interlocutory decree be dismissed, and the order denying a new trial be affirmed.

SMITH v. ELLIS et al. (Supreme Court of California.)

FRAUDULENT CONVEYANCES—CONVEYANCE—APPEAL.

The mere fact that the conveyance contradicts each other in its terms, will not warrant a reversal of the court's finding that the conveyance was fraudulent.

Commissioners' decision. Appeal from superior court, J. W. Towner, Judge.

Action by W. A. Smith against J. N. Ellis, Sr., to subject the property to the payment of judgments. Defendants. Plaintiff appeals.

Rehearing granted.

J. T. Houx, for appellant. J. W. Ballard, for respondents.

SEARLS, C. This is an action on the part of a judgment creditor of J. N. Ellis, Sr., to set aside as fraudulent a deed of conveyance of certain land in the county of Orange, executed by said J. N. Ellis, Sr., May 22, 1890, to his daughter M. E. Ellis, and to satisfy plaintiff's judgments out of said land. The defendants had judgment, from which, and from an order denying a new trial, as well as from an order denying a motion of plaintiff to amend his statement on motion for a new trial by inserting therein specifications as to insufficiency of evidence, etc., plaintiff appeals. For the purpose of disposing of the appeal, I shall assume the motion to amend the specifications of the insufficiency of the evidence as having been in fact allowed by the court. The testimony in the case was mainly that of the two defendants, father and daughter, and the two brothers of the latter, and the only question of any importance is, was it sufficient to support the findings? This question can be answered in this wise: If true, it was amply sufficient. There is sufficient contradiction in the testimony of the two defendants to awaken some suspicion as to their truthfulness in my mind. These contradictions may, however, arise largely from ignorance on the part of the witnesses, from a failure to comprehend questions, from forgetfulness, etc., and a judgment formed from an examination of the record cannot, in the very nature of things, be as satisfactory as one based upon a hearing of the witnesses in open court with ample opportunity to not only hear what they say, but to observe their manner, intelligence, apparent honesty, etc. With all these superior opportunities the court below evidently placed faith in their integrity, and by its findings negated all the charges of fraud. The findings are amply sufficient to support the judgment. I recommend that the judgment and orders appealed from be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

CALIFORNIA LOAN & TRUST CO. v.
HAMMELL. (No. 19,280.)

(Supreme Court of California. Feb. 6, 1894.)

MORTGAGES—PAYMENT—ASSIGNMENT.

When an agent holding for collection a note and mortgage to be delivered up when paid, with a release signed by his principal, assumes instead, on receiving payment, to assign them without recourse, no title in the mortgage passes to one with notice, who has agreed with the mortgagor to pay the debt, and taken other security for it.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by California Loan & Trust Company against James Hammell to foreclose a mortgage. Judgment for plaintiff. Defendant appeals. Reversed.

Guthrie & Guthrie, for appellant. Walter Bordwell, for respondent.

FITZGERALD, J. Action to foreclose a mortgage. Plaintiff had judgment, and defendant appeals. It appears that Cockens, who assumed to act as the agent of Robbins, the owner and holder of the note secured by the mortgage sought to be foreclosed in this action, in making the assignment thereof to plaintiff had no authority whatever to do so. The evidence shows that the note in question was delivered to him by Robbins for collection only, with directions that the mortgage, the release of which he had previously signed and acknowledged, should be delivered upon the payment of the note; that the note was thereafter presented by Cockens, after maturity, for payment, at the request of the maker, to one Avery, who thereupon paid the same for and at the request of plaintiff, in pursuance of an understanding to that effect between all parties. Cockens, however, instead of delivering the note and mortgage upon payment to him of the amount due thereon, as he had been directed by Robbins to do, and which was the limit of his authority, executed, as the pretended agent of Robbins, at the request of Avery, an assignment of the note without recourse to plaintiff. It further appears that Avery stated to Cockens at the time of the making of the assignment that they preferred taking an assignment of the note to paying it off and discharging the mortgage, as they wished to use it in a trade in which they were interested. Upon these facts, of which the plaintiff had due notice at and prior to the alleged assignment, it is clear that no title passed to it thereby. In addition to this, it is equally clear that the note was paid and the debt extinguished by the payment of the amount thereof as stated, which payment had theretofore been provided for and secured to plaintiff by the assignment to it for that purpose of the joint note and mortgage on other land executed by the maker of the note in question and his wife. Judgment and order reversed.

We concur: McFARLAND, J.; DE HAVEN, J.

LA FETRA v. GLEASON et al. (No. 19,204.)
(Supreme Court of California. Feb. 6, 1894.)

ACTION TO FORECLOSE MORTGAGE—SUMMONS AND COMPLAINT—SERVICE ON NONRESIDENT SUBSEQUENT LIENOR.

In an action to foreclose a mortgage as to a nonresident, whose interest in the mortgaged property is subject to the mortgage, personal service out of the state on such nonresi-

dent is sufficient, under Code Civ. Proc. § 413, which provides for service by publication on such a nonresident defendant, and that "personal service of a copy of the summons and complaint out of the state is equivalent to publication."

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Tylee W. La Fetra against Nellie H. Gleason, Charles Ingles, and others to foreclose a mortgage. From a judgment for plaintiff, and an order refusing to set aside a default and allow him to answer, defendant Ingles appeals. Affirmed.

R. Dunnigan and E. H. Bentley, for appellant. S. C. Hubbell, for respondent.

McFARLAND, J. This action was brought to foreclose a mortgage executed by defendant Gleason to plaintiff upon certain land in California. The defendant Charles Ingles and a number of other persons were made parties defendant upon the general averment that they claim to have some interest in the mortgaged premises, which interest is averred to be subsequent and subject to the lien of said mortgage. Judgment by default was rendered against all of the defendants, and a decree of foreclosure entered in favor of plaintiff. Defendant Ingles appeals from the judgment. He also appeals from an order denying his motion to set aside his default, and to be allowed to answer.

The appeal from the judgment is based entirely upon the judgment roll, no facts aliunde the record being shown. Practically therefore, appellant is in the same position as one attacking a judgment collaterally; that is, he contends that the judgment roll does not show jurisdiction. The default of appellant was regularly entered, and the court found specially in the decree that he was duly served and made default. This finding (no facts appearing aliunde) is conclusive, unless there is something in some other part of the judgment roll which overcomes or contradicts it. Now, the only other thing in the record on the subject of service is an affidavit annexed to the returned summons, made by one J. L. Dawson, in which he swears that he is over 21 years old, not a party to the action, etc., and that he served the summons personally on appellant by giving him a copy thereof, together with a copy of the complaint, etc., on a certain day, in Clinton county, in the state of Missouri. Appellant contends that this affidavit shows a want of jurisdiction, but we do not think so. It must be borne in mind that the action, as against appellant, is not in personam, but a direct proceeding to reach and affect an interest of appellant in property within this state; in other words, the action is in the nature of a proceeding in rem. In the leading case of *Pennoyer v. Neff*, 95 U. S. 714, the supreme court of the United States holds that while the courts

of a state cannot acquire jurisdiction over a judgment in personam resident without personal service within the state, still they may, for service, subject property of the defendant found within the state to the claims of her citizens, and maintain thereon a direct proceeding to foreclose that purpose, as by attaching the property to enforce the lien of a mortgage; such a case the procedure is in rem property, and is, in its nature, a proceeding strictly in rem property, is not necessary; but a statement that, in such a proceeding, no ruling must be given, in a proceeding to persons claiming interests in the property and in such event the method followed. In this state the statement that, in such a case, summons on a nonresident by publication is an order of court based on affidavit; and it also provides that if publication is ordered, personal service of a copy of the summons and complaint on the state is equivalent to publication. Code Civ. Proc. § 413. But the order for publication are no part of the judgment roll (*Estate of Newman*, 16 Pac. 887;) and of course they do not appear in the record which is to be brought here, and over which the court had no control. Therefore, as the finding in the judgment roll in the finding by the court of summons, and as appellant further on the subject, we will support of the judgment, the judgment was based upon service made of the statute. The judgment therefore be affirmed.

With respect to the appeal refusing to grant the motion to set aside the default and allow appellant to answer, it would be sufficient to say that the exceptions on the subject matter of such a motion was made and are some affidavits and other matters printed in the latter part of the transcript, but they are not in the record, nor are they in any way made part of the record. If, therefore, could be considered, they are not for holding that the court abused its discretion in denying the motion. The order appealed from are

We concur: DE HAVEN,
ALD, J.

McCARTNEY v. DENNISON
304.)

(Supreme Court of California.)

DEED—DESCRIPTION—FORECLOSURE

1. There is no objection to the phrase, "the south one-fourth," "10 acres," of a government sub-

2. A description in a foreclosure decree need not follow that of the complaint in terms, so it show the same land.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Nora McCartney against Lucius Dennison and others to foreclose a mortgage. Judgment for plaintiff. Defendants appeal. Affirmed.

E. C. Bower, for appellants. D. K. Trask, for respondent.

McFARLAND, J. This was an action to foreclose a mortgage, and defendants appeal from a judgment in favor of plaintiff. The appeal is taken upon the judgment roll alone, which shows merely the complaint, demurrer thereto, and the judgment. The only point made is that the description of the mortgaged premises in the decree is different from that set forth in the complaint. The description in the complaint, after giving the county and state, is as follows: "The south one-fourth ($\frac{1}{4}$) of the east one-half ($\frac{1}{2}$) of the north one-half ($\frac{1}{2}$) of the northeast one-fourth ($\frac{1}{4}$) of section 18" of a certain township and range, "containing ten (10) acres of land; also the six (6) acres of land having the same length east and west, being of uniform width north and south, and lying immediately south of and adjoining said first above described parcel; the whole parcel contained in both said descriptions being eighty rods in length from east to west, and thirty-two rods in width from north to south." The description in the decree is as follows: "The south 10 acres of the northeast quarter of the northeast quarter, and the north 6 acres of the southeast quarter of the northeast quarter, of section eighteen (18)" of the same township and range as stated in the complaint. These two descriptions describe exactly the same piece of land. The only plausible objection that can be made to the descriptions is that such terms as "south one-fourth" and "south 10 acres" are not usually applied, in United States government surveys, to legal subdivisions. Under that system, "quarter" is used to designate a square piece of land, as the "south-east" or the "north-east" quarter. But, while the description in question is not ordinarily used by the government in patents of land, there is no reason why it is not sufficient in conveyances between private persons. The south quarter of a piece of land bounded by parallel lines running north and south and east and west may be ascertained as well as the south half, which is used as a government subdivision. If the land, the south quarter of which is covered by the mortgage, had been a city lot, or some other tract of land that had never been known as a government legal subdivision, we apprehend that no one would have questioned the sufficiency of the description; but the fact that the

whole piece of which the south quarter is conveyed happens to have been a government subdivision can make no difference. The description is clearly not void for uncertainty. Appellant's assertion that "the description in the decree should follow the complaint" means only that the land described in the decree should be the same as that described in the complaint. Judgment affirmed.

We concur: DE HAVEN, J; FITZGERALD, J.

FREEMAN v. KIEFER.

KIEFER v. FREEMAN et al. (No. 19,259.) (Supreme Court of California. Feb. 6, 1894.) EQUITY — RESCISSION OF CONTRACT — FRAUD OF AGENT — LIABILITY OF PRINCIPAL — PARTIES — COSTS.

1. A land company, as plaintiff's agent, induced defendant by fraud to contract to purchase land, and then assigned the contract to plaintiff, who accepted the benefit thereof. *Held*, that plaintiff was, on rescission, liable to refund all money which he had received from defendant under the contract.

2. Defendant, in rescinding such contract, properly offered to convey all his title in the land under the contract to plaintiff, who was the legal holder of the contract, and for whose benefit it was made.

3. The land company was a proper, though not a necessary, party to defendant's action to rescind the contract.

Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by Freeman against Kiefer on a contract for the sale of land, and cross action by Kiefer against Freeman and the Centinela-Inglewood Land Company to rescind the contract. From a judgment for Kiefer, the company and Freeman appeal. Affirmed.

Geo. I. Cochran, Henry Bleeker, and A. M. Stephens, for appellants. J. L. Murphey, for respondent.

PER CURIAM. The pleadings and findings in this case are voluminous, and we do not deem it necessary to make any particular statement of the matters alleged and found. In our opinion the findings are sufficient to sustain the judgment. While there was some delay on the part of the defendant in rescinding the contract made by her with the Centinela-Inglewood Land Company, we cannot say the delay was unreasonable, and such as to deprive her of the right of rescission under the circumstances shown by the findings; nor can the efforts or willingness on her part to effect a settlement of the controversy between her and the plaintiff growing out of the contract be considered as a waiver of her right to now insist upon its rescission. The Centinela-Inglewood Land Company was simply the agent of the plaintiff in making the contract with defendant for the sale of the land; and the plaintiff, having accepted the benefit of the contract, as well as an assignment thereof from his

agent, is equally responsible with the agent for any fraudulent representations which induced it, and is liable to refund to defendant the money which she has paid under the contract, and which has come into the hands of the plaintiff. The plaintiff being the legal holder of the contract made by defendant with the Centinela-Inglewood Land Company, as well as the party for whose benefit it was made, the defendant properly offered to convey to him all her right, title, and interest in the land described, and vesting in her by that contract. The Centinela-Inglewood Land Company was a proper, although not a necessary, party to this action, and the court did not err in giving judgment against it for costs. Judgment and order affirmed.

MERRILL v. MERRILL. (No. 19,223.)¹
(Supreme Court of California. Jan. 26, 1894.)

VENDOR AND PURCHASER — RESCISSION BY VENDOR—LIEN OF VENDEE FOR PURCHASE MONEY.

The vendor of land placed the deed in escrow under a condition that, in case of the vendee's default in making payments, the sums paid should be forfeited, and the deed delivered to the vendor. The vendee defaulted, and the vendor obtained the deed. Held that, where the vendee recovered judgment in an action for the purchase money paid, she was not entitled to a lien on the land, under Civ. Code, § 3050, which provides that one who pays to the owner any part of the price of land, under a contract of sale, has a special lien on it, independent of possession, for such part as he may be entitled to recover back "in case of failure of consideration."

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by Mattie H. Merrill against F. H. Merrill to recover money paid under a contract for the purchase of land, in which there was a judgment for plaintiff. From a refusal of the court to allow her a lien on the land, plaintiff appeals. Affirmed.

John D. Pope, for appellant. R. Dunningan, J. M. Voss, and W. H. Henning, for respondent.

TEMPLE, C. This is an appeal upon the judgment roll, in which the plaintiff contends that she was not awarded all the relief to which she is entitled upon the pleadings and findings. It is the second appeal in the case. The first appeal was from a judgment on demurrer, and is reported 95 Cal. 334, 30 Pac. 542, where the nature of the contract upon which action is based is fully shown. Plaintiff recovered judgment for the money she had paid upon the contract of purchase, but was not allowed a vendor's lien upon the land. She now insists that the pleadings and findings, taken together, show that she is entitled to such lien, and she asks that the judgment be corrected or modified in accordance with her claim. In pursuance of the contract of purchase, the defendant, who is

the vendor, executed a deed, which was placed in escrow, under the condition that "in case of default in the payment of the sums of money as herein named, . . . then said sums of money are to be considered forfeited," and the deed was to be delivered to the vendor. After paying \$3000 plaintiff made default in the payment of an installment, and thereupon the vendor demanded and obtained the deed, and denied the right of plaintiff to purchase. Apparently the court denied the lien on the ground that the rescission was claimed by defendant because of the default of plaintiff.

Plaintiff relies upon section 3050, Civ. Code, which reads as follows: "One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back in case of a failure of consideration." She claims that when defendant withdrew the escrow deed, and denied her right to the conveyance, he thereby rescinded the contract, and that such rescission was a failure of the consideration; therefore she is entitled to the lien under the statute. For the proposition that it is a failure of consideration she relies upon the case of *Glassell v. Coleman*, 94 Cal. 261, 29 Pac. 508. In that case the court said: "Upon the election of the plaintiff to rescind the contract by declaring a forfeiture by Wilson of all his rights under the contract, the contract itself, and each of its provisions or terms ceased to be a subsisting or enforceable obligation against Wilson. The only right of action against him then remaining to the plaintiff was for damages for his breach of the contract. The plaintiff could not have a right of action on the contract and at the same time one for its breach. An action for damages for breach of a contract necessarily implies that the contract has been terminated, . . . and the forfeiture of his right to the land wrought an entire failure of the consideration for his promise to pay for the land." This language must be taken in connection with the facts of the case under consideration. In that case the vendor had notified the vendee that he had forfeited all rights under the contract. The vendor had then brought an action to recover \$50,000 damages for the breach of the contract on the part of Wilson. Practically, the case before the court was one to compel Wilson to pay the other installments of the purchase money after this forfeiture. It was said that plaintiff could not recover his damage and the purchase money also. When he availed himself of his privilege of forfeiting the right of the purchaser under the contract there was no consideration to support the promise to pay, and it could not be enforced. It is true when one sues to recover damages for a complete failure to perform a covenant, he is not bound to show performance of that covenant.

¹ Rehearing granted.

he has elected to take damages in lieu of performance, but I doubt whether it be correct to say that by bringing such action he rescinds the contract. Certainly it is not such a rescission as extinguishes the obligation. On the contrary, as said in *Wainwright v. Weske*, 82 Cal. 193, 23 Pac. 12, by such action he affirms the contract, and bases his right upon it. His recovery may be quite another thing from what he would be entitled to if he elected to rescind; and then he is not compelled to place the other party in statu quo, and his suit does not authorize the adverse party to recover everything of value paid by him. Often a party cannot rescind, but is remitted to his action for damages, because he cannot restore the other party to the condition he would have been in but for the contract. And, again, damages are often stipulated for in a contract, and may be recovered according to its terms. Bishop on Contracts states this doctrine very briefly: "Where a contract requires successive steps to be taken by the respective parties, if, when a step becomes due, the party, either in words or by their equivalent in acts, declines to take it, or is unable, while the other is ready and willing to do his part, the latter may rescind the contract; or, if he chooses, he can sue for the breach. He cannot do both." Bish. Cont. § 827. And again, section 842: "After a contract has been broken, whether by an inability to perform it, by a rescinding against right, or otherwise, the party not in fault may sue the other for the damages suffered; or, if the parties can be placed in statu quo, he may, should he prefer, return what he has received, and recover in a suit the value of what he has paid or done. The pursuing of the latter alternative is called 'rescission.'" It will be seen that, when a breach of the contract has occurred, the party is often put to his election whether he will rescind or sue for damages; and sometimes he cannot rescind, but must sue for damages, because he cannot place the other party in statu quo. Now, both of these courses would so far end the contract that the party suing can no longer insist upon a performance of that covenant for the breach of which he has claimed damages. Both cannot properly be called "rescission;" or, if they can, it must follow that rescission, effected by suing to recover damages for a breach, does not require that the parties shall be placed in statu quo, or authorize a recovery, by the party in the wrong, of money paid.

Plaintiff (appellant here) contends that when defendant withdrew the escrow deed, and denied the rights of plaintiff under the contract, he, by his own act, rescinded the contract, and caused a failure of consideration. I do not understand this to be the effect of a rescission of a contract when the rescission extinguishes the obligation. The consideration of the contract has not failed; the contract has simply ceased to exist. Con-

ceding a subsisting contract, and the consideration is ample. Nor do I think it was held in any of the cases cited that a rescission was effected simply by the act of a vendor in claiming a forfeiture. In some of the cases the contract provided that the vendor might rescind upon default of the vendee. In such cases the rescission is by consent of the parties. In others it seems to be held that when the vendor refuses further performance, and claims the damages according to the contract, he abandons the contract, and thereupon the vendee may also abandon it, and reclaim his money. Whether the conclusion be correct or not is not a question here. Unless the rescission is by consent, it is difficult to understand how it has been brought about; for, as respondent justly says, it is, in effect, enacted in section 1691, Civ. Code, that rescission cannot be otherwise effected without a compliance with that section. The idea must be that the abandonment of the contract by the vendor is equivalent to a claim of rescission on his part which may be acquiesced in by the vendee. In *Cleary v. Folger*, 24 Pac. 280, it was simply held that the vendor was also in default, in that he did not tender a deed on the very day it was due on the contract. Both being in default, either could treat the contract as rescinded. It was not here held that when a vendor refuses to complete performance because of a breach on the part of the vendor, and claims damages as stipulated in the contract, he thereby rescinds or consents to a rescission. It has been said in several cases that this doctrine was announced in *Drew v. Pedlar*, 87 Cal. 449, 25 Pac. 749. Perhaps it does so hold, but such conclusion seems to be based in that case partly upon the pleadings, in which both parties recognized the fact of a rescission. In other words, it was a rescission by mutual consent. *Phelps v. Brown*, 95 Cal. 572, 30 Pac. 774, was a suit against a broker who held money deposited by a vendee as a forfeit. It was held that, the parties having rescinded the contract, the broker could not hold the money. There was an actual rescission in that case, and no question was raised which required a discussion showing how a rescission was brought about.

Appellant's judgment is based upon the proposition that the contract had been extinguished by rescission. That could only have been accomplished with her consent, or because of her wrongful act. There was no claim that the consideration had failed, or that a rescission had been had or was sought upon that ground. This cannot be the failure of consideration contemplated in Civ. Code, § 3050. That was intended to secure a party from injury through the wrong or inability to perform of the other party. If the vendee did do himself the injury, he is not injured in the eye of the law. He cannot acquire an equity based upon his own wrong. The Civil Code, in general, was intended to announce rules of law already declared by

the courts. This presumption is not of such force as to control the language of the statute, but in all cases of doubt that construction should be preferred which accords with known rules. In equity a vendee had a lien when in possession under a contract if the consideration failed. It was the counterpart of the lien given to the vendor, and the rule in equity is that no such lien exists in favor of one who is in default. One who has himself abandoned the contract, or has refused to perform it according to its terms, is not afforded a lien to secure him from loss because of his own breach of the contract. 3 Pom. Eq. Jur. § 1260, and note. I think the judgment should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

SYMONS v. BUNNELL et al. (No. 18,178.)
(Supreme Court of California. Jan. 31, 1894.)

APPEAL—ORDERS.

1. An order striking a statement on motion for new trial is a special order after judgment, within the provision requiring appeals therefrom within 60 days from date.

2. No appeal lies from an order refusing to vacate an appealable order.

Department 2. Appeal from superior court, Tuolumne county; Joseph H. Budd, Judge.

Action by William Symons against E. F. Bunnell and others. From three orders, defendants appeal. Two appeals dismissed. One order affirmed.

Moses G. Cobb and J. B. Curtain, for appellants. F. D. Nicol, for respondent.

DE HAVEN, J. The order of September 16, 1891, striking the appellants' statement on motion for a new trial from the files, is a special order made after judgment, and the appeal therefrom, not having been taken within 60 days from its date, must be dismissed. Sutton v. Symons, 97 Cal. 475, 32 Pac. 588. The order referred to being itself an appealable order, (Calderwood v. Peyser, 42 Cal. 113; Clark v. Crane, 57 Cal. 633,) no appeal lies from the order refusing to vacate it, and the appeal from this latter order must also be dismissed. In the absence of the statement, the motion for a new trial was properly denied. Sutton v. Symons, 32 Pac. 588. Order denying the motion for a new trial affirmed. The appeals from the order of September 16, 1891, striking the statement from the files, and from the order refusing to vacate the same, are dismissed.

We concur: McFARLAND, J.; FITZGERALD, J.

GALLAGHER v. MONTECITO
TER CO. (No. 19,311)

(Supreme Court of California.)

WATERS AND WATER COURSES—RIGHT TO
WATER—TITLE BY PRESCRIPTION—
USE.

1. Where defendant and its predecessor in title diverted the waters of a stream from plaintiff's land bordered, at a point above plaintiff's land, and for many years prior to plaintiff's action, defendant's diversion used the same openly, to plaintiff and all others, it must be held to have acquired a prescriptive right to the diversion complained of.

2. The fact that defendant's diversion was at a point of diversion, and applied the waters to a use different from that for which the waters were diverted by its predecessor, furnishes no defense for complaint to plaintiff, if his injury thereby.

Department 2. Appeal from superior court, Santa Barbara county; W. B. C. Judge.

Action by Gallagher against Montecito Valley Water Company. From judgment for defendant, and costs, appeal. Affirmed.

W. C. Stratton, for appellant. J. H. Field and Richards & Carrier, for defendant.

DE HAVEN, J. The plaintiff's land bordered on the Cold Spring of Montecito creek, and this stream was brought for the purpose of rearing the defendant from diverting the waters of the stream. The defendant is a corporation organized under the laws of this state for the purpose of supplying water to the inhabitants of a portion of Santa Barbara county, and in its answer alleged that on January 14, 1888, John W. Coe had acquired a prescriptive right to divert the waters of the Cold Spring of Montecito creek to the extent of the defendant's diversion, and were then entitled to that right, and that on January 14, 1888, the defendant recovered a judgment against John and John W. Coe, condemning them to rights in said water; and for a period of more than ten years before said 14th day of January, 1888, said John Coe diverted to his beneficial purposes, from said stream, and used and enjoyed for beneficial purposes the waters thereof, to an amount equal to the quantity diverted by defendant, under claim of right and

uously, openly, notoriously, peaceably, uninterruptedly, and adversely to the plaintiff and to all other persons, and with the knowledge and acquiescence of plaintiff and his predecessors in interest; that a portion of the water so diverted and used by said John Coe was diverted and used upon land bordering on said Cold Spring branch." The court further found that such diversion was continued by the defendant after the judgment condemning the right of the Coes in and to the waters diverted, and that "the defendant and its predecessors in title aforesaid have diverted to their own use from said stream, for beneficial purposes, the water so condemned, as aforesaid, to the extent of the capacity of the box and pipes alleged in the complaint to have been used by defendant for diverting said water, and have used and enjoyed the same for beneficial purposes, continuously, openly, notoriously, uninterruptedly, peaceably, and adversely to the plaintiff and to all other persons, for the period of more than five years next before the commencement of this action." The court also found "that the plaintiff's cause of action is barred by the provisions of section 318 of the Code of Civil Procedure of this state."

It is claimed by plaintiff that these findings are not sufficient to show that defendant has acquired a prescriptive right to continue the diversion complained of. It seems to us, however, that the particular findings above quoted, to say nothing of the general finding to the effect that plaintiff's cause of action is barred by section 318 of the Code of Civil Procedure, are alone sufficient to show a good prescriptive title in defendant to the water in controversy, under the law as declared by this court in *Davis v. Gale*, 32 Cal. 27; *Water Co. v. Crary*, 25 Cal. 504; *Water Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379. It is urged by plaintiff that as Coe was a riparian owner, and the diversion was made upon riparian land, and the water diverted used upon such land, and the court having also found "that a portion of the waters of said Cold Spring branch of Montecito creek was used by plaintiff and his predecessors in title, for lawful purposes, for a period of more than ten years next before the time of the diversion mentioned in the amended complaint, and also since said diversions were made," the findings, when taken together, do not show such an invasion of the rights of plaintiff as would have entitled him to maintain an action therefor because of such diversion and use of the water by Coe, as plaintiff may at all times have had sufficient water flowing by his land for the proper use and enjoyment thereof; and the cases of *Ditch Co. v. Crane*, 80 Cal. 181, 22 Pac. 76; *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 186,—are cited to sustain this contention. These cases are not in point. In the first one cited, the defendant's ditch was above that of plain-

tiff, and the court held that a finding to the effect that plaintiff had diverted the water from the stream for more than five years prior to the commencement of the action, adversely to the whole world, the water so diverted being sufficient to fill the ditch of plaintiff "whenever there was water in the stream to fill it," could not, in the nature of things, show a diversion adversely to the defendant, as no right of his could possibly have been affected by such acts of the plaintiff, while in the case at bar defendant's diversion was at a point on the stream above the land of plaintiff. In the case of *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185, the court simply held that the diversion of water by one riparian owner for use upon riparian land could not be adverse to the rights of a lower proprietor along the stream, so long as there was left flowing in the stream an abundance of water to supply the present and prospective riparian wants and uses of the lower proprietor; but the facts as found by the court here do not bring this case within the rule there declared. The special finding above quoted, and upon which plaintiff relies, is not inconsistent with an adverse user of the water of the stream by defendant and its predecessors, and certainly is not so when it is read in connection with the special findings that Coe, the predecessor of defendant, had become entitled "by prescriptive use and enjoyment of a portion of the waters of the Cold Spring branch of Montecito creek, exceeding in quantity and amount the quantity of said waters diverted by defendant," "and that defendant has not at any time taken or diverted any of the waters of said stream in excess of the quantity so condemned to its use." The special findings do not show that defendant's present diversion and user of the waters in controversy are any more injurious to the riparian rights of plaintiff and other lower proprietors than when the diversion was commenced. On the contrary, it is clear that, as no more water is diverted now than at the commencement, if the present diversion is an infringement upon the equal right of plaintiff to the enjoyment of the water naturally flowing in the stream, it has always been so; and as the diversion was exercised under a claim of right, and in open hostility to the plaintiff, it has ripened into a prescriptive title.

The further point is made that the evidence does not support the findings, but we think the evidence is such that we would not be warranted in reversing the judgment upon this ground. It is shown that defendant has changed the point of diversion, and applied the waters to a use different from that for which they were diverted by its predecessor; but, as the rights of plaintiff do not seem to be injuriously affected by such change, he has no cause for complaint. It seems to be settled that one entitled to the use of water "may change the place of di-

version, or the place where it is used, or the use to which it was first applied, if others are not injured by such change." *Ramelli v. Irish*, 96 Cal. 214, 31 Pac. 41, and cases there cited. We discover no error for which the judgment should be reversed. Judgment and order affirmed.

We concur: **McFARLAND, J.; FITZGERALD, J.**

BANNING v. MARLEAU. (No. 19,207.)
(Supreme Court of California. Feb. 6, 1894.)

REPLEVIN—ANSWER—FINDINGS—VALIDITY OF SALE.

1. Under Code Civ. Proc. §§ 627, 667, providing for a judgment for the return of the property or its value if it be in plaintiff's possession, and defendant, in his answer, claim a return thereof, such judgment cannot stand where the answer fails to make the appropriate demand.

2. Plaintiff showed a written bill of sale (such as, under Civ. Code, §§ 1053-1057, vests title on delivery) of the property from H. to her, of date long before defendant's seizure. The court found that, at the date of such seizure, plaintiff was not the owner and entitled to possession; that defendant did not wrongfully come into possession of and detain the property; that H. was the owner and in possession of it, and defendant, a constable, seized it under certain attachments against H. Held bad, as not determining whether plaintiff was in no sense the owner, or whether H.'s sale to her, for want of change of possession, (Id. § 3340,) was void as against his creditors, or, if the latter, that the attachment plaintiffs were his creditors, within the protection of said section.

3. On the question whether a change of possession of an interest in cattle is good as against the seller's creditors, (Civ. Code, § 3340,) the fact must be considered that the buyer was the owner and in possession of the land where the cattle always grazed, and where some of them had been bred.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Replevin by Mary H. Banning against W. F. Marleau. Judgment for defendant. Plaintiff appeals. Reversed.

W. S. Wright, for appellant. Dupuy & Dunnigan, for respondent.

McFARLAND, J. This is an action to recover certain personal property, or its value. Judgment went for defendant, and plaintiff appeals from the judgment upon the judgment roll and a bill of exceptions. The court found that "the plaintiff is now in possession of said above-described property;" and the entire judgment is that "the defendant, W. F. Marleau, to have and recover of and from Mary H. Banning, the plaintiff herein, the following personal property, viz. [describing it,] and that said property be returned by plaintiff to defendant, or the value thereof, being the sum of six hundred dollars, in case a return cannot be had, be paid by plaintiff to defendant, together with costs and disbursements." But there is no prayer,

claim, or demand of any kind in the answer for a return of the property or its value; and, this being so, the judgment for its return cannot stand. Code Civ. Proc. § 627. *Gould v. Scannell*, 13 Cal. 431; *Pico v. H.*, 56 Cal. 459. It cannot be reasonably expected that, for the purposes of this case, we should ignore the statute, and overrule former decisions. We might, no doubt, demand the cause, with directions to direct the judgment into one which would single out the costs to defendant; but, as we are entirely satisfied with the case in other respects, we think that the ends of justice require a new trial.

Plaintiff claims ownership of the property sued for, consisting mostly of certain stock on a ranch; and defendant, a constable, took it as the property of one Hannon under two writs of attachment issued by justice of the peace. The findings on the main issues are merely "that on the 30th of November, 1891, in Los Angeles county, the plaintiff was not, nor has she at any time since said date been, the owner of the property entitled to the possession of the property described in the complaint; that the defendant herein, on said date, in Los Angeles county, did not wrongfully come into possession of said property," and does not wrongfully detain the same; and "that on the 30th of November, 1891, Joseph Hannon was owner and in possession of the property above described, and on said date the defendant, a constable in said county, seized said property by virtue of two writs of attachment against said Hannon, one in favor of W. H. Harbell, the other in favor of F. Hardy, aggregating the sum of \$578. The writs were duly issued by W. A. Gaines, justice of the peace of said county." The findings are not specific enough to show upon what theory the case was decided; that is, whether it was upon the theory that plaintiff was not the owner of the property in any sense, or upon the theory that the sale of said property by Hannon to plaintiff was void as against creditors, for want of change of possession, and an immediate and continued detention of possession, under section 3440, Civ. Code. If the findings mean that, as between plaintiff and Hannon, the latter was, and the former was not, the owner of the property at the time of the attachment, then the judgment is not supported by the evidence; for it appears that Hannon before that time sold whatever interest he had in the property to plaintiff, and had given her a bill of sale in transfer of the same, which passed title under Civ. Code, §§ 1063-1057. If, on the other hand, it was meant that the sale was rendered invalid by such possession as would make it void as against creditors of Hannon, it should have been found that the attaching writs were such creditors; and it was sufficient to merely find that the property was seized under certain writs of attachment. *Serey v. Adkinson*, 34 Cal. 11.

another trial the findings on these points can be made fuller and clearer.

The main question in the case seems to be whether there was a sufficient change of possession of the property from Hannon to plaintiff. The property consisted mostly of live stock on a ranch owned at one time by plaintiff and Hannon jointly, but owned exclusively by plaintiff for some years prior to the attachments. As to some of this property there is a conflict of evidence as to whether Hannon ever owned any interest in it, and as to the balance there is a conflict as to whether he ever owned anything more than an undivided interest therein. Whatever interest he had in any or all of it he had sold and transferred to plaintiff, by a written instrument, long before the attachment. He had acted for plaintiff at various times as a sort of general superintendent of the ranch; and, at the time of the attachment, had a cropping contract, which included part of the land. Plaintiff had other stock on the ranch belonging to her alone. In determining, therefore, whether there was a sufficient delivery and change of possession from Hannon to plaintiff of whatever interest he had in the property attached, due importance should be given to the fact that plaintiff was he owner and in possession (if such was the fact) of the land on which the stock always grazed, and on which some of it was bred and raised. *Morgan v. Miller*, 62 Cal. 492; *Hogan v. Cowell*, 73 Cal. 211, 14 Pac. 780. Defendant should be allowed to amend his answer so as to ask therein for a return of the property. The judgment is reversed, and cause remanded for a new trial.

We concur: DE HAVEN, J.; FITZGERALD, J.

YOUNG v. TRIERWEILER. (No. 19,373.) Supreme Court of California. Jan. 31, 1894.) Department 2. Appeal from superior court, Los Angeles county.

Action by Peter Young against Adam Trierweiler. Judgment for plaintiff. Defendant appeals. Appeal dismissed.

J. Marion Brooks and Moyle G. Norton, for appellant. Hughes & Garrison, for respondent.

PER CURIAM. Respondent moves the court to dismiss the appeal, and also to impose damages for delay, etc. The appeal is dismissed, but without damages.

McPHAIL v. FORNEY et al. Supreme Court of Wyoming. Feb. 15, 1894.) IRRIGATING DITCH—ENJOINING USE—PLEADING AND PROOF.

The board of control fixed the amount of water which a ditching company should take

from a certain creek, and described the land to be irrigated by such water; and the ditching company deeded to plaintiffs a four-fifths interest in the ditch and "the water therein contained," and a one-fifth interest to defendant. Held, that plaintiffs were entitled to enjoin defendant from diverting more than one-fifth of the water from the ditch, though he owned more than one-fifth of the land to be irrigated thereby, where he failed to show what water was actually and rightfully being used on his land when he acquired title, or that plaintiffs acquired their water rights after he had acquired title to his land.

Error to district court, Carbon county; Jesse Knight, Judge.

Action by William G. Forney individually and as administrator of Mollie Forney, deceased, and Jane P. Dillard, to enjoin Donald McPhail from diverting for irrigating purposes more than one-fifth of the water in the ditch of the Forney Ditching Company. From a judgment for plaintiffs, defendant brings error. Affirmed.

Craig & Chatterton, for plaintiff in error. McMicken & Blydenburgh, for defendants in error.

CONAWAY, J. It is alleged in the pleadings by the parties to this action, both plaintiffs and defendant, that defendants in error own a four-fifths interest in the irrigating ditch known as the "Forney Ditching Company's Ditch," and that plaintiff in error owns a one-fifth interest in the same ditch. Plaintiff in error, however, claims the right to divert from said ditch and use more than one-fifth of the water carried by it. The parties, plaintiffs and defendant, both claim under an order of the board of control, dated March 24, 1892, determining and establishing in the Forney Ditch Company a right by two appropriations to 6.28 feet per second of time of the waters of Jack creek, and describing the lands to be irrigated by this water. The parties to this suit now own the ditch in the proportions stated, derailing their respective titles from the Forney Ditching Company by deeds purporting to convey to them their respective interests in the ditch and "the water therein contained." As held in the case of *Frank v. Hicks*, (decided at the present term,) 35 Pac. 475, a right to the use of water for purposes of irrigation, together with the ditch or other conduit for the water, may be conveyed separate from the land upon which the water is used. It seems that this is what has been done with the water right involved in this action. Plaintiff in error claims the right to divert and use more than one-fifth of the water carried by the ditch in question; although he claims but a one-fifth interest in the ditch, because, as he claims, he owns more than one-fifth of the land for the irrigation of which the appropriation of the water was made by the Forney Ditching Company and allowed by the board of control. This claim is not consistent. If he has acquired by the purchase of the land the right to divert and use more than one-fifth of the water

carried by the ditch, he would, at the same time, acquire more than a one-fifth interest in the ditch as necessary to the enjoyment and use of the water right. According to the principles announced in the case of *Frank v. Hicks* and a number of cases cited therein, when a party who owns land, and a water right and ditch, used for the purpose of irrigating the land, conveys the land, the water right and ditch pass by the conveyance of the land. But plaintiff in error does not, by his pleading or evidence, bring his claim within the operation of these principles. He does not show what water was actually and rightfully being used on his land when he acquired title. He does not show that the conveyances of the different interests in the water right acquired by the Forney Ditching Company were not made before he acquired title to his land. Plaintiff in error also forgets that it is just as necessary to the creation and preservation of a water right to provide means for the continual diversion of the water from its natural channel, and for conducting it to the place where it is applied to some beneficial purpose, as it is to apply it to the beneficial purpose. And he cannot arbitrarily seize and use another's ditch, or interest in a ditch, for that purpose. Plaintiff in error claims a right to the use of more than one-fifth of the water furnished by the ditch mentioned. This claim might well be decided against him on the pleadings as well as on the evidence. This is the only question of interest involved. Some errors in the proceedings in the district court and in its findings are assigned, but they are not material to the decision of this question, and, if error, are not such error as to authorize a reversal of the decision. The district court, by its judgment and decree, granted a perpetual injunction generally restraining the plaintiff in error from diverting from the ditch known as the "Forney Ditching Company's Ditch" more than one-fifth of the water carried by it, but in certain contingencies allowing him more than one-fifth. This judgment and decree are at least as favorable to plaintiff in error as the facts warrant, and it is affirmed.

GROESBECK, C. J., and CLARK, J., concur.

RAINSFORD v. MASSENGALE et al.

(Supreme Court of Wyoming. Feb. 15, 1894.)

ACTION AGAINST PARTNERSHIP — INCONSISTENT PLEADINGS — VARIANCE — APPEAL — REVIEW.

1. The complaint in an action on a partnership note alleged that defendant was a partner. Defendant's answer denied such allegation, and the reply alleged that defendant was estopped to make such denial, as plaintiff accepted the note on the faith of defendant's representations that he was a partner. *Held*, that the complaint and reply were not inconsistent.

2. The appellate court will disregard a variance between pleading and proof where the adverse party failed to show by evidence aliunde

in the trial court that he was misled thereby to his prejudice.

3. A finding by the trial court on a question of fact from conflicting evidence will not be set aside on appeal.

4. Plaintiff sold live stock to a partnership, and accepted in payment defendant's individual check and a note signed in the firm name "per" defendant. In an action on the note plaintiff conceded that defendant was not a partner, but alleged that he was estopped to deny a partner's liability, as plaintiff had accepted the note on the faith of defendant's representation that he was a partner. *Held*, that evidence that the firm reimbursed defendant for the amount advanced by him by check was immaterial.

Error to district court, Laramie county; Richard H. Scott, Judge.

Action by John Massengale and James Ross, as partners under the firm name of Massengale & Ross, against Thomas B. Adams, Edward C. Choate, and Minerva M. Peters, as partners under the firm name of Adams, Choate & Co., and George D. Rainsford, on a promissory note executed by Rainsford for defendant partnership. From a judgment for plaintiffs, Rainsford brings error. Affirmed.

Potter & Burke and W. R. Stoll, for plaintiff in error. Lacey & Van Devanter, for defendants in error.

GROESBECK, C. J. This is an action to recover a sum due on a certain promissory note executed and delivered by Adams, Choate & Co., "per Geo. D. Rainsford." Thomas B. Adams, Edward C. Choate, Minerva M. Peters, and George D. Rainsford were sued as copartners doing business together under the firm name and style of Adams, Choate & Co. George D. Rainsford alone of the defendants answered, although it appears all were served with the process of the court. The other defendants were in default. Rainsford, in his separate answer, denies his liability, and alleges that he was never a member of said copartnership. To this answer the plaintiffs in the original action (defendants in error here) replied, alleging that Rainsford executed and delivered the note as a member of the copartnership of Adams, Choate & Co., and at the time of the execution and delivery represented that he was a member of said firm, and that he had full power to execute said note on the part of said firm, and that the plaintiffs, Massengale & Ross, relied upon said representations, believed them to be true, and accepted the note as that of said Adams, Choate, Peters, and Rainsford, by their firm name and style of Adams, Choate & Co. The reply pleads specially the estoppel caused by the representations and actions of Rainsford, and asserts that he ought not to be heard to deny that he is a member of the copartnership. Upon these issues a trial was had in the district court for Laramie county, by the court sitting as a jury, a jury trial having been waived, and upon the issues presented by the pleadings and the evidence adduced the court found for the plaintiffs against all of the de-

defendants, including Rainsford, and rendered judgment accordingly. Rainsford alone prosecutes error, as the other defendants were in default in the trial court, and do not appear here. The grounds of error will be treated of separately.

1. It is claimed as error that there is a fatal variance between the allegations of the petition and reply of plaintiffs and the proofs and testimony adduced on the trial of the case in behalf of the plaintiffs, which amounted to a total failure of proof. We do not see that there is any inconsistency or variance between the petition and the reply of the plaintiffs. They assumed in their petition that Rainsford was a member of the copartnership, and charged therein that he was. He denies this allegation in his separate answer, and in reply thereto the plaintiffs allege that he represented himself to be a member of the copartnership of Adams, Choate & Co.; that they relied upon such representations, believed them to be true, and accepted the note as that of all of the defendants, including Rainsford, who executed and delivered the note personally as a member of said firm. The plaintiffs, in their reply, specially plead an estoppel on the part of Rainsford that he ought not to be heard to deny that he was a member of said firm. So far as the pleadings go, the allegation in the petition and reply of the plaintiffs do not seem inconsistent. The plaintiffs may not have known the fact that Rainsford was not a member of the copartnership, and therefore charged in their petition that he was one of the copartnership sued. Upon the advent of the answer denying his connection with the partnership they had the right to plead the facts stated in their reply as estoppel, in order to charge him individually.

But it is further asserted as error that there is a variance between the pleadings and the proofs adduced by the plaintiffs, "which amounted to a total failure of proof." The evidence introduced on the part of the plaintiffs shows that the note sued on was a portion of the purchase price of a band of horses, the residue of the consideration being a personal check of Rainsford for \$400. Massengale, one of the plaintiff copartners, testified: "Mr. Rainsford just stated to me that he was buying those horses, and that he was not buying them for Rainsford & Palmer; he was buying them for Rainsford, Adams, Choate & Company. I asked him who the firm was, and he told me, I suppose; and he asked me whether I would let him have the horses on a credit for ninety days; that he would pay one-fourth of the money down. I told Mr. Rainsford I would let him have the horses, so far as that was concerned; that his reputation was good in our country for anything he wanted; and that I would let him have the horses if he wanted them, or he could have half the herd on credit, as he was one of the members of the firm." And again: "Yes, I asked him who

the firm was, and he told me Rainsford Adams, Choate & Company. I knew nothing about Adams and Choate; but Mr. Rainsford, I knew him, and his reputation was very good, so far as financial matters were concerned, as he was considered a pretty good man; and he could have had all the horses I had if he had wanted them." This testimony was corroborated by other witnesses for the plaintiffs. The note accepted by the plaintiffs was drawn and signed by Rainsford, the signature being "Adams, Choate & Co., pr. Geo. D. Rainsford." Massengale testifies that he was not a well-educated man, and, being called away when the note was being executed, requested one Reed, who was present, and who testified in the cause, "to notice the note." The variance and the failure of proof claimed by plaintiff in error are based upon these statements. Adams, Choate & Co. are sued, and it is clear that, as the note was executed by such a copartnership, none other could have been sued for the sum due on the note. The proof on the part of plaintiffs is that Rainsford represented that the firm was "Rainsford," Adams, Choate & Co., and that he was the head of the firm. We do not deem this a material variance. The gist of the actions and representations of Rainsford whereby he became liable, as detailed by the witnesses for the plaintiffs, was that he was a member of the copartnership, purchasing the horses and executing the note. The variance between his statements, detailed by the witnesses for plaintiffs, anterior to the execution of the note, and his signing of the note thereafter, are immaterial. The contention of the plaintiffs, when confronted with the answer of defendant Rainsford, is that he obtained the property by reason of his representations, which they believed and acted upon, and by reason of those actions he was estopped by his conduct from denying that he was a member of the copartnership. It is conceded that he was never a member of the copartnership of Adams, Choate & Co., but his liability does not arise from this fact, but from his alleged representations, the trust reposed in them, and the acceptance of the note with the understanding that he was one of the debtors. Massengale appears from his testimony and that of the witnesses for the plaintiffs to have been extremely solicitous to ascertain if Rainsford was interested in and liable for the unpaid purchase money of the horses. From the testimony on behalf of plaintiffs it is clear that the credit was extended to Rainsford and the actual members of the copartnership of Adams, Choate & Co. We do think that there was a failure of proof of the allegations in the reply. Neither do we consider it a material variance. If it was, the adverse party should have shown that he was actually misled to his prejudice, and that fact should have been proved to the satisfaction of the court. Thereupon the court might

have ordered the pleadings amended upon just terms. Rev. St. Wyo. § 2042; Code Civ. Proc. § 302. In the absence of such proof, the variance is to be deemed immaterial. *Catlin v. Gunter*, 11 N. Y. 368; *Place v. Minister*, 65 N. Y. 89; *Newhall House Stock Co. v. Flint & P. M. Ry. Co.*, 47 Wis. 516, 2 N. W. 1123; *Marschuetz v. Wright*, 50 Wis. 175, 6 N. W. 511; *Flanders v. Cottrell*, 36 Wis. 564; *U. S. v. Purdy*, 38 Fed. 902; *Merkle v. Township of Bennington*, 68 Mich. 133, 35 N. W. 846; *Insurance Co. v. Birnbaum*, 116 Pa. St. 565, 11 Atl. 378; *Niebuhr v. Schreyer*, (N. Y. App.) 32 N. E. 13; *Insurance Co. v. Schreck*, 27 Neb. 527, 43 N. W. 340; *O'Connor v. Delaney*, (Minn.) 54 N. W. 1108; *Kurtz v. Forquer*, 94 Cal. 91, 29 Pac. 413; *Brace v. Doble*, (S. D.) 53 N. W. 859; *Rice*, Ev. c. 16. It hardly seems as if there was a variance between the pleadings and the proof. If immaterial, it may be disregarded here, and, if material, the adverse party should have shown that he was misled by it to his prejudice, by evidence allunde in the court below.

2. Error is also predicated on the ground that the findings of the court were not sustained by sufficient evidence in this: that the plaintiffs failed to make out their case by a preponderance of evidence. There was sufficient evidence on behalf of the plaintiffs below to sustain the findings of the court for them. The evidence, taken as a whole, was conflicting, but the trial court, sitting as a jury, balanced the testimony, and found for the plaintiffs. We cannot set aside the verdict of a jury nor the finding of a court on a question of fact, unless the verdict or finding be not sustained by sufficient evidence, or is clearly against the weight of evidence. The trial court or the jury have peculiar advantages not possessed by a reviewing court for determining the truth of the testimony of a witness from his demeanor and manner of testifying. These important factors in testing the truthfulness of the narrative of a witness are missing in the cold words of the record in the appellate court. No court, with the record alone, and unable to travel these avenues of sight and sound which can only be traversed in a trial court where the witnesses are present, would attempt to decide a nicely-balanced case, which has been once determined with the aid of these means for testing the credibility of each witness. The matter is settled beyond cavil by repeated decisions of this court. *Telegraph Co. v. Monseau*, 1 Wyo. 17; *Bank v. Dayton*, Id. 336; *Byrne v. Myers*, Id. 352; *Lumber Co. v. Woods*, Id. 396; *Feln v. Tonn*, 2 Wyo. 113; *Garbanati v. Hinton*, Id. 271; *Edwards v. O'Brien*, Id. 493; *O'Brien v. Foglesong*, 3 Wyo. 57, 31 Pac. 1047; *Ketchum v. Davis*, 3 Wyo. 164, 13 Pac. 15.

3. The third ground of error is that the court erred in excluding the proffered testimony of Rainsford and Hay, which would have shown that defendant Rainsford was reimbursed for the \$400 which he advanced

by his personal check at the time of the execution of the note sued on. This evidence would have been immaterial. That Rainsford was never a member of the partnership is conceded. The rejected evidence would have been merely upon this point, as showing that he was reimbursed for his advance. His liability does not arise from the fact of making the cash payment advanced by his personal check on account of the purchase of the horses, and the subsequent repayment to him by Adams, Choate & Co. of that amount was not material to the issues. The judgment of the district court for Laramie county must be affirmed.

CONAWAY and CLARK, JJ., concur.

DAVIS et al. v. DEXTER BUTTER & CHEESE CO.

(Supreme Court of Kansas. Feb. 9, 1904.)

CORPORATIONS—ASSUMPTION OF LIABILITY—PROMOTERS.

Where a firm of contractors entered into a written contract with some 56 subscribers to construct and equip a creamery for \$7,000, conditioned that the subscribers accepting the creamery would pay that amount for the same, and the written contract had the further provisions that the firm would "hold each subscriber for the amount he subscribed, and no more," and that, "as soon as \$7,000 was subscribed in a reasonable time thereafter, the subscribers would incorporate under the laws of the state, and that such contract did not limit or prevent the corporation, after it was fully organized and in operation, from agreeing to assume and pay a balance due to the contractors not collected from the subscribers, for the construction of the creamery, if such creamery were thereafter over and accepted by the corporation upon an agreement.

(Syllabus by the Court.)

Error from district court, Cowley county. M. G. Troup, Judge.

Action by Davis & Rankin against the Dexter Butter & Cheese Company to recover an account. Defendant had judgment. Plaintiffs bring error. Reversed.

The other facts fully appear in the following statement by HORTON, C. J.:

This action was commenced by Davis & Rankin against the Dexter Butter & Cheese Company on the 19th of October, 1899, to recover \$1,553.09, being the balance due for constructing and completing a cheese factory at Dexter, in Cowley county. The plaintiffs entered into a written agreement with a number of persons to furnish everything including grounds, and equip with all necessary machinery and fixtures a butter and cheese factory, to be located at Dexter, this state, for which they were to receive \$7,000. By the terms of the agreement, work was to commence as soon as the firm was subscribed, and to be completed within 90 days thereafter. The subscribers agreed to pay their several subscriptions when the factory was completed and accepted. They also agreed that, as soon as the amount

\$7,000 was subscribed, or in a reasonable time thereafter, they would incorporate under the laws of the state, fixing the capital stock at not less than \$7,000, to be divided into shares of \$100 each. The agreement also contained this stipulation: "Davis & Rankin agree to hold each subscriber for the amount he subscribed, and no more." The plaintiffs received the sum of \$5,446.91, and there remains due and unpaid the sum of \$1,553.09. The plaintiffs, in their amended petition, after setting out the agreement, and referring to a copy of the same as "Exhibit A," alleged "that said butter and cheese factory was by them duly completed within the said ninety days from the time said corporation was organized and said subscription was complete; and that, pursuant to said agreement, said subscribers and promoters duly incorporated, which said corporation was and is known as the Dexter Butter and Cheese Company; and that said butter and cheese factory was duly accepted by the subscribers and by the defendant, after the same was completed, and after said corporation had been organized pursuant to said agreement." They also alleged "that said corporation, after having accepted said butter and cheese factory as aforesaid, took possession of the same, and assumed control thereof, and has ever since had possession and control thereof, and has owned and still owns said butter and cheese factory, and has operated it, and has received the benefits thereof ever since it accepted the same; that said corporation defendant adopted said agreement made by plaintiffs and subscribers and promoters, and has enjoyed and received all of the benefits growing out of the same, and agreed to assume and pay the amounts due plaintiffs on said agreement; that said defendant came into the possession and assumed the ownership of said butter and cheese factory without any consideration passing from it to any person or persons or corporation whatever save and except its said liability to these plaintiffs; and that most of the subscribers mentioned in Exhibit A of the original petition became the incorporators and shareholders in said corporation, and said defendant was fully aware of the debts and burdens resting upon and against said property when it received and accepted the same as aforesaid." To this amended petition the defendant corporation filed a general demurrer, which was by the court sustained. The plaintiffs elected to stand by their amended petition, and the action was dismissed by the court, and judgment rendered against the plaintiffs for costs, to all of which plaintiffs duly excepted, and bring the case here.

Beach & Torrance, for plaintiffs in error.
McDermott & Johnson, for defendant in error.

HORTON, C. J., (after stating the facts.)
It is evident from the provisions of the written contract between Davis & Rankin and

the various other parties or subscribers thereto that at the time of its execution it was the arrangement that a private corporation was to be formed by the parties, or some of them, to operate the factory, with a capital stock of not less than \$7,000, to be divided into shares of \$100 each. The stockholders are the parties who elect the directors or trustees of a corporation at such time and place as the by-laws prescribe, and it is not to be assumed that the directors or trustees will act contrary to the interest or directions of the stockholders. It appears from the petition that after the Dexter Butter & Cheese Company was organized it took possession and control of the factory, and agreed to assume and pay the balance of the money due for the construction thereof. The corporation had the power to make such an arrangement, and the written agreement referred to in the petition does not limit the powers or rights of the corporation. It is insisted, however, that if the corporation pays the balance claimed the parties signing the agreement may be called upon to pay more than they subscribed. This does not necessarily follow. If the subscribers who have not paid Davis & Rankin have taken stock, and paid for their shares in the corporation, then the corporation ought to have that money in its treasury, to apply to the payment of the indebtedness assumed by it. If they have subscribed and not paid, then their stock can be sold, and applied to the payment of the debt. If they have not taken any stock, the corporation has obtained a factory worth \$7,000 for \$5,446.91, and it is only just that it should pay the balance due upon the property. The subscribers who have not paid Davis & Rankin and have not taken any stock in the corporation have no claim or interest in the factory, as stockholders or otherwise. The judgment will be reversed, and the cause remanded, with direction to the court below to overrule the demurrer to the amended petition. All the justices concurring.

CONNER, Sheriff, v. HARDWICK.

(Supreme Court of Kansas. Feb. 9, 1894.)

HEPLEVIN—CONFLICTING EVIDENCE—POWER OF ASSIGNER IN INSOLVENCY—CHATTEL MORTGAGE—VALIDITY OF.

1. Frankhouser v. Ellett, 22 Kan. 127; Werner v. Bergman, 28 Kan. 60; Isenberg v. Fansler, 13 Pac. 573, 36 Kan. 402,—followed.

2. Where evidence is conflicting as to whether a mortgagee took actual possession of the property described therein, the finding of the jury is conclusive in favor of the successful party.

3. Where the assignee of an estate has full authority to sell the goods and personal property of the estate, and to accept notes with sureties thereon in payment thereof, and such notes, or any part thereof, are not paid when due, the assignee, in the interest of the estate, has full authority to accept a chattel mortgage

from the maker of the note primarily liable thereon to secure the payment of the same.

4. Where notes secured by a chattel mortgage represent valid and bona fide indebtedness from the mortgagor to the mortgagee, and there is no suggestion that the mortgage is given to secure more than the actual indebtedness, and the mortgagee takes actual possession of the property, under the terms of the mortgage, before other creditors of the mortgagor levy thereon, such a mortgage, although a preference in favor of the mortgagee as against other creditors, is valid and binding, and may be enforced to satisfy the lien secured thereby.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Action in replevin by W. P. Hardwick, assignee of the estate of C. W. Ridgeway, against J. W. Conner, sheriff. There was judgment for plaintiff, and defendant brings error. Affirmed.

The other facts fully appear in the following statement by HORTON, C. J.:

In January, 1889, Stow & Hite, a partnership composed of E. B. Stow & Rudolph Hite, were indebted to W. P. Hardwick, assignee of the estate of C. W. Ridgeway, for goods sold by Hardwick to Stow & Hite as such assignee, being goods belonging to his estate. Stow & Hite were at that time engaged in a general merchandising business, at Dexter, Cowley county, in this state, and the goods sold them by Hardwick were a general stock of merchandise. On the 21st day of January, 1889, Stow & Hite executed and delivered to Hardwick, as assignee, their three promissory notes for \$1,026.66, \$1,053.33, and \$1,006.66, and due in four, eight, and ten months from date, respectively, each note to bear 12 per cent. interest after maturity, and aggregating \$3,146.65; and at the same time they procured other persons to sign the notes as sureties. At the maturity of the first note it was not paid, and Hardwick was urging them to pay the note, and, when he was unsuccessful in getting the note paid, he demanded additional security. On the 13th day of June, 1889, Stow & Hite gave him a chattel mortgage upon their stock of goods then situated in Dexter, and being the same goods which Hardwick had sold to them, with other additions. At the time the chattel mortgage was executed, Stow & Hite were, in fact, insolvent. The chattel mortgage contained the following stipulations: "It is specially agreed that J. C. Hite shall take possession of, and sell from, said stock, and deposit eighty per cent. of all money received to be applied on above notes, and the remaining twenty per cent. invested in staple groceries, and such purchases shall belong to the stock, and be liable in this mortgage, owned entirely by us, without any incumbrance: provided, that if the undersigned shall pay said debt, then this mortgage shall be void. And it is hereby agreed that if default be made in payment of said debt, or any part thereof, or if attempt be made to dispose of or remove said property from Cow-

ley county, or if, at any time, the payee of said note shall deem the said debt unsafe or insecure, he is hereby authorized to enter upon the premises where the said property may be, and remove and sell the same at public or private sale, with or without notice, and out of the proceeds retain the amount then owing on said debt, with expenses attending the same, rendering to the undersigned the surplus, after the whole of said debt shall have been paid, with charges aforesaid." Hardwick attempted to file his chattel mortgage for record on June 14, 1889, at 10:30 a. m. in the office of the register of deeds of Cowley county, but the copy which was furnished omitted the words "January 21st, 1889," being the date of the notes secured; otherwise, the copy was correct in all particulars. On June 14, 1889, the next day after the chattel mortgage was given, Stow & Hite and J. C. Hite entered into a contract by which they sold the goods, subject to Hardwick's mortgage, to J. C. Hite. Hardwick knew nothing of this contract until after it was signed. About one week afterwards, J. W. Conner, as sheriff of Cowley county, under and by virtue of two executions and two orders of attachment in favor of creditors, and for amounts as follows, to wit: Henry Baden, execution, \$264; Rindskopf, Stern, Lauer & Co., execution, \$287; S. Strauss & Co., attachment, \$81.47; R. L. McDonald & Co., attachment, \$133.40,—seized and took into his possession the goods in controversy in this action. W. P. Hardwick then brought his action in replevin against the sheriff for the recovery of the goods, claiming to hold the same under the mortgage, which he alleged was given to him in good faith by Stow & Hite, and that under such mortgage he had, at the time of the seizure by the sheriff, the actual possession of all of the property. The contention of J. W. Conner, as sheriff, was that the mortgage was fraudulent and void, and that the mortgagee had no possession whatever. The case was tried to the court and jury at the September term for 1889. The trial commenced on the 3d day of October, 1889. The jury returned a verdict for Hardwick, and found the value of the goods detained to be \$1,850, and the value of his interest to be \$2,012.85. Hardwick afterwards, in open court, remitted all over \$1,614.05 of the verdict; that being the value of the goods as alleged in his affidavit in replevin. After the commencement of this action, and before the trial, Hardwick sold the remnant of the goods, and collected some accounts, and reduced the indebtedness down to the amount found by the jury. Subsequently, the court rendered judgment that Hardwick, as assignee, recover from the defendant, J. W. Conner, the immediate return and possession of all the personal property mentioned and described in the affidavit in replevin, and that, if no delivery or return could be had, then that he recover from Conner the sum of \$1,614.05, the value of the property, with

6 per cent. interest thereon, together with costs. Conner, the sheriff, excepted, and brings the case here.

J. B. Zelgler, for plaintiff in error. Mad-den & Buckman, for defendant in error.

HORTON, C. J., (after stating the facts.) There are six allegations of error discussed in the briefs. The principal ones are that the petition in the case fails to state any cause of action; that W. P. Hardwick, the assignee, never had any actual possession of the property in dispute prior to the seizure thereof by J. W. Conner, the sheriff; and that the verdict of the jury is excessive.

It is insisted that the trial court committed error in permitting the introduction of any evidence, upon the ground that the mortgage shows that the mortgagee was not entitled to possession, and that, if he took possession as he alleges, it was in violation of the agreement under which he had accepted the mortgage. It appears from the stipulations of the mortgage that the possession of J. C. Hite, a third person, was really for the benefit of Hardwick, the assignee. He was to sell the goods, and deposit 80 per cent. in the bank for the benefit of the notes secured, and was to use the other 20 per cent. in the purchase of staple groceries to keep up the stock, so that the rest of the stock could be sold to a better advantage. *Frankhouser v. Ellett*, 22 Kan. 127; *Whitson v. Griffiths*, 39 Kan. 211, 17 Pac. 801. The mortgage also contained a provision permitting Hardwick to take possession of the property if default were made in the payment, or any part thereof, or if he found himself unsafe or insecure. *Werner v. Bergman*, 28 Kan. 60. The petition specifically alleges that on the 13th day of June, 1889, there was default in the payment of a portion of the debt secured thereby, and that the mortgagor, deeming himself unsafe and insecure, upon the 14th day of June, 1889, took possession of all of the property under and by virtue of the mortgage, and that he continuously held possession thereof until the 21st day of June, 1889, at which time the sheriff seized the same. *Isenberg v. Fansler*, 36 Kan. 402, 13 Pac. 573. There was ample evidence offered in the case tending to show that Hardwick took actual possession of the property on the 14th day of June, 1889, and that J. C. Hite was in possession thereof for him and as his agent.

The verdict of the jury placing the value of the goods at \$1,850 was high, but there was some evidence to sustain it. D. D. Hale, who had at one time been engaged in buying and selling goods, was one of the appraisers at the time the goods in controversy were seized by the sheriff. He appraised the goods at a value he thought they would bring at a forced sale by the sheriff. His valuation was about \$1,500. A. J. Truesdale, another appraiser of the goods at the time the sheriff seized the same, fixed the value at \$1,500, or

close to that sum. At the time of the trial he was engaged in the hardware and grocery business. He also appraised the stock of goods at the time Hardwick, the assignee, filed his inventory. When he made the appraisalment for the assignee, the cost mark was given to him, but the last time he valued the goods he did so upon his own judgment, endeavoring to fix a value that the goods would bring under the hammer. This value was about 40 per cent. less than the cost mark as given to him. Hardwick showed by his evidence that the greater portion of the goods were the same which he had sold to Stow & Hite; that while he had the goods in his possession as assignee he was engaged in selling them at retail, which was only about six months before they were seized. He testified: "Q. Now, what was the value of the goods taken by the sheriff? A. I thought the value was \$2,000. Q. You say the value of the goods was \$2,000? A. Yes, sir." Under the circumstances, we do not think there was any error in receiving the evidence of Hardwick and Truesdale. In any event, no proper objection was made to the competency of Truesdale as a witness. Considering all of the evidence before the jury and trial court, as a remitter was allowed fixing the value of the goods at \$1,614.05, we are unwilling to reverse the case upon the ground of excessive value.

Upon the trial, the contention of defendant below was that Hardwick, as assignee, fully exhausted his authority when he made the sale of the goods to Stow & Hite, and accepted notes with sureties thereon in payment, and that he acted outside of his power or duty as assignee in accepting the chattel mortgage and in attempting to enforce the same; also, that the goods were not the property of Stow & Hite at the time the chattel mortgage was executed, as the firm had been dissolved and gone out of business, and that the chattel mortgage was taken to secure other indebtedness than that due from Stow & Hite to Hardwick as assignee. Stow & Hite were primarily liable upon the notes executed by them. To preserve the property of the estate, Hardwick, the assignee, had full authority to accept the chattel mortgage upon their goods to secure the payment of their notes. The jury were the judges of the weight and credibility of the witnesses, and upon their finding we must, of course, hold that the goods embraced in the mortgage belonged to Stow & Hite at the date of the mortgage, and that at that time the firm had not been dissolved. We must also hold that the chattel mortgage was taken to secure the actual indebtedness due from Stow & Hite to Hardwick; not any other or outside indebtedness.

We have examined the other errors alleged, but do not deem them sufficiently prejudicial to cause any reversal of the judgment; nor do we think it necessary to make any comments thereon. The debt owing to Hard-

wick, the assignee, was a valid, subsisting debt, and one that Stow & Hite were justly bound to pay. The mortgage was not given to secure more than the actual indebtedness. Stow & Hite had the right to prefer to pay Hardwick, and he had the right to seek a preference, even though the preference would leave the other creditors nothing. Upon the general finding of the jury, all doubtful questions of fact must be resolved in favor of the successful party. As the case is presented to us, Hardwick is in the condition of a vigilant creditor, who secured an honest claim in a lawful manner before any levies were made by other creditors. We perceive no good reason why his chattel mortgage should be set aside, or the subsequent levies of the creditors be regarded as prior or better liens. The judgment will be affirmed. All the justices concurring.

STATE v. BURWELL.

(Supreme Court of Kansas. Feb. 9, 1894.)

CRIMINAL LAW—REMARKS OF COURT—RECEIVING STOLEN PROPERTY.

1. A remark made by the court concerning a statement made by one of the witnesses, which, though open to criticism, is not deemed to have affected the result, will not require a reversal of the judgment.

2. The testimony examined, and held to be sufficient to sustain the conviction.

(Syllabus by the Court.)

Appeal from district court, Norton county; G. Webb Bertram, Judge.

O. J. Burwell was convicted of unlawfully receiving stolen property, and appeals. Affirmed.

John R. Hamilton, for appellant. John T. Little, Atty. Gen., and C. D. Jones, for the State.

JOHNSTON, J. O. J. Burwell was convicted of unlawfully and feloniously receiving an iron safe, of the value of \$50, and national bank notes, treasury notes, and gold and silver certificates of the amount of \$2,600, which had been stolen from the Pacific Express Company in the town of Lenora. The punishment adjudged was imprisonment at hard labor in the state penitentiary for a term of five years. A remark made by the court during the progress of the trial is the principal ground assigned for reversal. William Burwell, a son of the appellant, who was implicated in the larceny of the property, and had been convicted, was a witness in his father's behalf. The substance of his testimony was that the theft was committed by Charles O'Connor, Jim Burwell, and himself, and during the giving of a story related several schemes and adventures of an unusual character in which he had participated, including the breaking of jails, the burglarizing of depots, and the plan to rob a gold mine in the west, much of which was entirely incompetent. In response to an objection made

to an inquiry the court remarked: "It seems to me that the state could just let this witness go right along with his romance." A remark of this kind, whether jocularly made or not, was very objectionable, and, under some circumstances, might afford sufficient ground to set aside a conviction. The testimony preceding the remark related almost entirely to the commission of the larceny, of which there is no dispute, and in which it is not charged that the defendant took part. The stealing of the safe and the money is conceded, and the only important question in this case was whether the defendant had unlawfully received the stolen property. As the statements of the witness related to that which was conceded, we are inclined to the opinion that the remark did not affect the result. The court charged the jury that they were the exclusive judges of the testimony and of the credibility of the witnesses, so that in the end the weight and character of the evidence given by William Burwell were submitted to the determination of the jury. The proof of the charge made against the defendant was strong, and amply sufficient to sustain the verdict that was rendered. In view of all the circumstances, we think the remark of the court is not a sufficient ground to overthrow the verdict. The judgment of the district court will be affirmed. All the justices concurring.

ATCHISON, T. & S. F. R. CO. et al. v. ARNOLD et al.

(Supreme Court of Kansas. Feb. 9, 1894.)

CONSTRUCTION OF RAILROAD—OBSTRUCTION OF STREET—LIABILITY TO ADJUTERS.

Plaintiffs owned lots fronting on W. avenue 150 feet from F. street. Defendants lawfully constructed their railroad along F. street, crossing W. avenue. Under direction of the city authorities defendants graded W. avenue in front of plaintiffs' premises, as directed by the city engineer. Held, that defendants are not liable to plaintiffs for injuries to their property, caused by such grading.

(Syllabus by the Court.)

Error from district court, Sumner county; James A. Ray, Judge.

Action by W. M. Arnold and S. M. Arnold against the Atchison, Topeka & Santa Fe Railroad Company and the Southern Kansas Railway Company to recover damages resulting from obstructing a street. There was judgment for plaintiffs, and defendants bring error. Reversed.

A. A. Hurd, Robert Dunlap, and O. J. Wood, for plaintiffs in error. Elliott & Woods, John A. Murray, and Frank H. Foster, for defendants in error.

ALLEN, J. The plaintiffs were the owners of four lots, having a frontage of 25 feet each, on Washington avenue, in the city of Wellington. The south line of such lots was 150 feet north of First street, there being six lots

in the block between plaintiffs' lots and First street. In the year 1887 the defendant railroad companies constructed railroad tracks in First street. This action was brought by the plaintiffs, who alleged in their petition that the defendants wrongfully entered upon First street, and upon the alley in the rear of their lots at its intersection with First street, and along the south side of the block, and made large embankments and deep excavations, and constructed thereon their railroad tracks, switches, and yards, and thereby completely obstructed plaintiffs' access to their premises through the alley from the south; and that said defendants also entered upon Washington avenue in front of their property, and for a long distance north and south of the same, and made an excavation thereon, changing the established grade of said Washington avenue, rendering ingress to and egress from the same very difficult, and almost impossible; and the plaintiffs claim \$2,000 damages by reason of closing up the alley and the excavation in Washington avenue. The case was tried with a jury, which rendered a general verdict in favor of the plaintiffs for \$750, and also returned answers to special questions submitted to them.

The railroad was not constructed in front of plaintiffs' premises, but was constructed along First street, crossing Washington avenue at its intersection therewith. It appears that about the time of the construction of the railroad Washington avenue was graded by the employees of the railroad company. Such grading, however, was not done as a necessary incident to the construction of the plaintiffs' line of road, but was for the purpose of grading Washington avenue as a street. Among other special questions and answers were the following: "(7) Was not the excavation in front of plaintiffs' property on Washington avenue made as requested and directed by the city authorities of the city of Wellington, Kansas? A. Yes." "(19) Were not the grade stakes for this excavation set by a city engineer, Orville Smith, of the city

Wellington, Sumner county, Kansas, and as not said grade or excavation made according to such grade stakes? A. Yes." "(22)

not defendant's railroad on First street constructed in a good and workmanlike manner? A. Yes. (23) Did not defendant receive permission and authority from the city authorities of the city of Wellington, Kansas, to go upon First street, and build and construct its railroad thereon? A. Yes."

The jury were instructed, among other things: "You are further instructed that if you find from the evidence that the defendants did construct their railroad in and upon

First street, and across Washington avenue, and thereby made it necessary to grade down Washington avenue in front of plaintiffs' property, and that such grading was due to the injury of the plaintiffs' access to it from their property, to their damage, this is an element of damage which may be consid-

ered, and this, too, without regard to whether the city authorities had such grade made." This instruction was erroneous. The railroad companies were not liable for grading Washington avenue as a street under the direction of, and in the manner required by, the city authorities of Wellington. The city authorities had the right to establish the grade of the street, and the railroad companies would incur no greater liability for performing the work of grading it than a private citizen. *Methodist Episcopal Church v. Wyandotte*, 31 Kan. 721, 3 Pac. 527. Under the findings of the jury no damages could be allowed for the grading of Washington avenue. If this were the only claim in the case, we might direct judgment to be entered on the findings, but damages were also claimed for obstructing the alley in the rear of the lot. It is claimed by counsel for the defendants in error that as to the alley this case comes within the rule laid down in *Railway Co. v. Curtan*, 33 Pac. 297. On the other side, it is contended that the south end of the alley was already blocked and completely obstructed by an old Southern Kansas Railroad track, which crossed the alley about 15 feet from the southeast corner of the plaintiffs' lot. The findings of the jury on this point are favorable to the plaintiffs, and, while one of the plaintiffs testified that the alley was obstructed by the old Southern Kansas track at the time plaintiffs bought the lot, and that they had never entered the alley from the south, there seems to be a little testimony in the record tending to support the findings of the jury on that question. We therefore are not at liberty to direct judgment for the defendants. The judgment is reversed, and a new trial ordered. All the justices concurring.

CHICAGO LUMBER CO. v. ALLEN et al. (Supreme Court of Kansas. Feb. 9, 1894.)

MECHANIC'S LIEN—WHEN ALLOWED—TRIAL—INCONSISTENT FINDINGS.

1. Under the mechanic's lien law as it existed in 1888, if the consideration agreed to be paid by the owner of land to a contractor for the construction of a building on such land is insufficient to pay for all the labor and material expended thereon, any subcontractor who has obtained a legal lien against the property is entitled to a pro rata share of the contract price, which lien may be enforced against the owner's property, although the owner may have paid the full amount of the contract price to the contractor or to a part of the subcontractors.

2. Where some of the material findings of the court are inconsistent with each other, and not in harmony with the testimony, and it is manifest that the case was tried upon an incorrect theory, the findings and judgment will be set aside, and a new trial granted.

(Syllabus by the Court.)

Error from district court, Norton county; G. Webb Bertram, Judge.

Action by the Chicago Lumber Company against E. G. Allen and others for the price of goods sold and to enforce mechanic's lien.

There was judgment for defendants, and plaintiff brings error. Reversed.

W. W. & W. F. Guthrie, for plaintiff in error. L. H. Wilder, for defendants in error.

JOHNSTON, J. This was an action by the Chicago Lumber Company to recover \$254 for building material furnished to L. C. Faulkner, a contractor, with which to build a house on the premises of Mrs. E. G. Allen under a contract made with her husband, and to declare the amount of recovery a lien on the premises whereon the house was built. Faulkner entered into a contract with the Allens to build a house in the spring of 1888, and under the first arrangement he was to receive as consideration the sum of \$225 in money, and an interest in 80 acres of land, of the estimated value of \$250. It was claimed, and testimony was offered to show, that subsequently the contract was changed, by which the whole amount was to be paid in cash, but E. G. Allen denied that such a change was made. Faulkner entered upon the work of building the house, and carried it on almost to completion, when it is claimed that Allen, on account of sickness in his family, would not permit him to complete the work. Faulkner had purchased considerable material for the building, and employed laborers to assist him in its erection. Allen paid the contractor and the laborers who assisted him, and also for some material, the total sum of \$250, but no part of the lumber bill of the plaintiff was paid. There was no conveyance of the land to Faulkner, nor any transfer of the interest in the same, which was said to have formed a part of the consideration of the contract; nor was any further payment made by Allen. The cost of fully completing the building was estimated at \$20. After the abandonment of the work under the contract, and within the statutory time, the plaintiff filed its claim for a lien. There was some controversy at the trial as to the alteration of the contract with Faulkner, and as to the cause of delay in completing the building, but there was no dispute as to the amount of the plaintiff's bill, nor that the material sold was purchased for use in the construction of the building. If there was an abandonment of the work, as the preponderance of the testimony seems to show, plaintiff had a right to treat the building as completed; in which event its claim of lien was filed in time, and should be upheld. *Shaw v. Stewart*, 43 Kan. 572, 23 Pac. 616; *Great Spirit Springs Co. v. Chicago Lumber Co.*, 47 Kan. 672, 28 Pac. 714. While the lien of any subcontractor is in subordination to the contract between the contractor and the owner, each of the subcontractors is entitled to be subrogated pro tanto to the rights of the contractor under that contract. If the agreed consideration for the construction of the building is insufficient in amount to pay all the labor and material expended thereon,

then those who obtained legal liens for labor and material are entitled to be paid pro rata from the common fund. Under their existence at the time the contract was made the owner could not be compelled to pay anything to any person until the end of the time within which liens might be made, when he could know precisely to whom he was liable, and the amount due each claimant. "If the contract price will pay all claims, he should pay all; but if it will not pay all, as in this case, then he must pay various claimants in proportion to their claims due to each respectively." *Clough v. Donald*, 18 Kan. 114. It appears that the owner paid some of the lienholders their claims in full, and also paid a portion of the fund to the contractor. These payments were made at his peril, and will not release the owner from a pro rata distribution of the fund among all legal claimants. If the contract price was to be paid in cash, no difficulty will arise in the distribution; and on the other hand, if it consists in part of an interest in real estate, it will be necessary to provide for a sale of the same, and to convert it into money, before it can be determined what is the amount of the fund, and the share of the same to which each is entitled. In the case at bar the court reached the singular conclusion that the plaintiff was entitled to recover a personal judgment against the owner and her husband for the sum of \$35, but that it was not entitled to a lien against their property. In no event was the plaintiff entitled to recover a personal judgment against the Allens. It was entitled to a personal judgment against the contractor for the amount of the material furnished to him, but if it was entitled to any relief against the Allens it was entitled to a lien against their property for the material sold for the purpose of building the same. It is difficult to determine what view the court took of the case, but its findings are clearly inconsistent with each other, and not in harmony with the testimony found in the record. It is manifest that it was tried upon an incorrect theory, and in view of this fact and the inconsistency of the findings the ruling of the court cannot be sustained. The judgment will be reversed, and cause remanded for a new trial. All the justices concurring.

FREY v. BUTLER et al.

(Supreme Court of Kansas. Feb. 9, 1890.)

EXEMPTIONS—WAIVER.

Unless a debtor has, by express or unequivocal act, relinquished his right to claim an exemption of personal property seized upon execution, he may make the same at any time before the day of sale; and the fact that a debtor who was entitled to two horses only claimed one of them at the time of levy, and informed the officer that he did not claim another "at the present time,"

not constitute a waiver, nor preclude him from claiming another at any time prior to the sale.

(Syllabus by the Court.)

Error from district court, Norton county; Louis K. Pratt, Judge.

Action by George W. Frey against Amon Butler and George N. Kingsbury. There was judgment for defendants, and plaintiff brings error. Reversed.

L. H. Wilder, for plaintiff in error. L. H. Thompson, for defendants in error.

JOHNSTON, J. This is a controversy over a claim of exemption made by an execution debtor. A judgment had been obtained against George W. Frey, upon which an execution had been issued and placed in the hands of George N. Kingsbury, as under sheriff, and which he proposed to levy on some horses and other property owned by Frey. Upon learning this, Frey proposed to bring in his horses, and thus save trouble and expense, which he did. The officer proposed that Frey should claim his exemption, when Frey responded that he had retained one horse as exempt, and that he would not make any claim at that time. The reason given was that the horses had been mortgaged by him to one Heaton, and that Heaton had stated that he would replevy the horses, and give him one of them. The officer took possession of the remaining animals, but within a week, and before the proposed sale, Frey formally demanded the mare in controversy as exempt, but the officer refused to surrender her. The claim of the officer then, and the contention of the defendants in error now, is that Frey had waived his right to claim exemption by the voluntary surrender and turning over of the mare to the officer. It is conceded that Frey was the head of a family, and entitled to claim an exemption of a span of horses, and it appears to be conceded that the demand for the animal in controversy was legally made, if the right to claim it had not already been forfeited and lost. A liberal view of the rights of a debtor in claiming exemptions has been taken in this state, and accordingly it has been held that a selection or claim at the time the levy was made was not essential, but that it might be made at any time before the day of sale. It has been recognized that it was possible for the debtor to waive the right; but his mere silence or failure to assert the right at the time of levy will not ordinarily constitute a waiver. Unless the debtor has, by express declaration or unequivocal acts, waived the privilege, he may exercise it at any time prior to sale. *Rice v. Nolan*, 33 Kan. 28, 5 Pac. 437; *Gardner v. King*, 37 Kan. 671, 15 Pac. 920. In this instance, while the debtor declined, at the time of levy, to make a selection, his language implied that he might make it at a later time. The officer states that, when he told Frey that he was entitled to two horses,

he replied that one was all he would take "at the present time." The clear implication of his language was that, if the mortgagee did not take the animals and protect his rights, he would himself make the claim before the sale, and within the time allowed by law. It cannot be said that there was any express declaration or unequivocal act of relinquishment of the privilege which the statute affords him, and therefore we think the claim was made in time, and that the officer should have surrendered the animal claimed to the debtor. This conclusion compels a reversal of the judgment of the district court. All the justices concurring.

LIMBOCKER v. HIGINBOTHAM.

(Supreme Court of Kansas. Feb. 9, 1894.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—RIGHTS OF CREDITORS.

A creditor may maintain an action upon the original claim against an assignor who has made an assignment for the benefit of creditors, which is still open, and recover a personal judgment against him for the amount due, notwithstanding such creditor has presented, and had allowed in full, a claim against the estate, upon which no payment has been made.

(Syllabus by the Court.)

Error from district court, Riley county; R. B. Spilman, Judge.

Action by J. N. Limbocker against William P. Higinbotham. Defendant had judgment, and plaintiff brings error. Reversed.

The other facts fully appear in the following statement by JOHNSTON, J.:

Action brought by J. N. Limbocker against William P. Higinbotham to recover \$1,078.20, which had been deposited with Higinbotham as a private banker. There was a trial without a jury, and the following findings of fact and of law were made by the court:

"Findings of Fact: (1) That prior to the 31st day of December, 1888, defendant, William P. Higinbotham, had been engaged in business as a private banker at Manhattan, Riley county, Kansas; (2) on the 31st day of December, 1888, defendant was indebted to the plaintiff, as a depositor in his bank, in the sum of one thousand and seventy-eight dollars and twenty cents, (\$1,078.20,) for balance on open deposit account; (3) that on the 31st day of December, 1888, defendant made an assignment for the benefit of his creditors; (4) that on the 2d day of January, 1889, the clerk of the district court of Riley county sent notices to the creditors of the defendant, and, among others, to the plaintiff, who received the same, to the effect that a meeting of the creditors would be held at his office on the 28th day of January, 1889, for the purpose of electing a permanent assignee of said William P. Higinbotham; (5) that on the 28th day of January, 1889, at the meeting of the creditors of said defendant called by said notice, Orville Huntress was elected permanent assignee of said defendant, and that

said plaintiff was present at said meeting, and participated in said election; (6) that said Huntress, as permanent assignee of said William P. Higinbotham, gave public notice, as required by law, that on the 16th, 17th, and 18th days of June, 1889, at the office of the Blue Valley Bank in Manhattan, the county seat of Riley county, he would proceed to adjust and allow demands against the estate and effects of said William P. Higinbotham, and also notified this plaintiff by letter of the time and place of such allowance of demands, more than three months before the time fixed therefor; (7) that on the 18th day of June, 1889, this plaintiff appeared before said Huntress, as assignee of said William P. Higinbotham, at the place named in said notice, and there presented a claim against the estate of said William P. Higinbotham for the sum of \$1,078.20, and asked that the same be allowed in full, with interest thereon up to the date of allowance, amounting to \$1,113.40, as a demand against the estate and effects of said William P. Higinbotham, and that such claim so presented and allowed was the same claim and debt for which the plaintiff seeks to recover a judgment in this action; (8) that no appeal was taken from the decision of said Huntress, as assignee, allowing said claim of plaintiff.

"Conclusions of Law: (1) That plaintiff is not entitled to recover in this action upon the claim sued on; (2) that defendant is entitled to recover his costs."

Upon these findings, judgment was given in favor of the defendant. The plaintiff brings the case to this court for review.

H. C. & F. L. Isish and G. C. Clemens, for plaintiff in error. John E. Hessin, for defendant in error.

JOHNSTON, J., (after stating the facts.) An assignment for the benefit of creditors having been made, which is still open, can a creditor who has presented, and had allowed in full, a claim against the estate, which has not been paid, maintain an action upon the original claim against the assignor? No provision of the statute relating to assignments, which would preclude or suspend the right of a creditor to recover a personal judgment against the assignor, has been brought to our attention, and we find nothing in the nature and effect of such proceedings which would sustain such a claim. The act of assignment does not pay the debts, nor discharge the assignor from liability for their payment. The assignment proceeding is in the nature of a proceeding in rem, and all who desire to share in the assigned assets must conform to the procedure prescribed by the statute. The adjudication of the assignee is binding upon the interests of every person whomsoever in the res or property brought within his jurisdiction; but this adjudication is not personally binding on the assignor, like a judgment

in personam, and is not enforceable by general process. Our statute, unlike those of some other states, does not provide that the assignment of property, and the distribution of the proceeds among the creditors, shall operate as a discharge of the assignor from further liability. The debts are only discharged to the extent that the funds derived from the estate are distributed pro rata among the creditors. If he subsequently acquires other property, or if he possesses property which has not been assigned, no good reason is seen why a creditor may not pursue the ordinary remedies in obtaining satisfaction from such property for the unpaid debts. Under our statutes, a debtor may even make a partial assignment of property, provided all creditors may unconditionally participate in that which is assigned, and that the property not assigned is open and available to the remedies of all creditors. *McFarland v. Bate*, 45 Kan. 1, 25 Pac. 231. Can it be that the proving of a claim against such an estate will preclude the creditor from pursuing the ordinary remedies, and from obtaining a judgment in personam which may be a lien upon, or may be enforced on general process against, property not assigned? The case of *State v. Kansas Ins. Co.*, 32 Kan. 655, 5 Pac. 190, is strongly relied upon to sustain the contention that the allowance by the assignee was a judgment in which was merged the original claim. The decision, however, will not sustain that contention. There, the insurance company had made a general assignment for the benefit of creditors. A creditor presented his claim, but it was disallowed by the assignee. A judgment was obtained upon the original claim in another state, and subsequently the creditor attempted to have that judgment paid out of the trust estate, which had then passed into the hands of a receiver. It was held that the adjudication by the assignee, from which no appeal had been taken, was final, and that the creditor was not entitled to share in the distribution of the assets of the estate. Such an adjudication is final, so far as the assignment proceedings are concerned, and concludes all as to the distribution of the estate. The effort of the creditor to receive his pro rata share of an estate assigned for the benefit of all should not preclude him from converting his claim into a judgment against the assignor, which might at once become a lien against the unassigned estate, or enforceable by execution against it. The allowance by the assignee cannot be so used, and is of no avail to him, outside of the assignment proceedings. Section 21 of the assignment act provides for adjusting and allowing demands against the estate, and the only penalty prescribed for failing to present the claim of a debtor to the assignee is that he shall be precluded from any benefit of the estate. Gen. St. 1889, par. 302. There is no attempt to bar the plaintiff from maintaining an action for the recovery of a

personal judgment against the debtor upon the original claim, nor from pursuing the ordinary remedies afforded by the law. The supreme court of Indiana, in a similar case, held that an assignment of all the property of the debtor for the benefit of all his creditors did not suspend the right of the debtor to have and maintain his action in the proper court for the recovery of a judgment against the assignor, either pending the settlement of the trust or for any period of time. *Lawrence v. McVeagh*, 106 Ind. 210, 6 N. E. 327. As sustaining the view herein taken, we cite, also, *Cackley v. Smith*, 47 Kan. 642, 28 Pac. 617; *Barker v. Haskell*, 9 Cush. 213; *Sanborn v. Norton*, 59 Tex. 308; *Coburn v. Manufacturing Co.*, 10 Gray, 243; *Johnson v. Bleaching Co.*, 15 Gray, 216; *Newark v. Stout*, 52 N. J. Law, 35, 18 Atl. 943; *Nonantum Worsted Co. v. Holliston Mills*, 149 Mass. 359, 21 N. E. 670; *Hammond v. Pinkham*, 149 Mass. 356, 21 N. E. 871; *Durand v. Abendroth*, 97 N. Y. 132; *Nelson v. Couch*, 15 C. B. (N. S.) 99; *Toby v. Brown*, 11 Ark. 308; 2 Black, Judgm. § 674. We conclude that the plaintiff was entitled to recover a personal judgment against the defendant upon the original claim for any amount that might be due thereon, regardless of the assignment proceedings. If payments have been made upon the allowance of the assignee, they should be deducted from the amount of recovery; but the record shows that no dividends had been declared or paid when the action was brought. The judgment of the court below will be reversed, and the cause remanded, with instructions to enter judgment in favor of the plaintiff for the unpaid portion of his claim. All the justices concurring.

ST. JOHN & MARSH CO. v. CORNWELL.

(Supreme Court of Kansas. Feb. 9, 1894.)

AUTHORITY OF AGENT—RATIFICATION.

1. An agent of a nonresident corporation, having general charge of its local business in a Kansas town, has no implied authority to collect debts due his principal by a contract for his own personal board; and a person owing such principal a debt, who furnishes the agent board under an agreement that such agent shall give him credit for the amount thereof on the principal's debt, does so at his own risk.

2. Where, under such a contract, the agent gives the debtor credit on the books of the principal for parts of his board, and charges such amounts against himself, and deducts the same from his salary, and these credits are made known to the principal, who makes no objection thereto, or inquiry concerning the same, these facts alone do not amount to a ratification of the agent's unauthorized contract binding the principal for the amount due from the agent for board, and not so credited.

(Syllabus by the Court.)

Error from district court, Stafford county; Ansel R. Clark, Judge.

Action by the St. John & Marsh Company against John G. Cornwell to recover on ac-

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count of goods sold and delivered. Defendant had judgment for costs, and plaintiff brings error. Reversed.

The other facts fully appear in the following statement by ALLEN, J.:

This action was brought by the plaintiff in error to recover the sum of \$115.66, which it claimed was due it as a balance on account for lumber and building materials sold to the defendant. The case was submitted to the trial court on an agreed statement of facts, from which it appears that the plaintiff is a corporation; that it sold to the defendant lumber as alleged in the petition, and that the plaintiff's account thereof is correct, but that the defendant claims credit on account of having boarded one Catlin, who was the agent of the plaintiff, in charge of its lumber yard at St. John. So much of the agreed statement as it is necessary to recite is as follows: "That on the 22d day of February, 1888, John E. Catlin and defendant entered into the following parol agreement: That said Catlin should board with defendant, and credit defendant upon his account with plaintiff for lumber and building material, then charged upon plaintiff's books of account, and which books of account were in the hands of said Catlin for collection; and the price to be paid for said board was \$5 per week, which was to be credited weekly upon said account. That defendant at the time believed that Catlin had authority to make such contract, and bind the plaintiff thereby. The said Catlin commenced boarding with the defendant on the 22d day of February, 1888, and continued to so board with defendant until the 16th day of March, 1889, the same being 51 weeks, 6 days, and 11 meals, which, at \$5 per week, amounted to two hundred sixty-one and 85-100 (\$261.85) dollars. That on the 2d day of April, 1888, said Catlin credited upon said account the sum of \$27.50. That on the 2d day of June, 1888, he credited upon said account \$43.50. That on the 19th day of March 1889, D. F. McConnaughey, who was plaintiff's agent and auditor as aforesaid, credited upon said account of defendant with plaintiff for lumber, etc., the sum of \$50 on account of said board of J. E. Catlin. That at the time McConnaughey made this \$50 credit he was in possession of and had full knowledge of all facts of the contract of J. E. Catlin and the defendant for board. That McConnaughey knew, soon after they were made, that the credits of April 2, 1888, for \$25.50, and June 2, 1888, for \$43.50, on defendant's account with plaintiff, were made by J. E. Catlin on account of his board with defendant. That McConnaughey knew that J. E. Catlin was boarding with defendant at all times when he (McConnaughey) was here in St. John, between the 22d day of February, 1888, and the 16th day of March, 1889. That McConnaughey, nor any one for him, nor the plaintiff herein, made any mention to the defendant of the credits above, to wit,

\$27.50 and \$43.50, made on the defendant's account by J. E. Catlin, nor made any inquiry of defendant why such credits had been made. That J. E. Catlin, on or after the 22d day of February, 1888, up to and on the 19th day of March, 1889, was the local agent of plaintiff, resident at St. John, Kansas, and managing its yard there, with full authority from plaintiff to sell lumber and building material, collect accounts due, and remit proceeds to plaintiff, take notes and security, file mechanics' liens. That the credits mentioned herein—\$27.50, \$43.50, and \$50—is all that defendant has ever received credit for from plaintiff on his said account for Catlin's board, and that the balance is due and owing defendant from said Catlin, unless the plaintiff has become responsible therefor in law. That Catlin was working for the plaintiff at a fixed salary of \$55 per month, which was to be in full; and that he was to pay his own board and other ordinary expenses. That plaintiff was not responsible in any manner for the board of said Catlin, unless made so by its conduct herein set forth. That when said Catlin gave credit to the defendant upon plaintiff's account for the amount of his board at the different times set forth in this stipulation, he charged himself with the amount thus given credit for on his salary account as so much cash received by him on account, and applied to his salary. That when the sum of \$50 credit was made by McConnaughey on account of defendant it was done at the request of Catlin, who then and there caused the same to be and it was charged against his salary account as so much cash received by him, and he accounted to the plaintiff for the same as so much cash, and paid the same to the plaintiff either in cash or by a credit upon his salary. That Fred Smith and Bassett, whose board was credited upon said account, were in the employ of plaintiff, and that by agreement they paid to the plaintiff the said sums for which the defendant was given credit on account of their board, to wit, \$6.75 and \$3.75, or the same was charged to their salary account, and the plaintiff given credit therefor. That H. C. Wood, D. F. McConnaughey, and Charles McAnaulty were parties employed by plaintiff upon a salary, including all expenses, traveling and otherwise, while away from their home or headquarters, which were at Hutchinson, Kansas. That while at St. John it became the duty of plaintiff to pay all their expenses, and, if they paid out anything in cash, that the plaintiff was bound to refund the same to them. That under these circumstances they caused the said amount of their respective bills to be credited upon the account of defendant, and the same was credited by the plaintiff to expenses the same as though they had paid out the money for expenses, and had collected the money from the defendant. That the defendant had no knowledge of the facts as to the expenses of Wood, McConnaughey, Mc-

Anaulty, being paid by plaintiff as part of their compensation. It is agreed further that neither the plaintiff, H. C. Wood, nor McConnaughey knew anything about the contract between Catlin and the defendant, except such knowledge as they derived from credit given upon the books as herein set forth, until six or seven days before the credit of \$50, of March 19, 1889, was given upon plaintiff's books, when he was informed of such contract by defendant. That Catlin left the employ of plaintiff about March 19, 1889. That the credit of \$50 was given while Catlin was in the employ of the plaintiff. That if under the law as applied to the facts herein defendant is not entitled to have the balance of the board bill of J. E. Catlin credited upon his account with plaintiff for lumber and building material, that he is indebted to the plaintiff in the sum of one hundred fifteen and 66-100 dollars with interest thereon from March 19, 1889, at the rate of 7 per cent. per annum. That Bassett and Fred Smith were agents of plaintiff of like authority with Catlin. On these facts the court rendered judgment in favor of the defendant for costs.

John W. Roberts, for plaintiff in error.
F. M. Cowgill, for defendant in error.

ALLEN, J., (after stating the facts.) The main question presented for our consideration in this case is whether the agent of a foreign corporation having general charge of a lumber yard located in this state, with authority to collect accounts due it, may, by entering into a contract for his personal board with a person indebted to the company, bind his employer to the extent of its claim. It appears that Cornwell was indebted to the plaintiff at the time Catlin contracted for his board. Catlin agreed that Cornwell should have credit on the account with the amount of his board at the rate of \$5 a week. It appears that Catlin was working at a salary of \$55 a month, which was in full for all his services. The plaintiff was under no obligation to board him, or pay any other of his personal expenses. It may be conceded that, as to the transaction of plaintiff's local business at St. John, Catlin was its general agent. The question then arises whether it will be presumed that Catlin had authority to bind the plaintiff for the payment of his personal expenses. The general rule is that the principal is bound by acts within the apparent scope of the agent's authority, irrespective of secret instructions or private agreements known only to the principal and agent, but is the power to bind the principal for the board of the agent within the agent's apparent authority? Parties dealing with him necessarily know that board is furnished for the personal benefit of the agent. It cannot be said that employers are generally responsible for the board or other personal expenses of their agents or employes. To carry such presumption to its logical end would

make them responsible for clothing, household supplies, and other purely personal expenditures. We think no such authority can be presumed, and that when a party deals with an agent with reference to board, clothing, or any other matter which the party must know is furnished solely for the personal benefit of the agent, if he relies on the principal for payment, he does so at his peril. The defendant in this case expected Catlin to give him credit on the plaintiff's books for the amount of his board, and to charge himself with the same amount on his salary account. If this were done, it would be, of course, a proper and legitimate transaction, and would amount to a collection of the plaintiff's account; but until Catlin actually accounted to the plaintiff for the amount of his board the contract remained purely a personal one between Cornwell and Catlin. It was Cornwell's place to see that Catlin complied with the contract. No obligation rested on the plaintiff to inquire into the terms on which Catlin procured his board. It was under no obligation to pay it, and therefore under no duty to make inquiries with reference to it. This is not a case in which the agent has attempted to discharge a debt due his principal by receiving in payment thereof an obligation of his own, which, under the authorities, he could not do. *Mechem, Ag. § 375; Furniture Co. v. Mason, 52 N. W. 671; Deatherage v. Henderson, 43 Kan. 684, 23 Pac. 1052; Scully v. Dodge, 40 Kan. 395, 19 Pac. 807; Organ Co. v. Lasley, 40 Kan. 521, 20 Pac. 228.* In this case the agent undertook to bind his principal by a contract in advance for his own personal benefit, agreeing that the debt due the principal should be discharged by the board he was to receive. The defendant certainly could not fail to see that this arrangement was for the personal advantage of the agent, and must have known that the principal would reap no advantage from it unless the agent actually accounted for and paid over the agreed rate to the employer. It is well settled that the agent does not bind his principal by such contracts. *Mechem, Ag., supra; Aultman v. Lee, 43 Iowa, 404; Rhine v. Blake, 59 Tex. 240; Williams v. Johnston, 92 N. C. 532.*

It is urged on behalf of the defendant in error that the facts show a ratification of Catlin's contract. This is based on the items charged to himself by Catlin on plaintiff's books, and credited to defendant on account of board. It is urged that these entries were brought to the knowledge of H. C. Wood, the company's general agent, who had full authority in all matters connected with the company's business, and of McConnaughey, the company's auditor, and that such entries were notice of the existence of a contract between Catlin and the defendant, concerning the terms of which it then became the duty of the plaintiff to inquire. We think the ratification extends

only to the items appearing in the account on plaintiff's books. As to such items it is, of course, a ratification, and no objection is now made to these credits by the plaintiff; but the defendant seeks credit for the balance due him for Catlin's board which was not credited on plaintiff's books. We do not think the plaintiff was under obligation to inquire into the terms of Catlin's contract for board, nor that its ratification of his acts extended to anything beyond the items appearing on its books. Generally a principal is held to have ratified the unauthorized act of an agent only when he has been fully informed of all of the facts and circumstances of the transaction, and then accepts some benefit, or does some act inconsistent with a disaffirmance of the unauthorized transaction. *Bohart v. Oberne, 36 Kan. 284, 13 Pac. 388; Reynolds v. Ferree, 86 Ill. 570.* We think the court erred in its conclusions in this case. The judgment is reversed, with the direction to enter judgment in favor of the plaintiff for the amount claimed in its petition. All the justices concurring.

ATCHISON, T. & S. F. R. CO. et al. v. DAVIDSON.

(Supreme Court of Kansas. Feb. 9, 1894.)

CONSTRUCTION OF RAILROADS—OBSTRUCTION OF STREET—DAMAGES TO ABUTTERS.

1. An abutting lot owner within an incorporated city of the second class has a right to have the street adjoining his property maintained as a street, so that access to his lot may not be entirely cut off or destroyed.

2. If the roadbed and track of a railroad company is completed upon a street of a city of the second class in accordance with the provisions of a city ordinance, or with the assent and under the direction of the city officials, and is treated by the railroad company, the city officials, and the lot owners as a permanent taking or appropriation of a part of the street for railroad purposes, and thereby the access to an abutting lot is completely obstructed, the lot owner may recover of the railroad company damages for the consequent depreciation in the value of the lot.

(Syllabus by the Court.)

Error from district court, Sumner county; James A. Ray, Judge.

In an action by Orle Davidson against the Atchison, Topeka & Santa Fe Railroad Company and another for obstructing a street there was judgment for plaintiff, and defendants bring error. Modified.

A. A. Hurd, Robert Dunlap, and O. J. Wood, for plaintiffs in error. John A. Murray, for defendant in error.

HORTON, O. J. On the 10th day of May, 1887, the council of the city of Wellington attempted by ordinance to discontinue and vacate First street, between A and F streets, of that city, for the purpose of granting the right of way to two railroad companies, the defendants below. *Showalter v. Railway Co., 49 Kan. 421, 32 Pac. 42.* Soon afterwards

the railroad companies, in pursuance of the ordinance, built upon First street an embankment or roadbed, and occupied the street, or portions thereof, with tracks and switches. Plaintiff below owns two lots and a half, making 62½ feet, fronting east on C street, which street runs north and south. The lots are 140 feet long, and abut on First street, which runs east and west. Upon the evidence introduced at the trial, and upon the findings of the jury, it is apparent that the right of plaintiff below of ingress to and egress from First street, including the alley opening into First street, has been seriously obstructed by the embankment or roadbed, the switches and tracks of the railroads. Within the frequent decisions of this court the railroad companies have permanently taken and appropriated First street, or portions thereof, and in so doing have obstructed the ingress to and egress from the lots abutting thereon. *Twine's Case*, 23 Kan. 585; *Andrew's Case*, 26 Kan. 706; *Fox's Case*, 42 Kan. 490, 22 Pac. 583; *Curtan's Case*, 51 Kan. 432, 33 Pac. 297. If First street between A and F streets were actually vacated by the ordinance of the city, and the street reverted to the abutting lot owners in proportion to frontage, of course the abutting lot owner in this case would be entitled to compensation for his lot, or any part thereof, appropriated. See 1 Dill. Mun. Corp. (4th Ed.) § 97; 2 Dill. Mun. Corp. (4th Ed.) p. 785, § 660; *Id.* p. 808, § 680; *St. Louis Transfer Ry. Co. v. Merchants' Bridge Terminal Ry. Co.*, 111 Mo. 666, 20 S. W. 319. If the city of Wellington, as a city of the second class, did not possess the power to give to the railroads, or any other corporation, the exclusive right to use and occupy the street, yet, as this court has always recognized the right of an abutting property owner to have the street maintained so that access to his premises may not be entirely cut off, the abutting lot owner is entitled to his damages when access to his lots has been wholly or substantially destroyed.

It is insisted, however, that the railroad companies are not liable in damages for any obstruction of ingress to or egress from the lots caused by the embankment or changed condition of the surface of the street. As a general proposition, an abutting lot owner, in a city of the second class, cannot recover damages from the city or a railroad company, acting under the direction of the city authorities, on account of a mere change in the grade or surface of the street. *Railway Co. v. Early*, 46 Kan. 197, 26 Pac. 422. But that is not this case. Here the embankment or roadbed on First street was not constructed for the convenience of public travel, or for the use of wagons or other vehicles, or for the grading of the street, as that term is generally understood, but solely for the purpose of use by the railroads; and in constructing the embankment or roadbed for the tracks, switches, and switch stand access to the lots

and to the alley at the rear of the lots was substantially destroyed. Persons upon foot can use the street and alley, but it is impossible to have access to the lots or alley from First street with wagons or other vehicles. A city is not expected to grade a street for the purpose of preventing travel thereon, and cutting off all access of the abutting lot owners. When city officers grade or change the grade of a street they are expected to act for the public, with the public accommodation and convenience in view, and not to destroy the street, or prevent access to abutting lots. This case differs from *Chicago, K. & W. R. Co. v. Union Inv. Co.*, 51 Kan. 600, 33 Pac. 378, and *Railroad Co. v. Peterson*, 51 Kan. 604, 33 Pac. 600. In the *Union Inv. Co.* Case the embankment for the road and tracks was placed about the center of the street, the distance between the embankment and the abutting lots being from 30 to 40 feet. In surfacing the tracks there were holes dug, which interfered with the passing and repassing of vehicles; but these holes or obstructions were temporary only, and there was no permanent appropriation of any part of the street immediately adjoining the abutting lots so as to completely or substantially obstruct the ingress to and egress therefrom. In the *Peterson Case* the lots were not within the corporate limits of any city, and the track and roadbed were not constructed in accordance with the provisions of any ordinance, or under the direction of the city officials. There was no permanent taking or appropriation of any part of the street so closely adjoining the abutting lots to sufficiently obstruct all ingress or egress to authorize the damages allowed in that case. But in that case it was observed: "If the track and roadbed of a railroad is completed in accordance with the provisions of a city ordinance, or with the assent and under the direction of city officials. It may fairly be presumed that the railroad company considers such manner of occupation necessary for its purposes, and has so laid the track with reference to its own necessities, and that the city regards the use by the company of the alley or street so occupied as of more value to the public than the general use by the public itself, and will never interfere with such use by the company." In this case the embankment or roadbed, the tracks and switches, were made and completed in the summer or fall of 1887. This action was not commenced until the 29th of March, 1889. The trial was had in the latter part of January, 1890. It does not appear at any time prior to the commencement of the action or since its commencement that the railroad companies or the city authorities have in any way changed the embankment or roadbed or the tracks or switches so as to permit reasonable access to the lots or alley from First street. On the other hand, many things appearing upon the trial tend to show that the railroad companies, the city authorities, and the lot owners considered the

occupation of a large portion of the street as permanent and exclusive,—not temporary in any way. *Railroad Co. v. Twine*, 23 Kan. 585.

It is conceded that \$400, included in the verdict of the jury, was in the nature of a double allowance for the obstructions complained of. This amount plaintiff below offers to remit. We need not comment upon the allegations in the petition concerning any injuries resulting from surface water, or the overflow of the cellar, the washing of mud, etc., upon the lots, because, upon the findings of the jury, as the judgment will be modified, no damages are allowed on account of any of these matters. The case will be remanded, and, with consent of the plaintiff below, judgment will be entered in the district court for \$600 only. All the justices concurring.

STATE v. CLYNE.

(Supreme Court of Kansas. Feb. 9, 1894.)

LIBEL AND SLANDER — CRIMINAL PROSECUTION—SUFFICIENCY OF INFORMATION—EVIDENCE.

1. When a person intentionally and personally publishes of another what is libelous, by the general doctrine he is held to have malice in law against him, whatever the motive in fact.

2. Where a person is informed against in a criminal action for the publication of a libelous article charging another with having been posted, before a robbery, as to the time it would occur, and upon the trial the court permits the defendant, who is a witness in his own behalf, to testify fully with regard to when, where, and how he obtained the information concerning the matters published, and as to all the facts and circumstances relevant to such publication, and also permits such witness to testify that when he published the article "he believed its statements were true," *held*, that the trial court committed no prejudicial error in refusing to permit the defendant to testify as to the purpose or motive he had in view in writing the article for publication.

3. The information examined, and *held* to be sufficient, and not indefinite.

(Syllabus by the Court.)

Appeal from district court, Stafford county; J. H. Bailey, Judge.

Joseph Clyne was convicted of criminal libel, and appeals. Affirmed.

The other facts fully appear in the following statement by HORTON, C. J.:

On the 5th day of October, 1892, there was filed in the district court of Stafford county the following information, omitting caption, jurat, and the names of witnesses: "I, the undersigned county attorney of Stafford county, Kansas, in the name and by the authority and on behalf of the state of Kansas give information that on the 22d day of September, A. D. 1892, in said county of Stafford and state of Kansas, one Joseph Clyne did then and there unlawfully, willfully, and maliciously make, compose, write, and publish, and cause to be written and published, a false, malicious, and defamatory libel, containing divers false, scandalous, malicious, and defamatory matters of and

concerning one Frank S. Larabee, and of and concerning the evidence given of and about the said Frank S. Larabee on a certain trial then had in the district court of Reno county, Kansas, in a cause wherein the state of Kansas was plaintiff and B. A. Webber was defendant, according to the tenor and effect following, that is to say: 'Thieves Fall Out. [Meaning the said Frank S. Larabee and certain persons, who had been charged and arrested for the offenses of larceny and embezzlement of moneys and other personal property from the county treasurer's office in Stafford county, Kansas.] The case against the Stafford county hoodlars [and meaning the cases against these certain persons above mentioned as having been charged and arrested for the offenses aforesaid, and among which was the case of the State of Kansas, Plaintiff, against B. A. Webber, Defendant] is now occupying the attention of Judge Martin's court at Hutchinson, [meaning the district court of Reno county, Kansas, held at Hutchinson, in said Reno county, and presided over by Judge Martin.] Oliver, [meaning James K. Oliver,] one of the accused, [meaning one of the persons charged and arrested as above stated,] has turned state's evidence, and gave the whole robbery away, [meaning that the said James K. Oliver had in his evidence given the facts relating to the offenses for which certain persons were charged and arrested as above stated,] He [meaning James K. Oliver] testified on oath [meaning that he testified as a witness on the trial of the said case of the State of Kansas, Plaintiff, against B. A. Webber, Defendant, in the district court of said Reno county] that he went to Frank Larabee [meaning the said Frank S. Larabee] and told him the courthouse [meaning the county treasurer's office in the courthouse at St. John, in Stafford county, Kansas] was to be robbed, [meaning that money and other personal property in said treasurer's office was going to be stolen,] and if he had any money there [meaning in said treasurer's office] to get it out at once. It was further developed in the evidence [meaning the evidence on the said trial in which the state of Kansas was plaintiff and B. A. Webber was defendant] that Larabee [meaning said Frank S. Larabee] went to the treasurer, [meaning the county treasurer of Stafford county, Kansas,] and drew a large sum of money, a day or two before the robbery, [meaning before the commission of the offenses for which certain persons were charged and arrested as aforesaid.] We [meaning Joseph Clyne] understand that Larabee [meaning said Frank S. Larabee] corroborates the above evidence, [meaning the said testimony of the said James K. Oliver and other evidence on said trial,] and admitted being posted as to the time the robbery would occur, [meaning the time when the offenses for which certain persons were charged and arrested as above stated would occur.] And I, the said county attorney,

further state that prior to the 22d day of September, A. D. 1892, and in the year of 1892, the certain persons above referred to, to wit, William Glasscock, W. D. Wilson, the said Joseph Clyne, the said James K. Oliver, and the said B. A. Webber, had been charged and arrested for the larceny of money and other personal property from the office of the county treasurer of Stafford county, Kansas, and E. H. Landes, had been charged and arrested for the embezzlement of money and other personal property from the office of the said county treasurer, and the trial of the said B. A. Webber, hereinbefore referred to, was a trial of him under the said charge against him. And by the said composing, writing, and publishing the false, malicious, and defamatory libel in the foregoing article set forth, and in the causing the same to be written and published as aforesaid, the said Joseph Clyne did maliciously charge that the said Frank S. Larabee had knowledge that the said offenses would be committed, and of the time when they would be committed, and that he had such knowledge before they were committed, and that he admitted that he had such knowledge, and that it had been given in evidence on the trial of the said case of the State of Kansas, Plaintiff, against B. A. Webber, Defendant; that he, the said Frank S. Larabee, was in possession of such knowledge before said offenses were committed, and that by reason thereof he went to the county treasurer of said Stafford county, and drew from him a large sum of money, a day or two before the said offenses were committed. And all of which said charges against, of, and concerning said Frank S. Larabee, so contained in said published article, were false and malicious, and were so made for the purpose of defaming the said Frank S. Larabee. And the said Joseph Clyne, did on the — day of September, A. D. 1892, unlawfully, maliciously, and willfully publish and cause to be published in the People's Paper, which was a newspaper published at the county of Stafford, in Stafford county, Kansas, and circulated in said Stafford county, the said false, malicious, and defamatory libel, tending to injure, scandalize, and vilify the good name, fame, and reputation of said Frank S. Larabee, and tending to provoke him to wrath, and to expose him to public hatred, contempt, and ridicule, and to deprive him of the benefits of public confidence and social intercourse, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Kansas. O. C. Jennings, County Attorney of Stafford County, Kansas." On February 7, 1893, the defendant filed a motion to quash the information upon various grounds. This motion was submitted to the court without argument, and overruled. Trial was had at the February term, 1893, before the court with a jury. The jury returned a verdict against the defendant Joseph Clyne as

"guilty as charged." The defendant filed a motion for a new trial, and also a motion in arrest of judgment. Both of the motions were overruled. The defendant was sentenced to pay a fine of \$150 and costs of the prosecution, and to be committed to the county jail of Reno county until the fine and costs were paid, there being no county jail in Stafford county. Clyne, the defendant, accepted, and brings the case here.

Moseley & Waters, for appellant. John T. Little, Atty. Gen., Valentine, Harkness & Godard, O. C. Jennings, Ansel R. Clark, and P. R. Nagle, for the State.

HORTON, C. J., (after stating the facts.) On January 25, 1891, and prior thereto, the county treasurer's office, with the other public offices of Stafford county, were situated in the courthouse in St. John, in that county; and on the night of that day the treasurer's office was forcibly entered, and moneys, books, etc., stolen. Some time afterwards the county attorney of Stafford county commenced criminal prosecutions against several persons who were suspected of committing the offense, and among others against Joseph Clyne and B. A. Webber. At the time of the burglary and larceny, and before and since, Joseph Clyne and Frank S. Larabee both resided at Stafford. Webber's case was taken on change of venue to Reno county, and tried at Hutchinson, before the district court of that county. The jury, however, disagreed. On the trial, James K. Oliver became state's evidence, and testified in the case. On September 21, 1892, while the case was on trial, Clyne went from Stafford to Hutchinson, and there had conversations with Webber and Landes and others with regard to Oliver's testimony, and in the evening of the same day returned to his home. The next morning he went to the printing office where the People's Paper was published. Earl G. Nettleton was the editor, publisher, and proprietor. His wife, Allie M. Nettleton, and his brother, Adelbert M. Nettleton, assisted him. Clyne had no connection with the newspaper, and at that time the Nettletons were strangers to him. He wrote and procured to be published the following article as an editorial in the People's Paper on September 22, 1892, at Stafford: "Thieves Fall Out. The case against the Stafford county boodlers is now occupying the attention of Judge Martin's court at Hutchinson. Oliver, one of the accused, has turned state's evidence, and gave the whole robbery away. He testified on oath that he went to Frank Larabee, and told him the courthouse was to be robbed, and if he had any money there to get it out at once. It was further developed in the evidence that Larabee went to the treasurer, and drew a large sum of money, a day or two before the robbery. We understand Larabee corroborated the above evidence, and admitted being

posted as to the time the robbery would occur." Upon the trial, Clyne, who was a witness in his own behalf, was asked: "I wish you would state the purpose which actuated you to and the motive you had in view in writing that article for publication." This was objected to, and the objection was sustained. It is now insisted that material error was committed thereby. It appears that Frank S. Larabee was at the time of the publication a candidate for the office of presidential elector on the Republican ticket. It is claimed that the publication was one of privilege on that account, and that the motive or intent of Clyne in writing and publishing the article complained of ought to have gone to the jury. Clyne was permitted to testify fully with regard to when, where, and how he obtained his information with respect to Oliver's testimony, and the thieves, boodlers, and robbers referred to, and as to all the facts and circumstances that might have any relevancy to the case, and to everything that was said or done at the time of his preparing his article for publication and in procuring its publication. He was also permitted to give the following evidence: "Q. Now, I ask you to state, at the time that article was written and furnished to the publishers of the paper, what was your judgment and belief as to its truthfulness? A. I believed it was true. Q. Now, you stated that the time you wrote that article you believed it to be true? A. Yes, sir. Q. What made you believe it was true? A. The information that I had procured at Hutchinson, together with the information that Mr. Oliver gave me before that. Q. The information which you procured at Hutchinson from the persons that you told the Nettletons had told you about it? A. From the attorney, and from Mr. Webber, and from Mr. Landes, and from the conversation that I had with Mr. Oliver, and from the fact that I investigated the books and found that Mr. Larabee had drawn money out of the treasury,—the county treasury,—as Oliver told me he would. Q. I believe you stated you had known Mr. Larabee for five or six years? A. Five years, I put it, I think. Q. Have you known him quite well? A. During that length of time, yes, sir. Q. What have been your relations with him for the last two or three years,—friendly or otherwise? A. Well, they haven't been very friendly. Q. Do you speak as you meet? A. No. Q. How long has that condition of affairs existed? A. Since he sued me for killing his dog, for \$250." Clyne also testified upon cross-examination as follows: "Q. Did you say to Mr. Nettleton, or Mr. Nettleton say to you, about the time you were leaving the office, not to let it be known who wrote the article? A. Yes, I believe I did. I told him I didn't want my name signed to it. Q. Why didn't you want your name signed to it? A. Oh, people that write for papers don't generally

do that. Q. Are you a newspaper correspondent? A. I was starting out in the business then. Q. That was your maiden effort, then? A. Yes. Q. Have you had any experience in that line since? A. No, I have not written very much since. Q. In giving your reason for not signing the article, what reason did you have for not wanting it known who wrote it? A. I can't give any reason, only I didn't want my name put to a piece that I would put in a paper. I told Mr. Nettleton that the article was true, and that he need fear no trouble." Under the evidence disclosed, we think the court committed no error prejudicial to the defendant in sustaining the objection to the question proposed. "When a man intentionally and personally publishes of another what is libelous, by the general doctrine he is held to have malice in law against him, whatever the motive in fact." 2 Bish. Crim. Law, (New,) § 922; 13 Amer. & Eng. Enc. Law, pp. 385, 386; Newell, Defam. 301, par. 22; Odgers, L. & Sland. 264, 265; 2 Whart. Crim. Law par. 1654.

It is next insisted that the court did not give sufficiently clear, explicit, or applicable instruction with reference to the publication of the article concerning candidates for office, and to what extent they are privileged. An examination of all of the instructions show that they were very favorable to the defendant, and sufficiently so even if the article published was privileged. Among other things, the court charged the jury that "the writing and publishing the article complained of in the information in this case, with which the defendant, Joseph Clyne, is charged, is not seriously controverted, but it is by the defendant admitted to have been by him written and furnished the People's Paper, for publication. The defendant, however, denies that the article was designed or intended to be scandalous or defamatory of any one. He claims that in preparing the same for publication he was actuated by pure motives, and designed only to impart information to the citizens of Stafford county who should read the paper of and concerning matters of deep public and common interest to such citizens. The article mentions Frank Larabee, who the defendant claims to have been, and who is admitted to have been at the date of writing and publishing thereof, a candidate upon the Republican ticket for the office of presidential elector. It also mentions the judicial proceedings then pending in the district court of Reno county, which had grown out of and were pertaining to an alleged robbery and larceny connected with the funds, books, and papers belonging to the citizens of Stafford county in connection with the office of county treasurer of that county. You are instructed, as a matter of law, that if the defendant, in writing the article and preparing the same for publication, was moved thereunto by an honest purpose to inform the electors and the citi-

zens generally of the conduct of the parties charged with being implicated in such unlawful interference with said treasurer's office and the contents thereof, or as to the qualifications and moral character of a candidate seeking the votes of electors for the office aforesaid, or for the furtherance of both such purposes, that said article and communication was and is a privileged communication; and that, if the defendant was guided by and based his actions upon information and belief that the matters and things therein stated were substantially true, the same was not libelous in law, but that the defendant should and must be acquitted, unless you find from the evidence beyond a reasonable doubt that he was actuated by actual malice in so doing." Again, the court charged the jury as follows: "One may in good faith publish what he honestly believes to be the truth, which is essential to the protection of his interest or interests of other persons to whom he makes the publication, and thereby commits no offense, although the matters published by him are not true in fact, and are injurious to the character of others. Each and every voter is interested in the qualifications and moral character of candidates for public office. If the defendant, in framing for publication that article, was mistaken as to the truth of the same, or some parts thereof, and they are in fact derogatory to the character of the parties, or any of them, therein mentioned or referred to, yet if he at the time believed the matters to be true he thereby committed no criminal offense. Unless you find that the same was done through actual malice, you should acquit."

It is also insisted that the information is not sufficient or definite. We think it is sufficiently certain to sustain the charge alleged, and that within the provisions of the statute it is libelous. Section 270 of the crimes act reads: "A libel is the malicious defamation of a person made public by any printing, writing, sign, picture, representation or effigy, tending to provoke him to wrath, or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse." *Oastle v. Houston*, 19 Kan. 417; *State v. Brady*, 44 Kan. 435, 24 Pac. 948; *State v. Wait*, 44 Kan. 310, 24 Pac. 354; *State v. Morrison*, 46 Kan. 679, 27 Pac. 133, and cases cited.

We have considered the other allegations of error discussed in the briefs, but we do not think it necessary to comment thereon. The defamatory matter in the article published appears to have been wholly false. Frank S. Larabee was not referred to in the article as a candidate for any office, and the attention of the readers of the paper was not called to that fact by anything stated in the libelous article. We think the conviction is sustained by the record. The judgment will be affirmed. All the justices concurring.

POOR v. TUSTON et al.

(Supreme Court of Kansas. Feb. 9, 1894.)
RESTRAINING EXECUTION — SUFFICIENCY OF PLAINT.

Case reversed on the authority of *Y. v. Wafer*, 29 Kan. 279.
(Syllabus by the Court.)

Error from district court, Dickinson county; M. B. Nicholson, Judge.

Action by M. M. Tuston and another against Scott E. Poor to restrain execution of a judgment. There was judgment for plaintiff, and defendant brings error. Reversed.

John H. Mahan, for plaintiff in error.
Stambaugh & Hurd, for defendants in error.

ALLEN, J. This action was brought by Tuston & Herrington to enjoin the enforcement of a judgment rendered by a justice of the peace against them in favor of the plaintiff in error. It appears that the case was set for hearing on the 11th day of September, 1888, at Chapman. That the attorneys for both parties entered into an agreement to continue the case until October 6th, at Empirington, 18 miles distant, and forwarded by mail to the justice at Chapman. At that time the case was set for hearing, the plaintiff appeared, and took judgment. The relation to continue did not reach the justice until the following day. The petition in this case is fatally defective because it fails to show, even by the most strained interpretation, that the plaintiffs had a valid defense to their action before the justice of the peace. *Y. v. Wafer*, 29 Kan. 279. The judgment is therefore reversed. All the justices concurring.

WILKERSON, Sheriff, v. BELKNAP SAVING BANK.

(Supreme Court of Kansas. Feb. 9, 1894.)
SHERIFFS — COMPENSATION ON SALE OF REAL ESTATE — STATUTES — TITLE OF ACT.

Section 27, c. 109, *Session Laws 1883*, an act concerning the "sale and redemption of real estate," is without force or effect, and therefore does not change the compensation of sheriffs upon the sales of real estate.

(Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by the Belknap Savings Bank against Wyatt R. Johnson for the foreclosure of a mortgage. There was a decree for plaintiff, and sale of mortgaged property. From a judgment disallowing a part of the commissions claimed by J. M. Wilkerson, sheriff, he brings error. Reversed.

The other facts fully appear in the following statement by HORTON, C. J.:

On the 1st day of March, 1892, in the circuit court of Shawnee county, a judgment of foreclosure of a mortgage upon land was rendered in favor of the Belknap Savings Bank against Wyatt R. Johnson for \$

On April, 1893, the land was sold upon an order of sale to satisfy the judgment by the sheriff of Shawnee county, who in his return charged the usual fees and commission provided by law in such cases. The Belknap Savings Bank moved the court to disallow so much of the sheriff's charges as consisted of his commission, upon the ground that the commission constituted an unlawful charge. The court sustained the motion. The sheriff excepted, and moved for a new trial. The court overruled the motion. The Belknap Savings Bank was the purchaser at the sale made by the sheriff. The case made is brief, and contains, among other things, the following: "It is admitted that all the proceedings in the foreclosure of the mortgage and the sale of the real estate were regular; that there were several judgment creditors in the action, and that plaintiff, who bid in the property, was the prior creditor; that the commission is a legal charge, unless prohibited by section 27 of chapter 109 of the Session Laws of 1893, which provides for the sale and redemption of real estate; and that the only error complained of is the decision of the court holding that said section applies to this case, and prohibits the sheriff from charging or receiving said commission, or any commission, for said sale." Said section 27 is as follows: "In any case where the property is bid in by or for the prior creditor, the sheriff shall receive his fees for the sale, but shall not be entitled to charge any commission on said sale." See Sess. Laws 1893, p. 32. The act took effect March 17, 1893. The sheriff excepted to the ruling of the district court, and brings the case here.

Vance & Campbell, David Overmyer, and J. Houk, for plaintiff in error. Gleed, Ware & Gleed, for defendant in error.

HORTON, C. J., (after stating the facts.)

It is forcibly contended that section 27, c. 109, Sess. Laws 1893, is without force or effect upon various grounds; among other things, that it is unconstitutional, because the act contains more than one subject, and because the subject of said section is not clearly expressed in the title, and also because its provisions are so uncertain that they can not be intelligently applied. The title of the act is as follows: "An act to regulate the sale of real estate under execution, order of sale, or other judicial process, and providing for the redemption of such real estate from sale, and the terms thereof, and repealing sections 4550, 4551, 4552, 4556, and 4557 of the General Statutes of 1889."

It is urged in support of the contention that the subject of costs introduced into the statute by section 27 is entirely foreign to the general object of the act, that there is no reference in the title to sheriff's fees or commissions, and that the words "prior creditor" render the section void for uncertainty. Counsel for the bank, in answer, say: "Sec-

tion 27 cuts down the enormous commissions which have of late years made the office of sheriff so lucrative, and is for the benefit of the debtor, and not for the benefit of the creditor;" and they further argue that the subject of costs is germane or incidental to the subject of redemption; that these matters have intimate relation and connection with each other; and therefore that section 27 is constitutional, notwithstanding the title of the act is limited to "judicial sales and redemption of real estate," because "it diminishes the amount of the judgment against the debtor, and makes it that much easier for him to redeem," and also that the provisions of the section are sufficiently certain. If section 27 were applicable to sales of real estate subject to redemption only, and if "prior creditor" read "prior mortgagee" or "prior lienholder," there might be reason to declare the section was germane or incidental to redemption, and therefore connected with the general object or purpose of the act. But in section 1, c. 109, there is a provision that, if the real estate sold is not subject to redemption, the sheriff shall immediately execute a deed to the purchaser thereof; and section 28 provides in part for the execution of a deed immediately upon sale. It is conceded by all of the parties that the redemption features of the statute cannot affect the judgment of foreclosure rendered on the 1st day of March, 1892,—nearly a year before chapter 109 took effect. If it were not so conceded, the recent decision of this court in *Greenwood v. Butler*, 52 Kan.—, 34 Pac. 967, is decisive. It was there ruled that the said chapter 109 does not have the effect to change or nullify any of the terms of a judgment duly rendered before the passage of that act. Section 27, taken in connection with the other provisions of the act, applies as much to the sales of real estate where there is no redemption as to sales where there is redemption. In this case it is admitted, and the trial court ruled, that the real estate sold by the sheriff is not subject to redemption; therefore, even if the subject of costs is incidental or germane to redemption, it does not follow that it is germane or incidental to sales of real estate where there is no redemption. If the provision in the act not to allow the former fee or commission to sheriffs was adopted for the benefit of the debtor or mortgagor, and not for the creditor, it does not have that effect if applied in this case in favor of the bank, the creditor. In this case there is no redemption under the provisions of chapter 109, therefore the diminishing of the judgment or costs of sale does not make it easier for the debtor to redeem. It relieves the mortgagee, the creditor. The purchaser was entitled to his deed at the confirmation of the sheriff's sale, and a deed was issued. The debtor or mortgagor had no further interest or claim to the real estate. The argument therefore that section 27 is consti-

tutional because costs are germane or incidental to redemption wholly fails, as the provisions of the act make it apply to all sales without any reference to redemption. The attempt to support the act upon the ground that it benefits the debtor only is not tenable, because it applies to the creditor as well as the debtor, and in this case, if the section is given any force or effect, it applies wholly for the benefit of the creditor, the mortgagee. With the redemption provisions eliminated from the act, the fees or commissions of the sheriff are not germane or connected with the subject. The provisions of the act take effect and begin to run at that point where the sale has been consummated, so far as any regulation of any of the things which enter into a sale are concerned. The act commences: "After sale by the sheriff of any real estate on execution, special execution, or order of sale, he shall, if the real estate sold by him is not subject to redemption, at once execute a deed therefor to the purchaser," etc. Again, the words "prior creditor," in section 27, are difficult of reasonable interpretation in carrying out the professed object of the act. If we should legislate so that "prior creditor" may mean "first lienholder," then the question will arise whether it means the first lienholder as found in the proceedings, or the first lienholder according to the records. If we should declare that "prior creditor" may be extended by judicial legislation to every creditor and lienholder, then the second or third creditor or mortgagee, who bids in the property, and is compelled to pay over to the sheriff the amount of the prior liens, involves the sheriff in care and responsibility for which no fee or commission is provided. It is not claimed that this result was intended by the act. We think the objections made to section 27 are sufficient to forbid any change thereby in the commission of sheriffs upon the sales of real estate. For the foregoing reasons, and others that might be stated, the many cases decided by this court and cited by counsel of the bank do not, in our opinion, apply. Of course, a sheriff has no contract that he shall receive any particular compensation for the term he holds office. "The legislature may exercise its control by increasing or diminishing the salary or emoluments of an office, except in those special cases in which the constitution had forbidden its exercise." *Harvey v. Commissioners*, 32 Kan. 162, 4 Pac. 153. If the legislature had amended the act relative to sheriffs' fees or commissions, providing that, where real estate is bid in by or for any lienholder or judgment creditor, the sheriff should not receive any commission on the sale, such an act would be clearly constitutional. The order and judgment of the district court will be reversed, and cause remanded, with direction to allow the fee or commission charged. All the justices concurring.

HAYS, Sheriff, v. FARWELL et al.
(Supreme Court of Kansas. Feb. 9, 1894.)
CONVERSION—PARTIES—JOINDER OF PLAINTIFFS—INSTRUCTIONS.

1. Where the mortgagees of two chattel mortgages executed, delivered, and filed simultaneously upon the same personal property agree that the liens thereof shall be concurrent, the mortgagees become thereby tenants in common of the property so mortgaged, and may join in an action for the unlawful conversion of the same.

2. Instructions are to be considered and construed together as a whole, and, if not erroneous when so construed, no one of them will be held erroneous.

(Syllabus by the Court.)

Error from court of common pleas, Sedgwick county; Jacob M. Balderston, Judge.

Action by John V. Farwell & Co. and others against W. W. Hays, sheriff, for conversion. Plaintiffs had judgment, and defendant brings error. Affirmed.

The other facts fully appear in the following statement by HORTON, C. J.:

This was an action commenced by John V. Farwell & Co. and L. D. Skinner against W. W. Hays to recover \$10,000 damages for an alleged taking and conversion of goods and merchandise. The plaintiffs claimed the goods by virtue of two promissory notes,—one of which, for \$38,613.23, was held and owned by the firm of John V. Farwell & Co.; the other—\$6,450—by the State National Bank of Wichita, of which L. D. Skinner is the cashier. The first-named note was executed by the firm of W. J. Wilson & Co., signed both in the firm name and by the individual members, to J. V. Farwell & Co. The second note was executed by the same payors to L. D. Skinner, cashier. Each note was secured by a chattel mortgage upon a stock of merchandise at Wichita, in this state, owned by W. J. Wilson, the head of the firm of W. J. Wilson & Co. The other two members of said firm were George R. Chumasero and W. E. Wilson, the latter being a minor son of W. J. Wilson. The defendant, who is the sheriff of Sedgwick county, levied upon the goods under an order of attachment in his hands, issued in a civil action brought against W. J. Wilson & Co. by Blumenthal Bros. & Co. upon an account for goods sold and delivered. The defense was, aside from the question of misjoinder of plaintiffs, that the circumstances under which the mortgage of J. V. Farwell & Co. was executed were such as to make it invalid as against the attachment levy. Among others, the court instructed the jury as follows: "If the chattel mortgages in question were executed by the said W. J. Wilson & Co. with the intent to hinder, delay, and defraud their creditors, and the plaintiffs participated in such intent, and did not take such mortgages and the possession of said goods in good faith, and for the purpose of securing valid debts, but for the purpose of aiding the said W. J. Wilson & Co. to defraud their other

creditors, then the defendant had the right to attach the goods." "(3) If you believe from the evidence that the Farwell mortgage was for an amount largely in excess of the amount owing to Farwell & Co. by Wilson & Co., you may consider such fact as evidence of fraud; and if you further find that this was done for the purpose of hindering, delaying, or defrauding other creditors of Wilson & Co., this would amount to fraud, and render the mortgage void as to other creditors of Wilson & Co. (4) If Farwell & Co. wrote the letter of the date of August 20, 1887, in evidence, and gave the same to Wilson with the intention that the same should be used by Wilson to obtain credit, and the statements in said letter in relation to the financial character and ability were false, and known to be false by Farwell & Co., and Wilson showed this letter to Blumenthal Bros. & Co. for the purpose of inducing the latter to sell him goods on credit, and Blumenthal believed the statements in said letter to be true, and on the faith thereof sold the goods to Wilson, charged for in the attachment suit of Blumenthal Bros. & Co., you must find for the defendant." "(10) The fact that J. V. Farwell & Co. gave W. J. Wilson the letter which has been introduced in evidence will have no bearing upon the right of the plaintiff to recover in this action unless you find that said letter was given by said J. V. Farwell & Co. with the intent and for the purpose of enabling the said Wilson to buy goods on credit, and also given by said J. V. Farwell & Co. with the knowledge that the statements made in said letter were not true." The plaintiff recovered a verdict for \$3,798.75, and the defendant's motion for a new trial was overruled, and judgment rendered for the amount of the verdict against him, and the defendant brings the case to this court.

Campbell & Dyer, for plaintiff in error.
Edwin White Moore, for defendants in error.

HORTON, C. J., (after stating the facts.) It is insisted that the plaintiffs below had no joint interest in the property, or the proceeds thereof, and therefore that there was such a misjoinder of plaintiffs, and such a variance between the allegations of the petition and the proof, that the objections to the testimony and the demurrer thereto should have been sustained. The proof showed that the notes and mortgages were all executed on the same day, and filed at the same time, and that there was a verbal agreement between Farwell & Co. and Skinner that the liens should be concurrent. It is the rule that where two or more parties have a joint interest in personal property which is injured, or if the right interfered with is a right possessed by two or more in common, they must all join in an action for the interference with it. "The concurrent execution and delivery of two chattel mortgages upon

the same property to different parties makes the mortgagees tenants in common of the property mortgaged, and they should join in an action for the unlawful taking or the conversion of it." *Welch v. Sackett*, 12 Wis. 243; *Hill v. Gibbs*, 5 Hill, (N. Y.) 56. We think, therefore, that under the evidence offered the plaintiffs below had such a joint interest in the property converted as permitted them to jointly bring the action, and that there was no fatal variance between the allegations of the petition and the proof.

It is next insisted that the instructions of the court were erroneous and misleading. In August, 1887, Wilson went to Chicago, to see Farwell & Co., to whom he was indebted in a large amount. They agreed upon a plan by which the creditors of Wilson & Fox, of which Farwell was the largest, would release Fox and take Wilson alone. It was also arranged to form the partnership of W. J. Wilson & Co. At Chicago, Farwell & Co. drew up and gave to Wilson a letter, of which the following is a copy: "John V. Farwell & Company, Chicago, New York, Manchester, Paris. Credit Department. Chicago, August 20th, 1887. Gentlemen: After examining thoroughly the affairs of Messrs. Wilson & Fox, of Wichita, Kansas, we are of the opinion that the contemplated dissolution of partnership will be for the benefit of all parties concerned. We are satisfied that after the dissolution Mr. W. J. Wilson will have a surplus of at least \$25,000.00 in his business, and we are entirely willing to release T. L. & J. B. Fox, and hold our present claim, against Wilson & Fox, against W. J. Wilson only. Yours, truly, John V. Farwell & Company." Afterwards, at Wilson's solicitation, this letter was signed by J. H. Walker & Co. Wilson went from Chicago to New York. It is claimed by defendants that he showed the Farwell letter to Blumenthal Bros., of whom Wilson & Fox had ordered in the spring of 1887 a bill of goods amounting to about \$2,000; that by the letter Wilson induced them to ship the goods ordered by Wilson & Fox to W. J. Wilson & Co., and also to sell him on credit a bill of goods which was afterwards delivered to Wilson & Co., but Wilson denied that he showed the letter to Blumenthal Bros. & Co., or that he spoke to them about it. The court gave various instructions requested by the plaintiffs below, and the defendant. If the instructions given were not sufficiently definite, or if they did not apply to the precise evidence developed upon the trial, other instructions should have been requested. All of the instructions requested by the defendant, excepting one, which was modified so that the jury "might consider the circumstances therein referred to as evidence of fraud," were given. Farwell & Co., without any knowledge of or consent thereto, could not be held responsible by their letter "for other false statements made by W. J. Wilson to the Blumenthals in New York city as to

his financial condition or pecuniary ability." This case differs materially in many of its aspects from the Wafer Case, 46 Kan. 597, 26 Pac. 1032. In that case it was found that the insolvent debtor obtained goods from the attaching creditors by false and fraudulent means; that the goods were received by the debtor on the 17th day of March, 1884; that the chattel mortgage was given to the bank, the antecedent creditor, within three days thereafter; and that the letter of the antecedent creditor induced the attaching creditors to give the insolvent debtor credit, and sell him goods. In this case Wilson denied that he showed the letter of Farwell & Co. to Blumenthal Bros., or that he obtained any credit or goods from them thereby. The chattel mortgages were not executed until the 3d of February, 1888, six months after the date of the letter, and long after the goods had been received by Wilson & Co., and not until the season for the sale of fall and holiday goods had passed. The debt from Wilson & Co. to Farwell & Co. increased between August, 1887, and February, 1888, about \$9,000, an amount much more than the Blumenthals' debt, while 40 per cent. of the latter's debt had been paid. On the 13th of December, 1887, Wilson & Co. sent Blumenthal Bros. a check for \$500, and suggested in their letter containing the check that they had "bought too many nice cloaks," and asked "them to help them out of some of them." This was an intimation that they were willing to let them take them back again. Then, again, the evidence of Wilson, Harding, and Fox all tended to prove the good faith of Farwell & Co. in writing the letter. Criticism may be made upon some of the instructions given, if considered separately, but all of the instructions should be construed together. In this light, no one was prejudiced thereby.

Upon the merits of the case, the claim of defendant below was "that Wilson perpetrated his fraud when he purchased the goods from the Blumenthals; that he obtained them under false pretenses; that his fraud was consummated; that the giving of the mortgages did not aid him in doing that, but it was the giving of the letter of August 20, 1887, by Farwell & Co.;" and, further, that on account of the false statements contained in that letter, and the knowledge thereof by Farwell & Co., the latter could not accept or obtain a chattel mortgage upon the goods of Wilson & Co. adverse to the attachment lien of the Blumenthals. The following instruction, which was given, covers all the material facts of the claim so made: "If Farwell & Co. wrote the letter of the date of August 20, 1887, in evidence, and gave the same to Wilson with the intention that the same should be used by Wilson to obtain credit, and the statements in said letter in relation to the financial character and ability were false, and known to be false by Farwell & Co., and Wilson showed this let-

ter to Blumenthal Bros. & Co. for the purpose of inducing the latter to sell him goods on credit, and the Blumenthals believed the statements in said letter to be true, and the faith thereof sold the goods to Wilson charged for in the attachment suit of Blumenthal Bros., you must find for the defendant." The jury found for plaintiffs below and therefore all conflicting evidence must be resolved in their favor.

In one view of the case the tenth instruction might be complained of, but the instruction was followed by the one just cited, which permitted the defendant below to defeat the Farwell mortgage if the letter of August 20, 1887, was known by Farwell & Co. to be false, and was given to Wilson for the purpose of obtaining credit, whether the credit was for the purpose of releasing Wilson & Son or used to obtain goods. This instruction really covers all that was claimed. We do not think it necessary to comment further. The judgment will be affirmed, the justices concurring.

MIAMI COUNTY NAT. BANK OF PAOLA v. BARKALOW, Sheriff.

(Supreme Court of Kansas. Feb. 9, 1888.)

CHattel Mortgages—VALIDITY OF—REPLEVIN—PLEADING—RES JUDICATA.

1. A failing firm transferred a stock of merchandise by chattel mortgage to the plaintiff. Subsequently, it was seized by the sheriff under executions issued upon judgments obtained against the firm. Plaintiff then, acting under its mortgage, brought an action in replevin to recover the possession of the stock. The sheriff answered by a general denial of the substitution of the judgment creditors' stock for or obtained. *Held*, that the sheriff, as the representative of the creditors, was entitled to make any defense which they had made, had substitution been effected. *Held*, further, that the sheriff, under the general denial, might prove that the mortgage was a fraud upon the creditors of the failing firm.

2. The decision of a court vacating an attachment obtained by the creditors upon the ground that the transfer was fraudulent, is such an adjudication as will preclude a re-examination of the same subject-matter in a later form of action in the same or a subsequent controversy.

3. While the plaintiff was entitled to a security from the failing firm for the amount actually due from them, the inclusion of a mortgage of a large debt due to plaintiff by one who was not a member of the firm, which amounted to more than the entire assets of the firm, rendered the mortgage void as to the plaintiff. (Syllabus by the Court.)

Error from district court, Miami County. John T. Burris, Judge.

Action in replevin by the Miami County National Bank of Paola, Kan., against George D. Barkalow, sheriff. There was judgment for defendant, and plaintiff in error. Affirmed.

Sheldon & Sheldon, for plaintiff below. W. H. Browne, W. T. Johnston, and C. Sheridan, for defendant in error.

JOHNSTON, J. This was a controversy regarding the validity of a mortgage and transfer of a stock of groceries made by J. I. Carroll & Co. to the Miami County National Bank of Paola. The mortgage was executed to secure an actual indebtedness of the firm of the bank of about \$300, and also a claim of \$2,700 which the bank held against Frank I. Carroll, who was not a member of the firm of J. H. Carroll & Co. Immediately after the execution of the mortgage, the bank took possession of the stock of goods. They were subsequently seized by George D. Barkalow, sheriff, under eight executions issued from the district court upon judgments that had been rendered against J. H. Carroll & Co. The bank and one T. S. McLachlin, who had also obtained a mortgage upon the stock, commenced a joint action of replevin against the sheriff; and upon a trial the court sustained a demurrer filed by the defendant upon the ground that there was a misjoinder of parties plaintiff. They then asked permission to file separate petitions, which was denied, and the jury was discharged. Afterwards, upon the application of plaintiff, a new trial was granted, when a separate petition was filed by plaintiff, and a separate action docketed. The sheriff answered with a general denial, and a trial was had with a jury, which resulted in a verdict for the defendant that he was entitled

to the stock of groceries, the value of which was \$1,450, and that the sheriff's interest therein was \$1,532.33. Judgment was rendered against the bank, in favor of the sheriff, for the return of the property, or the recovery of the value of the same, with costs. In this proceeding for review, the first ruling criticised is the one holding that there is a misjoinder of plaintiffs, as the action is originally brought. As a new trial was granted, that ruling is no longer material.

It is contended that there was error in permitting the sheriff to introduce evidence attacking the bona fides of the chattel mortgage, and to show that it was taken by the bank for the purpose of hindering, delaying, defrauding the creditors of J. H. Carroll & Co. The judgment creditors were never substituted as defendants in the place of the sheriff, and, as his answer was a general denial, it is contended that he was not entitled to prove that the mortgage to the bank was a fraud upon the creditors of J. H. Carroll & Co. While the creditors might have been substituted upon the application of themselves and of the sheriff, such a substitution was not essential to the making of a complete defense by the sheriff. He was

representative of all the creditors in whose favor the executions were issued, and entitled to make any defense which they might have made, had substitution been effected. If there was a conflict of interest among the creditors, it would furnish a good reason for substitution, or the making of such creditors parties with the sheriff; but

in this case no such conflict existed, and no application for substitution was made. Civ. Code, § 45; *Holsington v. Brakey*, 31 Kan. 560, 3 Pac. 353; *Wafer v. Bank*, 36 Kan. 202, 13 Pac. 209. Under the general denial filed by the sheriff, he was entitled to introduce evidence attacking the chattel mortgage taken by the bank, for fraud and invalidity. *Holmberg v. Dean*, 21 Kan. 73, and cases cited.

In four of the actions wherein the execution creditors obtained judgments, attachments were sued out, and upon motions of the bank and of J. H. Carroll & Co. these attachments were vacated and discharged. It is now contended that as to those creditors the rulings upon the attachment were conclusive, upon the principle of *res adjudicata*. The decision of an interlocutory motion, such as these were, is not conclusive, and will not prevent a re-examination of the same subject-matter in a regular form of action in the same or in a subsequent controversy. *Stapleton v. Orr*, 43 Kan. 170, 23 Pac. 109.

It is further contended that the testimony is insufficient to sustain the verdict and judgment. Under the rule by which the testimony must be measured in this court, we think it must be held to be sufficient to sustain the result that was reached. We must assume from the testimony and verdict that the bank included in the mortgage given by the firm a claim of \$2,700 which the firm did not owe. The insolvent condition of the firm was well known to the bank, and, with a knowledge that creditors were pressing for a settlement of their claims, the bank included with its small debt against the firm an indebtedness of another, which appears to have been well secured, and which was about 10 times as large as the debt of the firm, thus covering by mortgage the entire assets of the failing firm. Indeed, the amount of the debt named in the mortgage was more than double the value of the mortgaged goods. The mortgage was hurriedly executed, and with the purpose that the bank should at once take possession of the entire stock. It is true, there was an effort made to show that Jennie C. Carroll, one of the firm, was in a certain sense liable for the \$2,700 debt included in the mortgage, but the finding of the jury negatives that claim. The charge of the court fairly and fully presented the case to the jury, and leaves the plaintiffs no ground for the complaint that is made. They were fully advised that a debtor, although financially embarrassed, might in good faith prefer one creditor to another, and, further, that partners, if they acted in good faith, might mortgage the partnership property to secure the payment of the individual debt of one of the partners. They were further properly instructed that if the \$2,700 note was not a debt of the firm, nor of either one of the partners, then the giving of the chattel mortgage by the firm upon the property of the partnership to secure that note was

fraudulent and void, although the same mortgage included a just debt from the firm to the bank of about \$373. While a small part of the debt was just and due, the acts of the firm and the plaintiff, as disclosed by the testimony and findings, in including an amount in the mortgage so greatly in excess of the real debt of the firm, entirely destroy the validity of the mortgage, so that it furnishes no security for the actual debt covered by it. *Wallach v. Wylie*, 28 Kan. 138; *Winstead v. Hulme*, 32 Kan. 568, 4 Pac. 904; *McDonald v. Gaunt*, 30 Kan. 693, 2 Pac. 871; *Beavers v. McKinley*, 50 Kan. 602, 32 Pac. 363, and 33 Pac. 359. The judgment of the district court will be affirmed. All the justices concurring.

VAN DEMARK et al. v. BARONS.

(Supreme Court of Kansas. Feb. 9, 1894.)

CORPORATIONS—LIABILITY OF STOCKHOLDERS—TRANSFER OF STOCK.

1. The general rule is that shares of stock of a corporation are personal property, and may be transferred like any other property, unless the transfer is restrained by the charter or articles of association, and that a bona fide transfer terminates the liability of the transferor either to the company or to creditors.

2. The liability of a stockholder of a corporation against whom an execution may be issued under the provisions of paragraph 1192, Gen. St. 1889, is measured by the number of shares held by him at the time the execution against the property or effects of the corporation is found to be ineffectual.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturgis, Judge.

Action by F. E. Barons against the Clyde Milling Company. Plaintiff had judgment, and, execution having been ordered against M. V. B. Van Demark and C. W. Van Demark as stockholders of defendant corporation, they bring error. Reversed.

The other facts fully appear in the following statement by HORTON, C. J.:

On the 28th day of September, 1885, before A. B. Chaffee, a justice of the peace of Cloud county, in this state, F. E. Barons recovered a judgment of \$135.08 and \$32.03 costs against the Clyde Milling Company, of Cloud county, for rent of a certain strip of land upon a written lease executed the 1st of August, 1884. The rent sued for was for the months of May and June, 1885, at \$75 per month. On the 17th day of May, 1889, the execution was issued by the justice of peace upon the judgment against the milling company, and returned unsatisfied for want of property on which to levy. On the 3d day of June, 1889, F. E. Barons filed his motion before Samuel Demers, a justice of the peace of the city of Concordia, in Cloud county, to obtain an execution against M. V. B. Van Demark and C. W. Van Demark, alleging that such persons were on and after the 1st day of August, 1884, stockholders of the Clyde Milling Company to the amount of \$5,000 each in

paid-up stock. All of this was sold and transferred in good faith to H. B. Salls, F. W. Frazius, and H. Dobbs before the 1st of May, 1885. The corporation continued to do business after that time until March 17, 1887, when the property was destroyed by fire. When the Van Demarks sold and transferred their stock their certificates were surrendered and canceled, and new certificates of stock were issued to the purchasers, and proper entries made thereof upon the stock books of the milling company. At the time the action was commenced by F. E. Barons against the Clyde Milling Company the Van Demarks were not stockholders in the corporation; neither were they stockholders at the time the judgment was rendered, nor at the time the application was made before the justice of the peace for execution to issue against them as stockholders. On the 7th day of June, 1889, the justice sustained the application of F. E. Barons, and directed an execution to issue. The Van Demarks excepted to the order, and prosecuted proceedings in error to the district court of Cloud county. On the 30th of April, 1890, the district court of the county affirmed the order and judgment of the justice of the peace. The Van Demarks excepted, and bring the case here.

Theo. Laing and C. W. Van Demark, for plaintiffs in error. J. W. Sheafor, for defendant in error.

HORTON, C. J., (after stating the facts.) The general rule is that shares of stock of a corporation are personal property, and may be transferred like any other property, unless the transfer is restrained by the charter or articles of association, and that a bona fide transfer terminates the liability of the transferor either to the company or to creditors. *Thomp. Liab. Stockh.* § 210, and cases cited; *Mor. Priv. Corp.* § 888. The decisions of the courts upon this question have been exceedingly conflicting, but the rule announced is in accord with the previous intimations of this court. *Valley Bank & Sav. Inst. v. Ladies' Cong. Sewing Soc.*, 28 Kan. 423. In *Plumb v. Bank*, 48 Kan. 484, 29 Pac. 699, it was observed: "The registration of stock required by statute is in part for the benefit of the public and to provide creditors with a record of those who are individually liable in case the corporation becomes unable to meet its obligations. * * * The general rule is that the books of the corporation furnish evidence as to what persons are entitled to the rights and privileges of stockholders and to whom creditors may look for payment in the event of the insolvency of the corporation." See, also, *Bank v. Wulfeuhler*, 19 Kan. 65; *Hentig v. James*, 22 Kan. 326. This rule also seems to be in accord with the express legislative will. Paragraph 1193, Gen. St. 1889, reads: "The clerk or other officer having charge of the books of any corporation, on demand of the plaintiff in any execution against the corporation, his

agent or attorney, shall furnish such plaintiff, his agent or attorney, with the names and places of residence of the stockholders (so far as known,) and the amount of stock held by each, as shown by the books of the corporation." The constitution of our state ordains that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes." The provision of the statute permitting an execution to be issued provides the stockholder is liable to "an extent equal in amount to the amount of stock by him or her owned," etc. Paragraph 1192, Gen. St. 1889. The true meaning of the constitution and statute is manifest. Each stockholder is liable for the dues of the corporation to an additional amount equal to the stock owned by him or her; that is, owned at the time the liability attaches. Missouri has a statute almost identical with ours, permitting an execution to issue against a stockholder. Section 13, Wag. St. 291. The Missouri statute, and the portion of our statute requiring construction at our hands, seem to have been taken almost literally from the English statute of 8 & 9 Vict. c. 18, § 36. The English statute is construed by the courts of that country to permit executions to be issued against the persons only who are stockholders at the time the execution against the property or effects of the corporation is found to be ineffectual. *Nixon v. Green*, 11 Exch. 549, 3 Hurl. & N. 686. The Missouri courts, following the construction given by the English courts, also hold that under the statute the liability of the stockholder is measured by the number of shares held by him at the time of the return of the execution nulla bona. *Skrainka v. Allen*, 76 Mo. 384. In this case no action in equity was brought to marshal the liabilities of all the stockholders, but a motion was made only for the issuance of an execution. "While we maintain the right of a shareholder to dispose of his shares absolutely," said Dillon, J., in a well-considered case, "by an out and out sale and registered transfer, and thus escape liability, provided the sale is made bona fide, and the purchaser is in law capable of assuming the liabilities of the transferor, yet this does not involve the right to transfer shares for a fraudulent purpose, or under circumstances which the transferor knows will make the transfer, if it is sustained, work a fraud upon other stockholders, or upon creditors." *Johnson v. Laffin*, 6 Cent. Law J. 131.

We are referred, upon the part of the plaintiff below, among others, to the following cases from Ohio: *Brown v. Hitchcock*, 36 Ohio St. 687, and *Wheeler v. Faurot*, 37 Ohio St. 28. It is urged that the constitution and statutes of Ohio are substantially the same

as those of this state. There is a slight difference only in the constitutions of the two states, but a wide difference in the statutes. In construing the statute of Ohio, the language of "all stockholders * * * shall be deemed and held liable for an amount equal to their stock subscribed in addition to such stock, for the purpose of securing the creditors of such company, and that the trustees and directors * * * shall be deemed and held individually liable for all debts contracted by them" was held as a legislative indication that the statute included those who were stockholders at the time the indebtedness was incurred, and also all of those who successively stand in their shoes in respect to the same stock. Therefore the Ohio decisions hold that the assignees, as well as the assignors, of stock are necessary parties in actions to enforce the liability of stockholders; the purchasers of stock being held in that state as indemnitors to the assignors against their liability to creditors. *Wheeler v. Faurot*, supra. The effect of these decisions is to attach the liability to the stock, and not to the stockholder merely. But in *Brown v. Hitchcock*, supra, deciding that the personal liability of a stockholder is not discharged by the subsequent assignment or transfer of his stock, two of the ablest judges dissented. The decisions referred to were made by the supreme court of Ohio after the adoption of our constitution and statute, and therefore we are not required to follow the judicial construction of that state. The judgment of the district court will be reversed, and cause remanded.

JOHNSTON, J., concurring.

ALLEN, J., (concurring specially.) I concur in the decision of this case because it is a proceeding to obtain by motion an execution against the stockholders, under paragraph 1192 of the General Statutes. Such a proceeding is summary in its character, and not adapted to the trial of controverted questions of fact, or the adjustment of equities growing out of transfers of stock. As to the effect of a transfer by one who is a stockholder at the time a debt is contracted to a person not financially responsible, even though made in good faith, where a regular action is brought to charge him with liability, I express no opinion.

MILLER v. WICHITA OVERALL & SHIRT MANUF'G CO.

(Supreme Court of Kansas. Feb. 9, 1894.)

ATTACHMENT—WHEN PROPER—DEBT NOT DUE.

1. The fact that a debtor voluntarily secures bona fide debts due to some of his creditors by chattel mortgages is not alone sufficient to support an attachment against his property on the ground that he has disposed of his property with the intent to hinder and delay his creditors.

2. Where an attachment is issued on negotiable promissory notes not due, it is error for the court to enter judgment thereon before the last day of grace.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Action on two promissory notes by the Wichita Overall & Shirt Manufacturing Company against L. M. Miller. There was judgment for plaintiff, and defendant brings error. Reversed.

C. T. Atkinson and McDermott & Johnson, for plaintiff in error. Rohrbaugh & Rauch, for defendant in error.

ALLEN, J. On the 14th day of December, 1889, the plaintiff in error executed, in the name of L. M. Miller & Co., two promissory notes payable to the order of the defendant in error,—one for \$150, due March 15, 1890, and the other for \$153.33, due April 15, 1890. This action was brought on December 16, 1889, on the two notes, and an attachment was obtained against the property of the defendant, by order of the district judge, on an affidavit stating that the defendant had disposed of his property with intent to hinder and delay his creditors. The defendant filed a motion to discharge the attachment, together with an affidavit denying the grounds stated in the affidavit on which the attachment was obtained. On the hearing of this motion, testimony was offered showing that, at the time the notes sued on were taken, a chattel mortgage was also executed by the defendant. The testimony offered in support of the attachment shows that Miller was a merchant doing business at Arkansas City, under the name of L. M. Miller & Co. Plaintiff was located at Wichita. Miller, being considerably in debt, and pressed by some of his creditors, executed a first mortgage on his stock of goods to the Kendall Boot & Shoe Company for \$1,032, and thereafter executed a number of mortgages to various other creditors before the one to the plaintiff. At the time of the execution of the Kendall Company's mortgage, it does not appear that they were asking for it, but the execution of the mortgage was voluntary on Miller's part. It does appear, however, that he was pressed by other creditors, and that he preferred to secure the Kendall Company first, giving as a reason therefor that he would rather be in their hands than in anybody else's; "that they had treated him very honorably, and would protect him from any other creditors if he got into trouble; and that they would allow him to handle the business for them, and thus protect himself." It appears that he took the mortgage himself from Arkansas City to Winfield, and filed it for record, but, before doing so, it was delivered by him to the attorney of the Kendall Company. The only evidence in the record tending in any manner to sustain the attachment is that concerning the statements made by Miller as

to his purpose in giving the Kendall Company a first mortgage on his stock. It is apparent that the execution of such a mortgage tends to hinder other creditors, to some extent at least, in the collection of their debts; yet it is the settled law of this state that a debtor has the right to secure one creditor by chattel mortgage in preference to others. *Furniture Co. v. Armstrong*, 46 Kan. 270, 26 Pac. 693; *Hosea v. McClure*, 42 Kan. 403, 22 Pac. 317. There is nothing in the record showing that the mortgage contained any unusual provisions, that any rights were reserved by Miller other than those of mortgagors generally, nor that there was any agreement on the part of the Kendall Company to show him any especial favors whatever. The most that can be said in support of the position is that Miller's statements show that he expected good treatment at their hands, and that his property would not be unnecessarily sacrificed. No claim was made on the hearing that the debts secured by mortgages prior to that of the plaintiff were given to secure any but bona fide debts, nor that any one of them was for an amount larger than that actually owing. In this state of the case, we think the evidence wholly fails to sustain the attachment, and, as the plaintiff brought suit on the notes before they were due, it cannot maintain its action if the attachment fails. It appears, also, that judgment was rendered on both notes on the 15th day of April, 1890. This was the date on which the second note was payable by its terms, but, as the defendant was entitled to three days of grace thereafter, the judgment was prematurely entered. The judgment and order sustaining the attachment must be reversed, and a new trial ordered. All the justices concurring.

ERVING v. PHELPS & BIGELOW WIND-MILL CO. et al.

(Supreme Court of Kansas. Feb. 9, 1894.)

MECHANICS' LIENS—WHO MAY INTERPLEAD.

Where a party, seeking to obtain foreclosure of a mechanic's lien, makes service by publication on the parties who appear from the records to be the holders of prior mortgages, and where the first mortgage is owned by a person whose assignment has not been placed on record, and on application of the second mortgagee, before any sale of the incumbered premises, the judgment is opened, and such second mortgagee let in to defend, and afterwards the holder of the first mortgage moves for leave to answer, and also leave to interplead, and the court grants leave to interplead, but refuses leave to answer, and afterwards revokes the order granting leave to interplead, and refuses all right to be heard, and where no intervening rights have been acquired on the faith of such judgment, *held*, that the court should have permitted the first mortgagee to answer, and have his rights protected.

(Syllabus by the Court.)

Error from district court, Kiowa county; S. W. Leslie, Judge.

Action by the Phelps & Bigelow Windmill Company against H. F. Megenity and others to foreclose a mechanic's lien. After a judgment was entered for plaintiff, W. A. Erving, the mortgagee of the property, moves to vacate the same. From a judgment denying the motion, Erving brings error. Reversed.

Geo. L. Douglass, for plaintiff in error. T. E. Dempsey, for defendants in error.

ALLEN, J. The defendant H. F. Megenity executed two mortgages to George C. Strong, the first one for \$500, and the second for \$50. The first one was assigned to E. G. Robertson, and said assignment duly recorded. Robertson thereafter assigned it to W. A. Erving, the plaintiff in error, who did not record the assignment to him. The second mortgage was assigned to the Hartford Investment Company. On January 8, 1889, the Phelps & Bigelow Windmill Company began this suit to foreclose a mechanic's lien on the property covered by the mortgage, making service by publication on Robertson and the Hartford Investment Company. March 13, 1889, a judgment was rendered in favor of the windmill company, declaring their liens paramount to all others, and ordering the sale of the lands. Neither Erving nor the Hartford Investment Company had any notice of this suit until after the sheriff had advertised the lands for sale. On December 11, 1889, the Hartford Investment Company filed its answer and cross petition, setting up three coupons, which were secured by the first mortgage, and also a motion for an order staying the sale. Thereupon bond was given, the sale was stayed, and no further order has been issued. At the first term of the court thereafter, the Hartford Investment Company made application to open the judgment, and filed an amended answer and cross petition, setting up the second mortgage held by that company. On March 27, 1890, an order was made opening and setting aside the judgment against the investment company, and continuing the case to the next term. At the same time, Erving, assignee of the first mortgage, appeared, and filed answer and cross petition, setting up his first mortgage, and moved the court to set aside judgment against Robertson, his assignor, and to be let in to defend as his successor in interest. Another motion was filed on behalf of Erving for leave to file an interplea, and to be made a party in said action. The application of Erving to be substituted as a defendant for Robertson was refused, but the motion for leave to interplead was allowed. Immediately thereafter, on the same day, the court vacated the order, and also set aside the order letting the Hartford Investment Company in to defend.

We are at a loss to understand why the court refused to open the judgment, and give the plaintiff in error an opportunity to set up his rights. The only service in the case was

by publication, notifying his assignor, Robertson, of the pendency of the action. Whether the plaintiff in error had a right to open the judgment, under section 77 of the Civil Code, or brought himself strictly within the position contemplated by that section or not, it is hardly necessary to decide. It appears that the property which was the subject of controversy had not been sold; that Erving was the owner of the \$500 mortgage, which, it is conceded on all hands, was a first lien on the premises. He had never had his day in court, in fact. The judgment had been opened to let in the Hartford Investment Company. There is no reason apparent for depriving Erving of his just claim. To hold, under the circumstances of this case, that his failure to record the assignment from Robertson, and foreclosure under service by publication on Robertson, absolutely cut him off from all rights where application is made to open the judgment before actual sale of the lands, and before any new rights have been founded on the judgment in the case, is to do a manifest and palpable injustice. We think the court erred in refusing to permit the plaintiff in error to answer and set up his rights. After the court had once permitted him to interplead, we fail to see how any change in the status of affairs between the Hartford Investment Company and the windmill company ought to or could affect Erving's rights. It may be that an application for leave to file an interplea was not technically correct in form, but the substance of the leave desired was that the plaintiff in error might set up his interest in the property. When the court had once granted permission to do so, under the circumstances in this case, it was manifest error to revoke the order, and deprive Erving of all his rights in the matter. Robertson had no longer any right to the mortgage. Erving was the real party in interest. The mere fact that he had failed to record his assignment should not operate to deprive him of his rights, where no one else has been injured in any manner by such failure. The judgment of the court below will be reversed, with direction to permit the plaintiff in error to answer in the case. All the justices concurring.

ATCHISON, T. & S. F. R. CO. et al. v. LUENING et al.

(Supreme Court of Kansas. Feb. 9, 1894.)

RAILROAD COMPANIES — CONSTRUCTION OF ROAD IN STREET—INJURIES TO ABUTTERS.

A railroad company constructed its road across First street in the city of Wellington, — a city of the second class. First street intersected Washington avenue, upon which a lot-owner's house fronted. Partly on account of the construction of the railroad on First street across Washington avenue, and partly for the purpose of enabling a street railway to lay its tracks over Washington avenue and across the railroad on First street, the surface or grade of Washington avenue was slightly lowered or

changed by the railroad company, with the consent and under the direction of the city authorities. This change of grade did not completely obstruct or materially destroy the ingress to or egress from the lots fronting on the avenue. *Held*, that the owner of the lots was not entitled to recover damages from the railroad company on account of such change or grade of the avenue.

(Syllabus by the Court.)

Error from district court, Sumner county; James A. Ray, Judge.

Action by J. K. Luening and another against the Atchison, Topeka & Santa Fe Railroad Company and another to recover for obstructing a street. There was judgment for plaintiffs, and defendants bring error. Reversed.

A. A. Hurd, Robert Dunlap, and O. J. Wood, for plaintiffs in error. John A. Murray, for defendants in error.

HORTON, C. J. J. K. Luening and Hermine Bolte alleged in their petition that they were the owners and in the possession of lots 20, 21, and 22, in block 1, L. K. Myer's First addition to the city of Wellington, in this state; that the lots are situated on the northwest corner of the block, and bounded on the west by Washington avenue, and on the north by First street; that there is a public alley or road on the east side of the lots, extending through block 1 and intersecting First street; that on the lots are a dwelling-house, barn, outbuildings, and fruit and other trees, of the value of \$2,000; that the house fronts towards the west on Washington avenue; that in the summer of 1887 the Atchison, Topeka & Santa Fe Railroad Company and the Southern Kansas Railway Company entered upon First street and Washington avenue, and, with excavations, embankments, railroad tracks, switches, and train yards, obstructed the ingress to and the egress from the lots and alley through and over the streets named. Evidence was offered by plaintiffs below upon the trial in support of a part of the allegations of the petition. The trial court gave, among others, the following instruction: "If you find that the defendants, at the time of the other acts complained of, excavated Washington avenue in front of said plaintiffs' property so as to change it from its former grade, and thus injure plaintiffs' ingress and egress to and from their property, this would also be an element of damage which you may consider; and it would make no difference whether or not consent for such change was given by the mayor or street commissioner or city engineer." The jury specially found that the railroads did not run on Washington avenue in front of the lots of the plaintiffs below, and that the only obstruction upon Washington avenue was caused by an excavation. It appears that there was evidence before the jury that Washington avenue, at its intersection with First street, was cut down a depth of three feet, and graded gradually so

that at the south line of lot 20 the grade was about a foot in depth; that the avenue was graded its full width; that this was done at the direction of the authorities of the city; that the grade was established by the city engineer, and was for the purpose of enabling a street railway to lay its tracks on First street and over Washington avenue. While it appears that the change of grade of Washington avenue in front of the lots was partly necessary on account of the construction of the railroads on First street and partly for the purpose of grade of a street railway, yet it nowhere appears that the change of grade of the street completely or materially obstructed the ingress to or egress from the lots. John D. Bradley, a witness called on behalf of plaintiffs below, testified: "Q. The ingress and egress to that property from the west or from Washington street is not impaired any? A. It is steep; yes, sir. Q. How? A. There is occasion for steps there in front. Q. Two little steps is that going up onto the lawn? A. Yes, sir. Can't people get to and from that house on the west to Washington avenue just the same as they could before the building of the railroad on First street? A. On the sidewalk; yes, sir. Q. They can have more and egress now just as they could before? A. Yes, sir; except the steps. Q. The railroad company don't occupy Washington avenue in front of the property? A. No, sir. Q. I will ask you if it is not a matter of fact that this grade was not cut down on Washington avenue for the purpose of lowering the street down on a level with the railroad, so that the street railway could cross the railroad? A. My recollection is that the time they were working there some one was said in relation to that. Q. Do you know, as a matter of fact, why that grade was made there. Answer yes or no. A. Yes, sir; I know. Q. I will ask you to tell if it is not a fact that those approaches to the railroad company from Washington avenue south of the track were not made for the purpose of lowering the street so that a street railway could cross the track of the railroad company. A. Yes, sir."

Upon all the evidence disclosed upon the trial, the instruction was misleading and erroneous. The jury were permitted to allow damages for any injury or inconvenience of ingress to or egress from the lots on Washington avenue, even if the inconvenience were the result only of the excavation or grading of the avenue under the direction of the city authorities. This identical question has been decided by this court many times, and it is only necessary to refer to the decisions. *Methodist Episcopal Church v. City of Wyandotte*, 46 Kan. 197, 26 Pac. 422; *Railroad Co. v. Mahler*, 45 Kan. 565, 26 Pac. 22; *Railroad Co. v. Smith*, 45 Kan. 264, 25 Pac. 630; *Chicago, K. & W. R. Co. v. Union Inv. Co.*

Kan. 600, 33 Pac. 378; and Railroad Co. v. Peterson, 51 Kan. 604, 33 Pac. 606; Railway Co. v. Arnold, (just decided,) 35 Pac. 780.

We are referred to *Egbert v. Railway Co.*, (Ind. App.) 33 N. E. 659. That case is not applicable, because in that case the fee of the street was in the lot owner. Washington avenue was originally dedicated from the land belonging to the occupants of the town site of Wellington. In this state the fee of all real estate, when dedicated to public use by the proprietors of any town or city, vests absolutely in the county wherein such real estate lies, and the county forever afterwards holds the property in trust for such use. The county holds the property as a mere agent of the public, and in trust for the public use. But the city has the control over it as another agent of the public. *Railroad Co. v. Garside*, 10 Kan. 552; *Showalter v. Railway Co.*, 49 Kan. 421, 32 Pac. 42. If the only question in this case were as to the obstruction of access to the lots from First street and the alley in the rear of the lots, then, as the defendants below claimed upon the trial that they permanently occupied what was formerly First street, or a large part thereof, under an ordinance vacating the street and permitting them to use the same, and if the damages found by the jury embraced only those resulting from the obstruction of all ingress and egress from and to First street and the alley, an affirmance of the judgment might be ordered; but the damages included in the verdict are not separable by any of the special findings of the jury, and, as the court instructed the jury that they might include in the verdict an improper element of damage for any injuries of ingress and egress to and from the lots by the excavation or grading of Washington avenue, the judgment must be reversed and cause remanded. All the justices concurring.

HOFMAN v. DEMPLE.

(Supreme Court of Kansas. Feb. 9, 1894.)

CANCELING DEED—SUBROGATION.

In an action brought by a wife to set aside a conveyance of the homestead, which was subject to a mortgage, where it appears that her signature to the deed was obtained by duress, but that she took no steps for more than a year and a half to set it aside, but, on the contrary, that its validity was acquiesced in by herself and husband, and the grantee, before any attempt was made to cancel or set aside said deed, paid off such mortgage and the existing tax liens on the premises, *held*, that it is not error for the trial court, in rendering a judgment canceling such deed, to subrogate the grantee to the rights of the original mortgagee, and order a sale of the mortgaged property, to repay to the grantee the amount expended by him in payment of the mortgage and tax liens.

(Syllabus by the Court.)

Error from district court, Shawnee county; John Guthrie, Judge.

Action by Gottlieb Hofman against Peter

Demple to cancel a conveyance of land. There was judgment for defendant and plaintiff brings error. Affirmed.

The other facts fully appear in the following statement by ALLEN, J.:

This action was brought by plaintiff in error to set aside a conveyance from herself and husband to the defendant of a five-acre tract of land constituting their homestead. It is alleged in the petition that the signature of the plaintiff to the deed was obtained by fraud and duress. It appears that, in exchange for said lands, the defendant conveyed to plaintiff's husband, Michael Hofman, a quarter section of land in Wabaunsee county, subject to a mortgage of a thousand dollars, executed by plaintiff's husband to defendant. In her petition the plaintiff alleges a tender of a deed reconveying the quarter section of land, and of \$473.50, the amount of a mortgage upon said homestead, with interest, and of the taxes paid by defendant on said land. At the trial a jury was impaneled, and certain questions of fact were submitted to them, in answer to which they found that the plaintiff was induced to sign the deed in controversy by threats of violence made by her husband, and that the defendant, Demple, furnished Hofman intoxicating liquors, and got him drunk, for the purpose of inducing him to convey the plaintiff's homestead. After this verdict was returned the plaintiff moved for judgment on the findings canceling the deed. The plaintiff tendered in court a reconveyance of the Wabaunsee county land to the defendant, but declined to pay the money, which had been tendered before the commencement of the action, into court. Thereupon the court heard further testimony in the case. In a deposition of the defendant, read in evidence by the plaintiff, he stated: "Up to about 18 months ago, Michael Hofman had paid me the interest on the amount due me on the trade as it fell due, and after the expiration of the 10 months during which he was to have free rent of the property he traded me, he paid me the rent for the same for the period of 13 months. I fully paid and satisfied the mortgage of \$400.00, with interest thereon, as I agreed to do at the time of making the trade with Hofman." The attorney for the plaintiff testified that the amount of money tendered before the commencement of the action was his own money. Thereupon the court proceeded to make further findings of fact, from which it appears that at the time of the execution by the plaintiff and her husband of the deed of their homestead there was a mortgage thereon, held by one Durein, for \$400; that before the commencement of this action the defendant paid off and satisfied said mortgage; that there was due thereon for principal, interest, and taxes, the sum of \$450 at the time it was paid. The court thereupon ordered that the deed for the Wabaunsee county land be delivered to the defendant; that the plaintiff

deposit in the clerk's office, for the defendant, within 90 days, the sum of \$473, which was found to be equal to the sum paid to the holder of the mortgage on the homestead, with interest and taxes paid by Demple; canceling the deed of the homestead; and decreeing that, in case the plaintiff should fail to pay into court the sum of \$473, the defendant should be subrogated to the rights of the holder of the mortgage, and that the homestead should be sold on execution for the payment thereof. The plaintiff excepted to this judgment, and brings the case here for review.

Wm. R. Hazen, for plaintiff in error.
Frank Herald, for defendant in error.

ALLEN, J., (after stating the facts.) It is contended that the court erred in subrogating the defendant to the rights of the former holder of the mortgage on the plaintiff's homestead. Counsel for the plaintiff in error urges that this is an action simply to obtain a decree declaring plaintiff's signature to the deed void; that it is void without any such decree; that the only purpose of prosecuting this action is to make a public record of the fact, and thereby prevent a transfer to an innocent party without notice; that the defendant, having procured the deed by fraud and duress, cannot acquire any rights through the transaction; and that his payment of the mortgage was voluntary on his part, and that he can found no claim thereon against the plaintiff. The authorities cited by counsel for the plaintiff in error merely reaffirm the well-established doctrine that a party cannot resort to a fraudulent, illegal, or immoral transaction as the foundation of a cause of action in a court of justice; that in all such transactions the court leaves the guilty party where it finds him. In this case, whether we recognize the nice distinction drawn by counsel for plaintiff in error or not, the action is equitable in its nature. The plaintiff seeks relief from an act which she claims she was compelled to do by duress. It appears that the deed sought to be canceled was executed on the 20th day of May, 1886, and, so far as appears from the record brought to this court, its validity remained unquestioned until about the time this action was commenced, which was on the 12th day of March, 1888. The testimony taken before the jury is not before us. All presumptions are, therefore, in favor of the findings and conclusions of the court. We must presume that the mortgage, which is conceded to have been a valid lien at the time of the execution of the deed, and then due, was paid by Demple after the execution of the deed, and before any steps were taken to question its validity. Would it be equitable to hold that the plaintiff might remain quiet, apparently ratifying the conveyance made, thereby induce the defendant to pay off and discharge the liens existing on the property, and then,

after a delay of more than a year and a half, come into court, and recover, not merely that which had been conveyed away, but something far better, the same homestead, freed and cleared of the liens which were thereon at the time she parted with it? We think this would be palpably wrong, and that the trial court took the correct view of the case. The judgment is therefore affirmed. All the justices concurring.

AMENT v. LOWENTHAL.

(Supreme Court of Kansas. Feb. 9, 1894.)

TROVER AND CONVERSION — LIMITATION — PLEADINGS.

1. Where an action is brought for the unlawful conversion of personal property, and the petition is somewhat indefinite as to the time of such conversion, which is material in the case, and a motion is made by the defendant to compel the plaintiff to state the exact date of conversion, and such motion is overruled, and the plaintiff and defendant both offer evidence as to whether the action was commenced in time, and the defendant, at the close of plaintiff's testimony, and before offering his evidence asks leave to file a supplemental answer raising the question of the statute of limitations, but this is overruled, and thereafter questions are submitted to the jury as to when the action accrued and of the date and service of the summons. *Held*, that the case must be regarded as having been tried as if the statute of limitations were involved, or that the refusal of the trial court to permit the plea of the statute of limitations to be filed was, under the circumstances, an abuse of discretion.

2. The time that a defendant is out of the state after a cause of action has accrued against him cannot be computed as any part of the period within which the action must be brought.

(Syllabus by the Court.)

Error from district court, Shawnee county; John Guthrie, Judge.

Action by Lottie G. Lowenthal against C. W. Ament for conversion. Plaintiff had judgment, and defendant brings error. Reversed.

J. G. Waters, for plaintiff in error. S. B. Isenhardt, for defendant in error.

HORTON, C. J. Mrs. Lottie G. Lowenthal brought her action against C. W. Ament for the unlawful conversion of certain personal property, and recovered judgment against him for \$394.75, which judgment is sought to be reversed. Ament loaned money to the husband of Mrs. Lowenthal, who stated he was the owner of the goods, and Ament held the same under a chattel mortgage executed by the husband. The goods belonged to Mrs. Lowenthal, and the mortgage was executed by her husband without her knowledge or consent.

The serious trouble in the case is over the statute of limitations. The jury found specially that the cause of action accrued to the plaintiff, Mrs. Lowenthal, in February, 1885. The petition was filed December 8, 1886, but the only service on the defendant was made on March 28, 1887, more than two

years after the action accrued to the plaintiff, according to the special finding of the jury. It is true that the jury also found that the summons was served on March 26, 1886; but this is contrary to all of the evidence. It is admitted that the petition was not filed until December 8, 1886, and therefore the summons could not have been served in March, 1886,—about 10 months prior to the filing of the petition. But, as the evidence shows the service of summons was made on March 28, 1887, this, in the absence of any other evidence to the contrary, is conclusive. A civil action is not commenced by merely filing the petition, but a summons must be issued thereon, and be served, as prescribed by the statute. The petition alleged the conversion as follows: "All of which said goods and chattels, afterwards, and on the — day of —, A. D. 1885, came into the unlawful possession of said defendant; and the said defendant, contriving to injure said plaintiff, did afterwards, on the said — day of —, A. D. 1885, unlawfully and wrongfully convert the said goods and chattels, of the value of two thousand five hundred dollars, to his own use and benefit." At the proper time, Ament moved the court to require the plaintiff to state when he unlawfully and wrongfully converted the goods to his own use. The court overruled the motion, and he excepted. After the plaintiff below had offered her evidence, the defendant demurred thereto. This was overruled by the trial court. Thereupon the defendant asked to file an amended or supplemental answer, pleading the two-years statute of limitations. Civ. Code, § 18, subd. 3. This was overruled; the defendant excepted.

Although the court refused to allow the plea of the statute of limitations to be filed, yet during the trial there was evidence offered by both the parties as to whether the action was barred or not. The plaintiff, in representing her case to the jury, introduced Ament as a witness, and attempted to show by him that he was absent from the state in 1885 and 1886. The defendant was permitted to show when the service of the summons was made upon him. The court, in receiving such evidence, and submitting to the jury questions as to when the action accrued, when the petition was filed, and the date and service of the summons, treated the case as though the statute of limitations was involved. Under all the circumstances, we think the case should be regarded as having been tried upon the theory as to whether the action was brought within time, or else that the trial court abused its discretion in not permitting the supplemental answer to be filed, raising the question of the statute of limitations. In this state, statutes of limitation are regarded as statutes of repose, and therefore favorably considered. *Sibert v. Wilder*, 16 Kan. 176. Upon another hearing the answer may be so amended as to fairly present the question whether this action was

commenced within time. In its instructions the court should fully charge the jury upon that issue. Of course, we do not intend, by anything said in this opinion, to imply that the action was actually barred at the time of its commencement. The jury, under proper instructions of the court, will be enabled to intelligently determine that question. We cannot render judgment upon the findings of fact, because, although the jury found that the date of conversion was February, 1885, they further found (incorrectly, however) that the date of summons and of the service thereof was on March 26, 1886. Further than this, there was some evidence tending to show that Ament was out of the state for a brief time after the cause of action accrued. The exact time that he was absent, the jury did not determine. If the action accrued the last of February, 1885, it is possible that Ament was out of the state a sufficient length of time for the action to have been brought within the statute, even if the jury were correct in the finding that the conversion took place in February, 1885. The time of his absence cannot be computed as any part of the period within which the action must be brought. Civ. Code, § 21. The judgment will be reversed, and a new trial awarded. All the justices concurring.

LAFEYTH v. EMPORIA NAT. BANK.

(Supreme Court of Kansas. Feb. 9, 1894.)

TROVER AND CONVERSION—WHAT CONSTITUTES.

B., who owned a herd of cattle, gave to L. a first mortgage upon 14 of them; and to a bank he gave another mortgage on some of these, as well as upon the remainder of the herd. Both mortgages were duly recorded. The bank's debt being overdue, and supposing that its mortgage covered the whole of the cattle, and was superior to all other liens, it agreed with B. that he should make a public sale of them, and that the proceeds should be applied in payment of the mortgage debt which it held against B. The bank sent one of its officers to the sale to assist B., but mainly to protect the interests of the bank, as it claimed the cattle under its mortgage; and at the sale two of the cattle included in the mortgage to L. were sold, and the proceeds of the sale taken to and retained by the bank. *Held*, that the action of the bank in aiding and assisting B. in the sale made it liable to L. as for a conversion of the two animals wrongfully sold.

(Syllabus by the Court.)

Error from district court, Lyon county; Charles B. Graves, Judge.

Action by John B. Lafeyth against the Emporia National Bank for conversion. Defendant had judgment, and plaintiff brings error. Reversed.

E. W. Cunningham, for plaintiff in error.
Lambert & Dickson, for defendant in error.

JOHNSTON, J. This action was brought to recover for the alleged conversion of 9 heifers and 3 bulls, of the value of \$400. C. B. Bacheller, who owned a herd of cattle

about 80 in number, gave mortgages upon them to John B. Lafeyth and the Emporia National Bank. Lafeyth had a mortgage on 14 of them, to secure an indebtedness of \$300, some of which appear to have been included in the mortgage given to the bank. It seems to have been the understanding of the officers of the bank that the bank's mortgage covered the whole herd, and that it was superior to any other liens held against the cattle. Where the same cattle were included in both mortgages, it has been found that the one given to Lafeyth gave him the first lien upon such cattle. The debt to the bank was past due, and it was pressing Bacheller for payment, and he had been warned that if the debt was not taken care of the bank would proceed to recover it from the mortgaged property. To meet this demand, and in accordance with an agreement with the bank, Bacheller advertised and held a public sale of the cattle, which was attended by an officer of the bank. The sale had not proceeded far when it was discovered that the cattle were not bringing a fair price, when the public sale was discontinued. At that sale, however, two animals upon which Lafeyth had a first lien were sold, for which the purchasers gave notes, which were turned over to the bank, discounted, and credited upon Bacheller's indebtedness to the bank. Afterwards, the remainder of the herd was sold at private sale for cash and approved promissory notes, all of which were turned in to the bank and placed to Bacheller's credit. In this way, Bacheller sold six other animals which were covered by the Lafeyth mortgage; thus making eight of the animals on which Lafeyth held a lien that were disposed of by Bacheller, and the proceeds turned over to the bank. The six other animals that were included in the Lafeyth mortgage either died or were otherwise disposed of, and none of the proceeds of these was ever received by the bank. Lafeyth then brought the present action against the bank, alleging a wrongful conversion of the cattle; and the court found from the evidence that Lafeyth held the first lien upon the eight animals in controversy, but that the acts of the bank and its agents did not amount to a conversion of any of them, and accordingly gave judgment.

If, as contended by the bank, it did not participate in the sale, and if Bacheller alone sold the cattle, and turned the proceeds of the same over to the bank in payment of an existing indebtedness against him, and this was done without any knowledge by the bank that any particular portion of the proceeds was derived from the sale of the cattle in controversy, then certainly the ruling of the court was correct, and an action for the conversion of the animals does not lie. Such an action might be maintained against Bacheller, who sold the cattle, and Lafeyth might follow and recover them from the purchasers. If this was a proceeding to reach

the proceeds of the cattle, or to follow and reclaim a trust fund, other and different considerations would arise; but, being an action for the wrongful sale and conversion of property, no recovery can be had for a misapplication of the proceeds of the property, which were paid by Bacheller to the bank. *Bixel v. Bixel*, 107 Ind. 534, 8 N. E. 614. From the evidence and findings of the court, we must assume that the bank had no connection whatever with the disposition of the cattle sold at private sale; but, reading the testimony of the defendant, we cannot say that it had no connection with the disposition of the two animals covered by the Lafeyth mortgage, which were disposed of at public sale. If the bank joined with Bacheller in wrongfully selling and disposing of the mortgaged cattle, a liability arises against either or both of them for the wrongful conversion of the same. Now, the testimony offered in behalf of the bank shows that the bank considered that it had a mortgage on all of the cattle; that it consented and agreed that a public sale of them should be made, and the proceeds applied in discharge of Bacheller's indebtedness. The sale, it is true, was advertised in the name of Bacheller, and did not purport to be a sale under the mortgage of the bank. It is also stated that Halleck, an officer of the bank, attended the sale, mainly at the instance of Bacheller, to examine and pass upon promissory notes and securities which purchasers might give for cattle. Halleck, however, states that he went there, by "request of Bacheller and the bank, to look after the interests of the bank." He states that he went there at the request of Maj. Hood, who was the manager of the bank, and attended the sale for the purpose of looking after the interests of the bank, as the bank claimed the cattle under the chattel mortgage. The notes which were taken for the two Lafeyth animals were carried by Halleck to the bank, and the proceeds of the same applied by it on the payment of Bacheller's debt. Maj. Hood testifies that Bacheller sold the cattle, and brought the proceeds to the bank, but he admitted that he consented that the sale should be advertised and held; that he claimed the cattle in controversy by reason of a mortgage; that he was urging Bacheller to realize upon the cattle, and make payment of his debt; and that Halleck was sent to and assisted in the sale in the interest of both Bacheller and the bank, but particularly in the interest of the bank. It is thus shown that the bank not only agreed upon a sale of the cattle, but that it actually co-operated with Bacheller in making a sale of two of them. The proceeds of the sale were taken to and retained by the bank. As the mortgage of Lafeyth was recorded, the bank must be held to have knowledge of the lien which it created, and that a sale of the cattle by Bacheller without the consent of Lafeyth would be a tortious conversion of the same. As the bank

aided and assisted in the sale and conversion of two of the animals, it becomes liable to an action for a wrongful conversion of them, equally with Bacheller. *Brown v. Campbell Co.*, 44 Kan. 237, 24 Pac. 492; *Walt, Act. & Def.* 140; *Cooley, Torts*, 451. The judgment of the district court will be reversed, and the cause remanded for a new trial. All the justices concurring.

BURLINGTON INS. CO. v. MORTIMER.

(Supreme Court of Kansas. Feb. 9, 1894.)

CORPORATIONS—ACTIONS—SERVICE OF SUMMONS.

In an action against an insurance company in any county, service of summons may be made upon the chief officer of the agency which the company may have in such county, as provided in section 14 of the Justices' Code, which provision was not repealed by the enactment of section 41, c. 93, Laws 1871, nor by section 4, c. 112, Laws 1875.

(Syllabus by the Court.)

Error from district court, Coffey county; Charles B. Graves, Judge.

Action by the Burlington Insurance Company against W. W. Mortimer for an injunction. There was judgment for defendant, and plaintiff brings error. Affirmed.

G. E. Manchester, for plaintiff in error.
J. I. Wolfe, for defendant in error.

JOHNSTON, J. This was an action to enjoin the enforcement of a judgment obtained before a justice of the peace by W. W. Mortimer against the Burlington Insurance Company. The company had insured several of his animals against lightning, and, one of them having been killed, a recovery of \$75.65 was had. An abstract of the judgment rendered by the justice of the peace was filed in the office of the clerk of the district court, and thereupon an execution was issued to the sheriff of the county, commanding him to seize the property of the company to satisfy the judgment. This proceeding was then begun, and at the trial it was shown that the only summons served upon the insurance company in the action before the justice of the peace was one served upon A. W. Hindes, who was the agent and chief officer of the company within Coffey county. It was also shown that, by the terms of the insurance policy upon which the judgment was obtained, the liability of the insurance company was limited to \$50 on each animal of the kind described in the bill of particulars or claim made by Mortimer. Upon a demurrer to the evidence, the court held it to be insufficient to entitle the insurance company to the relief asked, and judgment was therefore given in favor of Mortimer.

The principal ground assigned for reversal is that, as no service was made upon the superintendent of insurance, no jurisdiction was obtained by the justice of the peace, and therefore the judgment is a nullity.

The service was made in pursuance of section 14 of the Justices' Code, which is exactly the same as section 69 of the Civil Code, and reads as follows: "When the defendant is an incorporated insurance company, and the action is brought in the county in which there is an agency thereof, the service may be upon the chief officer of such agency." Gen. St. 1869, par. 4,860. If this provision, which has been published in all editions of the General Statutes since 1868, still exists, the service was good, and the judgment based thereon is valid. It is contended that this section has been repealed and that service must now be made upon the superintendent of insurance, as provided by section 41 of chapter 93 of the Laws of 1871, as amended by section 4 of chapter 112 of the Laws of 1875. See Gen. St. 1889, par. 3354. It is not pretended that there was any express repeal of the provision authorizing the service upon the chief officer of the agency of an insurance company in a county, but it is contended that the later provisions, creating an insurance department in the state, and regulating the insurance companies doing business therein, cover the whole subject of the former, and were intended as a substitute for it. We are unable to agree with this contention. It is well settled that repeals by implication are not favored in law, and are only upheld where the new law is in irreconcilable conflict with the former one, or where it obviously covers the whole subject-matter, and was plainly intended by the legislature as a substitute for the other. Courts presume that laws are passed with deliberation, and with a knowledge of those in existence, and hence it will be inferred that the legislature did not intend to abrogate a prior law, unless the repugnancy between the two is irreconcilable, or that the last was manifestly intended to supersede the former. If, for any reason, both may be given effect and subsist together, it is the duty of the courts to uphold both. The later statute, which, it is claimed, operates as a repeal of general code provisions, was enacted to regulate and control the business of insurance transacted in the state. As first enacted, it incidentally made it a condition precedent to the transaction of business within the state that foreign insurance companies should submit to its jurisdiction, and should consent that service of process might be made upon any agent of the company, within the state, or, where the company had withdrawn from the state, service might be made by sending a copy of the process by mail addressed to the company, at the place of its principal office, when it ceased to do business; and it further provided that this substituted service should be deemed as valid as if it had been made in the ordinary manner. By the amended law of 1875, it was provided that insurance companies, on applying for permission to transact business in the state, must, as a condition precedent, consent that

service of process might be made upon the superintendent of insurance of this state, and provided the manner in which it should be made. Such companies were required to stipulate and agree that the service so made should be deemed as valid and binding as if due service had been made upon the president or chief officer of the corporation. Instead, therefore, of making the service upon the superintendent exclusive, the language of the statute implies that the other service provided for in the Code might be made. It was the evident purpose of the legislature to provide an additional method of obtaining service upon, and jurisdiction over, insurance companies whose agents or officers might be remote from the locality where the contracts of insurance were made. It was not infrequent that insurance companies which had been engaged in business had discontinued their agencies and withdrawn from the localities where policies of insurance had been issued; so that, in the enforcement of insurance contracts, service of process could not be obtained upon the company, and local policy holders were required to follow the company to some remote place or state, at great inconvenience and loss. To meet such a contingency, the legislature provided for another method of service by which causes of action might be enforced in the counties in which they arose. The statute does not contemplate that it is the only method, but obviously treats it as a cumulative, rather than an exclusive, method. It is somewhat similar to the provision with reference to service upon railroad corporations. Chapter 123, Laws 1871, provided additional facilities for obtaining jurisdiction over such companies, but it has never been contended that this provision superseded or set aside the earlier and general one providing for the service of summons against corporations. The ground that judgment was rendered for an excessive amount might have been a sufficient cause for reversal if a proceeding in error had been instituted, but it does not avoid the judgment, and is not available in an action to enjoin its enforcement. The judgment of the district court will be affirmed. All the justices concurring.

ROE v. ROE.

(Supreme Court of Kansas. Feb. 9, 1894.)

DIVORCE—ALIMONY—RES JUDICATA.

1. Where a husband obtains a valid decree of divorce from his wife, in another state, and no order is made with reference to alimony or a division of the property of the parties, the wife cannot, long afterwards, in an action brought in this state by her to obtain a divorce and alimony, obtain a decree for alimony alone, in the absence of any showing that the law of the state where the divorce was granted is different from that of Kansas.

2. The final judgment in an action granting

a divorce settles all property rights of the parties, and is a bar to an action afterwards brought by either party to determine the question of alimony, or any property rights which might have been settled by such judgment.

(Syllabus by the Court.)

Error from district court, Montgomery county; J. D. McCue, Judge.

Action by Adella Roe against O. F. Roe for divorce. From the decree rendered, defendant brings error. Reversed.

C. A. Cox, for plaintiff in error. S. M. Porter, for defendant in error.

ALLEN, J. This action was commenced by Adella Roe, as plaintiff, in the district court of Montgomery county, on the 18th day of October, 1884, to obtain a divorce from the defendant, and the custody of a minor child. The only service then attempted on the defendant was by publication soon thereafter. Nothing further appears to have been done in the case until the 31st day of July, 1889, when an amended petition was filed, praying for suit money, custody of said child, and for a divorce and alimony. On the 8th day of August, 1889, a summons was issued and personally served on the defendant in Neosho county, Kan., where he had resided since the fall of 1881. The defendant's answer was filed on the 10th of September, 1889, and denies generally the allegations of the petition. The case was tried in March, 1890. The plaintiff testified that she was married to the defendant on the 21st day of April, 1877, which was Saturday; that the defendant stayed with her, at her father's house, on the following night and Sunday; and that he left on Monday morning, and had never lived with her since. On the 27th of July following, the child referred to in the pleadings was born. The defendant went to Colorado soon after leaving the plaintiff, and on the 22d day of September, 1881, obtained a judgment of divorce from the plaintiff in the county court of Conejos county, Colo., on a service by publication. He then returned to Kansas. In the fall of 1882 the defendant was married to Miss Perry, by whom he has four children.

One of the principal questions litigated at the trial was as to whether the plaintiff had been married before she was married to the defendant. It appears from the testimony of the plaintiff herself that she lived and cohabited with one John McAllister, for more than a year, when she was 15 or 16 years old; but she testifies that they were not married, and that the defendant was informed with regard to it before their marriage. At the conclusion of the trial the court made special findings of fact, among which are findings that the parties were married as alleged in the plaintiff's petition; that at the time of the marriage the plaintiff was pregnant with a child, of which the defendant was the father; that the defendant instituted an action in Colorado to obtain a divorce on

the ground of previous marriage and adultery on her part; that the plaintiff in this action had no actual notice of the pendency of said case; that a decree of divorce was granted in said case; that said decree was obtained by false testimony offered by the defendant; that at the time the defendant returned to Kansas he had property of the value of about \$250. The court, thereupon, as a conclusion, sustained the Colorado decree of divorce, and granted the plaintiff \$200 as alimony, and also adjudged that he pay the costs. Of this judgment he complains. While the court found that the Colorado divorce was obtained by false testimony, it did not find that the plaintiff in that action knew that such testimony was false; and, inasmuch as the trial court sustained the validity of the Colorado decree, all presumptions are in its favor. More than that, however, the validity of that decree and of the subsequent marriage of the defendant are not challenged in this court. We then are left only to determine the question whether a decree for alimony can be sustained, under the circumstances, where it is conceded that the defendant had obtained a valid decree of divorce before his second marriage. The question litigated on the trial as to whether the plaintiff had a husband living at the time of her marriage with the defendant was resolved by the trial court in favor of the plaintiff on conflicting testimony. We therefore need not consider that matter.

The Colorado statutes with reference to the granting of divorce and alimony were not introduced in evidence at the trial. We must then assume that the law of that state is the same as the law of Kansas. *Furrow v. Chapin*, 13 Kan. 107; *Railway Co. v. Cutter*, 16 Kan. 568; *French v. Pease*, 10 Kan. 51. The Colorado decree merely grants a divorce, and contains no provision whatever with reference to property. It then only remains to determine whether, under the laws of Kansas, long after a decree of divorce has been rendered,—after one of the parties has married, and become the father of a family of children,—the divorced wife can prosecute an independent action, and obtain a judgment for alimony. Under section 646 of the Civil Code, it is provided: "If the divorce shall be granted by reason of the fault or aggression of the wife, the court shall order restoration to her of the whole of her property, lands, tenements and hereditaments owned by her before, or by her separately acquired after such marriage, and not previously disposed of, and also such share of her husband's real and personal property, or both, as to the court may appear just and reasonable; and she shall be barred of all right in all the remaining lands of which her husband may at any time have been seized." Section 647 contains the provision that: "A divorce granted at the instance of one party shall operate as a dissolution of the marriage contract as to

both, and shall be a bar to any claim of the party for whose fault it was granted in or to the property of the other, except in cases where actual fraud shall have been committed by or on behalf of the successful party." In the case of *Lewis v. Lewis*, 15 Kan. 181, it was held: "Where a decree of divorce was duly and legally entered after service by publication, and the mailing of a copy of the petition and publication notice, as required by section 641 of the Civil Code, that the defendant could not come in under section 77 of the Civil Code, and, upon the showing of want of actual notice, have the decree set aside, and be let in to defend." And that: "Where the decree of divorce contained no other order concerning property than one barring defendant of all right and interest in the property of plaintiff, held, that this order must stand with the decree, and, the decree being undisturbed, the order could not be set aside." This case was decided long before the amendment rendering it unlawful for either of the parties to a judgment of divorce to marry within six months after the rendition of the judgment. It is the general policy of the law, strongly adhered to by this court in its prior decisions, to require every question properly involved in any suit to be disposed of by the judgment finally rendered in the case. *Commissioners v. Welch*, 40 Kan. 787, 20 Pac. 483; *Bierer v. Fretz*, 37 Kan. 27, 14 Pac. 558; *Railroad Co. v. Beebe*, 39 Kan. 465, 18 Pac. 502; *Westbrook v. Mize*, 35 Kan. 299, 10 Pac. 881; *Chicago, K. & W. R. Co. v. Commissioners of Anderson Co.*, 47 Kan. 768, 29 Pac. 96. Under the law of Kansas the court rendering judgment in an action for divorce is authorized, on a proper showing, to grant alimony, whether the divorce be allowed or not. If the divorce is granted, it operates as an absolute dissolution of the marriage tie. Whatever orders with reference to alimony or a division of the property are desired by either party may then be considered and determined by the court. If they may be so considered and determined, and a party neglects to require such determination, the judgment is as full and complete a bar as if the question had been fully tried and determined. Within the case of *Lewis v. Lewis*, though the rule declared may sometimes work great hardships, a judgment on service by publication is as effectual as where personal service is made. We conclude, then, that under the evidence, and the finding of the court sustaining the Colorado divorce, the parties were not husband and wife either at the time the suit was commenced, or when it was finally determined, and that the court was without power to grant alimony to the plaintiff while sustaining the Colorado divorce made so long before. The judgment is reversed, with the direction to enter a judgment in favor of the defendant on the findings of the court. All the justices concurring.

BOLEN COAL CO. v. WHITTAKER BRICK CO.

(Supreme Court of Kansas. Feb. 9, 1894.)

RES JUDICATA—SPLITTING OF ACTIONS.

1. Where a creditor splits up a running account which constitutes a single cause of action, and recovers upon a part of the same, such adjudication constitutes a complete bar to a recovery on the remaining portion of the account.

2. In an action before a justice of the peace upon a verified account, no bill of particulars or verified denial was filed by the defendant. Held that, while the correctness of the account was admitted by the defendant, it did not prevent him from setting up and establishing the defense of res adjudicata.

(Syllabus by the Court.)

Error from district court, Wyandotte county; O. L. Miller, Judge.

Action by the Bolen Coal Company against the Whittaker Brick Company to recover on account of goods sold and delivered. There was judgment for defendant, and plaintiff brings error. Affirmed.

Anderson & Littick and Cunningham & Dolan, for plaintiff in error. Getty & Hutchings, for defendant in error.

JOHNSTON, J. This was an action to recover the balance due upon an account for coal furnished by the Bolen Coal Company to the Whittaker Brick Company during the months of May and June in 1889. It was brought originally before a justice of the peace, and from his judgment an appeal was taken to the district court, where the case was tried without a jury. The defense was that the subject-matter was necessarily involved in a former trial between the same parties, and that the adjudication and judgment in that case was a bar to the maintenance of the present one. No special findings of fact were made, and the general finding and judgment of the court sustained the defense of the brick company. Accepting the testimony in its most favorable light for the brick company, as we must, it appears to be sufficient to sustain this defense. It appears that the brick company agreed to purchase coal for its use from the coal company at prices named by the latter. Afterwards, the brick company obtained coal from time to time on seven different days during the months of May and June, which was entered up by the coal company in an account against the brick company. This account, embracing the several items, was presented to the brick company for payment, and, the same not being paid, two actions were brought thereon before the same justice of the peace, and upon the same day. One action was brought to recover the first two items of the account, and the remaining items were embraced in the other action. In the first action a judgment was obtained against the brick company for \$71.60, which was paid and satisfied. Subsequently, the other action was tried upon the balance of the account, and

the judgment in the former trial was claimed to be a bar to any further recovery. The coal was sold in accordance with an oral agreement, and a running account of the several lots delivered was kept by the coal company. The items of the account upon which the actions mentioned were based corresponded with the items and charges in the running account which was presented to the brick company. The balance due upon this account constituted one, and only one, cause of action. *Tootle v. Wells*, 39 Kan. 452, 18 Pac. 692. It is the policy of the law to avoid a multiplicity of actions, and a party is not permitted to split a cause of action into two or more parts, and maintain separate actions for each of the separate parts. A recovery of one part of an action so split up will constitute a complete bar to a recovery upon any remaining portion thereof. The principle of indivisibility applies to running accounts, like the one under consideration; and, if the plaintiff could split this account into two causes of action, he might bring as many actions as there were items in the account. The doctrine of res adjudicata forbids a repetition of vexatious lawsuits, and a former trial and judgment upon one of the items is conclusive between the same parties as to all matters which were or might have been litigated in all other actions, whether commenced before or after the action in which the adjudication was made. *Whittaker v. Hawley*, 30 Kan. 317, 1 Pac. 508; *Railroad Co. v. Beebe*, 39 Kan. 465, 18 Pac. 502; *Shepard v. Stockham*, 45 Kan. 244, 25 Pac. 559; *Chicago, K. & W. R. Co. v. Commissioners of Anderson Co.*, 47 Kan. 766, 29 Pac. 93.

The remaining question arises upon a ruling of the court in the admission of testimony. The account upon which plaintiff's action was brought was verified, and the defendant filed no bill of particulars, nor any verified denial of the plaintiff's account. The plaintiff objected to the introduction of any testimony in behalf of the defendant, claiming that under section 84 of the justices' act the defendant's indebtedness was admitted. That section provides that the correctness of an account duly verified shall be taken as true, unless there be a verified denial of the same. The defendant did not dispute any item or charge in the account, and did not question the correctness of the same. His claim was that, while the account was correct, the plaintiff, by its conduct, had forfeited any right to recover on the same. The defense of res adjudicata does not deny the correctness of the account, any more than would the defense of the statute of limitations, which it is admitted could be made without a verified denial. In each case the conduct of the party precludes a recovery. It has been held that the omission of the defendant to deny the correctness of a verified account upon which action is brought before a justice of the peace will not prevent the defendant from introducing evidence to prove

y set-off or counterclaim which he may
ve against the plaintiff. *Railway Co. v.*
uld, 44 Kan. 68, 24 Pac. 352; *Baughman v.*
ale, 45 Kan. 453, 25 Pac. 856. The defend-
ts were not required to file any bill of par-
ulars before the justice of the peace, and,
pleading having been required in the dis-
ct court, defendant was entitled to offer
y evidence and make any defense which
had, except to deny the correctness of the
count. The admission of that fact did not
clude the defendant from showing that the
rmer adjudication upon the account was a
mplete bar to any further recovery. The
dgment of the district court will be af-
med. All the justices concurring.

KINGSLEY v. PURDOM.

(Supreme Court of Kansas. Feb. 9, 1894.)

MORTGAGES—PAYMENT—WHAT CONSTITUTES.

1. A principal debtor, whose debt is secured
mortgage on property owned by another per-
1, cannot, by purchase of the obligation given
secure the payment of the debt, and causing
same to be assigned to his agent, foreclose
mortgage, and subject the mortgaged prop-
erty to the payment to him of the debt. Such
empted purchase operates as a payment of
debt.

2. The evidence in this case supports the
dings of fact made by the court.
Syllabus by the Court.)

Error from district court, Allen county;
Stillwell, Judge.

Action by George A. Bowlus against J. F.
Kingsley, R. M. Purdom, and others to fore-
close a mortgage. From the judgment ren-
dered, defendant Kingsley brings error. Af-
med.

The other facts fully appear in the follow-
ing statement by ALLEN, J.:

This action was brought by George A. Bow-
lus to foreclose a mortgage executed by the
plaintiff in error and his mother, Celinda
Thomas, to the Iola Building & Loan Assoc-
iation, and to recover the amount of a bond
executed by the same parties, which said
mortgage was given to secure. Bowlus claim-
ed by assignment from the building and loan
association. Defendant in error, R. M. Pur-
dom, and one W. H. McDowell, were also
named as defendants. McDowell made de-
fult. Purdom answered, specifically deny-
ing that the plaintiff was the owner of the
bond and mortgage sued on, and setting up
lien on the mortgaged property by virtue
of a judgment of the district court of Allen
county in his favor against the defendants
Celinda Thomas and W. H. McDowell for
\$35.05. The plaintiff in error, Kingsley, an-
swered, alleging that he was only surety for
the payment of the bond; that he himself
re-purchased said bond and mortgage from the
building and loan association, and for con-
fidence had the same assigned to the plain-
tiff, and praying a foreclosure thereof in his
favor. Plaintiff, Bowlus, thereupon filed a

reply, admitting the allegations in the an-
swer of Kingsley. An amended answer was
afterwards filed by Kingsley, and a reply
thereto by Purdom, in which reply it was
alleged that the said bond and mortgage were
paid in full by Kingsley and his mother.
The case was tried by the court, and special
findings of facts were made, as follows: "(1)
The defendant Celinda Norris is the mother
of the defendant J. F. Kingsley by a former
marriage. Said defendants Norris and Kings-
ley lived in the state of Ohio. Prior to their
coming to Kansas, Kingsley owned a farm
in the state of Ohio. He had trouble with
his wife, and separated from her, and on ac-
count of this trouble with his wife he made
a conveyance of his Ohio farm to his mother,
Mrs. Norris, apparently without any con-
sideration. In course of time the Ohio farm
was sold, and ultimately from the proceeds
of the Ohio farm the defendant Mrs. Norris
obtained the legal title to a house and lot
in Iola, Kansas, known as the 'Arnold Prop-
erty.' In equity, as between Mrs. Norris
and her son, the defendant Kingsley, the
Arnold property was really the property of
defendant Kingsley, and it was expressly
understood between Mrs. Norris and the
defendant Kingsley, as far back as 1884, that
said Arnold property was and should be so
considered, between them, the property of
defendant Kingsley. (2) When Mrs. Norris
obtained the legal title to said Arnold prop-
erty there was a mortgage on it in the sum
of \$360, which was a valid incumbrance on
said land, and for the purpose of getting
money with which to pay off this mortgage
the defendants Mrs. Norris (then Mrs. Thom-
as) and Kingsley on May 6, 1886, executed to
the Iola Building and Loan Association a bond
and mortgage for \$573.48, by means of which
they obtained the sum of \$300, said bond
and mortgage being the same that are sued
on in this action. This mortgage was on real
property other than the Arnold property, the
title of record to said mortgaged property
being in Mrs. Norris. The said \$300 so ob-
tained by this mortgage to the Iola Building
and Loan Association was used in paying
off the said mortgage on the Arnold property.
(3) About three or four years prior to No-
vember, 1889, the defendant Kingsley traded
the Arnold property for a farm in Dakota.
Mrs. Norris made the deed for the Arnold
property, and the deed for the Dakota farm
was made to defendant Kingsley, and he re-
ceived and retained for his own use, as per
agreement between him and his mother, the
proceeds of said Dakota farm. Kingsley sub-
sequently sold the Dakota farm, and with
the proceeds made other investments. The
exact date of these transactions does not ap-
pear, further than heretofore stated. (4)
About June 6, 1889, the Iola Building and
Loan Association commenced an action to
foreclose the mortgage sued on herein, and
the defendant Kingsley was a party to said
suit. He thereupon went to the officers of

said association, and effected an arrangement with them, whereby, in consideration of the sum of \$450, paid by said defendant to said association, the said association assigned the bond and mortgage sued on to George A. Bowlus, the said Bowlus agreeing to hold the same as the agent of said Kingsley. (5) Some time subsequent to the execution of the mortgage sued on—the exact time not being shown—the defendant Mrs. Norris conveyed the property covered by the said mortgage to the defendant W. H. McDowell. (6) On the 8th day of March, 1889, the defendant R. M. Purdom duly recovered a judgment in the district court of Allen county, Kansas, against the defendants Celinda Norris and W. H. McDowell for the sum of \$333.05 and costs, with 10 per cent. interest thereon from said date, which judgment is still in full force and effect. (7) It is inferable from all the evidence, facts, and circumstances in the case, and I therefore find the fact to be, that the intent and purpose of defendant Kingsley, in effecting the transaction mentioned in finding of fact No. four herein, was to prevent the defendant Purdom from resorting to the land covered by said mortgage, for the purpose of obtaining any satisfaction of his aforesaid judgment." And the court thereupon found as a conclusion of law that "the defendant Kingsley is not entitled to a foreclosure of the mortgage sued on. Said mortgage is to be held and considered as paid and satisfied, and the lien of the judgment of the defendant Purdom is the first and prior lien on the land described in said mortgage." Thereupon judgment was entered in accordance with the conclusion of the court. Kingsley excepted, and brings the case here for review.

Ewing & Bennett and Oscar Foust & Son, for plaintiff in error. O. E. Benton and A. H. Campbell, for defendant in error.

ALLEN, J., (after stating the facts.) The plaintiff in error does not question the correctness of the second, fourth, fifth, and sixth findings of fact, but challenges the first one as not supported by the evidence. We think the evidence fairly shows that the Arnold property was purchased with the proceeds of the Ohio land, which had belonged to Kingsley; that the loan secured by the bond and mortgage in suit was obtained from the building and loan association by Kingsley to pay off a mortgage on the Arnold property; and there is no dispute whatever in the evidence as to the fact that Kingsley traded the Arnold property for Dakota land, which was deeded to himself, and which he afterwards sold and received the proceeds of, the deed to the Arnold property being made by his mother to the party with whom he traded. It is urged in opposition to finding No. 7 that the evidence shows that Kingsley acquired the title to the bond and mortgage by the assignment made

by the building and loan association to his agent, Bowlus; that a surety has a right to pay the debt and take an assignment to himself of the instrument securing the same, and that he may thereupon enforce it against the principal debtor; that, inasmuch as both he and his mother, who were the only parties bound by the obligation, swore positively that she was the principal, and he was only surety, such testimony concludes the controversy in favor of the position of plaintiff in error. Conceding the soundness of the legal proposition advanced by the plaintiff as to the right of a surety to take an assignment of the bond of his principal and enforce it by an action in his own name, we cannot hold that the mere statements in court by the parties to the instrument that Kingsley was surety necessarily determines the question. It was not only the right, but the duty, of the court to consider all the testimony in the case, and from all of the statements of witnesses, and the facts and circumstances surrounding the transaction, to determine who was in fact principal and who surety. It was Kingsley himself who took a share in the building and loan association in order that the loan might be obtained. His name appears first on the bond, though second on the mortgage. The money was applied to the payment of a mortgage on lands to which he had the equitable, though not the legal, title, and from which he ultimately received the proceeds. This certainly is some evidence tending to show that he was the principal in the obligation, and, if so, of course the transaction by which the bond was assigned to his agent, for a consideration paid by himself, simply amounts to a payment and discharge of the obligation. We think the findings of fact are supported by the evidence, that the conclusion of law is correct, and the judgment is affirmed. All the justices concurring.

RUSSELL v. SEERY.

(Supreme Court of Kansas. Feb. 9, 1894.)

ARBITRATION AND AWARD—SETTING ASIDE AWARD.

1. Awards of arbitrators made in pursuance to the statute are to be liberally construed, and should not be set aside upon any grounds other than those named in the statute.

2. Error of judgment by arbitrators as to the effect or weight of evidence is not a ground for setting aside an award.

3. Where the contending parties expressly agree that no oaths shall be administered to arbitrators, and that the testimony of witnesses unsworn shall be received, neither of them will be allowed to make the omission to administer oaths to arbitrators and witnesses a ground of objection to the award, after a result adverse to him has been reached.

(Syllabus by the Court.)

Error from district court, Shawnee county; John Guthrie, Judge.

Arbitration proceedings between John W. Russell and Mary E. Seery, administratrix

of the will of James Seery, deceased. From a judgment setting aside the award filed, Russell brings error. Reversed.

James H. Guy and A. M. Thomas, for plaintiff in error. Thomas H. Bain, for defendant in error.

JOHNSTON, J. James Seery and wife conveyed a tract of land to John W. Russell by warranty deed, which was described by metes and bounds. The width of the tract, as described in the deed, was 20 rods and 63 links, whereas the width of the tract actually owned by Seery was 20 rods and 63-100 of a rod, and this latter description was shown by the abstract of title which was furnished by Seery. By the conveyance, Seery undertook to convey more land than he actually owned, and Russell claimed damages from Seery upon this ground. Being unable to agree, they submitted the controversy to the arbitration of three persons mutually agreed upon by them, and stipulated that the award of the arbitrators should be made a rule of the district court; and it was stated that all matters in controversy between them regarding the boundaries or description of the land should be submitted to and determined by the arbitrators. In pursuance of this agreement a hearing was had before the arbitrators, both parties being present with their witnesses, following which a majority of them found in favor of Russell, awarding him the sum of \$600, upon receipt of which Russell and wife were to reconvey to Seery, by quitclaim deed, the tract or piece of land included in Seery's deed, and which was not owned by him. The award further provided that the expenses of arbitration should be paid equally by the parties. Seery refused to comply with the award when it was filed in the district court by Russell, who asked for the entry of judgment thereon. Seery thereupon moved to set aside the award upon several grounds: First, that neither the arbitrators nor witnesses were under oath during the hearing; second, on account of excess of authority by the arbitrators in ordering a deed made by Russell and wife to Seery; third, on account of excessive damages, given under the influence of prejudice and through fraud and partiality; and, fourth, that the award was not sustained by sufficient evidence and was contrary to law. The court sustained the motion, and upon the ruling error is assigned.

The record does not disclose upon what ground the motion was sustained, and none of those assigned appear to be sufficient to justify the setting aside of the award. To avoid the formalities and fixed rules of law, the parties chose to arbitrate their controversy before a tribunal selected by themselves. The submission was general and comprehensive, and the award, although it may not meet the approbation of the court, is final and conclusive, unless it is subject to

some of the objections named in the statute. Gen. St. 1889, par. 329. It is provided that if any legal defects appear in the award or proceedings, or if it is made to appear that the award was obtained by fraud, corruption, or other undue means, or that there was misconduct on the part of the arbitrators, the award may be set aside. In reviewing the proceedings, no legal defects were shown. It does not appear that any of the arbitrators or witnesses were under oath during the hearing, but the uncontradicted testimony is that Seery and his counsel were present at the commencement of the proceedings, and expressly stated that they did not desire that the arbitrators or witnesses should be sworn, and thereupon it was agreed between the parties that the testimony of the witnesses and the report of the arbitrators were to be accepted the same as though they had been sworn. Although the statute provides for the administration of an oath, it is not such an imperative provision as will prevent the parties from waiving the formality of an oath, if they see fit. Both parties having expressly agreed that the testimony of witnesses unsworn should be received, and that no oaths should be administered to the arbitrators, neither should be allowed to make it a ground of objection, after a result adverse to him has been reached. *Weir v. West*, 27 Kan. 650; *Anderson v. Burchett*, 48 Kan. 153, 29 Pac. 315; *Morse, Arb.* 133.

There was no testimony before the court tending to show misbehavior on the part of the arbitrators, or that the award was obtained by fraud, corruption or other undue means. Some testimony was produced as to the character of the evidence that was submitted to the arbitrators. It was a meager statement, however, composed mostly of conclusions, and did not purport to be all the testimony that was given. From this evidence the court might have reached a different conclusion than was reached by the arbitrators, but, to warrant the court in reviewing an award upon the merits, something more than mere error in their judgment of what is proved by the evidence must be shown. Awards are to be liberally construed, and should never be set aside as contrary to the evidence unless it appears that there was no evidence to support it. From the evidence which was preserved, it might seem that the award was hardly warranted by the testimony, and was liberal in amount; but this was not a subject for review by the court, and it is not such as to evince fraud, partiality, or prejudice on the part of the arbitrators.

Another objection is that there was an excess of authority on the part of the arbitrators in ordering a reconveyance by Russell and wife to Seery of that part of the land in controversy, which had never belonged to either party. This is an immaterial matter, which does not in any degree injure or prejudice the complaining party. There might

be some ground for Russell to object to the trouble and expense of making a conveyance of this land, to which neither had any title, but he is not complaining; and certainly Seery has no cause to complain of the return of what he had given to Russell, although it was of no consequence. It follows that the order of the court in setting aside the award must be reversed, and the cause remanded for further proceedings. All the justices concurring.

MISSOURI PAC. RY. CO v. YAWGER.

(Supreme Court of Kansas. Feb. 9, 1894.)

COURTS—APPELLATE JURISDICTION—TAXATION OF COSTS.

Chapter 245 of the Laws of 1889 deprives this court of jurisdiction to review an order made by a district court on a motion to retax costs where no other matter is brought here for review. Johnston, J., dissenting.

(Syllabus by the Court.)

Error from district court, Rush county; V. H. Grinstead, Judge.

Action between the Missouri Pacific Railway Company and J. A. Yawger. From a judgment on a motion to retax costs the railway company brings error. Dismissed.

J. E. Andrews and Waggener, Martin & Orr, for plaintiff in error. Diefenbacher & Banta, for defendant in error.

ALLEN, J. This is a petition in error, by which it is sought to review the action of the district court of Rush county on a motion to retax costs. Though the point is not made by the defendant in error, a question of jurisdiction appears on the face of the record, which we are not at liberty to ignore. There is nothing involved in this controversy but costs. Section 1, c. 245, Laws 1889, provides: "No appeal or proceeding in error shall be had or taken to the supreme court in any civil action unless the amount or value in controversy, exclusive of costs, shall exceed one hundred dollars (\$100,) except in cases involving the tax or revenue laws, or the title to real estate, or an action for damages in which slander, libel, malicious prosecution or false imprisonment is declared upon, or the constitution of this state, or the constitution, laws or treaties of the United States, and when the judge of the district or superior court trying the case involving less than one hundred dollars (\$100) shall certify to the supreme court that the case is one belonging to the excepted classes." This case does not fall within any exception. It was held by this court in the case of Martin v. Shrubshall, (decided in April, 1893,) on a motion to dismiss, that this court had no jurisdiction in a case like that now before us, even though the amount of costs involved exceeds \$100. No opinion was written in that case. The language of the statute seems to be clear, and the amount of costs is unimpor-

tant. We perceive no sound reason for holding that a petition in error may be entertained to review an order of the court made on a motion to retax costs, when the statute expressly takes away jurisdiction to review the merits of a case involving less than \$100, no matter how much the costs may be. The petition in error will therefore be dismissed.

HORTON, C. J., concurring.

JOHNSTON, J., (dissenting.) Where the costs are merely incidental to the action in the trial court, they cannot, of course, be considered as a part "of the amount or value in controversy" for the purpose of giving jurisdiction in this court. But where the costs, as here, form the subject-matter of the controversy in the court below, I think a different rule applies. In my opinion, a distinct or independent proceeding to enjoin the collection of costs or to set aside or to retax costs which in amount exceeds \$100, is reviewable. It is immaterial whether debt damages, costs, or other thing of value, constitutes the subject-matter of the controversy; but, whatever it may be, it must of itself amount to more than \$100, exclusive of the costs incident to that proceeding, to be reviewable under the statute. It seems to me that the costs referred to in the statute are only those which are incidental to the controversy brought up for review, and that, as the amount involved here exceeds \$100, the court has jurisdiction to review the merits of the proceeding.

FIRST NAT. BANK OF CLAY CENTER v. BEEGLE.

(Supreme Court of Kansas. Feb. 9, 1894.)

SALE—GROWING CROPS—SEVERANCE.

1. A crop of corn was planted and grown upon mortgaged land by the mortgagor. In accordance with a judgment of foreclosure, the land was sold without reservation on the last day of September. Four days before the sale of the land, the mortgagor sold the crop of corn to another. The corn was then mature, but there had been no physical severance of the same from the land at the time of the judicial sale. *Held*, that the vendee of the mortgagor was entitled to the crop, and that the same did not pass with the soil to the purchaser of the land.

2. *Held*, further, that the sale of the corn by the mortgagor constituted a constructive severance of the same from the land.

(Syllabus by the Court.)

Error from district court, Clay county; R. B. Spilman, Judge.

Action by S. D. Beegle against the First National Bank of Clay Center for conversion. Plaintiff had judgment, and defendant brings error. Affirmed.

Harkness & Godard, for plaintiff in error. O. C. Coleman and Anthony & Stackpole, for defendant in error.

JOHNSTON, J. S. D. Beegle brought an action against the First National Bank of Clay Center, Kan., alleging that it had wrongfully converted 5,000 bushels of corn belonging to the plaintiff, of the value of \$1,250, for which sum judgment was demanded. The corn was grown upon mortgaged land in the year 1889. The crop was planted and cultivated by F. M. Tuthill, who was the owner of the land prior to September 30, 1889, and upon which he had given a mortgage that was foreclosed by the bank. The judgment of foreclosure was rendered January 26, 1889, under which a sale was made to the bank on September 30, 1889. No reservation of the crop was made at the sale, which was confirmed November 26, 1889. Plaintiff, Beegle, claimed, and offered testimony to prove, that he purchased the corn from Tuthill after it had fully matured, and that the harvesting of the same began before the sheriff's sale, and continued uninterruptedly until about the 1st of November, and that the purchase was made in good faith, and for a valuable consideration. The testimony was somewhat conflicting in regard to the maturity of the corn on September 30, 1889, when the judicial sale occurred, and as to the bona fides and absolute character of the sale of the corn. The jury, after being properly instructed, found generally in favor of the plaintiff upon all the issues, and this finding effectually settles the controversy.

The contention of plaintiff in error is that as the corn was standing in the field, unhusked, the title thereto passed to the bank by virtue of the foreclosure sale. It has been clearly settled in this state that a conveyance of land, either by voluntary deed or judicial sale, without reservation, carries all growing crops with the title to the land. This rule only applies to crops which are immature and have not ceased to draw nutriment from the soil at the time of sale, and is not applicable to crops that are ripe and ready for harvest. This distinction has been carefully recognized in all the cases where the subject was considered. *Garranflo v. Cooley*, 33 Kan. 137, 5 Pac. 766; *Beckman v. Sikes*, 35 Kan. 120, 10 Pac. 592; *Caldwell v. Alsop*, 48 Kan. 571, 29 Pac. 1150; *Goodwin v. Smith*, 49 Kan. 351, 31 Pac. 153; *Land Co. v. Barwick*, 50 Kan. 57, 31 Pac. 685. When the crops mature, they can no longer be regarded as a part of the realty, and hence do not pass to the purchaser of the land. As the ripened crop possesses the character of personalty, the fact that it rests upon the land, unsevered, is of little consequence. If the severance of such a crop was at all material, it had, in legal effect, been severed through the sale by Tuthill to the plaintiff. The mortgage or sale of a ripened crop at least operates as a constructive severance of the same from the land. *Caldwell v. Alsop*, supra; *Willis v. Moore*, 59 Tex. 628; 2 Freem. Ex'ns, 349.

None of the errors assigned by plaintiff in error can be sustained, and hence the judgment of the district court will be affirmed. All the justices concurring.

STATE v. TRIPLETT.

(Supreme Court of Kansas. Feb. 9, 1894.)

CRIMINAL LAW—NEW TRIAL—SUFFICIENCY OF INFORMATION—ASSAULT.

1. Where a defendant is charged with an assault with intent to kill, and that offense is ignored by the jury, and the defendant is found guilty of an assault only, it is immaterial, upon a motion for a new trial, whether the information sufficiently charges an assault with intent to kill.

2. Where a person standing about 50 feet from another fires his revolver in the direction of such other person, without any intention of shooting such person, but for the purpose of frightening or alarming him, intending thereby to create the impression that he will injure him by shooting, he is guilty of an assault.

(Syllabus by the Court.)

Appeal from district court, Finney county; A. J. Abbott, Judge.

Angle Triplett was convicted of an assault, and appeals. Affirmed.

J. J. Hitt, for appellant. John T. Little, Atty. Gen., S. L. Miller, and H. F. Mason, for the State.

HORTON, O. J. Angle Triplett was charged in the court below with having made an assault with intent to kill, and was found guilty of an assault only. She was sentenced to pay a fine of \$50 and the cost of the prosecution, and to be committed to the jail of Finney county until the fine and costs were paid. She appeals to this court. A motion was made to quash the information, but it is unnecessary to decide whether an assault with intent to kill was sufficiently charged. It is admitted that the information charges an assault. The higher offense was ignored by the jury. *State v. Baxter*, 41 Kan. 516, 21 Pac. 650; *Crumbley v. State*, 61 Ga. 582.

The theory and evidence upon the part of the defendant were that, while admitting the firing of a pistol, she claimed it was done for the sole purpose of frightening a horse that had been trespassing upon her premises, and that the pistol was never pointed at or towards the complaining witness, and that there was never any purpose to kill or injure such witness, or any one else. The evidence for the state was that the defendant, standing about 50 feet from the complaining witness, fired a revolver in his direction, and apparently at him. Several witnesses testified to this, and one witness stated he saw the dust fly up about 20 feet beyond, and in apparent range with the complaining witness.

The principal instruction complained of is as follows: "If one person should shoot in the direction of another without any inten-

tion of injuring the other, but only for the purpose of frightening him, tending thereby to create the impression that he would do injury by the shot, he is guilty of an assault." There was no error in this instruction, as applied to the facts of this case. The defendant was within shooting distance. A person may be guilty of an assault upon another with a pistol, without firing it at all, and, if he does fire it, without intending, at the moment of firing, to hit the person upon whom he is charged with committing the offense. *State v. Morgan*, 3 Ired. 186; *State v. Myerfield*, Phil. (N. C.) 108; *State v. Rawles*, 65 N. C. 334; *State v. Sigman*, (N. C.) 11 S. E. 520. When the attitude or action of a party is threatening towards another, and the effect is to terrify, the offense of assault is complete. "It has been said that the gun must be within shooting distance; but, plainly, if it is not, yet seems to be so to the person assaulted, or danger otherwise appears imminent, that will be sufficient." 1 Whart. Cr. Law, par. 606; 2 Bish. Cr. Law, § 32. "The state interferes with and punishes evil conduct whenever, among other reasons, it tends to public disturbances or breaches of the peace, creates disquiet in the community, or inflicts on the individual a wrong entitling him to governmental protection." 2 Bish. New Cr. Law, § 32, par. 3. We are cited, on the part of the defendant, to *State v. Moran*, 46 Kan. 318, 26 Pac. 754. That case is not applicable. In that case the defendant was charged with assault with intent to kill, and an instruction was given that he might be convicted of an assault with intent to commit manslaughter, without any evidence having been offered to establish such an offense. Upon this instruction the jury found the defendant guilty of an assault with intent to commit manslaughter. In this case an instruction was given, defining the offense of assault with intent to kill; and the jury were instructed as to what constituted a simple assault, and were further instructed that they might find the defendant guilty of assault with intent to kill, or of simple assault, or not guilty. There was no error in this part of the instructions, or in any of the instructions. The judgment of the district court will be affirmed. All the justices concurring.

HOPPER et al. v. CALHOUN.

(Supreme Court of Kansas. Feb. 9, 1894.)

ASSUMPTION OF MORTGAGE BY VENDEE—CONSTRUCTION OF DEED—EVIDENCE.

1. To create a personal liability on the part of a grantee in a deed to pay a prior mortgage on the lands conveyed, where there is no evidence to explain the language used, or showing a mistake, the words used must clearly import that the grantee assumes such payment; and, *held*, that the words, "except a mortgage of \$2,170.00 and one interest mortgage of \$1,155.00, both mortgages given to C. S. Calhoun, which

mortgages of said second party accept and agree to pay," wholly unexplained by other evidence, are not sufficient to show an assumption of the mortgages referred to by the grantee named in the deed.

2. The assumption of such mortgages may be shown by competent evidence outside of the deed.

(Syllabus by the Court.)

Error from district court, Pratt county; S. W. Leslie, Judge.

Action by C. S. Calhoun against C. A. Hopper and others to foreclose a mortgage. There was judgment for plaintiff, and defendant Hopper brings error. Reversed.

Apt & Crawford, for plaintiff in error. Carskadon & Thompson, for defendant in error.

ALLEN, J. C. S. Calhoun, as plaintiff, brought an action in the district court of Pratt county, to foreclose a mortgage executed by F. M. Rea and wife, for \$2,170, and to obtain a personal judgment against C. A. Hopper, plaintiff in error, for the amount of said mortgage and interest, which the plaintiff alleged Hopper assumed and agreed to pay. Rea and wife conveyed the mortgaged property to Marion Wilson. Wilson and wife conveyed to Hopper by warranty deed. In this deed, following the covenant against incumbrances, are these words: "Except a mortgage of \$2,170.00, and one interest mortgage of \$195.00, both mortgages given to C. S. Calhoun, which mortgages of said second party accept and agree to pay." The defendant Hopper answered, denying that he had assumed payment of the mortgage. At the trial the plaintiff sought to prove by the notary public who had taken the acknowledgment of the deed what conversation took place between Wilson and Hopper in regard to the insertion of the clause pertaining to the mortgage. This evidence was excluded by the court, evidently because the court regarded it as unnecessary. The defendant Hopper interposed a demurrer to the plaintiff's testimony, which was overruled, and, no further proof being introduced, judgment was rendered in favor of plaintiff against Hopper for the amount of the mortgage and interest, and also foreclosing the mortgage against the other defendants.

While various matters are discussed in the briefs, the only one we deem it necessary to consider is whether the deed which was introduced in evidence, without any explanation or showing as to the facts surrounding the transaction, and without any proof of a mistake on the part of the scrivener in writing this clause in the deed, contains such an assumption of the debt as will authorize the court to enter judgment on it against the grantee in favor of the holder of the mortgage. In the case of *Holcomb v. Thompson*, 50 Kan. 598, 32 Pac. 1091, it was held that "to create a personal liability on the part of a grantee in a deed to pay a prior mortgage or lien on the premises conveyed, the cove-

ant or words used therein must clearly import that the obligation was intended by the grantor, and knowingly assumed by the grantee. Where a grantee of land takes the same subject to a certain mortgage, he does not hereby assume any personal liability, but simply takes the land charged with the payment of the mortgage debt." In that case the words which it was claimed amounted to an assumption by the grantee were: "Excepting note for \$2,000, dated April 21, 1887, to F. C. Holcomb, with 8 per cent. interest from date, and with said mortgage for \$2,000 the said * * * assumes and * * * agrees to pay." Can we say that the language of the deed now under consideration imports clearly an assumption by the grantee of the mortgage debt? The language used certainly is not clear. In order to make it an assumption by the grantee, we must strike out the word "of," and make the word "party" the subject of the verbs "accept and agree," instead of the object of the preposition "of," as it appears to be from the reading of the deed. Under the rule declared in *Holcomb v. Thompson*, we do not feel at liberty to make, by interpretation merely, such a radical change in the language of the deed. It was competent for the parties to show by oral testimony the facts surrounding the transaction, and, under proper pleadings, to prove that the insertion of the word "of" was a mistake of the scrivener, or to show by any competent evidence the real agreement of the parties. The assumption of the payment of the mortgage on the land conveyed need not necessarily be in writing. *Jones, Mortg. § 10*. We think the court erred in excluding the testimony of the notary public. We cannot, however, in aid of the judgment rendered by the court, assume that the testimony offered would have upheld the judgment. *Schmucker v. Sibert*, 18 Kan. 104. We link the deed, unexplained, fails to show a clear assumption of the mortgage debt by the grantee. As this compels a reversal of the judgment, we deem it unnecessary to specially consider the other errors alleged, but perceive no other substantial error. The judgment is reversed, and a new trial ordered. All the justices concurring.

LEASE v. FREEBORN.

Supreme Court of Kansas. Feb. 8, 1894.)

POWER OF GOVERNOR TO REMOVE STATE OFFICERS.

The governor has no power, without notice and a hearing, to remove arbitrarily or capriciously a member of the board of trustees of the charitable institutions of the state after confirmation by the state senate, as the tenure of office of such trustees is declared by law to be three years. Section 2, art. 15, State Const.; section 2, c. 130, Sess. Laws 1876.

(Syllabus by the Court.)

Original action in quo warranto by Mary Lease against J. W. Freeborn to try de-

fendant's title to membership of the state board of charities. Heard on demurrer to petition. Judgment for plaintiff.

Eugene Hagan, for plaintiff. M. B. Nicholson, for defendant.

PER CURIAM. This case has been submitted to us upon the petition and the demurrer thereto. It is insisted that there was no vacancy upon the board of trustees of the charitable institutions of the state in March, 1893, and, therefore, that the allegations in the petition do not show that Mrs. Mary E. Lease was ever a member of the board, or, if she was ever a member, that her time expired on the 1st of April, 1893. This is purely technical, and in no way touches the merits of the case. The petition alleges that in March, 1893, Mrs. Lease was appointed by the governor, confirmed by the senate, and qualified as a member of the board of trustees for the term of three years. In view of the statute and the public records of the senate, the petition may be considered as amended, and as alleging that the term of office of Mrs. Lease commenced on April 1, 1893. Paragraph 6533, Gen. St. 1889. Of course, her appointment, confirmation, and qualification necessarily preceded the commencement of her term of office. The allegations that the attempt to remove or oust her from office was made in December, 1893, clearly show she not only held the office after March, 1893, but also show she was recognized as a member of the board after March, 1893, and is in line with the allegation that her term of office extended to three years. We think the other allegations in the petition sufficiently allege an unlawful removal and a wrongful ouster, and, therefore, that the general demurrer must be overruled.

The petition states that the governor, without any cause or warrant of law, attempted to remove Mrs. Lease from office, and attempted to prevent her from acting as a member of the board; that the defendant, J. W. Freeborn, has obtained a commission from the governor for the same office, and has usurped and intruded himself into the office, thereby depriving her of all of her rights thereto, and from receiving the emoluments thereof. The petition concludes "that the defendant, J. W. Freeborn, has forcibly and illegally dispossessed her of the office, and is now unlawfully and wrongfully holding the same." If the petition alleged that Mrs. Lease had been removed upon charges after notice and hearing thereon, then it might be assumed, in the absence of other allegations, that her removal was within the provisions of some statute. But the petition does not allege that any charges have been made, or any notice served, or any hearing had. The constitution ordains that the "trustees of the benevolent institutions shall be appointed by the governor by and with

the advice and consent of the senate," but does not declare the term or tenure of office of the trustees. Section 2, art. 15, of the constitution, ordains: "The tenure of any office not herein provided for may be declared by law; when not so declared such office shall be held during the pleasure of the authority making the appointment." Section 2, c. 130, Sess. Laws 1876, declares the term or tenure of office of the trustees, after 1879, shall be three years. The obvious meaning of section 2 of article 15 of the constitution is that in those offices, the term or tenure of which is not fixed by law, the incumbent may be removed at the pleasure of the appointing power; but, where the term or tenure is declared by law, then the officer shall hold for the full term. *People v. Jewett*, 6 Cal. 291; *People v. Hill*, 7 Cal. 97; *People v. Freese*, 76 Cal. 633, 18 Pac. 812; *Mechem*, Pub. Off. 335. It is well settled by the authorities that it is only where no term or tenure is fixed by the constitution or the statute that an officer holds at the pleasure of the appointing power. *Jacques v. Little*, 51 Kan. 300, 33 Pac. 106; *Mechem*, Pub. Off. §§ 445, 454; 19 Amer. & Eng. Enc. Law, pp. 562*, 562g*; *State v. Board of Police Com'rs*, 88 Mo. 144; *Kibby v. Cold*, 63 Iowa, 663, 19 N. W. 824; *Throop*, Pub. Off. § 341. Of course, any trustee may be removed "for good cause shown;" but this fact becomes a condition precedent, and the cause or causes enumerated must be alleged, and the party notified, and the causes examined. *State v. City of St. Louis*, 90 Mo. 19, 1 S. W. 757; *Page v. Hardin*, 8 B. Mon. 648, 672; 1 Dill. Mun. Corp. (4th Ed.) 240-256. The mere silence of the statute with respect to notice and hearing will not justify the removal of an officer whose term or tenure is declared by law without knowledge of the charges, and an opportunity to explain his or her conduct, and defend his or her course and character. *Jacques v. Little*, supra. This case differs from *State v. Mitchell*, 50 Kan. 289, 33 Pac. 104, because the statute expressly provides that the "executive council may at any time remove the railroad commissioners, or any of them." No such provision exists concerning the trustees of the charitable institutions. Upon the hearing of the demurrer, it was argued on the part of the counsel for the defendant, and also by the attorney general, that the trustees and other persons connected with the charitable institutions could only be removed by charges presented in writing to the governor, after notice and hearing, under the provisions of chapter 239, Sess. Laws 1889, (Gen. St. pars. 5958-5960); and it was suggested that the petition ought to have alleged that its provisions had not been complied with. It is unnecessary for us to determine in this case whether a removal can be had upon a hearing before the governor alone, or before the special tribunal created by chapter 239, Sess. Laws 1889, or until malfeasance or misfeasance in office has

been established in the courts. The petition does not allege any notice, hearing, or trial. It is not claimed by any of the counsel that there has been any trial before any officer, tribunal, or court. We therefore need not discuss the precise mode of procedure for removal from office. "Sufficient unto the day is the evil thereof." If Mrs. Lease has been arbitrarily or capriciously removed, without any cause or warrant of law, as alleged in the petition, she is entitled to be restored to all of her rights. She cannot be ousted excepting for cause, and, before being ousted, she is entitled to be heard in her own defense. All the justices concurring.

In re CARR.

(Supreme Court of Kansas. Feb. 9, 1894.)

MINES AND MINING—LOCATION AND SURVEYS.

Chapter 127 of the Laws of 1877 does not authorize a survey by order of a district court of that part of a mine which is located beyond the state line, in the state of Missouri, even though the only means of access thereto is by a deep shaft located in Kansas.

(Syllabus by the Court.)

Original proceeding in habeas corpus by J. E. Carr for release from custody. Petitioner discharged.

Lucien Baker and Wm. C. Hook, for petitioner. J. H. Gillpatrick, for respondent.

ALLEN, J. Daniel Leahy presented to the district court of Leavenworth county his affidavit alleging that he was the owner of the southeast quarter of section 1, and the northeast quarter of section 12, in township 52, range 36, in Platt county, Mo.; that he had good reason to and did verily believe that the Leavenworth Coal Company, a corporation doing business under the laws of Kansas, within Leavenworth county, was without authority mining and taking coal from said lands, through its shaft and mine situated in the county of Leavenworth,—and asking an order directing the county surveyor of Leavenworth county to survey the mine for the purpose of ascertaining the truth as to such encroachment. Thereupon, the court, under the provisions, as it is claimed, of chapter 127 of the Laws of 1877, made an order as prayed for, directing F. C. Waite, county surveyor, to forthwith survey the mine, and to file his report thereof with the clerk of the court. The county surveyor attempted to make a survey of the mine in pursuance of the order of the court, but was prevented from so doing by the petitioner, John E. Carr, who is the president of said coal company. Thereupon, a complaint was filed by Waite, under section 5 of said act, charging the petitioner with interfering, molesting, and hindering said surveyor in making such survey, and the petitioner was thereupon arrested by the sheriff of Leaven-

worth county. He seeks to be discharged from his restraint under a writ of habeas corpus issued out of this court.

It is claimed that the act of the legislature under consideration is unconstitutional, and also that it appears on the face of the affidavit of Leahy that the property on which it is claimed the coal company is trespassing is situated in Missouri, and is therefore beyond the jurisdiction of the courts of Kansas. We perceive no good reason for holding the act unconstitutional, so far as it applies to property in Kansas. Without such acts, courts have authorized the inspection of mines located on neighboring lands in which the plaintiff had no interest. *Lewis v. Marsh*, 8 Morr. Min. R. 14; *Bennitt v. Whitehouse*, 28 Beav. 119. A more serious difficulty, however, arises from the fact that the complainant's lands are located in Missouri, beyond the jurisdiction of the district court of Leavenworth county, and outside of the territory in which the county surveyor is an official. The complaint, upon its face, shows, not only that the land from which it is alleged the coal company is mining coal is across the state line, but it is conceded that other lands lie between those described in the complaint and the state line. It is, of course, on the other side of a navigable stream,—the Missouri river. Does such an affidavit furnish any ground for action on the part of the district court, under the statute? Can the court authorize the county surveyor to make a survey in Missouri as an official of Kansas? Both these questions must be answered in the negative. It is elementary that the statutes of a state can have no extraterritorial force. The title of the act above mentioned is, "An act to authorize the granting of injunctions restraining the mining of coal by unauthorized persons on the lands of another, and to authorize the county surveyor to survey coal mines to ascertain the facts in relation thereto." The remedy afforded by the act is an injunction. The survey is merely preliminary, and for the purpose of ascertaining whether a cause of action exists. We realize the practical difficulty in the way of Leahy in finding out whether his rights are in fact invaded, because of the depth under the surface at which the mine is worked. But, whatever these difficulties may be, it is clear that the courts and officers of Kansas cannot invade the soil of Missouri for the purpose of gaining information concerning trespasses supposed to be committed on property situated there. The fact that access is gained through an underground passageway by the trespassers does not have the effect to draw that part of the mine which is located in Missouri under the jurisdiction of the courts and officers of Kansas. Nor is a fruitless survey, necessarily ending at the state line, authorized by the statute. As to the equitable powers of the district court, in a case in which it has jurisdiction, over the per-

son of the coal company, to restrain by injunction continuing trespasses on the lands of the defendant, and to grant leave to take testimony within or without the state, above or below ground, with reference to the acts of the company, we express no opinion, because no such question is before us. We are clear, however, that the affidavit presented failed to show a case calling for any action on the part of the district court; that the order of the district court based thereon was void, and conferred no right on the county surveyor to enter the mine. It follows, therefore, that the restraint of the petitioner is unlawful, and he must be discharged.

HORTON, C. J., concurring.

JOHNSTON, J. I concur in the view that a survey cannot be ordered or compelled in territory outside of the state, but I do not desire to express any opinion upon the other objections made to the validity of chapter 127 of the Laws of 1877.

CITY OF TOPEKA et al. v. BOUTWELL.

(Supreme Court of Kansas. Feb. 9, 1894.)

TRIAL—SUBMISSION OF SPECIAL QUESTIONS — MUNICIPAL ORDINANCES — FALSE IMPRISONMENT—INVOLUNTARY SERVITUDE.

1. Where pertinent questions of fact are stated in writing and handed to the court by a party at the conclusion of the testimony, to be submitted to the jury for their findings thereon, it is error for the trial court to refuse to submit them.

2. The city council of the city of Topeka has the power by ordinance to require the keepers of boarding houses, restaurants, and hotels to furnish the street commissioner the names of persons liable to poll tax boarding or lodging in their houses, and to impose a fine for refusal to do so.

3. A judgment duly rendered by the police court of a city cannot be held void because of a defense of which the prisoner did not avail himself.

4. Ordinance No. 91 of the city of Topeka, approved May 12, 1870, permitting prisoners committed to the city prison for the violation of a by-law or ordinance of the city, necessary for the preservation of order and the welfare of society, to be employed by the city marshal at labor, either on the streets or public work of the city, or in a public or private place, being credited \$1 a day on the judgment for each day's work performed, is not in conflict with section 6 of the bill of rights of the constitution of the state, or article 13 of the amendments to the constitution of the United States, prohibiting slavery and involuntary servitude. Allen, J., dissenting.

5. The marshal and policemen of a city, and any persons aiding and abetting them, are liable in damages for unnecessary cruelties and indignities inflicted by them on prisoners in their charge.

(Syllabus by the Court.)

Error from district court, Shawnee county; John Guthrie, Judge.

Action by D. W. Boutwell against the city of Topeka and others for false imprisonment.

Plaintiff had judgment, and defendants bring error. Reversed.

The other facts fully appear in the following statement by ALLEN J.:

D. W. Boutwell brought suit in the district court of Shawnee county against the city of Topeka, D. C. Metsker, its mayor, John F. Carter, Joseph Reed, Pat Wilson, J. W. Gardiner, Henry Bernard, John Ewing, and Ben Williams, charging them with assault and battery, false imprisonment, and other wrongs and indignities connected with such imprisonment, for which he demanded damages. A demurrer on the part of the city of Topeka to the petition was sustained. Demurrers of the other defendants were overruled. Metsker, by his answer, denied generally the allegations of the petition. Carter alleged that he was the duly appointed and acting marshal of the city of Topeka; that on the 14th of September, 1887, the plaintiff was tried before one Joseph Reed, police judge of said city, upon a charge of unlawfully refusing to give, upon request, to the street commissioner of said city, the names of certain persons, liable to pay a poll tax, then lodging in a certain boarding house, of which said plaintiff was the keeper; that the plaintiff was found guilty of said charge, and sentenced to pay a fine of \$25, and committed to the city prison until such fine should be paid; that the plaintiff was also tried, on the same day, before said police judge, upon a charge of resisting an officer in the discharge of his duty, found guilty, and sentenced to pay a fine of \$75, and committed to the city prison for the nonpayment thereof; that it became his duty, as marshal, to confine and safely keep the plaintiff until he should comply with said judgments; that, the plaintiff being an able-bodied man, the defendant as marshal did, by virtue of Ordinance No. 91 of said city, command the plaintiff to work at breaking rock on the rock pile, which the plaintiff refused to do; that in his treatment of the plaintiff he used no more force than was necessary to execute the judgment of the court, and perform his duties as the custodian of such prisoner. The defendant Wilson alleges that he was a policeman of the city; that a warrant was duly issued by the police judge and placed in his hands, commanding him to arrest the plaintiff on a charge of unlawfully refusing to furnish the street commissioner the names of persons, liable to poll tax, lodging in a boarding house of which he was keeper; that he proceeded to serve such warrant; that the plaintiff resisted arrest with deadly weapons; that he used no more force in making the arrest than was reasonably necessary. All of the other defendants justified under the processes referred to in the answers of Carter and Wilson. Ordinance No. 426, providing for the collection of poll taxes, contains this section: "Sec. 4. It is hereby made the duty of all proprietors, or keepers of all boarding houses, restaurants,

or hotels in the city of Topeka, to furnish the street commissioner, when required to do, the names of all persons boarding or lodging in their houses, and any such person, who shall neglect, or refuse so to do, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof in the police court of said city, be fined in the sum not less than \$5.00 nor more than \$25.00 for each offense." Ordinance No. 36, relating to misdemeanors, contains the following section: "Sec. 14. That any person conducting himself in a riotous or disorderly manner, who shall resist or oppose any officer in the discharge of his duty, or who shall openly use profane or indecent language, or who shall expose his or her person, or commit any nuisance upon any street, sidewalk, alley, or other public place of the city, shall be fined in a sum not less than \$1.00 nor more than \$100.00." Ordinance No. 91 provides that persons committed to the city prison may be compelled by the marshal to work at hard labor, and, in case of refusal to so work, that they shall be kept in confinement, and fed on bread and water only, until they consent to work. On the issues so joined the case was tried. After testimony was concluded, special questions for the jury to answer were filed and read up to the court by the defendants' counsel, with the instructions asked by the defendants, but no announcement of the result was made, and plaintiff's counsel did not know, at that time, that such special questions were presented. After the court discharged the jury, and after the opening argument for the plaintiff and the first argument for the defendants had been made, the court's attention was called to the special questions by the defendants' counsel, whereupon the court adjourned for dinner. Thereupon the court handed the questions to counsel for the plaintiff, which was the first knowledge they had of their existence, who, upon the opening of the court at 2 o'clock, objected to the presentation of said special questions, and also asked an opportunity to be heard by the court respecting the legality, fitness, and propriety to the issue of said proposed questions, to which counsel for the defendants objected. Thereupon the court refused to submit the special questions to the jury. The jury were charged that section 4, under the original complaint was filed in the police court, was void, and plaintiff's arrest was unlawful; that, such being the case, the plaintiff could not be guilty of any offense in resisting said officer in making said arrest; that the judgment of the police court was void, and the subsequent imprisonment of the plaintiff was unlawful and false. It was shown on the trial that on the 13th of September, 1887, a complaint was filed by Wilson, charging the defendant with violation of section 4 of ordinance No. 426, above quoted. A warrant was issued

such complaint, and placed in the hands of Wilson, who was a policeman, to serve. The plaintiff resisted arrest. Wilson called others to his assistance, overpowered the plaintiff, put him in a wagon, and took him to the city prison, where he was kept until the following day. On the 14th he was taken before the police judge for trial. He refused to plead. Thereupon a plea of not guilty was entered for him, witnesses were examined, he was found guilty and fined \$25, and ordered to stand committed until such fine should be paid. The same day another complaint was filed, under section 14 of Ordinance No. 36, above mentioned, charging the plaintiff with resisting an officer in serving a warrant on plaintiff. He was arraigned on this charge also, and refused to plead. A plea of not guilty was entered for him. He was tried, convicted, and sentenced to pay a fine of \$75 for this offense, and committed to the city prison. The marshal kept him in custody under these commitments until the 17th day of September, when he was released from custody by giving a bond in a habeas corpus proceeding in the district court of Shawnee county, and afterwards, on the 3th day of November, 1887, was discharged under such proceedings by said court. The jury rendered a verdict in favor of the plaintiff against all of the defendants for \$2,100. The defendants bring the case here for review.

W. A. S. Bird and Douthitt, Jones & Mason, for plaintiffs in error. G. C. Clemens and D. Overmyer, for defendant in error.

ALLEN, J., (after stating the facts.) Many questions are discussed by counsel. We shall consider only such as are necessary for the disposal of the case. The defendants stated, in writing, pertinent and material questions of fact to be submitted to the jury. These were filed with the clerk and handed to the court, together with special instructions asked, at the conclusion of the testimony. This was certainly in good time. It appears that the attention of plaintiff's counsel was not called to the fact that special questions were asked until after the opening argument by the plaintiff and one argument on behalf of the defendants, when the defendants' counsel again called the attention of the court to the questions. The court then refused to submit them. The only excuse hinted at in the record is that plaintiff's counsel asked leave to discuss the propriety of the questions, to which the defendants objected, and that they were not submitted in time. In this the court erred. *Bent v. Philbrick*, 16 Kan. 30; *Railroad Co. v. Plunkett*, 25 Kan. 198; *City of Wyandotte v. Gibson*, Id. 236; *Railroad Co. v. Fechheimer*, 36 Kan. 45, 12 Pac. 52. When counsel for the defendants presented these questions to the court, and requested their submission, they had done all

the law required of them. It might have been well for the court or counsel to have called the attention of the opposing party to them, but we cannot hold that a failure to do so deprived the defendants of their right under the statute. We also think, where there was no court rule prescribing the time within which such questions might be presented, that the defendants were still in time when they called the attention of the court and opposing counsel to them before the noon adjournment, and before defendants' argument was concluded. The error committed in this particular compels a reversal as to all of the defendants. It is, therefore, unnecessary to consider errors urged by the defendant Metsker alone.

Upon a new trial the court will be required to pass on the validity of the ordinance, and the legal process issued thereon. It seems, therefore, to be necessary for us to also consider these matters. The trial court held section 4 of Ordinance 426 void. We fail to perceive any good reason for so holding. It is a provision to enable the officers of the city to learn the names of persons subject to poll tax. The ordinance of which it is a part was framed to require the performance of labor on, or the payment of money for the improvement of, the city's streets. This is a necessary public purpose. All revenue laws have distasteful features. It is necessary, in their enforcement, that methods somewhat inquisitorial be pursued. All attempts of the public to gather statistics, either by taxing officers, census takers, or in any other manner, necessarily impose some burdens and inconveniences on the people. We see nothing unreasonable in requiring the keepers of boarding houses to make known to the officers of the law the names of their boarders. The conviction, therefore, under the complaint filed in this action was not void, nor was the warrant under which the first arrest was made. However this might be, there is no pretense that the second complaint did not charge an offense under a valid ordinance. There is no claim that a person who, in fact, resists an officer in the discharge of his duties may not be punished for so doing. The defendant had the privilege of showing, if he could, that he was not guilty of the offense, but if, on the trial, the court found him guilty and assessed a fine against him, a commitment clearly would not be void, even though he were in fact innocent of the offense charged.

The validity of Ordinance No. 91, authorizing the marshal to compel prisoners confined in the city prison to work at hard labor, is challenged, as being in conflict with section 6 of the bill of rights of this state, which reads as follows: "Sec. 6. There shall be no slavery in this state; and no involuntary servitude, except for the punishment of crime, whereof the party shall have been duly convicted." The authority for the pas-

sage of the ordinance is contained in subdivision 37, § 11; c. 18, of the General Statutes of 1889, by which the mayor and council are given power to enact ordinances "to regulate the police of the city, and to impose fines, forfeitures and penalties for the breach of any ordinance, and to provide for the recovery and collection thereof, and in default of payment, to provide for confinement in the city prison or to hard labor." The ordinance in question does not provide for a judgment sentencing the defendant to confinement at hard labor, but authorizes the marshal to require the prisoners in his custody to labor. The ordinances under which the convictions were had authorized punishment by fine. The police judge imposed a fine of \$25 under the first complaint, and \$75 under the second, and committed the defendant to the city prison until the fine and costs should be paid. In neither case was there any judgment imposing hard labor as a punishment for the violation of an ordinance. It was said by this court in *Re McCort*, 34 Pac. 456, in considering an ordinance of a city of the second class: "The law permits but does not require city authorities to cause city prisoners to work on the streets and public grounds of the city." In that case it was contended by the prisoner that it was incumbent on the city authorities to cause him to work, and that if they failed to do so he was entitled to the same credit per day on his fine that he would have had if kept at work. The question as to the power of the city to compel the performance of hard labor was not raised. It was said in the opinion: "The punishment which the law authorizes is a fine and the costs. If the defendant pay the fine and costs, neither imprisonment nor compulsory labor can be imposed. For the purpose of enforcing the collection of the fine the law authorizes imprisonment, and for the same purpose it also authorizes the employment of prisoners on the streets." In order to uphold Ordinance 91, so far as it authorizes compulsory labor, it is necessary that it be imposed as a punishment for crime. If the prisoner is unwilling to work, clearly to compel him to do so would be to impose involuntary servitude. *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935. In this case, and in the *McCort* Case, on payment of the fine the defendant would have been entitled to discharge, and could neither have been confined in prison nor required to labor. The provisions of the ordinances authorizing imprisonment and compulsory labor are mere means of collecting the fines. Neither is imposed as a punishment. It is wholly unnecessary to discuss the question as to whether section 5, which guarantees the right of trial by jury, has been violated. For authorities on that point, see *State v. City of Topeka*, 36 Kan. 76, 12 Pac. 310; *In re Rolfs*, 30 Kan. 758, 1 Pac. 523; *City of Emporia v. Volmer*, 12 Kan.

622; *Neltzel v. City of Concordia*, 14 Kan. 446. The conclusion is inevitable that hard labor was not imposed on the plaintiff as a punishment for crime whereof he had been duly convicted, but that the attempt to cause him to labor was made in pursuance of the ordinance as a means of collecting the fines, and was therefore in violation of the bill of rights.

It is claimed by the plaintiff that, in making the arrest, in taking him to prison, and while in confinement, he was beaten and treated with harshness and cruelty. The policeman who made the arrest had the right to use such force as was reasonably necessary under the circumstances to overcome the plaintiff's resistance, and where resistance is made with deadly weapons, like a hatchet or hammer, the officer would not be held to that degree of nice and scrupulous care in effecting the arrest that would be required in ordinary cases; but, having overcome such resistance and having the prisoner fully in his power, the officer is then liable for any unnecessary harm or indignity done to the prisoner. It is the duty of all keepers of jails and prisons to treat their prisoners humanely. Keepers of city prisoners have no warrant or authority in law to be harsh and brutal in the management of those in their custody. For all needless sufferings and indignities which they impose they are accountable in damages to the party injured, and all persons aiding or assisting in such wrongs are liable with them. For the errors mentioned, the judgment must be reversed, and a new trial awarded.

HORTON, C. J., (concurring specially.) I do not assent to all that is stated in the foregoing opinion. I supposed that the power of a city to require city prisoners, committed to the city jail, to work was no longer a subject of contention in this state, but it is questioned again in this case. In *re Dassler*, 35 Kan. 678, 12 Pac. 130; *State v. City of Topeka*, 36 Kan. 76, 12 Pac. 310; *In re McCort*, 34 Kan. —, 12 Pac. 456. In the latter case, it was expressly held by this court that "the law permits, but does not require, city authorities to cause city prisoners to work on the streets and public grounds of the city." In the opinion prepared in the *McCort* Case by Allen, J., it was observed: "The punishment which the law authorizes is a fine and the costs. If the prisoner pays the fine and costs, neither imprisonment nor compulsory labor can be imposed. For the purpose of enforcing collection of the fine the law authorizes imprisonment, and for the same purpose it also authorizes the employment of prisoners on the streets. The statute gives the city council the power to fix the rate per day to be allowed a prisoner who is working out his fine, without any limitation. The city may or may not have work on which it would be profitable or de-

sirable to employ city prisoners. If the city authorities see fit to put the prisoner at work, he must be credited on the fine and costs at the rate of one dollar per day for the time he is so employed; and, if they do not see fit to have him work, he will get no credit for the time he remains in jail, but can be discharged at any time on payment of the fine and costs. This court has already decided that fines and costs are not debts, within the meaning of the constitutional provision forbidding imprisonment for debt. Therefore, when it is stated that imprisonment and labor imposed under the provisions of a statute or the ordinances of a city are "solely the means of collecting a debt," such language is misleading, as the word "debt" is construed in the constitution. A fine is not the kind of a debt referred to in the organic law. In *re Wheeler*, 34 Kan. 96, 8 Pac. 276; In *re Boyd*, 34 Kan. 570, 9 Pac. 240. If, however, we re-examine the power of cities of this state to compel persons committed to city prisons to work, I think the validity of Ordinance No. 91 of the city of Topeka, approved May 12, 1870, may be sustained upon two different lines of decisions, either of which is amply sufficient for its support. The ordinance authorizes persons committed to the city prison for the nonpayment of fines or penalties to be employed by the city marshal at labor, either on the streets or public work of the city, or in a public or private place, until the fine and costs are paid; a credit of \$1 being allowed on the judgment for each day's work performed. This ordinance was passed in conformity to subdivision 87, § 11, c. 18, Gen. St. 1889, conferring general powers upon the mayor and council of the cities of the first class. Paragraph 555, Gen. St. 1889. A similar statute permits confidence men, vagrants, or strolling vagabonds to be set to work. Paragraph 571, Id. Another statute authorizes county commissioners, when they deem it advisable so to do, to put to work prisoners committed to the jails of their respective counties, for failing to pay fines and costs. Paragraphs 2510, 5425, Id. Similar statutes exist in almost every state of the Union.

Article 13 of the amendments to the United States constitution, prohibiting "involuntary servitude," is substantially the same as section 6 of the bill of rights of the state constitution. Korstendick was convicted May 1, 1876, in the circuit court of the United States for the district of Louisiana for conspiracy, and sentenced to a pay a fine of \$2,000, and to be confined for 16 months in the penitentiary at Moundsville, W. Va. The statute under which he was convicted did not make hard labor a part of the punishment, and labor was not imposed by, or included in, the sentence. After his conviction, Korstendick was confined in the penitentiary at Moundsville, and was compelled

by the authorities in charge to perform hard labor. He objected, and commenced his proceedings in the supreme court of the United States to obtain his discharge by habeas corpus. His contention was that, "where the punishment provided for by the statute is imprisonment alone, a sentence to confinement at a place where hard labor is imposed as a consequence of the imprisonment is in excess of the power conferred." His writ was denied. Chief Justice Waite, in delivering the opinion in that case, stated that "as early as 1834 congress enacted that, whenever any criminal convicted of any offense against the United States shall be imprisoned in pursuance of such conviction, or of the sentence thereon, in the prison or penitentiary of any state or territory, such criminal shall, in all respects, be subject to the same discipline and treatment as convicts sentenced by the courts of the state or territory in which such prison or penitentiary is situated," and then observed: "Where the statute requires imprisonment alone, the several provisions which have just been referred to place it within the power of the court, at its discretion, to order execution of its sentence at a place where labor is exacted as part of the discipline and treatment of the institution, or not, as it pleases." *Ex parte Korstendick*, 93 U. S. 306. In *Re Mills*, 135 U. S. 263, 10 Sup. Ct. 762, Harlan, J., remarked that "there are offenses against the United States for which the statute, in terms, prescribes punishment by imprisonment at hard labor. There are others the punishment of which is 'imprisonment' simply. But, in cases of the latter class, the sentence of imprisonment, if the imprisonment be for a longer period than one year, may be executed in a state prison or penitentiary, the rules of which prescribe hard labor." Both of these cases fairly decide that persons sentenced to imprisonment only may be subject to hard labor, if the rules of the jail or prison exact of the inmates such discipline and treatment.

Therefore, if it be conceded that hard labor was not imposed in this case as a punishment, yet, within the decisions of the United States supreme court, the sentence of imprisonment may be executed in the city prison, the rules of which prescribe hard labor for discipline and treatment. Further, we have industrial and reform schools in the state, where incorrigible girls and boys who disregard the commands of their parents, or resort to immoral places or practices, may be confined. Labor, to a reasonable degree, is properly exacted from such girls and boys as a part of the discipline and treatment of these institutions. It is not imposed in all such cases as a punishment for crime; yet I do not believe it will be contended that the labor so exacted can be denominated "involuntary servitude," within the meaning of the constitution. Pub. Doc. 1891-92, vol. 2,

"Report of State Board of Charities," pp. 4, 55, 86, 124. Many of the inmates in the deaf and dumb institution are required to work at printing, cabinetmaking, shoemaking, and harnessmaking, and even in the asylum for imbecile youth children are compelled to perform physical labor. Pub. Doc. 1891-92, vol. 2, "Report of State Board of Charities," pp. 4, 5. If the trustees and superintendents of charitable institutions have no authority to compel any boy or girl confined therein to perform labor contrary to his or her will, such a ruling would forbid all reasonable rules for the discipline or good health of the inmates. It is a trite saying that "laziness begins in cobwebs and ends in iron chains," and, therefore, it is not favored, either in our reformatory or penal institutions. Of course, all labor imposed as discipline, or as a measure of health, must be reasonable and suitable for the age, the sex, and the condition of the person from whom it is exacted. If not of this character, the courts may interfere and correct any abuse. In the McCort Case, *supra*, the prisoner complained because he was not permitted to work for the city, so that his fine might be discharged.

Again, the ordinance may be upheld along the line of those decisions which make imprisonment and hard labor a part of the punishment or penalty, or "the means of enforcing the collection of fines" imposed for the preservation of order and the welfare of society. The statute expressly provides that "it shall be part of the judgment that the defendant stand committed till the judgment be complied with." Paragraph 609, Gen. St. 1889; *In re McCort*, *supra*; *In re Lewis*, 31 Kan. 71, 1 Pac. 283; *Ex parte Bedell*, 20 Mo. App. 125; *Berry v. Brislan*, 86 Ky. 5, 4 S. W. 704; *State v. Peterson*, 38 Minn. 143, 36 N. W. 443; *Huddleson v. Ruffin*, 6 Ohio St. 604; *In re Long*, 87 Ala. 46, 6 South. 328; *Gady v. State*, 83 Ala. 51, 3 South. 429; *Ex parte Sing Ah Tong*, 84 Cal. 165, 24 Pac. 181; *Preston v. City of Louisiana*, 7 Ky. Law Rep. 797; *Slaughterhouse Cases*, 16 Wall. 68; *Vanvabry v. Staton*, 88 Tenn. 334, 12 S. W. 786. In the last case it was stated that "the fine and costs imposed in a misdemeanor case are imposed as punishment. If the prisoner cannot pay or secure them, then he must pay them by his labor in the workhouse, at the rate of twenty-five cents per day, in addition to his jail fees. This is the process of the law for the payment of such fines and costs."

In answer to the suggestion that the sentence of the police judge did not impose or include "confinement at hard labor," and, therefore, that it cannot be exacted, the case of *Holland v. State*, 23 Fla. 123, 1 South. 521, is directly in point. The syllabus of that case reads: "A statute authorizing the county commissioners to employ at hard labor upon public works all persons imprisoned in the jails of the several counties, under sen-

tence upon conviction of crime or imprisonment for failure to pay fine and costs, is not rendered unconstitutional or made the exercise of a judicial function by the fact that it does not contemplate that its terms shall be pronounced as a part of, or incorporated in the record of, the sentence of the court, or by the fact that they are not so pronounced or incorporated." Mr. Justice Raney, in delivering the opinion, observed: "Whenever any express sentence of imprisonment in the county jail, or any sentence of fine and costs, for the nonpayment of which a prisoner will be confined in the county jail, is rendered, such prisoner becomes as much subject to the enforcement of the provisions of the act in question, as if the provisions were set out in the sentence. The judgment of the law is, as a result and legal consequence of the sentence of imprisonment, that he is liable to the provisions stated, if the county commissioners see fit to so employ him, and, as a legal consequence of the sentence of fine and costs, that he will, if he does not pay them, be liable to the enforcement of such provisions upon being put in the county jail. That the legislature can provide that persons who may be so convicted of crime shall be sentenced and made to labor is not denied, and we know of no reason why the legislature cannot provide that a legal sentence shall have, as to offenses committed subsequently to its enactment, a certain legal effect, although the effect is not declared in the body of the sentence." See, also, *Foster v. Territory*, 1 Wash. St. 411, 25 Pac. 459; *People v. Degnen*, 54 Barb. 105, 6 Abb. Pr. (N. S.) 87. In this case the police judge sentenced the defendant to the city prison for the nonpayment of the fines assessed against him. Ordinance No. 91, authorizing prisoners committed to the city prison for nonpayment of fines or penalties to work, was then in force, and a part of the city by-laws. The provisions of this ordinance ought, in my opinion, to be construed in connection with the sentence imposed. The sentence carried with it all the effect which the ordinances of the city then in force gave to it, and the sentence, by its legal effect, made the provisions of the ordinance requiring labor to be performed a part thereof. Both the police judge and the defendant understood, within the provisions of the statute and the ordinances, that the sentence had this effect. In this connection I refer to the following language of Lurton, J., in *Durham v. State*, 89 Tenn. 723, 18 S. W. 74: "The imposition of labor as a means of discipline and a measure of health is neither cruel nor unusual. It operates, when rightly regulated, as a mitigation rather than an aggravation of the punishment involved in imprisonment. The prisoner may be disgraced and degraded by his punishment, but he cannot ascribe his degradation to his labor. To a certain degree it compels crime to

support itself, and in many ways the power to require convicts to labor is a valuable addition to the forces of law and order." This case is not within the decision of *Jaremillo v. Romero*, 1 N. M. 190, where compulsory service exacted from a "peon" or a servant for the payment of an ordinary debt to his master is denounced and forbidden. About all decided in *Ex parte Wilson*, 114 U. S. 417, 6 Sup. Ct. 935, is that a crime punishable by imprisonment under the constitution and laws of the United States for a term of years at hard labor is an infamous one, and that no person can be lawfully convicted thereof except upon the presentment or indictment of a grand jury.

In conclusion, it is perhaps unnecessary for me to say, in view of what is stated in the principal opinion, that the constitution of the state forbids cruel or unusual punishments, and the courts have ample power to prevent such punishments from being inflicted. In making arrests and in the treatment of prisoners, in or out of city prisons, no police or other officer is justified in using unnecessary harshness or excessive violence. If any policeman, to magnify his office, or to exaggerate his importance, or for any other insufficient reason, transcends his power in this respect, he may be mulcted in damages and also criminally punished, but a person who has been lawfully arrested is bound to submit himself peaceably and go quietly with the officer.

JOHNSTON, J. I concur in the views expressed by the CHIEF JUSTICE, and also in all said by Justice ALLEN, except that part of the opinion which holds that the ordinance authorizing the employment at labor of prisoners committed to the city prison for non-payment of fines to be invalid.

SOUTHERN KANSAS RY. CO. et al. v. DRAKE.

(Supreme Court of Kansas. Feb. 9, 1894.)

INJURY TO EMPLOYE—ASSUMPTION OF RISK.

An employe, possessed of full knowledge of the services to be performed by him and of the dangers which they involve, who voluntarily accepts the employment and continues in the service of the employer, will generally be held to have assumed the risk of the hazards of such service, and to have absolved his employer from liability for damages in case of injury. *Railroad Co. v. Schroeder*, 47 Kan. 315, 27 Pac. 965.

(Syllabus by the Court.)

Error from district court, Franklin county; A. W. Benson, Judge.

Action for personal injuries by Aaron S. Drake against the Southern Kansas Railway Company and the Atchison, Topeka & Santa Fe Railroad Company. There was judgment for plaintiff, and defendants bring error. Reversed.

The other facts fully appear in the following statement by JOHNSTON, J.:

Aaron S. Drake was employed by the railroad company as a laborer, working about the shops, grounds, and yards of the railroad company. On April 28, 1888, he and four other men were directed to unload rails from a push car, some of which were 30 feet long and some only 27 feet long. They selected a place for unloading the rails where there was a slope or ditch along the side of the track about 12 feet in width, and on the other side of which was a slight embankment about 20 inches in height. There had been a rain upon the previous day, and the ground was wet. The five men carried two of the rails, which were 30 feet in length, and threw them upon the embankment. They carried a third rail, which was 27 feet long, and were proceeding to throw it upon the pile, when Drake lost his balance, was jerked or fell forward, thrown down, and the rail, rebounding, caught and crushed the ends of two of his fingers. He brought this action, alleging that the injury was occasioned by the negligence of the railroad companies in failing to provide the requisite number of employes to safely and properly perform the work,—the companies well knowing that such labor could not be performed with safety to employes with less than eight men,—and he asked for judgment in the sum of \$5,100. A trial was had with a jury, which returned a verdict in favor of Drake, assessing his damages at \$150, and returning with it the following special findings of fact: "1st Q. What was the length and weight of the rail by which the plaintiff was injured? A. Twenty-seven feet long; weight, 504 pounds. 2d Q. Before the men began to unload the iron at the place where the plaintiff was injured, did they look over the ground and discover that the sloping bank was damp and slippery, and did they conclude and agree among themselves that it would not be safe, while in the act of throwing a rail, to step upon or against the sloping bank? A. Yes. 3d Q. Were not the men instructed by Charles Lockwood, who directed the work there, and were they not cautioned, both by him and by Mr. A. D. Bumps, one of their number, before the plaintiff was injured, not to step upon or against the sloping bank, when in the act of throwing the rail? A. They were. 4th Q. Was this slope of the bank wet and slippery at the time plaintiff was injured? A. Yes. 5th Q. Did the plaintiff set his foot upon or against the sloping bank when the rail by which he was injured was thrown? A. Yes; against. 6th Q. Did the plaintiff's foot, when he set it against or upon the sloping bank, slip, and thereby cause him to fall as the rail was thrown? A. We have no evidence of the slip causing him to fall. 7th Q. Had the plaintiff, before he received the injury of which he complained, been engaged in the work of handling railroad iron and other material? If so, how

much experience had he had in that kind of work? A. Two and a half years. 8th Q. From his experience in handling railroad iron and other material, was he not capable of judging what would be a sufficient force of men to do the work he was engaged in at the time he was injured, with reasonable safety to the men so employed? A. Yes. 9th Q. Did the defendants, or either of them, have greater knowledge than the plaintiff as to what constituted a sufficient force of men to do the work he was engaged in at the time he was injured, with reasonable safety to the men employed? A. Yes. 10th Q. If you answer the last question in the affirmative, then state what officer, agent, or employee of the defendants, or either of them, had a greater knowledge than the plaintiff upon that subject. A. Foreman Bumps. 11th Q. If, in answer to the foregoing question, you name any person or persons, then state which of said defendant companies they were officers, agents, or employees of. A. A., T. & S. F. and S. K. R. R. 12th Q. Did the other four men, with whom the plaintiff was working at the time of his injury, continue to do the same kind of work, at the same place, in the same manner, as the five men had been doing before, handling iron rails of as great weight as the one by which the plaintiff was injured, with safety to themselves, exercising ordinary care on their part? A. Jury cannot agree. 13th Q. Was the place on which the rail was thrown, by which the plaintiff was injured, higher or lower than the rail was when in the hands of the men at the time they threw it? A. Lower." After the special findings were returned into court the defendants below requested the court to require the jury to answer the twelfth special question, which request was refused; and they also moved the court for judgment in their behalf upon the special findings returned. This motion was denied, and the defendants allege error.

A. A. Hurd, Robert Dunlap, and W. Littlefield, for plaintiffs in error. C. B. Mason and J. W. Deford, for defendant in error.

JOHNSTON, J., (after stating the facts.) There is but little room for dispute as to the cause of the injury for which a recovery is sought, and the findings of fact as returned by the jury, when considered in connection with the previous rulings of this court, clearly point to the judgment that must be rendered. No negligence is imputed to any of the employees of the railway company who were assisting Drake in unloading rails from the push car, but the contention is that the injury resulted from the failure of the company to provide a sufficient number of men to perform that kind of work with reasonable safety. Assuming, as we may, that the company had not provided a sufficient number of persons to perform the labor safely,

still we cannot overlook the fact that Drake was fully acquainted with all the hazards incident to the employment, and chose to accept and continue in the performance of such work with full knowledge of all the dangers connected with it. The work of unloading rails from a push car required no special skill, and involved no perils except such as are obvious to every one. Drake, as we have seen, had been engaged in that kind of labor for 2½ years, and had performed similar work with the same or a less number of men. He claimed that it required eight men to safely do that kind of work, and a greater number than five had previously been employed by the company; but for several months before the accident the crew consisted of only five men, and work of the character in question had sometimes been performed by four of them. He continued in the service of the company long after the force at work in the yard was reduced, and if the number employed was insufficient to perform the work he was aware of that fact. The foreman was not present at the time of the accident, and the jury have said that he had a greater knowledge than Drake as to what constituted a sufficient force of men; but that is immaterial, as the jury have found that Drake himself was capable of judging as to what number would be a sufficient force of men to do the work he was engaged in at the time he was injured, with reasonable safety to the men employed. The place for unloading the rails was selected by the men, and before any rails were unloaded attention was called to the character of the place and to the condition of the ground. On account of rain on the previous night the bank upon which the rails were to be thrown was in a slippery condition, and, after being cautioned by one of the men, all agreed that it would be unsafe to step upon or against the bank while they were unloading the rails. Notwithstanding this warning and agreement, Drake set his foot against the bank, slipped, and fell, and the result of the fall was the pinching of his fingers. Strangely enough the jury said that there was no evidence to show that the slip caused him to fall, but, in view of the facts found and conceded, this finding is unimportant. He rests his case wholly upon the failure of the company to furnish sufficient help. He was an experienced man, of full age, capable of judging what number of employees were necessary to safely do the work, and if there was an insufficient number he knew that as well as the company knew it. The work was simple, and the risks and dangers were obvious. Possessed of a knowledge of the men employed, the manner in which the work was to be done, and the hazards which it involved, he voluntarily accepted employment, and continued in the service of the company, and must be deemed to have assumed the risks incident to such service. We only fol-

low in the path of authority in holding that an employe, by voluntarily remaining in the service, with full knowledge of the dangers of the service, assumes the risks of such dangers, and absolves the employer from liability for damages in case of injury. The facts in this case bring it within the rule of *Railroad Co. v. Schroeder*, 47 Kan. 315, 27 Pac. 965, and cases there cited. In that case the injury was alleged to have resulted from a failure of the railroad company to furnish sufficient help to perform the duties of the employe, and it was there said that, while "it is the duty of an employer, whether a railroad company or other corporation or person, to make the work of his or its employes as safe as it is reasonably practicable, yet when the employe, with full knowledge of all the dangers incident to or connected with the employment as it is conducted, accepts the employment, or, having accepted the same, continues in it with such full knowledge, and without any promise, on the part of the employer, or any reason to expect, on the part of the employe, that the employment will be made less dangerous, the employe assumes all the risks and hazards of the employment." See, also, *Rush v. Railway Co.*, 36 Kan. 129, 12 Pac. 582; *Clark v. Railway Co.*, 48 Kan. 654, 29 Pac. 1138; *Railway Co. v. Moore*, 49 Kan. 616, 31 Pac. 138; *Railway Co. v. Monden*, 50 Kan. 552, 31 Pac. 1002; *Railway Co. v. Corps*, (Ind. Sup.) 24 N. E. 1046; *Railroad Co. v. Rogers*, 57 Fed. 378; *Railway Co. v. Lemon*, (Tex. Sup.) 18 S. W. 331; *Railroad Co. v. Barber*, 5 Ohio St. 541; *Kelly v. Railroad Co.*, (Wis.) 9 N. W. 816; *Smith v. Railroad Co.*, (Minn.) 43 N. W. 968; *Crown v. Orr*, (N. Y. App.) 35 N. E. 648. Under the rule of these authorities, the facts show no right of recovery in *Drake*, and hence the judgment must be reversed, and the cause remanded, with instructions to enter judgment upon the findings in favor of the plaintiff in error. All the justices concurring.

GREAT BEND LAND & LOT CO. v. COLE.

(Supreme Court of Kansas. Feb. 9, 1894.)

QUIETING TITLE—VALIDITY OF JUDGMENT.

Where an action is brought, alleging that the plaintiff is in the quiet and peaceable possession of certain real estate, (describing it); that he has the equitable title thereto by virtue of a contract of purchase from one W., the former owner, deceased, and that the defendants, who are the heirs of the deceased, set up and claim an estate and interest in and to the real estate adverse to the estate and interest of the plaintiff; that the plaintiff has complied with all the terms and conditions of the contract of purchase on his part, and is entitled to a decree in his favor of the legal title to the real estate; and the prayer of the petition is that the defendants should be compelled to show their title, and that the same may be determined to be null and void as against the title of the plaintiff; And a judgment is entered decreeing that the plaintiff is entitled to re-

cover the premises, and all of the estate, right, title, and interest of the defendants, and also that the defendants be required to execute a quitclaim deed to the plaintiff, and, in default thereof, that the decree of the court stand in lieu of such conveyance; and subsequently the judgment is amended so as to require the sheriff to make a deed of all the right, title, interest, and claim of the defendants,—*held* that, although such judgment is somewhat informal and irregular, it is not wholly void.

(Syllabus by the Court.)

Error from district court, Barton county; J. H. Bailey, Judge.

Action by T. C. Cole against the Great Bend Land & Lot Company to foreclose a mortgage. Plaintiff had judgment, and defendant brings error. Affirmed.

The other facts fully appear in the following statement by HORTON, C. J.:

On the 28th of September, 1889, T. C. Cole commenced his action against the Great Bend Land & Lot Company to recover \$2,625, with interest thereon at 8 per cent. per annum from the 15th day of July, 1887, upon certain promissory notes executed by the company, and also to foreclose a mortgage upon certain real estate. The notes secured by the mortgage were given in part payment of the purchase money of the premises described in the mortgage. The defenses pleaded were want of consideration and failure of title. The title of Cole, the mortgagee, was founded on an action commenced in the district court of Barton county on the 4th day of June, 1883, his petition being in words and figures as follows: "The State of Kansas, Barton County. In the District Court of Said County. T. C. Cole, Plaintiff, vs. Lenora Walters, Sr., Charles Walters, Robert Walters, and Lenora Walters, Jr., Heirs of Elias Walters, Dec'd, Defendants. Said plaintiff alleges that he is in the quiet and peaceable possession of the following described real estate [describing it] in Barton county, Kansas, and has been for more than two years last past, and that he has the equitable title to said land under and by virtue of a contract of purchase from Elias Walters, the then owner of the above-described tract of land, who has since died; and that the above-named defendants are his heirs, and that they, the said defendants, set up and claim an estate and interest in and to said premises adverse to the estate and interest of the said plaintiff as aforesaid averred; that the plaintiff has complied with all the terms and conditions of said contract of purchase on his part, and is entitled to a decree in his favor of the legal title to said land. The plaintiff therefore prays that the said Lenora Walters, Sr., Charles Walters, Robert Walters, and Lenora Walters, Jr., be compelled to show their title, and that it may be determined null and void as to and against said title of the said plaintiff." Upon the foregoing petition the following judgment was entered: "Now, upon this day this cause

came on to be heard upon the petition and answers, allegations and proofs, of all the parties; and it appearing to the court that the plaintiff herein is entitled to recover the premises in controversy, and the court being fully advised and informed of the facts in the case, a jury having been waived by agreement of the parties, doth consider and adjudge that the plaintiff have and recover of and from the defendants the following described real estate: The east half of the south-east quarter of section thirty-two, (32,) township nineteen, (19,) of range thirteen, (13,) in Barton county, Kansas,—and all the estate, right, and title and interest of the defendants therein; and that, if the defendant Lenora Walters, Sr., in her own proper person, and the defendants Charles Walters, Robert Walters, and Lenora Walters, Jr., minor heirs of Elias Walters, deceased, by Elrick C. Cole, their guardian ad litem, fail to quitclaim the said premises to the said plaintiff within ten days from this date, then this decree of this court shall stand in lieu of said conveyance; and it is further ordered that defendants pay the costs of this action." Subsequently, upon notice, the judgment was amended as follows: "The court finds that a decree of specific performance of a written contract was rendered in this case, wherein one Elias Walters agreed to deed to T. C. Cole the east ($\frac{1}{2}$) of the south-east ($\frac{1}{4}$) of section thirty-two, (32,) in town nineteen, (19) south, of range thirteen (13) west; and the court further finds that the defendants herein were by said decree ordered to make a deed of said land to T. C. Cole; and the court finds that the said defendants have failed to make said deed. It is therefore considered, ordered, and adjudged by the court that T. D. Wilson, the sheriff of Barton county, Kansas, is hereby appointed to make a deed of all the right, title, interest, and claim of the defendants, and each of them, to said land herein described, divesting said defendants, and each of them, of any and all claims in and to said land; that said deed be made to T. C. Cole. The court finds that Lenora Walters, Sr., was the wife of Elias Walters; that Charles Walters, Robert Walters, and Lenora Walters, Jr., are minor heirs of said Elias Walters, deceased." Trial was had in the case of Cole against the land and lot company on the 24th of March, 1890, before the court without a jury. The court rendered judgment in favor of Cole for \$3,350.05, and also decreed a foreclosure of the mortgage set forth in the petition. The Great Bend Land & Lot Company excepted, and bring the case here.

B. F. Simpson and Clayton & Clayton, for plaintiff in error. James W. Clarke, for defendant in error.

HORTON, C. J., (after stating the facts.) It is insisted that the district court of Bar-

ton county did not have jurisdiction, in the case of Cole v. Walters et al., to render any judgment, upon the ground that there was no proper service, by publication or otherwise, upon the defendants who were minors under 14 years of age. It has already been ruled by this court that a nonresident minor may be served by publication as well as a nonresident adult. Civ. Code, § 71; Walkenhorst v. Lewis, 24 Kan. 420; and Head v. Daniels, 38 Kan. 12, 15 Pac. 911. In the case of Cole v. Walters et al. it appears that Lenora Walters, the widow of Elias Walters, deceased, filed an answer. After the notice of publication had been approved, upon application to the district court, Elrick C. Cole was appointed guardian ad litem for the minor heirs, viz Charles Walters, Robert Walters, and Lenora Walters, Jr., and, as such guardian, he filed an answer for them. Under the statute and the facts disclosed, the trial court had full jurisdiction over all the parties.

It is next insisted that the trial court had no jurisdiction to render the particular judgment entered of record. The petition contained allegations in the nature of an action to quiet title, and also for specific performance. It alleged that the plaintiff was in the quiet and peaceable possession of the premises, and had the equitable title thereto by virtue of a contract of purchase from Elias Walters, the former owner, then deceased; that the defendants set up and claimed an estate or interest in the premises adverse to the estate and interest of the plaintiff. It also alleged that the plaintiff had complied with all the terms and conditions of the contract of purchase on his part, and was entitled to a decree in his favor of the legal title to the premises. The prayer of the petition was that the defendants should be compelled to show their title, and that the same should be determined null and void as against the title of the plaintiff. "In an action to quiet title to land, a general finding of title in the plaintiff, and consequently of no title in the defendants, is a conclusive and binding decision against the defendants on the question of title, from whatever source it may be derived, and forever estops them from asserting a claim of title which existed at the time of the finding and judgment." Commissioners v. Welch, 40 Kan. 767, 20 Pac. 483. "Where a landowner executes a written agreement to convey to a person therein named, for a valuable consideration, a certain piece of land on payment of the purchase price, and the party accepting the contract takes possession of the land, and agrees to pay the price in thirty days from date, it is not to be presumed the parties intended that time should be of the essence thereof; and upon such contract the purchaser is entitled to a conveyance of the title if he pays or tenders the purchase price and interest within a reasonable time after the time speci-

fied for payment." *Sanford v. Weeks*, 38 Kan. 319, 16 Pac. 465. The trial court not only had jurisdiction over the parties and the subject-matter, but it also had power to enter a judgment quieting title to the premises in favor of the plaintiff against the defendants, and perhaps for a decree of specific performance. The original judgment, and the judgment as amended, were somewhat informal or irregular, but show that T. C. Cole was fully entitled to the possession of the premises described in his petition, and that the defendants had no estate, right, or title therein. We cannot say that the judgments were so informal or irregular as to be utterly void. After the rendition of such judgments it is certainly clear that none of the defendants were entitled to any estate or interest in or to the premises. If the cause was here upon error, we might modify or correct the judgments. It is sufficient, however, as against a collateral attack. *Bryan v. Bauder*, 23 Kan. 95; *Walkenhorst v. Lewis*, supra; *Rowe v. Palmer*, 29 Kan. 337; *Clouston v. Gray*, 48 Kan. 30, 28 Pac. 983; *Bank of Santa Fe v. Haskell County Bank*, 51 Kan. 50, 32 Pac. 627.

It is finally insisted that the trial court erred in not permitting witnesses to explain the meaning of a stipulation in the mortgage. The clause referred to is not ambiguous, and the court committed no error in rejecting the evidence. The judgment will be affirmed. All the justices concurring.

EQUITABLE MORTG. CO. v. LOWE et al. (Supreme Court of Kansas. Feb. 9, 1894.)

SCROBATION—WHEN PROPER—APPEAL—PARTIES.

1. Where a mortgagee or creditor holds security upon two properties or funds, with perfect liberty to resort to either for the payment of his debt, and another mortgagee or creditor holds a junior security upon only one of these properties or funds, equity will compel the former mortgagee or creditor to exhaust the property or fund upon which he alone has security, before coming upon the latter property or fund, and thereby depriving the latter mortgagee or creditor of all of his security.

2. Where a judgment cannot be disturbed or reversed without affecting all of the defendants in the court below, all of such defendants must be made parties in the supreme court upon proceedings in error to have the case disposed of upon its merits.

Johnson, J., dissenting.

(Syllabus by the Court.)

Error from district court, Phillips county; G. Webb Bertram, Judge.

Action by the Equitable Mortgage Company against John W. Lowe and others. There was judgment for defendants, and plaintiff brings error. Affirmed.

The other facts fully appear in the following statement by HORTON, C. J.:

On the 3d day of May, 1889, the Equitable Mortgage Company commenced its action against John W. Lowe, Josiah Mitchell, the

Mortgage Trust Company of Pennsylvania, the Kansas Trust & Banking Company of Atchison, and others, to be subrogated to four mortgages, aggregating \$934.13, which it had paid off upon certain premises in Phillips county. Trial was had at the January term of the court for 1890, before a court without a jury. It is agreed by all the parties that the evidence introduced upon the trial established the following facts:

"That on or about the 1st day of January, 1889, the defendant John W. Lowe applied to the plaintiff for a loan of \$3,500 upon the real estate described in plaintiff's petition. That said Lowe falsely and fraudulently represented to plaintiff that he (the said Lowe) was the owner of all of said real estate at that time, and that there were no mortgages or liens of any kind upon any part or parts of said real estate, except the four mortgages on the S. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of 33-5-18, which were afterwards paid off by the plaintiff, as alleged in its petition. That, at the time said Lowe applied for said loan, he sent to the plaintiff, at its office in Kansas City, Missouri, a false, fraudulent, and forged abstract of title to said real estate, purporting to have been made, compiled, and certified to by Norton and Crandall, abstractors of Phillipsburg, Kansas. That said abstract was not compiled by said Norton and Crandall, but was a forgery. That said false and forged abstract of title showed the title of said real estate to be vested in the said Lowe, and, as appeared from said fraudulent abstract, there were no mortgages or liens of any kind upon said real estate, except the four mortgages upon the S. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$, 33-5-18, which the plaintiff afterwards paid off. That the plaintiff, relying upon the condition of the title to said real estate as disclosed by said forged abstract, and fully believing the title to said real estate to be, in truth and in fact, as represented by said abstract, agreed to loan to said Lowe \$3,500 on said real estate. That on the 21st day of January, 1889, the said Lowe executed what purported to be a first mortgage upon said real estate to secure the said \$3,500. That on the 7th day of February, 1889, the plaintiff received from said Lowe what purported to be a receipt from the register of deeds of Phillips county, Kansas, showing that there had been filed for record in said office a mortgage for \$3,500 on said real estate, executed by said Lowe and wife, and in favor of the plaintiff. That on the 8th day of February, 1889, the plaintiff, relying upon the showing as made by said fraudulent abstract and register's receipt, as above stated, advanced the sum of \$934.13 as a part of said \$3,500 loan, for the purpose of paying off and discharging the four mortgages, as alleged in plaintiff's petition; said sum being sent by the plaintiff directly to the owners of said mortgages in New York city, said mortgages being thus fully paid off, discharged, and

satisfied. That said register's receipt was a forgery. That the defendant Elizabeth M. Lowe did not sign the said \$3,500 mortgage or notes; her name, and that of the notary to the same, being a forgery. That the title to said real estate was not as represented by said fraudulent abstract. That there were, in fact, a number of mortgages upon various parts of said real estate, aside from, and in addition to, the four mortgages paid off by the plaintiff. That the Kansas Trust and Banking Company, the Mortgage Trust Company of Pennsylvania, and the Nebraska and Kansas Farm Loan Co. held mortgages on said S. E. and S. W. $\frac{1}{4}$ of Sec. 33-5-18, as alleged in their pleadings, but that the four mortgages paid off by the plaintiff were prior and superior to the mortgages of any of the defendants, or any other parties. That the mortgages of the Kansas Trust and Banking Co. and Mortgage Trust Company of Pennsylvania were prior to the mortgages of the Nebraska and Kansas Farm Loan Co. That the mortgages from Lowe to the plaintiff were junior and inferior to the mortgages of the defendants. That in said fraudulent abstract there appeared a deed purporting to convey the said S. E. $\frac{1}{4}$ of Sec. 33-5-18, from the defendant Josiah Mitchell to the defendant John W. Lowe. That said pretended deed was a forgery, and that the title to said S. E. $\frac{1}{4}$ of Sec. 33-5-18 vested in the said Josiah Mitchell subject to the mortgages paid off by plaintiff and the mortgages of defendants, above stated. That the mortgages of defendants were all properly recorded, and had been properly of record from the times mentioned in the pleadings, and were and are in full force and effect at the time the plaintiff advanced said \$934.13, but that the plaintiff at that time had no actual notice of the existence of any of said mortgages, and no notice or knowledge of the forgery and fraud above stated. That no part of said \$934.13 has ever been repaid to plaintiff by said Lowe or any one. That the defendant John W. Lowe, for several years prior to the 8th day of February, 1889, had been engaged in business at Phillipsburg, Kansas, as a loan agent, and as such had negotiated from the defendants the Kansas Trust and Banking Co. and the Nebraska and Kansas Farm Loan Co. the mortgages, as alleged in their pleadings, by means of false and fraudulent abstracts of title, which said false abstracts did not show any of the four mortgages which the plaintiff afterwards paid off, although said four mortgages were at that time valid and existing liens upon said premises, as shown by the records of said county. Said abstracts so furnished to defendants were relied upon by said defendants as genuine, and showed title to said land in mortgagors free from incumbrance. That, when the said Lowe negotiated the loan from the Kansas Trust and Banking Co. for the said Josiah Mitchell, the said Mitchell authorized

Lowe to receive from the loan company the full amount of said loan, which amount was actually remitted by the Kansas Trust and Banking Co.; and, by the authority and direction of the said Mitchell, the said Lowe retained in his possession a sufficient amount of said money to fully pay off the two mortgages on said S. E. $\frac{1}{4}$, 33-5-18, which the plaintiff afterwards paid off, and the said Mitchell directed and authorized the said Lowe to pay off said mortgages, but the said Lowe failed to do so. That said money was thus left with Lowe in February, 1887, and that the said Mitchell never examined the records, or inquired of Lowe or any one, as to whether said mortgages had been paid off by Lowe or not, until in May, 1889. That the said John W. Lowe, for some time prior to January 1, 1889, had been engaged in the loan business in company with one A. P. McElroy under the firm name of McElroy & Lowe. That said firm had been negotiating loans for different parties with a number of loan companies, the plaintiff among others. That the plaintiff, in its correspondence in relation to the loan being made to defendant Lowe, directed all of its letters to the said A. P. McElroy at Phillipsburg, Kansas. That said A. P. McElroy was not in Phillipsburg at that time, having removed to Osborne, Missouri, in the fall of 1888. The said McElroy never received any of said letters. The plaintiff did not know at that time that McElroy was not in Phillipsburg, but believed that said McElroy and Lowe were both present in Phillipsburg, and were partners in the law and loan business. The defendant Lowe, in applying for said loan, executed an instrument, and sent to plaintiff, appointing the said McElroy his attorney in fact to negotiate for him said loan. That the mortgages from Lowe to the plaintiff were on the 6th day of April, 1889, by said Lowe deposited in the office of the register of deeds of said county for record, and said mortgages were then duly recorded. That said \$3,500 mortgage was not filed in said register of deed's office on the 6th day of February, 1889, as represented by the fraudulent register's receipt above mentioned. That the plaintiff received the real estate bond, coupons, and notes set out in its petition on the 7th day of February, 1889, but the mortgages from Lowe to plaintiff were not actually received by the plaintiff until the 11th day of April, 1889, at which time they were delivered to plaintiff by the register of deeds of said county, after they had been recorded, as above stated. That the plaintiff sent its agent, J. F. Coburn, to Phillipsburg, Kansas, on the 10th day of April, 1889. That the defendant Lowe left Phillipsburg, Kansas, on the night of the 11th day of April, 1889. That the mortgages held by defendant the Nebraska and Kansas Farm Loan Co. on the S. W. $\frac{1}{4}$ of 33-5-18, purporting to have been executed by defendant Josiah Mitchell, were forgeries.

That the said Mitchell had been in possession of said S. E. $\frac{1}{4}$, 33-5-18, for more than two years prior to January 1st, 1889, and up to and including the time of trial. That the mortgages and notes set out in the cross petitions of the Kansas Trust and Banking Co. and the Mortgage Trust Company of Pennsylvania were genuine and valid instruments."

The trial court found the issues generally against the Equitable Mortgage Company, and further found that the company was not entitled to subrogation, as prayed for in its petition. The company filed its motion for a new trial, which was overruled. It excepted, and brings the case here.

Frank McKay and Rossington, Smith & Dallas, for plaintiff in error. H. M. & W. A. Jackson, for defendants in error.

HORTON, C. J., (after stating the facts.) If the S. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of section 33, township 5, range 18, were the only real estate mortgaged by John W. Lowe to the Equitable Mortgage Company, we would promptly dispose of the case in favor of the mortgage company, upon the equitable doctrine announced in *Everston v. Bank*, 33 Kan. 352, 6 Pac. 605. But 800 acres of land in Phillips county were included in the mortgage recited in the petition. This mortgage, according to the petition, was executed on the 21st of January, 1889, and filed for record on the 6th of April, 1889. It was to secure \$3,500, but the only money paid thereon was \$934.13. It appears from the evidence that the mortgage company received the mortgage on the 11th day of April, 1889. This action was commenced on the 3d day of May, 1889. The petition alleges, and the evidence shows, that Lowe, the maker of the mortgage, had no title to the S. E. $\frac{1}{4}$ of section 33, township 5, range 18, but there are no allegations in the petition showing that he had no title to all the other land described in the mortgage. There are allegations in the petition that Charles H. Smith, Phillip Yountz, and the American Investment Company had mortgages at one time upon a part of the 800 acres of land other than the S. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of section 33, but there are no allegations in the petition that these mortgage liens actually existed at the commencement of this action, or that they were of the full value of all the land, or that the other land not incumbered by mortgages was worthless as a security for the debt. For all that appears in the petition or evidence, the 480 acres of land alone, not embraced in the mortgages paid off, may have been sufficient to satisfy the \$934.13 advanced upon the mortgage of John W. Lowe to pay off the four mortgages upon the S. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of section 33. This, therefore, is somewhat like a case in which a mortgagee has a lien on two properties or funds, and other mortgagees have junior liens on a

part of the same properties or funds. In such cases, equity demands that the mortgagee who is secured by two properties or funds shall resort first to that property or fund which is not bound to the other mortgagees or creditors, in order that the others may receive the benefit of their security, so far as may be practicable. *Sheld. Subr.* § 63; *York, etc., Ferry Co. v. Associates of Jersey Co.*, 1 Hopk. Ch. 480; *Evertson v. Booth*, 19 Johns. 486; and *Hayes v. Ward*, 4 Johns. Ch. 123. It was in the power of the Equitable Mortgage Company in this very action to pursue and exhaust its remedy against the 480 acres of land included in the mortgage, before being subrogated to the four mortgages paid off by it upon the S. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of section 33, upon which the Kansas Trust & Banking Company and the Mortgage Trust Company of Pennsylvania also have mortgages. The right of subrogation or of equitable assignment is not founded upon contract, but upon the facts and circumstances of the particular case, and upon principles of natural justice. *Everston v. Bank*, supra; *Crippen v. Chappel*, 35 Kan. 499, 11 Pac. 453; *Yaple v. Stephens*, 38 Kan. 680, 14 Pac. 222. The Equitable Mortgage Company should have proceeded first against the 480 acres; and it is not equitable or just that it exhaust, in the first instance, the S. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of section 33, so as to exclude the mortgagees or creditors having junior liens upon that property or fund only. The Equitable Mortgage Company showed in its petition that the defendant John W. Lowe had failed and neglected to pay the taxes for the year 1888 upon the lands embraced in his mortgage, and that the mortgage and debts secured thereby, on account of such default, were due and payable at the time this action was commenced. If, therefore, the mortgage company had proceeded against all of the land mortgaged, all of the mortgages could have been foreclosed, and the liens of all the mortgagees adjusted, according to equitable principles; but it is contrary to equity and natural justice, without a further showing, to permit the Equitable Mortgage Company to exhaust all of the property or fund upon which there are junior liens, when its mortgage embraces other property which may be sufficient to satisfy its debt.

Upon the trial it was shown that Mrs. E. M. Lowe did not sign the mortgage, and that the notarial certificate to the acknowledgment was a forgery; but this would not release John W. Lowe, or render the mortgage null and void as to him. If John W. Lowe and the other parties having interests in the 480 acres of land referred to, who were parties in the court below, but have not been made parties in this court, were properly in this court, we might, perhaps, reverse the case, and send it back for a full foreclosure upon the whole 800 acres of land, and have the proceeds properly distributed; but

we cannot render any judgment that will necessarily affect defendants who are not the parties in this court by summons in error, or otherwise. *McPherson v. Storch*, 40 Kan. 313, 30 Pac. 480. Upon the petition, the other pleadings, and the evidence introduced upon the trial, the judgment of the district court must be affirmed.

ALLEN, J., concurring.

JOHNSTON, J., (dissenting.) The money advanced by the Equitable Mortgage Company upon the forged and fraudulent mortgage was loaned for the purpose of discharging a prior valid incumbrance, and had actually been so applied. When these facts had been established, they made a prima facie case entitling the Equitable Company to be subrogated to the rights of the prior incumbrancer whose debt had been thus satisfied, there being no intervening rights or incumbrances. *Everston v. Bank*, 33 Kan. 359, 6 Pac. 605; *Sheld. Subr. § 8*; *Har. Subr. § 825*. By advancing the money and paying the prior incumbrance, the plaintiff succeeded to the rights of the prior mortgagee, and this substitution in no manner disturbed or depreciated the liens of the subsequent mortgagees. Their securities were just as good after the payment and substitution as they would have been had no payment been made by the Equitable Mortgage Company. It is highly equitable that subrogation should be made, and it appears that it can be made without lessening the rights or doing any injustice to the defendants. The only material objection or defense against the subrogation of the plaintiff is the claim that there are two funds to which plaintiff may resort, on one of which the junior mortgagees have no lien, and that for their protection the plaintiff should exhaust the property covered by the fraudulent mortgage given to it, before resorting to the lien which it has succeeded to by payment. This doctrine of two funds recognizes that the party who has discharged a prior incumbrance is entitled to subrogation, and it only provides a rule for marshaling securities and adjusting priorities in the interest of justice and equity. The doctrine, however, is never applied so that it will work injustice to a senior creditor. He cannot be compelled to resort to doubtful securities, or to funds upon which he can realize only by litigation. "To confine the senior creditor to one of two funds, it must be shown that it is sufficient to satisfy his debt." *Har. Subr. §§ 496, 497*; *Sheld. Subr. § 63*. This fact must be shown by the defendant. When the plaintiff had proved the payment of the prior incumbrance, and its

right to take the place of the prior incumbrancer, it had established the right of subrogation; and it devolved upon the defendants to show that the fund or property covered by the fraudulent mortgage was available, and sufficient without resorting to the other property. From what appears in the record, the mortgage made by Lowe to the plaintiff was false, fraudulent, and forged, and some of the land which it purported to cover he did not own. The loan was obtained upon a false and forged abstract of title. The mortgage was false and fraudulent, to which the wife's signature had been forged. The receipt of the register of deeds, showing that the mortgage had been filed for record, was also a forgery. If there are any lands included in the mortgage which were owned by Lowe, his wife has an interest in them which is not conveyed by the mortgage. The loan having been obtained by the grossest fraud, on a false and forged instrument, the plaintiff was at liberty to treat it as being without force or effect, so far as the mortgagors were concerned. If Lowe has any interest in the mortgaged lands against which the plaintiff might enforce its claim, it is of the most dubious and doubtful character, and probably furnishes little, if any, security for the payment of the money innocently advanced, and used in the discharge of a valid debt and incumbrance. If the judgment of the district court is sustained, the plaintiff is entirely cut off from any benefit of its substituted lien, although the interest of Lowe in the lands covered by the fraudulent mortgage may be wholly valueless. The authorities cited in the prevailing opinion do not go to the extent of defeating the senior mortgagee, but, recognizing his superior right, merely suspended the proceedings which he had instituted until the fund or mortgage which was not bound to the other creditors should be pursued and exhausted. The judgments entered in those cases decreed that if, after exhausting the funds in which the others had no interest, any debt or balance remained due to the plaintiff, the original suit should then proceed in the usual course to enforce the payment of such debt or balance, and the junior creditor could then take what remained. *York, etc., Ferry Co. v. Associates of Jersey Co.*, 1 Hopk. Ch., 460; *Hayes v. Ward*, 4 Johns. Ch. 123; *Evertson v. Booth*, 19 Johns. 486. This was certainly as far as the district court should have gone in this case, instead of cutting off the plaintiff from any rights under his substituted lien. I think the facts shown in the record entitle the plaintiff to subrogation, and that the judgment of the district court should be reversed.

SINGLETON v. EUREKA COUNTY.

(Supreme Court of Nevada. Feb. 26, 1894.)

CONSTITUTIONAL LAW—SPECIAL LEGISLATION—
WHAT CONSTITUTES.

St. 1893, p. 80, authorizing the sheriff of a certain county to appoint a night watchman at a definite salary, to be paid by the county, violates Const. art. 4, § 25, providing that the legislature shall establish a uniform system of county government throughout the state.

Appeal from district court, Eureka county; A. L. Fitzgerald, Judge.

Action by James B. Singleton against the county of Eureka to recover his salary as night watchman. Judgment for plaintiff, and defendant appeals. Reversed.

Peter Breen, Dist. Atty., and Thomas Wren, for appellant. Henry Rives, for respondent.

MURPHY, C. J. The only question argued before this court, and the one relied upon by the appellant in the district court, to defeat the right of the respondent to recover the money alleged to be due him, is that the act of the legislature under which the respondent received the appointment and performed the services is unconstitutional. The act thus challenged reads as follows: "The sheriff of Eureka county is hereby authorized and empowered to appoint one night watchman at a salary of \$75 per month, said salary to be allowed and paid in the same manner as the salaries of other county officers and employes are allowed and paid." St. 1893, p. 80. The contention is that this act falls within the prohibition mentioned in section 20 of article 4, and is not a compliance with section 25 of the same article of the constitution. By the tenth paragraph of section 20 the legislature is prohibited from passing local or special laws "regulating county and township business;" and by section 25 "the legislature shall establish a system of county and township government, which shall be uniform throughout the state." Section 21 of the same article reads: "In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." During the session of the legislature of 1885 an act was passed by that body, and approved by the governor, section 9 of which authorized and empowered the sheriff of any county to appoint policemen, not exceeding two in number, in any unincorporated city, town, or village. Their compensation was not to exceed \$100 per month. The policemen should serve within the limits of such unincorporated city, town, and village, and, in case of the appointment of more than one policeman, one should serve in the daytime and the other at night. Section 10 of the act provides that it shall not be put in force, or have effect, until a petition should be presented to the board of

county commissioners, signed by a majority of the resident electors of the city, town, or village, and requesting the appointment of such policemen, and the levying of a tax of one-fourth of 1 per cent., as provided for by the act. Section 11 provides that upon the presentation of such a petition it shall be the duty of the board of county commissioners to levy the tax, and notify the sheriff, in writing or otherwise, to make the appointment of one or more policemen, as provided for by the act. In the foregoing act we have a general law, which has been on our statutes for 29 years. It is uniform in its operation, and the constitutional provisions were complied with when the legislature had devised one system or plan for the government of unincorporated cities, towns, and villages. By it certain general powers of local government and police regulations were delegated to the resident electors of unincorporated cities, towns, and villages, upon presentation of a petition to their board of county commissioners, who were elected officers, and had control of the internal affairs, of the county, and the power to levy taxes, and whose duty it was to carry into effect the wishes of the resident electors. If the act of 1893, in authorizing and empowering the sheriff of Eureka county to appoint one watchman, created a county office, then the act clearly comes within the constitutional interdiction, because it is not uniform in its operation. By its terms it is confined to, and was intended for, Eureka county, and never was intended to apply to any other county in the state, and is interdicted by section 25 of article 4 of the constitution. "No words could have been used by the legislature that could limit the operation of the act to the county of Eureka more absolutely and definitely than those employed in the act of 1893." State v. Boyd, 19 Nev. 43, 5 Pac. 735; Williams v. Bidleman, 7 Nev. 68; State v. Dousman, 28 Wis. 542; Nevill v. Clifford, 63 Wis. 448, 24 N. W. 65; State v. Supervisors, 25 Wis. 346; Frye v. Partridge, 82 Ill. 273; Montgomery v. Com., 91 Pa. St. 132; State v. Riordan, 24 Wis. 486; Hallock v. Hollingshead, 49 N. J. Law, 64, 6 Atl. 433; Freeholders v. Buck, 49 N. J. Law, 228, 7 Atl. 860; State v. Mitchell, 31 Ohio St. 607; State v. Hermann, 75 Mo. 346; McCarthy v. Com., 110 Pa. St. 246, 2 Atl. 423. A watchman is an officer in cities or towns, whose duty it is to watch during the night and take care of the property of the inhabitants. Black, Law Dict.; Bouv. Law Dict. Webster's definition of the word "watchman" is, "one who guards the streets of a city or building by night." The plaintiff, in testifying, said: "I have been night watchman by appointment of the sheriff of Eureka county since the 2d day of last January. Ever since that date I have acted continuously and exclusively as night watchman in the town of Eureka. I never acted as night watchman outside the town of Eureka during said time."

It is my duty, as night watchman, to walk the streets of Eureka from about dark until daylight, to guard against fire, ring the curfew bell, and perform all of the duties incident to and usually performed by a night watchman of a village." This is a sufficient statement of the evidence to show what the duties of the plaintiff were, and what they were intended to be.

The counsel for respondent contends that the position of watchman is not an officer, but an employe of the county, and he cites the case of *Trainor v. Board*, (Mich.) 50 N. W. 809. We do not think that case supports his position. All that is held in that case and the cases referred to in the opinion of the court is, officers receiving their appointments from county boards, or a city council, and removable at the will and pleasure of such boards and council, are not the holders of such offices as the courts would concern themselves about in quo warranto proceedings. Take the case of the *Attorney General v. Cain*, 84 Mich. 223, 47 N. W. 484, which was an information in the nature of a quo warranto to test the right of certain parties to act as policemen of the city of Adrian. The court said: "It would seem that the number of policemen, their term of office, and their removal from office, is entirely within the will of the common council of the city. They may be appointed for one day, or for one year, and may be removed at any time, without cause shown, from their position by the common council. These persons—policemen and night watchmen—are not mentioned in the city charter as city officers, and there is nothing in any of its provisions warranting the claim that they are to be considered as such officers. * * * We do not think the position of policemen, under these circumstances, is such an office as authorizes the attorney general to file an information by quo warranto in this court to test the title to the position." It was said in *People v. De Mill*, 15 Mich. 182, that "there are grades of position denominated 'offices' which do not rise to the dignity of being entitled to the notice of the attorney general by information." We do not understand that any of the decisions referred to deny but what policemen and watchmen in cities and towns are officers, but what they do hold is, their right to hold and perform the duties of such offices cannot be inquired into by quo warranto, because such offices are not usually created by legislative acts; and, as was said by Judge Cooley, in closing the opinion in the case of *Throop v. Langdon*, 40 Mich. 686: "But it is proper to say that it is at least doubtful whether the proceeding by information is applicable to the case of an office not created by the state itself." The legislature has, in the case under consideration, tried to create an office; but whether the respondent be an officer or an employe is immaterial, for the reason that the act under which his appointment

was made, and upon which he relies for recovery of the money alleged to be due, is local and special, being confined to Eureka county alone, and falls within the prohibition of the constitution. It is not enough that what the legislature has the power to increase, diminish, consolidate, or create certain county officers, and to regulate city and township business by general law. If the act increasing, diminishing, consolidating, or abolishing the officers, or regulating the internal affairs, be of a general nature, although it may not be applicable to all the counties of the state by reason of the fact that the localities and objects to which it was intended to act are distinguished from others by characteristics and a peculiar relation to the legislative power, and showing the legislation to be applicable to some counties or localities and inapplicable to others, the counties or localities will be considered as a class by the legislature as respects such legislation, and legislation affecting such a class in general; but an act increasing, diminishing, consolidating, or abolishing county officers, or regulating internal affairs of a county, exclusive of its operation counties or localities and situated, and in like relation to the legislative purpose, then the classification is uniform, and is faulty as being both local and special. The act under consideration is within the rule of the latter class. It is an attempted regulation of the internal affairs of Eureka county, and all other counties similarly situated are excluded from the privileges thereof; and the respondent, claiming his appointment of night watchman under the provisions of an unconstitutional act, cannot recover in this action. It is ordered that the judgment of the district court be reversed, and the cause remanded.

BELKNAP, J., concurs.

BIGELOW, J., (concurring.) Experience has proven that for many reasons many ways local and special legislation is harmful to the public interests. Legislators are elected to enact laws, not for a city alone, but for the whole state. We hope that in the multitude of counsel there may be wisdom; but where such legislation is permitted a bill affecting a locality is almost invariably referred to local members, and, if satisfactory to them, is passed without scrutiny from the representatives, and without any responsibility upon their part. The probability of it leads to improper compromise among the members, and often to even vicious legislation, that would be permitted were it to affect the whole state. Among a number of provisions in the constitution directed against this evil is that requiring the legislature to establish a system of county and township government which shall be uniform throughout the

To a certain extent the system to be adopted was left to the discretion of the legislative body, but the requirement is absolute that, whatever the system may be, it must be uniform; indicating that this uniformity was a more important consideration with the constitution makers than the plan to be adopted. These limitations upon the power of the legislature should be executed by the courts in the same spirit in which they were adopted, and so as to prevent legislation sought to be guarded against. A system of government consists of the powers, duties, and obligations placed upon the political organization, and the scheme of officers charged with their administration. If the system is to be uniform, it is necessary that these powers, duties, and obligations shall be the same in each county; that the same officers shall be provided, and the responsibilities of government be divided among them in the same manner; otherwise the system is not uniform, for, as here used, the word means that the county governments to be established are in all essential particulars to be alike. *State v. Boyd*, 19 Nev. 43, 5 Pac. 735, is an authority squarely in point, and that fully sustains this construction of the constitution, and that case is in turn supported by a number of well-considered cases from Wisconsin, (*State v. Riordan*, 24 Wis. 484; *State v. Supervisors*, 25 Wis. 339; *State v. Dousman*, 28 Wis. 541; *McRae v. Hogan*, 39 Wis. 529; *Rooney v. Milwaukee Co.*, 40 Wis. 23;) and from Florida, (*Lake v. State*, 18 Fla. 501; *McConihe v. State*, 17 Fla. 238; *State v. Stark*, 18 Fla. 255; *Ex parte Wells*, 21 Fla. 280;) and from California, (*Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66,)—where, under varying circumstances, similar clauses in the constitutions of those states were considered and construed.

Let us now examine the act upon which the respondent rests his right to recover in the action. It was first enacted in 1889, (St. 1889, p. 80,) and is entitled "An act fixing the salaries and defining the duties of certain county officers of Eureka county, and other matters relating thereto." Section 1 fixes the salaries of the officers of that county as they then existed. Section 2 directs that no other compensation shall be paid them by the county. Section 3 forbids the payment by the county deputies, except in one instance. Section 4 reads as follows: "The board of county commissioners of said county may appoint one night watchman for the town of Eureka, provided the amount allowed or paid therefor in any one year shall not exceed the sum of nine hundred dollars." In 1891 (St. 1891, p. 78) this section was amended so as to read: "The board of county commissioners of Eureka county may authorize the sheriff to appoint one night watchman at a compensation not to exceed \$75 per month." In 1893 (St. 1893, p. 80) the section was amended to its present form, and now reads: "The sheriff of Eureka

county is hereby authorized and empowered to appoint one night watchman at a salary of \$75 per month, said salary to be allowed and paid in the same manner as the salaries of other county officers and employees are allowed and paid." Here, perhaps, is a fair illustration of the effects of permitting local and special legislation. At each session of the three last legislatures an act has been passed concerning a small matter of purely local concern, that should have been left, under the general law, entirely to the people interested, and whereby the taxpayers of other parts of Eureka county have been compelled to assist in maintaining a watchman for the town of Eureka, for that has been the practical construction put upon the act; something in which they had no interest, and from which they derived no benefit, for the fact that the county owned property in the town no more called upon it to furnish a town watchman than it did upon the owners of any other property therein. As will be readily noticed, as originally enacted, section 4 provided for the appointment by the commissioners of a night watchman for the town of Eureka, who was, inferentially, to be paid by the county, not to exceed a certain sum. The amendment of 1891 provided that, instead of appointing him themselves, the commissioners might authorize the sheriff to do so, and the clause that provided that he should be appointed for the town of Eureka was omitted. The amendment of 1893 authorizes the sheriff to appoint him without reference to the commissioners, and provides that he shall be paid the sum of \$75 per month, in the same manner as the salaries of other county officers and employees are paid. By the amendments the watchman is not to be appointed for any particular place, and it was argued by the respondent's attorney that if his services were more needed elsewhere than at the town of Eureka, he could transfer them there. As the law now stands, this view seems correct, for apparently ex industria the legislature has omitted the provision that he is to be appointed for that town, which indicates an intention to repeal it, and he is furthermore to be appointed by an officer whose jurisdiction certainly extends all over the county. Probably it would make no difference here if his duties were confined to the town, but, as the matter stands, we have in Eureka county a watchman whose duties and jurisdiction extend all over the county, who is provided for in an act entitled an act fixing the salaries of the county officers of that county, who is to be paid by the county, and in the same manner that the salaries of other county officers and employees are to be paid. These premises lead surely to the conclusion that the intention was that he should become permanently an integral part of the government of that county, and as much one of its officers as any other officer in it. Other

counties do not have such an officer, and it follows that this brings the act in conflict with the constitutional provision requiring uniformity in the county governments. Certainly this law is fully within the mischief intended to be guarded against by the constitution, and also, as it seems to me, clearly within its letter.

2. There are several other constitutional provisions with which the act seems to conflict, but there is one with which the conflict is clear, and that is that no local or special law shall be passed regulating county and township business. That the law is local to Eureka county cannot be denied, and to some extent it certainly regulates the business of that county. "County business" may be defined as covering almost everything that concerns the administration of the county government. It includes the election or appointment of its officers and employes, the amount of their compensation, and how, when, and from what fund it is to be paid. This act directs how the watchman is to be appointed, upon which subject there have been three different regulations. It regulates its business by making it responsible for the watchman's salary, which otherwise it would not be. It directs that the county's money shall be taken from its treasury, and paid to one who otherwise would have no claim upon it. It fixes the amount which the county must pay, and by reference to the manner of payment of the salaries of other county officers, it directs how, when, and from what fund the money is to be paid. This is a regulation of county business, within the meaning of the constitution, concerning which local laws are forbidden. *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66; *Williams v. Bidleman*, 7 Nev. 68; *Montgomery v. Com.*, 91 Pa. St. 125. I concur in the judgment.

STATE v. HENDEL.

(Supreme Court of Idaho. Feb. 19, 1894.)

HOMICIDE — CUSTODY OF JURY — OBJECTIONS TO EVIDENCE BY CODEFENDANT NOT ON TRIAL — EXPERT EVIDENCE—APPEAL.

1. The appointment of an ellisor to take charge of a jury during the progress of a trial is not within the provision of section 1887 of the Revised Statutes of Idaho.

2. H. and R. were jointly charged by information with the crime of murder. H., upon his application, was granted a separate trial. During the trial of H., a certain bullet was offered, and counsel for H. asked the court to permit a chemical and microscopical examination of the bullet to be made, in order to ascertain if there were not evidences of human blood and human tissues discoverable upon the surface of the bullet. To this, counsel for the defendant R. objected that to grant the request would be to jeopardize his client, by the destruction of evidence vital to his defense. *Held*, that the permitting of counsel for R. to be heard to raise this objection was not error.

3. It appearing that the making of the test requested would consume from one to two weeks, and there being no evidence of anything

upon the surface of the bullet that seemed to indicate the presence of blood or human tissue, the denial of the request was not error.

4. The admission or rejection of expert testimony in a given case must rest largely in the discretion of the trial court, and where it is evident that such testimony, if admitted, would tend to aid the jury in coming to a satisfactory conclusion upon the facts, such admission is not error.

5. Where, in a criminal case, it sufficiently appears from the bill of exceptions that the venue was proved, and it is conceded that the record contains only a part of the evidence, the objection that proof of the venue does not affirmatively appear in the bill of exceptions will not obtain.

(Syllabus by the Court.)

Appeal from district court, Alturas county; C. O. Stockslager, Judge.

John Hendel was convicted of murder in the second degree, from which, and an order denying a new trial, he appeals. *Affirmed*.

N. M. Ruick, for appellant. Atty. Gen. Parsons, for the State.

HUSTON, C. J. The defendant John Hendel was charged jointly with one Louis Roder, by information filed in the district court for Alturas county, with the crime of murder in the killing of one Leander Holstrom, on the 17th day of March, 1893. Upon their arraignment, defendant Hendel, on his own application, was given a separate trial. On said trial, at the June term, 1893, of said district court, defendant Hendel was convicted of murder in the second degree. A motion for new trial was made on his behalf, which was denied by the court, and from the order denying said motion, and from the judgment of final conviction, this appeal is taken.

The case comes to this court upon a bill of exceptions. The errors assigned are seven in number, and are as follows: "First. The court erred in overruling appellant's motion for the appointment of an ellisor to take charge of the jury. Second. The court erred in permitting J. S. Waters, Esq., counsel for Louis Roder, to interpose an objection to, and to be heard in argument upon, the request by appellant's counsel, upon the trial, that the bullet taken from the vest worn by deceased be submitted to a microscopical and chemical expert for examination and analysis. Third. The court erred in overruling the application made by appellant's counsel, upon the trial, for leave to have made a microscopical and chemical examination of the bullet found in the vest of deceased, and of the substance or substances adhering thereto. Fourth. That the court erred in overruling the objection of appellant's counsel, upon the trial, and in permitting the witness D. W. Figgins to testify as to his belief in relation to the bullet found in the vest of deceased. Fifth. That the court erred in overruling the objection of the appellant upon the trial, and in permitting the witness Thomas Miser to testify as an expert in answer to the following question, put to him by the counsel for the state: 'What is your opin-

ion as to whether that bullet [State's Exhibit No. 8.] was fired from a pistol?—and to the following: 'What is your opinion as to whether that [bullet found in vest] has been fired from a pistol?' Sixth. The court erred in overruling the objection of appellant, made at the trial, and in permitting the witness Seaborn Jones to testify as an expert as to the appearance and condition of a bullet, then in evidence, and as to whether it had been fired from a weapon,—gun or pistol. Seventh. The court erred in denying defendant's motion for a new trial." We will consider the errors assigned in the order in which they are presented in appellant's brief.

As to the first error assigned: The refusal of the court to appoint, on application of defendant, an ellisor to take charge of the jury during the trial of the case. We think the action of the court was correct. The application did not come within the provision of the statute applicable to such cases. Rev. St. § 1837. The granting or refusing of the application was within the discretion of the court, and it seems to us it was properly exercised in this case.

As to the second assignment of error by the court: In permitting counsel for appellant's codefendant to be heard in opposition to appellant's request that a certain bullet, offered in evidence by appellant, should be submitted to analytical and microscopical examination. While the point presented is somewhat novel, we think it was largely a matter of discretion with the trial court, and we cannot say, upon an examination of the record before us, that the action of the court even tended to prejudice the case of appellant. The facts, as shown by the record here, (and it is conceded it is only a part of the evidence,) are substantially as follows: The appellant was a keeper of a saloon or beer hall in the town of Halley, Alturas county. On the night of the 16th March, 1893, deceased and three others had been drinking beer at appellant's place, until about 4 o'clock on the morning of the 17th, when, as is quite usual in such cases, the debauch culminated in a quarrel between appellant, his codefendant, Roder, who was at the time in the employ of appellant, on the one side, and deceased and his three companions, on the other, during which quarrel two shots were fired, one by appellant and one by his codefendant, Roder. There is some evidence of a third shot being fired, but it hardly arises to the dignity of a suspicion. One of the shots took effect on the body of deceased, entering between the seventh and eighth ribs, on the right side, striking and tearing away a piece of the eighth rib, one-fourth of an inch in width, and one-half an inch in length, glancing upward, and passing through the lungs and through the body of the heart, and out through the left breast, between the sixth and seventh ribs. At the time the inquest was being held, and after the clothes

had been removed from the body of deceased, a bullet was found upon the floor, in close proximity to the place where the clothing was removed from the body. This bullet was of the size carried by the pistol used by appellant on the night, or rather the morning, of the homicide, to wit, a "British Bulldog" pistol, of 44 caliber. Another bullet was also found at that time, which had passed through a portion of the partition of the room, about eight feet from the floor. This latter bullet was of the size carried by the pistol had and used by appellant's codefendant, Roder, on the night of the homicide, to wit, a 45-caliber Colt's revolver. It is conceded that appellant and Roder each fired one shot at and in the direction where deceased was, or was supposed to be. When the clothes of deceased were removed, it was found that the bullet that had passed through him had made a hole in the lining of his vest, at a point thereon corresponding with the place of exit of the bullet from his body. Search was made for the bullet, and one was found, as above stated, on the floor near where the clothes had been taken from the body of deceased. No other bullet was found at that time. The bullet found on the floor, as stated, bore unmistakable evidence of having been fired from a gun or pistol, and also of having come in contact with some hard substance, which had battered the point, and scraped or torn some of the substance from the side of it. This bullet was of the size and fitted the pistol of appellant. But now appears the peculiar and disturbing feature of this case. When the clothing of deceased was brought before the magistrate on the preliminary examination of the defendant, (it does not appear from the record when the preliminary examination took place, but it was presumably some time after the inquest, which was held on the 17th or 18th of March; it is not exactly clear which of these two days,) upon an examination of the vest of deceased by the sheriff, in whose custody the clothing of deceased had been from the time of the inquest to the time of the preliminary examination, a bullet was found in the lower corner of the left side of the vest, between the outside material and the lining; and this bullet, so found, fitted and was the size carried by the pistol used by appellant's codefendant, Roder, on the occasion of the homicide. Upon the production of this bullet by the sheriff, (called on the part of the defendant,) who took it from the vest of deceased at the time of the preliminary examination of defendant Hendel, and who had retained it in his possession since that time, counsel for defendant Hendel moved the court to permit a microscopical and analytical examination to be made by a competent expert of the substance or substances adhering to the bullet found in the vest of deceased, for the purpose of determining its true composition. To this motion, one J. S. Waters, an attorney of said district court,

and who, it seems, was counsel for appellant's codefendant, Roder, objected, claiming that, as the production of this bullet was an attempt to fasten the alleged homicide upon his client, he insisted that the bullet should be retained in its then condition until the trial of his client, informed against jointly with the defendant on trial, was had. The permitting of Waters, aforesaid, to be heard upon said motion, is assigned as error by counsel for appellant. We are unable to see any error in this ruling of the court. The defendants had been informed against jointly. Hendel, upon his application, had been awarded a separate trial. It was, it seems to us, the duty of Roder's counsel, not only to be present at the trial of Hendel, but to vigilantly watch and scrutinize the conduct of such trial, to the end that none of the legal rights of his client should be sacrificed or jeopardized in the interest of Hendel. We think the district court committed no error in permitting the counsel of Roder to be heard on the said motion of appellant, either as *amicus curiae*, or in behalf of his client, but that the action of the court was consonant with, and calculated to effect the ends of, justice.

The third specification of error presented by appellant is based upon the refusal of the court to permit the "microscopical and chemical examination of the bullet, and of the substance or substances adhering thereto." Aside from the objections urged by the counsel for Roder against the granting of this request, which, of themselves, were sufficient, in our view, to warrant the action of the court, neither the court nor the law ever intended that the granting of a separate trial to one of two or more defendants, jointly indicted, should be used by the defendant first placed on trial as a means by which he could sacrifice his codefendants, or do aught to impair their just and legal defense. But it does not appear from the record that there was any substance or substances adhering to the bullet which required the invocation of either chemical or microscopical aid to define its character. One witness testified: "There is something in the creases of this bullet, but I cannot say what it is. The apex of the bullet is slightly battered, and is marked with the imprint of the cloth,—warp of the cloth,—on the end of the bullet." And this was all the testimony appearing in the record upon the subject. Neither of the medical witnesses testified to the existence of anything on the surface of the bullet at all resembling, or intimating an appearance of, "blood stains, or human tissues." So far as the record before us shows, the blood and tissue theory has no more support in the evidence than does the theory of the third shot, with which it is intimately allied. The medical witnesses stated that it would take from one to two weeks to procure the test required. We think, under the circumstances, it was within the discretion of

the trial court to grant or refuse the application on the part of appellant, and in refusing it, the court committed no error.

The fourth specification of error is predicated upon the ruling of the court in permitting D. W. Figgins, one of the medical witnesses, "to testify as his belief in relation to the bullet found in the vest of the deceased." It was a theory sought to be established by the defense that three shots were fired—two by Roder and one by Hendel; that it was one of the shots fired by Roder that killed the deceased. To maintain this theory, the defense called Dr. J. Brown, who testified as follows, in relation to the bullet found upon the floor near the clothing was removed from the body of the deceased: "Under all the conditions the injuries inflicted, and the manner in which the deceased was dressed, this bullet from its appearance, did not pass through the body of the deceased." On being shown the bullet taken from the vest of the deceased, said witness testified in regard to the same as follows: "I believe this bullet could have produced all the effects upon the body of the deceased, as I have observed them, as they have been testified to here in court. This bullet has marks on the point that resemble the mesh work of wearing of cloth, and the edges are turned over from force of some kind, striking some substance, or some substance striking it." Unsatisfactory as this evidence would seem to be, either from a legal or a logical standpoint, it was admitted that it was offered on the part of the defense, and was permitted to go to the jury, and it was but common justice to permit the prosecution to meet it in rebuttal by the testimony of Dr. Figgins, who testified as follows: "A bullet striking a rib would be battered, in my opinion. I do not believe that the bullet taken from Holstrom is the bullet which killed Lee Holstrom. I have examined that bullet, both with a naked eye and with a magnifying glass. There is the appearance of the web or mesh of the cloth on that bullet, while I believe that the bullet which caused the death of Lee Holstrom was battered, more or less, and would not have the meshes of the cloth stamped on it. The meshes of the cloth stamped on the bullet, would have been destroyed by contact with the rib. In my experience, as a surgeon, I never saw a bullet that had been fired into bodies that had any grease substance left upon it, or burning of the powder would make it so." Without commenting upon the relative value of the testimony of these expert witnesses, it is enough to say that the ancient conundrum of "Who should be when doctors disagree?" seems to have been settled by the jury in this case, at least. Several other witnesses were called by the defense in rebuttal, who testified to the effect as Dr. Figgins,—that the appearance of the bullet taken from the vest of

ceased showed it had never been fired from a gun or pistol,—giving various reasons for this conclusion. Notwithstanding counsel for the defendant had opened the door to this class of testimony by introducing that of Dr. Brown, he now contends that it was error for the court to permit the same class of testimony in rebuttal. A careful examination of the authorities constrains us to believe that the question as to the admissibility of expert testimony must depend largely, if not entirely, upon the circumstances of each particular case; and where it is apparent, not only that no injustice has been done, and that the exigencies of the case seem to warrant or require the admission of such testimony, for a proper and satisfactory presentation of the facts to the jury, such admission is not error.

It is objected by counsel for the appellant that the bill of exceptions does not show that any venue was proven upon the trial. While it is apparent from the record that there was great remissness on the part of counsel who represented the state in the settlement of the bill of exceptions, we think there is sufficient therein to show that the venue was proven. Besides, it was conceded by counsel for appellant, before the argument of the case was entered upon, that the record contained only a portion of the evidence.

The objection that the verdict is contrary to the evidence is not well taken. In addition to the evidence already commented upon, no less than four witnesses (Field, McGarnish, Farrel, and Saunders) testified positively that Hendel admitted to them, and in their presence, that he killed Holstrom, and undertook to justify the killing by saying that deceased had knocked him down, and had knocked his wife down, and he had to kill him. Hendel's attempt to explain away these admissions was, as evidenced by the verdict, a failure. Finding no reversible error in the record, the judgment of the district court is affirmed.

MORGAN and SULLIVAN, JJ., concur.

In re BADGER.

(Supreme Court of Idaho. Feb. 6, 1894.)

ATTORNEY—DISBARMENT.

Where an attorney persuades a person to appear in the United States land office and make oath to an affidavit relating to desert-land entries, and to falsely personate and represent herself to be another person, who had prior thereto made a desert-land entry at such office, he will be disbarred.

Information for the removal of J. W. Badger as an attorney of the supreme court of Idaho.

HUSTON, C. J. Information was filed against the respondent by Hon. George Ainslie, on behalf of the bar association of the

third judicial district, under the provisions of title 4, p. 429, of the Revised Statutes of Idaho, charging him with violation of his oath as an attorney, and of his duties as such, and of being guilty of false representation and fraudulent practices as an attorney, involving moral turpitude, in this: "(1) That the said J. W. Badger, being then employed as an attorney in and about certain matters relating to desert-land entries in the United States land office at Boise City, Idaho, did on or about the 16th day of February, A. D. 1893, at Boise City aforesaid, corruptly instigate, suborn, and persuade one Aldora Abbott to be and appear in the land office aforesaid, and subscribe and make oath to an affidavit to be used in said land matters, and to falsely and fraudulently personate and represent herself to be one Cordella M. Wing, who had prior thereto made a desert-land entry at said office, all of which more fully appears by reference to the complaint of C. S. Kingsley, subscribed and sworn to before Jonas W. Brown, U. S. commissioner, on October 21, 1893, a copy of which said complaint is hereto attached, and marked 'Exhibit A,' and made a part of this information." The matter was referred to a committee composed of three members of the bar of this court, to take testimony and make report of findings. This duty has been performed by said committee, and the court has carefully and thoroughly examined the report of the committee, and the evidence upon which said report is based, and has duly considered the arguments of counsel upon the report and evidence, and will now give the result of its deliberations:

There is no duty imposed upon a court more important than that of preserving, to the best of its power and ability, the professional integrity and purity of its bar. Courts are established for the administration of law and justice. The attorneys who constitute its bar are an integral part of the court. Without them, the court would be a dead engine, so far as the accomplishment of the ends of its creation go. The duties and obligations imposed upon the judges of courts are no more binding or obligatory than are those to which their position constrains the attorneys who constitute the bar of the court. The professional conduct of each and every member of the bar is a matter in which all are specially interested. No member has the right, nor should be permitted, to so conduct himself in his profession as to bring reproach upon the guild. There was a time when any scoff or jibe the poet or the romancer saw fit to cast upon the lawyer was received, without question, as deserved obloquy. But that rule has never obtained in this country. The history of the legal profession in this country is the history of the republic. America can proudly and fearlessly challenge comparison of her lawyer sons with any that the world has ever produced. No grander models can be

found for the student of the law than our own country presents. And it should be the earnest desire and endeavor of every member of the profession that the standard of professional excellence be not lowered. That unworthy members will be found in the ranks is inevitable; "for where's the palace whereinto foul things sometimes intrude not?" While the standard of ability and integrity of the American bar is second to none, it is to be regretted that defections from the line of professional duty are becoming disturbingly frequent. Perhaps, under all the circumstances, this is less a matter of surprise than regret. Lawyers are only men, and subject to the same influences that act upon other men; and it would perhaps be unjust to expect that, in an age and a country where the worship of the golden calf has become the accepted and almost universal creed, the legal profession alone should be excluded from the shrine. But the lawyer, if he is a lawyer, in the true acceptance of the term, will ever temper his devotion at that altar with the recognition of those eternal truths which he has drawn from the fountain head of jurisprudence. I cannot myself conceive how a man with ordinarily honest instincts, who has been a careful and thoughtful student of Coke, Blackstone, Kent, and Story, can ever be induced to resort to unscrupulous and dishonest methods in the practice of his profession. It may be that it is to the lack of familiarity with the writers mentioned that some of the looseness so painfully apparent in the practice of some members of the profession is attributable. Perhaps another reason for the lowering of the professional standard may be found in the monstrously heretical idea which many, both professional and profane, have of what constitutes true professional success. To be a lawyer is and should be understood and recognized as being well versed in the law, and possessed of ability to make a just and proper application thereof to the facts in a given case. It is an erroneous and unreliable rule which gauges the ability of a lawyer by the number of cases he wins in the courts of first instance. The true test should be, did he show that he was thoroughly conversant with the law of the case, and did he ably and honestly make a just and proper application of the law to the facts, and not the simple inquiry, "Did he get away with the case?" No matter what the means resorted to may have been, though to reach it he may have been obliged to

"Distort the truth, accumulate the lie,
And pile the pyramid of calumny."

The attainment of the end sanctified the means, no matter how unprofessional, dishonest, or vile.

And I apprehend it is to an overweening desire for temporary and ephemeral success, unrestrained by knowledge or recognition of

those ethical principles which underlie all the writings and teachings of the fathers of the profession, that much of the moral decadence of the legal profession is attributable. The lawyer who, to secure success, either for himself or his client, will violate willfully and knowingly, either the express or implied obligations of his professional oath, is on a par with the minister of the Gospel who, to gratify his avarice, would drag the pure vestments of the altar through the turbid pools of mercenary traffic, or, to encompass an unholy ambition, would "hang the tatters of a political plety upon the cross of an insulted Savior." The restraints which both the common and civil laws laid upon lawyers in matters of compensation for their services have been greatly relaxed, but the reasons which prompted this relaxation were beneficent, and the action should not be made to serve the purposes of oppression or cupidity. There is no reason why a lawyer should not acquire wealth, as well as another, if he does it honestly and legitimately; but as his temptations, in the way of opportunity, are greater than others, so are his obligations to keep strictly within the lines of probity and integrity. And that in so doing he is adopting the course best calculated to insure success, all experience verifies. Go through the ranks of the profession in this country or elsewhere, and it will be found to be a rule, with scarcely an exception, that the successful members of the profession are those who have practiced upon lines of strictest integrity, and it is a matter of just pride to the profession that deviations from the line of duty are exceptional. The rule given by Burns to his young friend Alken may well be adopted by every member of the profession as a check upon his zeal either for the acquisition of pecuniary results or the attainment of professional success:

"But where you feel your honor grip,
Let that eye be your border;
Its slightest touches, instant pause,—
Debar all side pretenses;
And resolutely keep its laws,
Uncaring consequences."

Had the respondent in this case been governed by such a rule, the painful duty imposed upon this court would have passed by us.

Mr. Badger, stand up. As one member of this court, I can assure you I entertain for you only feelings of the profoundest commiseration. I will not add to the painful humiliation of your position by commenting upon the circumstances of your case, further than to say that the court has carefully and critically examined the evidence upon which the findings of the committee are based, and we approve and adopt them. It is the order and judgment of the court that you deliver to the clerk of this court the certificate of admission as a member of the bar of this court heretofore issued to you, and

that your name be stricken from the roll of attorneys of this court.

MORGAN and SULLIVAN, JJ., concur.

DE LANO et al. v. BOARD OF COM'RS OF LOGAN COUNTY.

(Supreme Court of Idaho. Feb. 14, 1894.)

COSTS IN CRIMINAL CASES—WITNESS FEES—LIABILITY OF COUNTY.

1. Affidavit of defendant under section 8151, Rev. St., as amended in 2 Sess. Laws Idaho, p. 20, should state what defendant expects to prove by such witnesses, in order that court may judge of materiality of testimony.

2. Courts can exercise judicial functions only at such times and places as are fixed by law, and judges of courts can enter no order in vacation, except such as are expressly authorized by statute.

(Syllabus by the Court.)

Appeal from district court, Logan county; C. O. Stockslager, Judge.

Claim of N. C. De Lano and H. H. Clay, partners as De Lano & Clay, against the board of county commissioners of Logan county. There was judgment for claimants, and defendant appeals. Reversed.

The other facts fully appear in the following statement by MORGAN, J.:

At the May term, 1893, A. W. Tyler and W. J. Elder were indicted for the crime of robbery. On the 5th day of May, 1893, defendant Elder made the following affidavit, to wit: "Exhibit A. In the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Logan. The State of Idaho, Plaintiff, vs. A. W. Tyler and W. J. Elder, Defendants. State of Idaho, County of Logan,—ss.: W. J. Elder, being duly sworn, deposes and says: That he is one of the defendants above named, and that the above case has been, by an order of said court, set for trial on the 18th day of May, 1893. That the following named witnesses: Geo. Romain, Geo. Warren, Pat. Murphy, Chas. Sherry, Al. Short, A. Stewart, Vanswick, W. North, H. Plughoff, Charles Coney, Frank Reed, Geo. Byles, Geo. Walker, James White, Press Higgins, Phillip Lynch, —Shorty, Pater Mavee-Sherman, Jack Rafter, (Doc.) bartender Tom Connelly, Chas. Riddle, Ed. Nicholson, Chas. Harvey, Jack Nicholson, George Bronough, Sam Gundecker, John Doe (Lunchman at Combination Saloon,) J. P. Gambell, Guss Sawyer, Geo. Richardson, Thomas McNary, Joseph Montgomery, Willet Young, Arty Worswick, Clyto Cloyd, Jud Thompson, H. Blake, Joe Brown, McWilliams, Joe F. White, Scarbrough, Chas. Hogan, Lew Harrod, R. Straiggeaway, W. Soden, F. Maginniss, Ferguson, Otto Sielaff, W. Davey, Gus Wohlgemuth, Campbell, (American Falls,) E. O. Glenn,—are, and each is, a witness for the defendants herein in the trial hereof, and that the evidence of said witnesses, and each of them, is material for

these defendants, and each of them, on the trial of said case. That this defendant, nor his codefendant, cannot safely go to trial without the evidence of said witnesses, and each of them. W. J. Elder. Subscribed and sworn to before me this 5th day of May, 1893. W. B. George, Clerk of District Court." On the 19th day of May, 1893, the judge of the district court, at chambers, made the following order: "It is hereby ordered by me, C. O. Stockslager, district judge of the fourth judicial district, in and for Logan county and the state of Idaho, that a subpoena issue for the above-named witnesses, out of the said court, by the clerk of said court, for each of said witnesses. [Signed] C. O. Stockslager, District Judge." Among those summoned by virtue of said order was one E. O. Glenn, who, with the others, served, as aforesaid, two days as such witness for the defendant, and traveled one mile, and received a certificate from the clerk of said court for such attendance and mileage for the sum of \$4.25. Said certificate was assigned to plaintiffs herein, and by them presented to the board of commissioners of Logan county for allowance. The board refused to allow the same. Upon this statement of facts an agreed case was submitted to the district court, to determine whether said fees were a legal charge against Logan county. On said submission the court, sitting without a jury, made the following conclusions of law: "Findings. This appeal and cause having been brought in to be heard this 24th day of November, 1893, in open court, upon an agreed statement of facts submitted to the court in said appeal and cause, and the court being fully advised upon the facts agreed upon and submitted, as conclusions of law from said agreed facts, the court finds that the order made on the 9th day of May, 1893, at chambers, by the Hon. C. O. Stockslager, district judge of the fourth judicial district, in and for Logan county and state of Idaho, and referred to in said agreed statement of facts, ordering and directing the issuance of a subpoena in the case referred to in said agreed statement of facts, was legally and rightfully made by said district judge, and was in all respects legal and binding; and the said district judge had the right, power, and authority, at chambers, to make said order, and the action of the board of county commissioners, refusing to allow the witness E. O. Glenn his fees under the order of the court, and the certificate as such witness issued to him by the clerk of this court, and duly presented to said board of commissioners for allowance, is reversed, and the said board of county commissioners are hereby ordered to allow said claim of said E. O. Glenn. C. O. Stockslager, District Judge. Nov. 6, 1893." On these findings of facts the court gave judgment in favor of plaintiffs, and against the defendant, and ordered the board of county commissioners to allow said

claim for costs. From this judgment the defendant appeals to this court.

H. S. Hampton, for appellant. P. M. Bruner, for respondents.

MORGAN, J., (after stating the facts.) The principal question brought to this court is, could the judge, upon the presentation of the foregoing affidavit at chambers, as district judge, make the order directing the issuance of a subpoena summoning said witnesses? Section 8151, Rev. St. Idaho, contained no provision for the pay of defendant's witnesses in criminal cases, as originally drawn. The section was amended (2 Sess. Laws, p. 20) by the addition of the following provisions: That, when a defendant in a criminal proceeding requires the attendance of more than five witnesses in his behalf, before such witnesses shall be subpoenaed at the county expense, or their fees and mileage be a charge against the county, such defendant must make an affidavit setting forth that they are witnesses whose evidence is material to his defense, and that he cannot safely go to trial without them. In such case the court shall order a subpoena to issue for such of said witnesses as the court may deem material for the defendant, and the costs incurred by the process, and the fees and mileage of such witnesses, shall be paid in the same manner that costs and fees of other witnesses are paid. It will be noticed that the statute provides that the court shall order a subpoena to issue for such witnesses as the court shall deem material. No power is given the judge, by this or any other section, to make such order; and it would seem to be with good reason, as these fees become a county charge, without the county, through their officers, having anything to say in the matter. Courts can exercise judicial functions only at such times and places as are fixed by law, and judges of courts can enter no order in vacation, except such as are expressly authorized by statute. 12 Am. & Eng. Enc. Law, 14. Such business as may be transacted out of court is exceptional, and must find its warrant in some express provisions of the statute. *Larco v. Casaneuava*, 30 Cal. 561; *Norwood v. Kenfield*, 34 Cal. 329; *Loomis v. Andrews*, 49 Cal. 239. The judge at chambers not being authorized by law to make the order for witnesses for defendant above set forth, said order is illegal and void, and cannot be made a basis for compelling the county to pay the fees of such witnesses. The statute (section 8151, as amended; 2 Sess. Laws Idaho) provides that in such cases the court shall order a subpoena to issue for such witnesses as the court may deem material for the defendant, etc. It is evident, therefore, from this reading of the statute, that the court must exercise its judgment as to the materiality of witnesses. How shall this be done, if the affidavit simply states they are material to his defense,

without stating facts which show to the court that such witnesses are material? The court evidently could and should require that the defendant should state in his affidavit what he expects to prove by the witnesses. Then the court should judge as to the necessity for summoning them. This would prevent the summoning of a large number of witnesses who were not needed in the trial and save unnecessary expense. Judgment of the lower court reversed. Costs awarded to appellant.

HUSTON, C. J., and SULLIVAN, J., concur.

DUNN v. SHARP et al., State Wagon-Road Commission.

(Supreme Court of Idaho. Feb. 21, 1894.)

ACTION TO REVIEW PROCEEDINGS OF PUBLIC BOARD — WHO MAY MAINTAIN — STATE WAGON-ROAD COMMISSIONERS — POWERS — CONTRACT — VALIDITY.

1. A citizen and taxpayer beneficially interested in the orders and proceedings of a board created by law or in the doings of a public officer has the right to bring a proper suit to determine whether such board or officer has performed his duties as the law requires.

2. The state wagon-road commission has no authority to let the contract for the construction of a section of said road until the survey of the same has been completed according to law.

3. The said board exists only by authority of the statute, and has no power or authority except that given it by the statute. In the performance of its duties it must be governed by the law prescribing and directing the method of its work.

(Syllabus by the Court.)

Petition by Alfred J. Dunn for a writ of review to N. J. Sharp and others, state wagon-road commissioners, to determine the legality of a contract executed by such commissioners and William H. Payne for the construction of a certain wagon road. Petition and writ granted.

The other facts fully appear in the following statement by MORGAN, J.:

Plaintiff is an owner of real estate, both improved and unimproved, in the town of Wallace, state of Idaho, and resides in said town; is a taxpayer upon said property. He is also one of the owners of a certain mining property and a quartz mill near Pierce City, in Shoshone county, Idaho. He has been operating the same for the last year, and expects to operate them in the future. Defendants are the state wagon-road commissioners, appointed and organized under and by virtue of the act of the legislature of the state of Idaho approved February 16, 1883. (2 Sess. Laws, p. 23.) After the organization of the said board, one George R. Trask, a competent engineer, was employed to make survey of a section of said state wagon road, running from the town of Wallace, in Shoshone county, to the mouth of the St. Mary's river, on the St. Jo river. The said engineer proceeded to survey said road. Commencing

at the town of Wallace, he surveyed and staked the line of the said road from the said town of Wallace to a point on the St. Joseph river, 20 to 25 miles above the mouth of the St. Mary's river. So much of the survey was completed on or before the July, 1893, meeting of the state board of commissioners. At this meeting said Trask made report to the said board of his said survey. No plot of the road so surveyed was ever made out or placed on file with the board of commissioners, and no specifications or profile of the amount so surveyed was ever made. Differences having arisen between the said engineer, Trask, and the commissioners, the engineer handed in his resignation. The survey not having been finished, no profile of the portion so surveyed was ever placed on file. The board of state road commissioners then employed one White to make survey from said town of Wallace to the mouth of the St. Mary's river. The latter, commencing at a point on the St. Jo river opposite the mouth of the St. Mary's river, surveyed the line of said road along the north bank of the St. Jo river a distance of about 11 miles, leaving, of said White survey, 20 or 25 miles yet to be made, to connect the same with the town of Wallace, and of the Trask survey about 25 miles unsurveyed, to connect the same with the mouth of the St. Mary's river. At this juncture the said board of commissioners advertised for proposals for the construction of the different sections of said road throughout the state. In reply to this advertisement one William H. Payne filed proposal to construct the said state road from point on the Mullen road in Shoshone county to the mouth of the St. Mary's river for the sum of \$16,850, which said bid was accepted by the said board of state road commissioners, and a contract entered into by and between the said William H. Payne of the first part, and the state wagon-road commissioners, party of the second part, for the construction of a portion of said road described as follows: "The point of beginning being a point on the county road known as the Mullen Road," between the east and west forks of Pine creek, in Kingston precinct, Shoshone county, Idaho; thence up and along the main branch of Pine creek to the divide between the head waters of Pine creek and Falls creek; thence over said divide to the northwest of headwaters of said Falls creek to the divide of Montan Doon creek; thence down and along said creek to the southeast corner of Montan Doon ranch, the north side of the St. Jo river, at the mouth of the St. Mary's river. The said Payne further agreeing to perform and complete said work on or before the 20th day of September, 1894. * * * The said party of the first part further covenants and agrees and with the said party of the second part that he will begin, carry on, and prosecute said work to completion in all its several stages within five months from the date

of this agreement." The contract was executed by N. J. Sharp, president of the state wagon-road commission of Idaho, and John Hunter, secretary on the part of the state, and by William H. Payne on his own part. Acknowledged before George H. Stewart, notary public. This contract contained various other provisions, not necessary here to mention.

W. B. Heyburn, for petitioner. J. H. Hawley and Geo. H. Parsons, Atty. Gen., for defendants.

MORGAN, J., (after stating the facts.) It will be noticed that the foregoing contract was executed and entered into without any survey of said road having been made or completed between the town of Wallace and the mouth of the St. Mary's river; that no profile or any specifications of said or any survey between the above-described points was ever placed on file in the office of the state wagon-road commission. The statute authorizing the construction of a system of state wagon roads in this state in part is as follows: "Sec. 2. There shall be constructed as a portion of said system of roads, a road beginning at the head of the falls of the Little Salmon river, * * * and extending thence north through Nez Perce and Latah counties, by the way of the mouth of the St. Mary's river to Wallace in Shoshone county, * * * together with such bridges over the streams crossed by all of said roads as may be necessary for safe and convenient travel thereon." After providing in the five succeeding sections for the organization of the state wagon-road commission, section 8 provides as follows: "Sec. 8. Said commission or a majority of the members thereof, shall at their first meeting, or as soon as practicable, appoint one or more persons to survey and definitely locate the roads to be constructed under this act, between such places and along such general routes as the commissioners may order, subject to the provisions of the act," etc. The section then proceeds to prescribe the qualifications of such engineers and their compensation, and proceeds: "All work done by said engineers shall be accurately performed and clearly marked out in the field, provided that no grade on said road shall exceed 10 per cent. Sec. 9. As soon as practicable after the lines of said roads have been determined the commission shall meet at such place as may be determined upon and shall proceed to divide the lines of said proposed roads into sections, naming as the beginning and end of each section well known and easily determined points; and shall determine and settle upon the width of proposed grades, the points on said roads where culverts, corduroys, drains, and turnouts shall be necessary, the distance upon each side of the roads that trees shall be cut down, the bridges that shall be built and their dimensions, method of construction and

material out of which they shall be built, and all other requirements that may be proper and necessary. Sec. 10. That upon dividing said roads into sections, as provided for in section 9, the said commission shall let as soon as practicable in the year 1893, to the lowest responsible bidder or bidders, * * * contracts for such of the several and different sections of said road as the commission may decide upon letting for said year." Section 10 further provides that one of said sections shall commence "at Wallace in Shoshone county, and extending towards the mouth of the St. Mary's river in Kootenai county, and on the right of the road, and commencing at the mouth of the St. Mary's river in Kootenai county and extending towards Mt. Idaho."

The first question to be considered by the court is the authority of the plaintiff in this cause to bring this action. A very similar condition of things existed in the case of *Orr v. Board*, reported in 2 Idaho, 923, 28 Pac. 416. It is not necessary here to repeat the opinion in that case, but it is sufficient to say that on the authority of that case and on the case of *Maxwell v. Supervisors*, 53 Cal. 391, we hold that the plaintiff, being a citizen and a taxpayer in Shoshone county, and the value of his property being affected by the location and building of this road, he has the right to bring suit to determine whether the commissioners have exceeded the authority given them by the law in the letting of this contract, and this latter question is the principal one to be determined by this court. It will be seen from the provisions of the law as above quoted that, prior to letting any contract, an engineer shall be appointed, and surveys made, and the road accurately marked out on the ground over which it passes; that the commission shall determine and settle upon the width of proposed grades, the points on such roads where culverts, corduroys, drains, and turnouts shall be necessary, the distance on each side of the roads that trees shall be cut down, the bridges that shall be built, and their dimensions, etc. The board of state wagon-road commissioners exists only by authority of the statute quoted above; it has no power or authority except that given it in this statute. In the performance of its work it must be governed by the law prescribing its duties and directing the method of its work. It will be seen by the above statement of facts that the commission has proceeded to let this contract to the said Payne without having first made any survey, plot, or profile of the road to be so constructed. This is in direct violation of the statute. The reasons for the provisions are apparent, as no person desiring to build this portion of the road, without the same is surveyed, staked upon the ground, maps and profiles thereof made, the bridges to be built and positions and dimensions thereof designated, can form any correct estimate of the amount of money required to build the same,

and therefore can make no proposal from which he himself or the commissioners can form any judgment as to whether the sum proposed for construction is too great or too small. As no complete survey has been made of this section, neither the commissioners nor the contractor can know whether the road can be built for the sum named, or whether it can be built for one-half the sum. The board not having followed the provisions of the law above set forth, the court must hold that the said contract so entered into between the state wagon-road commission and the said Payne is illegal and void. Costs awarded to petitioner.

HUSTON, C. J., and SULLIVAN, J., concur.

ROSENAU v. SYRING et al.

(Supreme Court of Oregon. Feb. 14, 1894.)
CONVERSION BY COTENANT—DEMAND BEFORE SET-TROVER AGAINST LANDLORD.

1. Where one tenant in common claims the exclusive ownership, and applies the joint property to his own exclusive use, there is such a conversion as will enable his cotenant to bring trover against him.

2. Where defendant denies plaintiff's title and pleads ownership and right to the possession in himself or another, he cannot defeat recovery on the ground that plaintiff did not allege and prove demand before suit.

3. Where, during the term of a lease, the landlord enters and takes possession of the premises, and converts to his own use removable trade fixtures erected by the tenant for use in his business, the tenant may bring trover against the landlord, unless he has surrendered the premises and abandoned the term.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by Minnie Rosenau against Albert Syring and Amelia Syring. From a judgment for plaintiff, defendants appeal. Affirmed.

T. J. Geisler, for appellants. W. L. Nutting, for respondent.

BEAN, J. This is an action to recover damages for the unlawful conversion of personal property. The complaint, in substance, avers: That on December 2, 1892, Gustav Lichthorn and Anna Lichthorn were the owners and in possession of certain personal property, which, for the purposes of this case, may be segregated and considered in three parts: First, sundry small articles, of the aggregate value of \$135; second, 20 sacks of flour, of the value of \$23; and, third, a bake oven, of the value of \$350. That on the day named the defendants wrongfully and unlawfully took and carried away said property, and converted the same to their own use. That prior to the commencement of this action the Lichthorns assigned and transferred to the plaintiff their right, title, and interest in and to the property, and their claim against the defendants for its conversion.

The defendants answered jointly, denying the allegations of the complaint, and, among other defenses, alleged, in substance, that at all the times mentioned in the complaint the property therein described, except the bake oven and flour, belonged to Gustav Lichthorn alone, and was on December 1, 1892, seized under a writ of attachment issued in an action brought by the defendant Amella Syring against him to recover the sum of \$58, and afterwards sold to satisfy the judgment recovered in the action; that the 20 sacks of flour belonged to, and was the property of, Kratz & Kernan, and was by them replevied from the sheriff after the levy of the execution, and before the sale; that the bake oven referred to was constructed by Gustav Lichthorn upon the property of defendant Amella Syring, which he occupied as her tenant, and that the same is an irremovable fixture, the ownership and title to which go with the land; and that about December 1, 1892, the Lichthorns surrendered possession of the premises, and abandoned whatever interest they had in the oven to the landlord. The reply put in issue the new matter alleged in the answer. Upon the issues thus joined the cause was tried, and a verdict rendered in favor of the plaintiff for the sum of \$200, and from the judgment entered thereon this appeal is taken.

1. The evidence tended to show that plaintiff's assignors, who were conducting a bakery on property leased of the defendants, were the joint owners of the property in controversy on the 1st day of December, 1892, when Gustav Lichthorn's interest therein,—except the bake oven,—was duly attached in an action brought against him by the defendant Amella Syring, and afterwards sold to satisfy a judgment recovered therein, and purchased by the defendants. Upon these facts the contention for defendants is that the plaintiff cannot, in this action, recover for the alleged conversion of Anna Lichthorn's interest in the property, because the defendants, by their purchase at the execution sale, became the owners of Gustav Lichthorn's interest, and therefore tenants in common, or joint owners, with her. The general rule is that one tenant in common of chattels cannot maintain an action of trover against his cotenant, because the right of possession lies at the foundation of the action, and the one is as much entitled to the possession as the other. But where one tenant in common, denying the right and title of his cotenant, and claiming the exclusive ownership in himself, applies the joint property to his own exclusive use, it will amount to a conversion, and enable him cotenant to support trover against him therefor. *Cooley, Torts*, § 455; *Agnew v. Johnson*, 17 Pa. St. 373; *Winner v. Penniman*, 35 Md. 163; *Fiquet v. Allison*, 12 Mich. 328; *Grove v. Wise*, 39 Mich. 161. Now, in this case, the defendants, by their answer, and all through the trial, denied, and refused to recognize or ad-

mit, Mrs. Lichthorn's interest in the property, but asserted exclusive title and ownership in themselves, which would amount to a conversion, and enable plaintiff to recover the value of Mrs. Lichthorn's interest in this action.

2. It is next contended that the property came rightfully into the possession of the defendants by virtue of the attachment and execution proceedings, and no action for its conversion can be maintained without allegation and proof of demand and refusal to deliver. The undoubted general rule is that, when property belonging to one is rightfully in the possession of another, no action for its conversion can be maintained until after a demand and refusal. The reason for this rule is the presumption that one in possession of property belonging to another will, upon demand, surrender it to the true owner, and hence ought not to be harassed by an action to recover its possession until after opportunity to do so. But where the defendant, in his answer, denies plaintiff's title, and pleads ownership and right to the possession in himself or another, he cannot defeat a recovery on the pretense that he would have surrendered the property if demand had been made. By such an answer he admits the detention, and justifies it by claiming title and right of possession in himself, and in such case it is not necessary for plaintiff to allege and prove demand previous to bringing the action. *Cobbey, Repl.* § 448; *Lewis v. Smart*, 67 Me. 206; *Raper v. Harrison*, 37 Kan. 243, 15 Pac. 219.

3. The next assignment of error is in refusing to instruct the jury that the bake oven could not be considered by them in assessing damages, because it is so attached as to become part of the realty, and therefore not the proper subject of an action in replevin or trover. But in this we think there was no error. On July 8, 1882, the Lichthorns leased of the defendants, for a term of 10 years, certain premises in Albina, for use as a bakery; and there was evidence tending to show that the oven in question, which was built of brick, and rested on a platform supported by posts set on the ground, was a removable trade fixture erected by them for the purpose of the business in which they were engaged, and which they had a right to sever and remove during their term. But before the expiration of the term the landlord entered, and took possession of the demised premises, and applied and converted the oven to his own use; and the weight of authority seems to be that the tenant may maintain trover against the landlord, under such circumstances, unless he has surrendered the premises and abandoned the term, which was one of the issues made by the pleadings in this case, and was for the determination of the jury. 2 Woodf. Landl. & Ten. 620, and note; *Ex parte Hemenway*, 2 Low. 496; *Finney v. Watkins*, 13 Mo. 201; *Watts v. Lehman*, 107 Pa. St. 106; *Villas v.*

Mason, 25 Wis. 310. The court could not, therefore, have properly instructed the jury, as a matter of law, that the oven was not to be considered by them, in estimating plaintiff's damages.

There were several other questions suggested at the argument, but the consideration given them has disclosed that they are without merit. The judgment of the court below is therefore affirmed.

SNIDER v. JOHNSON et ux.

(Supreme Court of Oregon. Feb. 14, 1894.)

Resulting Trusts — PAROL EVIDENCE TO ESTABLISH—SUFFICIENCY—LIMITATIONS.

1. The statute does not begin to run against an action to establish a resulting trust in land until the cestui que trust, who has been in possession, is ousted.

2. Where the testimony was conflicting as to whether land was bought with a mother's or her son's money, whether the bond for a deed was taken in her name for herself or to protect his interests as a minor, and whether she directed the deed to be made to him or to her, and the evidence showed that at her request the bond for a deed was never recorded, that the deed was made to the son, and that she delayed over 20 years before she demanded a deed to herself in accordance with his bond, a trust on behalf of the mother is not established.

Appeal from circuit court, Douglas county; H. K. Hanna, Judge.

Suit by Elizabeth Snider against John Y. E. Johnson and Elizabeth Johnson, his wife, to establish a resulting trust in land. From a decree for plaintiff, defendants appeal. Reversed.

The other facts fully appear in the following statement by MOORE, J.:

This is a suit to establish a resulting trust in land. The facts show that one Solomon Abraham, on May 20, 1869, was the owner of lot 8, block 27, in Roseburg, Douglas county, Or., and on that day executed and delivered to plaintiff a bond for a deed, in which he covenanted to convey to her the legal title thereto, in consideration of \$275, of which \$100 was then paid, and the remainder was evidenced by plaintiff's note, payable in one year. This bond was delivered to the county clerk of said county, but, by plaintiff's order, was not recorded. That said Abraham and his wife, on February 14, 1870, in consideration of the payment of said note, conveyed said lot to the defendant John Y. E. Johnson, plaintiff's son, who was then aged about 20 years, and the deed therefor was on June 23, 1870, duly recorded in said county. The plaintiff, about June, 1869, moved into an old house on the north half of said lot, and occupied it until about October, 1875, when she moved into a new one erected upon the south half, where she resided until about September, 1883, when she removed to a new house built on the north half, which she occupied until about September, 1887, at which date she went to Portland, Or., to make an extended visit. The

defendant John Y. E. Johnson married the defendant Elizabeth Johnson on March 2, 1887, and moved into the house on the south half, but, after the plaintiff went to Portland, he occupied the one on the north half and when the plaintiff returned, in May, 1888, she was obliged to live in the building on the south half. The plaintiff alleges that she paid the consideration to Abraham for said lot, and, after the bond was executed, she entered into a contract with her son, by which it was agreed that he should receive the legal title to the south half, in consideration of his living with and aiding plaintiff in the support of her family, and applying what he could spare from his wages to the payment of the consideration. That the defendant had notice and knowledge of plaintiff's claim of ownership of the north half of said lot at the time said deed was executed, and has repeatedly admitted that he held the title in trust for, and promised to convey it to, her; and that, relying upon his admissions and promises, she has been misled into security, in consequence of which and of her ill health she had not commenced any proceedings to recover the title thereto until this suit was brought. That, upon the execution and delivery of said bond, the plaintiff, in pursuance thereof, entered upon the north half of said lot, and ever since has been, and now is, in the actual, open, exclusive, and uninterrupted possession thereof. The defendant, after denying the material allegations of the complaint, in substance alleges that said bond was taken in plaintiff's name, for his use and benefit, and with the direct agreement that said lot should be conveyed by Abraham to him; that he paid the entire purchase price, and that said Abraham, with the consent and by direction of plaintiff, conveyed said premises to him; that he has, since the execution of said bond, been in the open, notorious, adverse, and exclusive possession thereof under claim of ownership, and that plaintiff's alleged cause of suit did not accrue within 10 years prior to the commencement thereof; that he has made improvements of the value of \$1,620, and paid the taxes, amounting to \$110, while in possession of the north half, which has enhanced the value thereof to that extent. The reply denied these allegations of new matter, and the cause, being at issue, was referred to John Hamilton to take the testimony; and, upon the report thereof, the court found that the equities were with the plaintiff, and that defendant held the legal title to the north half of said lot in trust for her, and decreed a deed of conveyance thereof, together with the costs and disbursements of the suit, from which the defendants appeal.

J. W. Hamilton, for appellants. E. B. Preble, for respondent.

MOORE, J., (after stating the facts.) The defendant contends that, the plaintiff having set up her cause of suit upon an alleged re-

sulting trust, the plea of the statute of limitations may be interposed in bar thereof. The principle is elementary that time does not bar a direct trust when the relation of trustee and cestui que trust is admitted to exist, (*Manaudas v. Mann*, 22 Or. 525, 30 Pac. 422,) but courts will not enforce a resulting trust after a great lapse of time or laches on the part of the supposed cestui que trust, (*Perry, Trusts*, § 141.) There is, however, an exception to the application of this general rule in favor of a cestui que trust in possession of an estate. In such case the statute does not begin to run until he has been ousted. *Gilbert v. Sleeper*, (Cal.) 12 Pac. 172; *Lakin v. Mining Co.*, 25 Fed. 347; *Love v. Watkins*, 40 Cal. 569; *McCauley v. Harvey*, 49 Cal. 497; *Altschul v. Polack*, 55 Cal. 633. The record shows that plaintiff occupied the north half of said lot from 1869 to 1887, except when a new house was being built thereon, from 1875 to 1883, and that she had never been denied the possession thereof until 1888, and therefore the statute of limitations did not begin to run until that time.

Where one purchases land with the money of another, and takes the title to himself, the courts presume from the transaction of the parties that a resulting trust arises in favor of him whose money paid for it, (*Parker v. Newitt*, 18 Or. 274, 23 Pac. 246; 1 *Perry, Trusts*, § 26;) and parol evidence is admissible to establish such a trust, notwithstanding a recital in the deed that the consideration was paid by the grantee (*Chenoweth v. Lewis*, 9 Or. 150.) "The admission of parol evidence to establish a resulting trust has been often said to be 'one of the mistakes of a court of equity.' To raise a trust not expressed in the writing, the evidence of it must be full, clear, and convincing. If it is attended by doubt and uncertainty, the writing must remain the highest and best evidence." *Lee v. Browder*, 51 Ala. 238; *Baker v. Vining*, 30 Me. 121; *Whitmore v. Learned*, 70 Me. 276; *Parker v. Snyder*, 31 N. J. Eq. 164; *Boyd v. McLean*, 1 Johns. Ch. 582; *Rogers v. Rogers*, 87 Mo. 257; *Clark v. Pratt*, 15 Or. 304, 14 Pac. 418. Considering the evidence in the case at bar for the purpose of determining its sufficiency under this rule, we find that the plaintiff admits in her testimony that \$50 of the amount paid when the bond was executed was realized from the sale of stock that the defendant had earned by his labor; but she claims that, because he was then a minor, this property was hers; that the other \$50 then paid she received from her husband's estate; that, in order to obtain funds for the payment of the note, she did work, for which she received from one person \$47; that she did the washing for thirteen men and one woman; and that every \$5 that she obtained she deposited with Dr. S. Hamilton, and earned enough by transient washing to support her family; that she let a building on the south half of the lot, and the rents therefrom, together with every \$5

or \$10 that her son could spare, made up the amount to pay off the note, and, when this amount was raised, she sent her son to Oakland, Or., to pay it to Abraham; that M. M. Melvin, the county clerk, to whom she had delivered the bond, brought the note and deed to her, and, when she discovered that the property was conveyed to her son, she refused to accept the deed, and directed Melvin to return it to Abraham. Melvin testified that he never saw the deed, and that plaintiff never told him to take it back to Abraham, or said anything about the bond after it had been delivered to him, till this suit was commenced. The defendant testified that his father died in 1852, while crossing the plains, and that his mother married George W. Snider about 1855; that he lived with them till the summer of 1864, when he left home, for the reason that his presence seemed to cause trouble between his mother and stepfather; that his stepfather died in 1865, leaving his mother with three small children, and that another was born soon after his death, all of whom were girls; that, upon Mr. Snider's death, his mother invited him to return and aid her in the support of her family, and then told him that he might keep whatever he could earn by his labor, and that thereafter, he received his earnings, and invested them in what he needed; that his mother at that time was very poor, and had no means except such as she received for her labor; that in 1869 he and his mother had a conversation in regard to the purchase of a home, and, learning that Abraham had a lot for sale, it was agreed that he should purchase it, but, being a minor, it was further agreed that his mother should take the bond therefor in her name, to protect his interests, and that she would instruct Abraham to make the deed to him when the purchase price was paid; that he worked and earned \$50 by sawing wood and other labor, which, with the \$50 realized from the sale of the cattle, constituted the \$100 paid at the time the bond was executed; that he deposited his earnings with his mother and with Dr. S. Hamilton until he had a sufficient amount to discharge the note, when he drew the money, paid it to Abraham, at Oakland, and told him to execute the deed as his mother had instructed him; that he paid the whole consideration; and that his mother never paid any part thereof. Solomon Abraham testified that, while he could not remember the details of the transaction, he believed that, from his careful method of doing business, a deed made by him to Johnson must have been by his mother's direction; that he was living in Oakland at the time the deed was executed, but moved to Roseburg in 1875, and lived one block from the plaintiff's home till 1890; and during that time she never said anything to him about the deed till May 9, 1890, when she demanded from him a conveyance of the whole lot, but at Portland, in the fall of that year, she demanded a deed

for only one-half of the property. J. H. Snider, plaintiff's stepson, testified that he lived with the plaintiff during the years 1868 and 1869, and that she many times said she was going to have the property deeded to her son. The plaintiff and her daughters testified that the defendant had frequently promised to convey the north half of said lot to his mother, and Laura La Forest testified that she heard him at one time make this promise. This the defendant denies. But these promises, if made at all, the testimony shows, were made after the conveyance, and hence could not create a resulting trust. To create such a trust, the promise must have been in force at the time the deed was delivered. "And," says Mr. Perry in his work on Trusts, (section 140,) "if the nominal purchaser, under such circumstances, should afterwards agree to hold in trust for, or to execute a conveyance to, the person who paid the money, courts would not enforce the agreement if it was without a new consideration or voluntary." The evidence cannot be reconciled upon any theory, and the presumptions and inferences deducible from the acts of the parties must be relied upon for a solution of the question: (1) The bond by plaintiff's direction was never recorded. This fact would seem to support the defendant's theory that his mother was acting for him, and in his interest, and did not desire to make the bond a matter of record. (2) The fact that Abraham made the deed to Johnson is a strong presumption that he did so at plaintiff's request. (3) The fact that plaintiff, for more than 20 years, never made any demand upon Abraham to comply with the terms of his bond, seems to further show that the deed was executed according to her instructions. From these facts and circumstances, it seems clear that the trust has not been established with that character of proof required in such cases, and for that reason the decree is reversed, and the bill dismissed.

CURRIE, Receiver, v. BOWMAN.

(Supreme Court of Oregon. Feb. 14, 1894.)

MORTGAGE BY CORPORATION—AUTHORITY OF PRESIDENT—RATIFICATION BY DIRECTORS—FRAUDULENT PREFERENCES.

1. The president of a corporation was authorized, by resolution of its directors, to transfer notes or contracts of the company in order to borrow money. Thereafter, desiring to mortgage the goods of the company to secure a loan, he showed such resolution to the mortgagee, with the words "mortgage" and "property" interlined, apparently in the same handwriting, so as to authorize the president to execute a mortgage, whereupon the loan and mortgage were made. The directors present at the adoption of the resolution denied that the power to mortgage was conferred on the president, and he had no such power apart from the resolution. *Held*, that the mortgage was given without authority.

2. The directors had access to the minute book in which the interlined resolution was re-

corded, but did not discover it until possession was taken under the mortgage, they having left the management of the company entirely to the president. When possession was taken under the mortgage, the directors made no opposition, nor did they disaffirm the mortgage for several months, or try to refund the borrowed money. *Held*, that the directors ratified the execution of the mortgage.

3. The fact that one to whom a corporation mortgaged its property knew that it was in failing circumstances, and that its president sought, by the mortgage, to tide over its difficulties, does not render the mortgage void, if valid on its face, and accepted without any secret trust or participation in the president's fraudulent intent, but merely to secure the payment of a debt.

4. On an issue as to the right to possession of certain notes, defendant, who held a mortgage on a stock of goods, testified that they were given to him by the mortgagor's president as additional security, while the person put in charge of the stock of goods by defendant when he took possession testified that defendant took the notes without the consent of the president. *Held*, that defendant was not entitled to the notes.

Appeal from circuit court, Multnomah county; L. B. Stearns, Judge.

Suit by the Durand Organ & Piano Company, by W. A. Currie, receiver, against B. H. Bowman. From a decree for defendant, plaintiff appeals. Modified.

A. H. Tanner, for appellant. W. W. Thayer and E. B. Williams, for respondent.

LORD, C. J. This is a suit in equity, brought by the plaintiff, as receiver for the Durand Organ & Piano Company, against the defendant, to have certain chattel mortgages, alleged to have been executed by the president and secretary of said company in his favor without lawful authority, adjudged to be fraudulent and void as against the company and its creditors; to compel him to account for and pay over the proceeds of sales of the mortgaged property to such receiver, and to surrender the residue of such property remaining in his hands unsold, together with certain promissory notes, made by divers persons and payable to the order of the company, which are alleged to be in his possession, and retained by him in fraud of the rights of such company and its creditors, and contracts for musical instruments sold to divers persons, which are alleged to be fraudulently retained by him; or, in case any of such notes or contracts have been collected, in whole or in part, by the defendant, to compel him to account to, and pay over the money so collected to, such receiver, and to surrender and deliver up three policies of insurance upon the life of Ezra Durand, made payable to such company, which were transferred and delivered to him as collateral security for money alleged to have been loaned by him to the said Durand as president of said company, etc.; and for a full and complete accounting of all matters and transactions as set forth in the complaint. The defendant, by his answer, bases his claim of right to the possession of the

mortgaged goods, and to the proceeds arising from the sale thereof, as against the said company and its creditors, upon two sets of chattel mortgages, alleged to have been executed in his favor by the president and secretary of the company, with the consent and authority of its board of directors, as security for the company's indebtedness to him, and claims the right to possession of the promissory notes referred to in the complaint by reason of their delivery to him, by the president of said company, as additional security for such indebtedness. The defendant also claims that the said contracts were turned over to him without indorsement, by the president, for the consideration of \$1,210, and that the life insurance policies and notes were transferred to him long prior to the transaction complained of, as collateral security for the sum of \$10,000 loaned to said company. The trial court, after hearing the evidence, held, in effect, that the company had acquiesced in the execution of said mortgages; that they were not void upon their face, or by reason of any extrinsic facts, as against the creditors of said company; that they constituted a lien upon the stock of goods, and that the defendant was entitled to hold the same, and to retain the moneys arising therefrom, until the indebtedness secured thereby was paid; that the delivery of the said notes to the defendant by the president, under the circumstances, although without indorsement, was sufficient to constitute an equitable assignment of them, and to entitle the defendant to retain the same, and all moneys collected thereon, until the said indebtedness was paid; that the defendant was entitled to retain and hold the contracts received by him from the president, and the moneys collected, or which he may collect, thereon, until he realizes the sum of \$1,210, the amount paid for said contracts, and that, after realizing such amount, he should transfer the remaining contracts to the plaintiff; and that the plaintiff was not entitled to any relief against the defendant.

As the plaintiff bases his objections to the findings of law by the court upon the ground that they are not sustained by the evidence, we shall consider his objections in their order. His first objection is that the evidence is insufficient in law to show such a ratification or acquiescence in the execution of such mortgages by the president and secretary as would bind the company. The facts show that prior to the 2d day of December, 1891, E. Durand, as president of such company, was authorized, by resolution of its board of directors, "to indorse and transfer, on behalf of the company, any notes, contracts, leases, or other obligations belonging to the company, for the purpose of borrowing money, or selling the same to such persons, and upon such terms, as he shall think best," to enable him to obtain money when needed for use in the business of the company; that about the 19th day of December, 1891, the

president, finding it necessary to execute a chattel mortgage upon the stock of goods in the store of the company to secure a loan from Daly & Son of some \$9,000 or thereabouts, was informed, upon consultation with their attorney, that he must have authority by resolution of the board of directors of the company before he would be authorized to execute such chattel mortgage; that upon receiving such advice he procured the minute book of the company, and exhibited the same to such attorney with the word "mortgage" and the word "property" interlined in the resolution above stated, which words appeared to be in the same handwriting as the original resolution; and, though the interlineation aroused some suspicion in the attorney, he did not feel justified in questioning its authenticity, and made no further inquiry, whereupon a chattel mortgage was executed by E. Durand, as president of the company, and D. J. Durand, as secretary thereof, under the seal of the corporation, and delivered to Daly & Son, as security for the sum specified, which mortgage was filed in the office of the county recorder. It appears that prior to the 9th day of January, 1892, Daly & Son were pressing the company for payment of their mortgage, and that the president applied to the defendant for the loan of a sufficient sum to pay it; that the company was indebted to the defendant, at the time, in the sum of \$10,000, and that he held a large number of notes and contracts payable to it as collateral security for the payment of such sum, and also certain policies of insurance upon the life of the president, which policies were made payable to the company, but the evidence shows that many of such notes and contracts were forged, and that many of the contracts had been paid before they were assigned, so that there is no way of ascertaining their probable value; that the defendant agreed with the president to loan the company the sum of \$8,938.75 to pay off the Daly & Son mortgages, and the further sum of \$1,445 to pay certain dishonored checks drawn by the company, provided that the president would secure the payment thereof, and of the said previous indebtedness, which proposition was assented to by him for the company; that in pursuance of such agreement, and to secure the defendant in the payment of said sums, the president and secretary of the company executed and delivered, on the 19th day of January, 1892, to the defendant, two chattel mortgages upon the stock of goods, wares, and merchandise, musical instruments, and fixtures of the company, but subsequently it was discovered that a mistake had been made therein, in describing the organs and pianos, and on the 25th day of January, 1892, they executed and delivered to the defendant two other chattel mortgages to correct such misdescriptions; that such chattel mortgages were duly filed in the proper office, but the recorder was requested not to give the same

out for publication in the official abstract. The evidence further discloses that there were other mortgages executed by the president and secretary for the company to several persons before these mortgages were made and delivered to the defendant. There is no doubt that the company, under its articles of incorporation, had the authority to execute such chattel mortgages, but there is no authority given to the president to execute them, except such as may be found in the interlined resolution, to which reference has been made. All the directors who were present when that resolution was adopted deny that any such power was intended to be conferred on the president, or that anything was said in reference to it. Their evidence also indicates that the president was the guiding spirit of the company; that their meetings were conducted in a careless manner; and that, from the confidence which they then reposed in him, he could doubtless have obtained the power to make such mortgages if he wanted it. But at that time there seemed to be no necessity for such power. It was when he wished to procure a loan from Daly & Son, who required a chattel mortgage, and to see his authority to give it, that he recognized the necessity of such power, and learned that he could not obtain such loan unless he could exhibit his authority from the company to make the required mortgage. It was doubtless to meet the exigence of this occasion that the words to which we have referred were interlined in the resolution. In view of these considerations, and the appearance of the interlined words, we are satisfied that the mortgages given to Daly & Son and to defendant were not authorized by the board of directors, either by resolution or any other express manner; nor is there anything in the evidence to indicate that any of the directors, except the president, had any actual notice or knowledge of such chattel mortgages until the 29th day of January, 1892, when the defendant took possession of the stock of goods, musical instruments, and fixtures of the company under his chattel mortgages; so that when Durand, as president of the corporation, in its name, and using its corporate seal, undertook to execute these mortgages to the defendant, he did so without authority from the board of directors, and, being thus executed, the company was not bound by them without ratification.

The general agent of a corporation is not authorized to mortgage its property, as a security for a loan, without specific authority from the board of directors. *Luse v. Railway Co.*, 6 Or. 125. This being so, the inquiry now is whether the facts in evidence are sufficient to show such ratification or acquiescence in the unauthorized acts of the president in the execution of these mortgages as would bind the company. It appears that, for several years prior to the transactions mentioned, E. Durand was the

general manager of the corporation; that its business was carried on and conducted by him as president and manager, and that the board of directors were careless and negligent in not knowing and keeping themselves informed as to the condition of the business, and the manner in which Durand, as president, was conducting the same and dealing with its property. It further appears that the directors had access to the minute book in which the interlined resolution, authorizing the president to mortgage the property, was recorded, and by ordinary attention to the duties which devolved upon them could have discovered such interlineations; yet such resolution was allowed to remain upon the record in that form, unknown to them, until the defendant took possession of the property under his chattel mortgages. They paid little or no attention to the management of the company's business; nor do they seem to have known anything about its financial condition, except that it was in debt, and that its president was borrowing money, and making provision, in his own way, for the payment of its obligations. When the lamentable condition of the business of the company is considered as a result of Durand's mismanagement and the manner in which he conducted it, the directors' ignorance or want of knowledge of its affairs can find its only justification, if at all, in the implicit confidence which they reposed in him and his management. Other mortgages, prior to those mentioned, had been given by him on the property of the company in the regular course of its business, but without any express authority therefore. Nor is this all. When the defendant took possession of the stock of goods included in the chattel mortgages, and proceeded, with their knowledge, to sell off and dispose of it, they took no steps to prevent the same, or to disaffirm the execution of such mortgages; nor did they make any effort to refund or repay the moneys mentioned, which had been used in the business of the company, or do anything in reference thereto, until several months thereafter, when the present suit was instituted. A few days before the defendant took possession of the stock of goods, the president of the company absconded, and went to parts unknown, and so remains, and a few days thereafter another director left the state. In view of the policy of the board of directors of the company, under the circumstances, when they had full knowledge of the unauthorized act of its president, and took no steps to disaffirm his authority to execute such mortgages on behalf of the company, we think they have acquiesced in the execution of said mortgages, and that the same have become binding upon the company, as though authority was originally given to execute them. "The law is well settled that a principal who neglects promptly to disavow an act of his agent by which the

latter has transcended his authority makes that act his own; and the maxim which makes ratification equivalent to a precedent authority is as much predicable of ratification by a corporation as it is of ratification by any other principal, and it is equally to be presumed from the absence of dissent." *Kelsey v. Bank*, 69 Pa. St. 429. Mr. Morawetz says: "Acquiescence is good evidence of consent; and if the agents of a corporation who have power to ratify an unauthorized act performed by another agent manifest no dissent after having received full notice, a ratification of the act may often be presumed." *Mor. Priv. Corp.* § 633. And Mr. Beach says: "Ratification by directors may be made by accepting the report of a committee stating the facts, or by the acquiescence of a majority of the directors with full knowledge of the contract so ratified. Ratification may be also presumed from a failure to exercise promptly the right of disaffirmance." 1 *Beach, Priv. Corp.* § 195. In *Sherman v. Fitch*, 98 Mass. 59, where an action was brought upon a mortgage executed by the president of the corporation without formal authority, the court says: "The remaining consideration relates to the authority of Sampson to execute the mortgage in behalf of the corporation. It is not necessary that the authority should be given by a formal vote. Such an act by the president and general manager of the business of the corporation, with the knowledge and consent of the directors, or with their subsequent and long-continued acquiescence, may properly be regarded as the act of the corporation. Authority in the agent of a corporation may be inferred from the conduct of its officers, or from their knowledge and neglect to make objection, as well as in the case of individuals."

The next objection is that the chattel mortgages were fraudulent and void as against creditors. The defendant contends that they are shown by the evidence and circumstances attending the transaction to have been made and executed on the part of the president of the company with the intent to hinder, delay, and defraud its creditors, and that the defendant actively participated in such intent. This contention proceeds upon the idea that the object of Durand, as president, in making such mortgages, was to put the property under cover, so that he could carry on the business and hold the other creditors off for an indefinite period, and that the defendant, having knowledge of such purpose, aided him in its execution. At the time the mortgages were taken, the company was actively engaged in business, and had been for several years. It is probable, in the light of subsequent events, that it never was solvent, and its collapse was only a question of time. Now that the character of its president stands revealed, he seems to have been an adventurer, adroit and unscrupulous, full of confidence in himself and the successful

accomplishment of his business plans, which in some instances involved actual criminality; yet when these transactions took place he had been president of the company for several years, and under his management it had done a large business in selling goods and borrowing money, which indicated that it was generally regarded by the business community as solvent, and that its manager possessed their confidence. He had borrowed large sums of the defendant at different times, and the circumstances under which the mortgages in question were made and taken have already been detailed. There is no doubt that the defendant was anxious to make himself secure. The previous indebtedness of the company to him, and the sum to be advanced to pay Daly & Son, were large, and in all his prior transactions with the president he had required collateral security for loans. There was therefore nothing out of the usual order of affairs in his taking security, and, as the Daly & Son indebtedness was secured by a mortgage, it could hardly be expected that he should relinquish such security, or do otherwise than he did, in the exercise of ordinary business prudence. It may be true that the fact of the mortgage covering the entire property suggested to his mind that the company was in falling circumstances; and, even if it did, it would be nothing more than ordinary business caution for him to secure himself against loss, and if, in so doing, he acted in good faith, the transaction was not fraudulent. It is only when the mortgage is given and received with the intent to hinder and defraud creditors that it is void, and not when it is taken by the mortgagee for the honest purpose of securing a valid claim or indebtedness. It may be that Durand knew the business of the company must collapse sooner or later; yet his conduct indicates that when these transactions occurred he thought he would be able to meet the obligations of the company to the other creditors, and carry on the business for some time, at least. But however that may be, even if we assume that his object in making the mortgages was to hold off his creditors, unless the defendant participated in that purpose, or connived at his design to hinder and delay them, such mortgage would not be fraudulent or void. The statute avoids the mortgage or conveyance when it is made and taken by the parties to it with the intent to hinder and delay the creditors of the mortgagor. It is the purpose of the conveyance to which the statute has reference, and hence it is the intent or purpose of the parties in giving and receiving the mortgage which constitutes the test of its validity. It is not enough that the claim or debt secured by the mortgage may be valid, although that circumstance is an important factor in the transaction, if such mortgage was made and taken by the parties with intent to hinder or delay creditors. Now, although the defend-

ant may have thought that the company was in failing circumstances, and that its president sought by the mortgages to hold off its creditors until its financial difficulties could be tidied over, yet if the mortgage was valid on its face, and accepted by the defendant without any secret trust or understanding in furtherance of such object, or connivance or participation in such fraudulent intent, but for the purpose of securing the payment of the debt, such mortgages are not fraudulent or void. The mere fact that hindrance and delay would necessarily result from the execution of such mortgages would not render them fraudulent. Every mortgage upon the property of the debtor necessarily tends to hinder and delay creditors, and especially so when it covers the entire property of the mortgagor, as in that case its effect would be to deprive other creditors of all means of obtaining satisfaction of their equally meritorious claims; yet if the mortgage was received by the creditor in good faith, to secure the payment of a valid debt, the delay and hindrance necessarily arising therefrom is not a fraudulent hindrance in the sense of the law. This results from the fact that it is lawful for a debtor to prefer one creditor to another, or to secure one and leave another unsecured, notwithstanding his motive may be to prevent his other creditors from collecting their demands; the delay or hindrance occasioned thereby to such creditors is not within any legal prohibition. The reason is that, where there is a valid debt and a real transfer, there is no ground upon which to predicate collusion or fraud. To avoid a mortgage or other conveyance as fraudulent and void, there must be a real design on the part of the mortgagor, in which the mortgagee participated, to withdraw his property from the claims of his creditors; so that the real question is whether the president of the company made the mortgages in question with intent to defraud, delay, or hinder its creditors, and the defendant accepted them with knowledge of that design, and with intent to promote its accomplishment. There was some evidence tending to show that the president of the company thought or expected that if he could procure a loan from the defendant whereby he would be able to liquidate the mortgages to Daly & Son, who were demanding payment, and at the same time secure the defendant by a mortgage upon the stock of goods, it would enable him to tide the company over its difficulties, and hold off its other creditors until he could make some other arrangements for paying them, which he contemplated. If Durand had in mind, beyond securing the indebtedness to defendant, the purpose to use the mortgages as a cover to withdraw the mortgaged property temporarily out of the reach of the company's creditors, he could not make such purpose effective without the consent and co-operation of the defendant; and there are no facts or circumstances tending

to show that the defendant connived at or participated in such purpose, or that the mortgages were taken with the secret understanding that they should be used as a means to hold off or baffle other creditors. The anxiety of the defendant to secure his demand and the money advanced to pay off the Daly & Son mortgages shows that in the race of diligence he was vigilant and attentive to his own interests, but there are no facts or circumstances connected with the transaction which satisfy us that the defendant connived at, or participated in, any fraudulent design that Durand may possibly have contemplated. If the mortgages only appropriated a fair amount of property as security for the indebtedness, although it was all the property of the company, the fact that the defendant may have known that Durand, in making such mortgages, had the design to hinder and delay other creditors, would not vitiate them if the defendant did not accept them with the intent to aid him in such design, but solely to secure the payment of his claim against the company. Mr. Bump says: A creditor "does not violate any principle of the statute when he takes payment or security for his demand, though others are thereby deprived of all means of obtaining satisfaction of their own equally meritorious claims, and though he may be aware of the intent of the debtor to defeat the collection of them. Fraud, in its legal sense, cannot be predicated of such a transaction. Wherever there is a true debt and a real transfer for an adequate consideration there is no collusion." Bump, *Fraud. Conv.* (2d Ed.) p. 187. A debtor has the right to secure a creditor, and, if he does so by giving a mortgage, it is what the law admits to be rightful, although the effect will be to hinder other creditors, and he so intends; yet, if such mortgage is accepted in good faith, it is not a fraudulent hindrance, because the debtor has not disposed of his property in a way to prevent its application to the satisfaction of his bona fide debts. *Sabin v. Fuel Co.*, (Or.) 34 Pac. 694. To hold otherwise would be to establish as a rule what Black, C. J., says "requires a man to take care of his neighbor's interest at the expense of his own," and which he thinks "is utterly impracticable in the present state of human society." *Covanhoven v. Hart*, 21 Pa. St. 501.

As the company was carrying on its business with the expectation of its continuance at the time when these transactions occurred, and was what is sometimes called a "going concern," we have not deemed it necessary to consider the question as to the right of an insolvent corporation to prefer creditors. The mortgages contain no power of sale in the mortgagor for his own benefit, nor is there anything therein which the court can say is unlawful. The mortgagor is allowed to remain in possession of the goods, but he is required to keep a strict account, and pay

over the proceeds, less the expenses of the business, to the defendant; and it is perfectly evident that by honest conduct under these mortgages there could be no fraudulent result. The facts show that the president of the company did account for and pay over the proceeds of the stock some time between the 9th and 29th of January, 1892, and furnished written statements of sales made for cash, and of some few small goods that were sold on credit, which latter sales being contrary to the terms of the mortgages, the defendant became dissatisfied, and on the last-named date took possession of the stock of goods, and proceeded to sell and dispose of it. The record discloses the amount of sales made by him, and the stock remaining on hand and under his control when the present suit was commenced. It is the fact that the sales of a few small goods on credit, and the failure to render proper accounts, thereby violating the terms of the mortgage, gave rise to the inference that the president was allowed to remain in possession of the goods, and to use the proceeds for his own benefit. But the evidence shows that Durand only remained in possession about 20 days, and that, as soon as the defendant discovered that the accounts were not kept as they should be, he took possession of the stock. Under these circumstances, we do not think that the sales of these small goods, which brought but a trifling amount, ought to operate to render the mortgages void. The defendant was vigilant, and his conduct indicated that he intended that the terms of the mortgages should be strictly observed, and that any departure therefrom would not be tolerated. We think, therefore, that the mortgages were valid, and constitute a lien on the property, and that the defendant is entitled to hold and retain the same, and the moneys arising therefrom, until the company's indebtedness to him is fully paid.

It is further contended that the company is entitled to the possession of certain promissory notes, which it is claimed that Durand, as president, delivered to the defendant as additional security for such mortgage indebtedness. The facts show that the notes were payable to the company, and were not indorsed to the defendant, but were simply handed over to him by verbal delivery. The evidence is conflicting in regard to the circumstances under which such delivery was made. The defendant testifies, in effect, that after he took possession of the stock he demanded additional security, and that the president of the company handed those notes to him with the remark, "Here, I will turn those notes over to you as additional security," and that he said, "All right," and took the notes. Mr. Anderson, who was placed in charge by the defendant, testified that the notes were turned over to him by the president to assist, or to be used, in paying running expenses, and that while the notes

were in his charge, and in the safe, Durand asked for them; and upon their delivery to him he was about to deliver some of them, amounting in face value to about \$1,500, to another creditor, when he (Anderson) protested, and telephoned the defendant what Durand proposed to do, whereupon the defendant soon after came over and took the notes, against his will and his understanding, and carried them off. The president had no authority, other than that derived from the resolution to which reference has been made, to deliver such notes as collateral security. It is extremely doubtful if such resolution authorized him to use such notes for that purpose, and, in view of the fact of conflict in the evidence as to whether or not they were ever delivered to him as additional security for the indebtedness, we do not think there was such a delivery as would constitute an equitable assignment of such notes, or entitle the defendant to retain the same, or the moneys collected thereon, until his indebtedness should be paid, or at all. The facts show that he has collected upon such notes the sum of \$3,142.55, and that he has the same in his possession or under his control. The finding of the trial court, therefore, in respect to such notes, is set aside, and the defendant is required to turn over the above-mentioned sum, as collected on such notes, to the receiver for the company, and also to deliver to him the notes remaining in his hands, and unpaid in whole or in part.

The next objection relates to certain contracts which were delivered to William A. Currie by the president in the way of a pledge for a debt owing to him for money advanced for the company. The facts show that defendant paid Currie \$1,210 for such contracts, which secured the possession of the same, and that Currie credited the company with the amount of this money when so paid. Upon these contracts the defendant has collected in cash the sum of \$1,136.46, and those uncollected are still in his possession. As the facts show that the money received from the defendant in payment for those contracts was applied to the discharge of the company's obligations incurred for freight, the trial court held that the defendant was entitled to hold such contracts, and all money collected thereon or which he may receive, until he realizes the sum of \$1,210, the amount paid for them, and that, after realizing said amount, he should transfer said contracts to the plaintiff. Without further detail, we think, in view of all the facts and the circumstances surrounding them, that this finding is correct, and should be sustained. From these considerations it follows that the decree must be modified so as to conform to the views herein expressed; and it is so ordered, and that the plaintiff recover his costs and disbursements in this court.

SABIN v. COLUMBIA RIVER LUMBER & FUEL CO. et al.

(Supreme Court of Oregon. Feb. 14, 1894.)

INSOLVENT CORPORATION—PREFERENCES.

The fact that a corporation engaged in the business for which it was organized is embarrassed, and unable to pay its debts at maturity, does not necessarily render it insolvent, so as to preclude the execution by it of a mortgage on its property in good faith to secure a debt. 84 Pac. 692.

On rehearing. Denied.

For prior report, see 34 Pac. 692.

BEAN, J. The opinion in this case is challenged by a petition for rehearing because it held therein that, if the mortgages were taken by the mortgagee in good faith to secure an honest debt, the motive or purpose of the debtor in giving them was immaterial. This question has been re-examined both on this petition and in *Durand Organ & Piano Co. v. Bowman*, (just decided,) 35 Pac. 848, and the opinion of the chief justice in the latter case renders the further discussion of that subject unnecessary.

It is also challenged because it is substantially held that a corporation engaged in the conduct of the business for which it was organized, although embarrassed and unable to pay its debts at maturity, does not necessarily become insolvent, within the meaning of the authorities holding that an insolvent corporation cannot prefer one creditor to another, and counsel say they "are at an utter loss to imagine why the same rule should not be applied in such cases as in bankruptcy proceedings." The reason is manifest. A corporation conducting a business of the magnitude and character of this depends for its very life upon credit. It could not run a single day without it. It must have credit in bank, and with those with whom it deals; and to say that it is insolvent, within the meaning of the rule invoked, because it is unable, by reason of a dull market or other cause, to meet its obligations in the ordinary course of business at maturity, or because sufficient could not be realized from its property at forced sale to pay its debts, would be to deny to such a corporation the *jus disponendi* of its property and the right to continue in business. In *Corey v. Wadsworth*, (Ala.) 11 South. 350, the court, in defining at what stage of a corporation's affairs it must be pronounced insolvent, so as to bring it within the rule prohibiting preferences, says: "It is not enough that its assets are insufficient to meet all its liabilities, if it be still prosecuting its line of business, with the prospect and expectation of continuing to do so; in other words, if it be, in good faith, what is sometimes called a 'going' business or establishment. Many successful corporate enterprises, it is believed, have passed through crises when their property and effects, if brought to present sale, would not

have discharged all their liabilities in full. And Mr. Thompson, who is an able advocate of the "trust-fund" doctrine, says, upon the subject: "The meaning of the doctrine is that such assets [of a corporation] are in a strict or close sense a trust fund for the creditors of a corporation while it is a going concern. It does not in any sense disqualify directors from dealing with the assets of a corporation, in the ordinary course of business, as fully as an individual might under the same circumstances deal with his assets; but its meaning is that, when the point of insolvency is reached or approached, that the directors can no longer deal with the assets of the corporation in the ordinary course of business, but must deal with them in the contemplation of insolvency and suspension, then the assets become, in the hands of the directors, a trust fund for the creditors of the corporation, and the directors become the trustees of that fund." And, illustrating the doctrine, he puts the case of a corporation which, after resisting a run made by its depositors by payment of their demands to its counter, is finally compelled to suspend, and says: "So long as it did that, it was acting in the regular course of its business. In the absence of a statutory prohibition under all legal conceptions, the preferences obtained by those depositors were bona fide, lawful, and were made in good faith, because they were made when the directors believed that they would be able to pay all its debts; but if, after closing its doors, the directors should solve to single out certain of its depositors and pay them in full, or divide among them what remains, such a transaction would be prohibited," he says, within the doctrine prohibiting an insolvent corporation from preferring one creditor to another. 27 Am. Law Rev. 101. It seems to us that the doctrine for which the plaintiff contends can only apply, if it be, when that point in the affairs of the corporation is reached where its managers find themselves obliged to deal with its assets in the contemplation of a suspension by reason of its insolvency, but not while the corporation is in good faith engaged in the business for which it was organized, although in fact it may be insolvent. This principle is borne out by *Lyons & Co. v. Hardware Co. v. Perry Stove Manuf. Co.* (Tex. Sup.) 24 S. W. 16; *Duncomb v. Road Co.*, 88 N. Y. 1, and *Durand Organ & Piano Co. v. Bowman*, *supra*. The petition is denied.

SCHMIDT et al. v. McEWEEN et al. (131.)

(Supreme Court of California. Dec. 3, 1893.)

In bank. Appeal from superior court and county of San Francisco; F. W. McEween, Judge.

Action by Schmidt and others against McEween and others to recover damages for infringement of a trade-mark, and to enjoin. From a decree for permanent

from an order denying a motion for a new trial, defendants appeal. Order affirmed. Decree modified.

James G. Maguire, E. S. Salomon, and Henry Eickhoff, for appellants. John L. Boone and Langhorne & Miller, for respondents.

PATERSON, J. The larger label used by the defendants in this case is very much like the one used by the defendants in the Brieg Case, (Cal.) 35 Pac. 623. It is oval in form, and in that respect more closely resembles the plaintiff's label. The neck label is crescent in form, with letters of unequal length, but bears no marginal lines like those found in the plaintiff's neck label. Taken as a whole, it is at least as close an imitation of the plaintiff's label as the Brieg label is; and, the evidence in other respects being the same, the order should be affirmed. The order denying the defendant's motion for a new trial is affirmed. The cause is remanded, with directions to the court below to modify the decree in accordance with the views expressed in the case of Schmidt v. Brieg, (this day filed.) As so modified, the judgment will stand affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; FITZGERALD, J.

SCHMIDT et al. v. STEINKE et al. (No. 15,133.)

(Supreme Court of California. Dec. 30, 1893.)

In bank. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by Schmidt and others against Steinke and others to recover damages for infringement of a trade-mark, and to obtain an injunction, from a decree for plaintiffs, and from an order denying a motion for a new trial, defendants appeal. Order affirmed. Decree modified.

James G. Maguire, E. S. Salomon, and Henry Eickhoff, for appellants. John L. Boone and Langhorne & Miller, for respondents.

PATERSON, J. The labels used by the defendants in this case are precisely the same in shape and size as those used by the plaintiffs. The word "Sarsaparilla" covers the same space in the margin of the upper portion of the label, and in the same type as in the plaintiffs' label. In the margin of the lower portion of the label are the words "and Iron Phosphates," the same space in the plaintiffs' being occupied by the words "and Iron Water." In place of the trade-mark in the upper portion of the label, defendants inserted in their label a monogram occupying about the same space, with the letter "s" in the center, making the monogram resemble somewhat the trade-mark of the plaintiffs, the chief feature of which is the letter "s." Two parallel lines cross the center of the label, with the words "Steinke Bros." where the plaintiffs' label shows the words "Schmidt & Co." In the lower portion of the large label, and above the inner marginal line, are the words: "San Francisco. A great blood purifier and pleasant tonic. Taken in quantity, it cures all skin diseases." In the same place on the plaintiffs' label are the words "Stockton, Cal. A great blood purifier and pleasant tonic. Taken in quantity, it cures all skin diseases." Beneath the words in each label is a fancy flourish, almost identical in form. The two labels are practically the same, except in color. The order denying the defendants' motion for a new trial is affirmed. The cause is remanded, with directions to the court below to modify the decree in accordance with the views expressed in the case of Schmidt

v. Brieg, (No. 15,132, this day filed.) 35 Pac. 623. As so modified, the judgment will stand affirmed.

We concur: GAROUTTE, J.; McFARLAND, J.; HARRISON, J.; FITZGERALD, J.

SCHMIDT et al. v. CRYSTAL SODA-WATER CO. (No. 15,124.)

(Supreme Court of California. Dec. 30, 1893.)

In bank. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by Schmidt and others against the Crystal Soda-Water Co. to recover damages for infringement of a trade-mark, and to obtain an injunction. From a decree for plaintiffs, and from an order denying a motion for a new trial, defendant appeals. Order affirmed. Decree modified.

James G. Maguire, E. S. Salomon, and Henry Eickhoff, for appellant. John L. Boone and Langhorne & Miller, for respondents.

PATERSON, J. The labels of the defendant are the same in size, form, and design as those used by the plaintiffs. The neck label is somewhat different from those noticed in the other cases. It bears the words "Trade Mark," in letters of unequal length, according to the position they occupy on the crescent-shaped label, with a triangle in the center of the label between the two words, inclosing a scroll and the letters "C. S. W. Co." The plaintiffs' neck label has upon it the word "Universal," in letters of unequal length, according to their position on the paper; and the trade-mark occupies about the same space as the triangle of the defendant in the center of the label, between the letters "e" and "r" in the word "Universal." The case is in all material respects like the Brieg Case, (this day filed.) 35 Pac. 623. In all of these cases the complaint is the same. Appellant contends that the demurrers ought to have been sustained, because it is not alleged that the plaintiffs ever acquired any trade-mark or exclusive right to the use of the words "Sarsaparilla and Iron," or that defendant ever adopted or used any imitation of plaintiffs' alleged trade-mark. It is claimed, also, that the complaint is ambiguous in certain respects. We deem it sufficient to say, upon this question, that the facts stated in the complaint are substantially those we have set forth in our opinion in the Brieg Case, and, upon the views therein expressed, the demurrer was properly overruled. The order denying the defendant's motion for a new trial is affirmed. The cause is remanded, with directions to the court below to modify the decree in accordance with the views expressed in the case of Schmidt v. Brieg, (No. 15,132; this day filed.) As so modified, the judgment will stand affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; FITZGERALD, J.

SCHMIDT et al. v. HAAKE et al. (No. 15,135.)

(Supreme Court of California. Dec. 30, 1893.)

In bank. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by Schmidt and others against Haake and others to recover damages for infringement of a trade-mark, and to obtain an injunction. From a decree for plaintiffs, and from an order

denying a motion for a new trial, defendants appeal. Order affirmed. Decree modified.

James G. Maguire, E. S. Salomon, and Henry Bickhoff, for appellants. John L. Boone and Langhorne & Miller, for respondents.

PATERSON, J. This action is in its nature and the facts found similar to the Brieg Case, (No. 15,132, this day filed,) 35 Pac. 623. The defendants' label in this case differs from the label in the Brieg Case, chiefly in the matter of color. Like the plaintiffs' label, the larger label is oval in form, and the smaller or neck label a crescent, with letters of unequal length. There are the same parallel and prominent lines in the border. Instead of a monogram like those in the other cases, there is a small picture, occupying about the same space as the plaintiffs' trade-mark, and upon the inside of the label are written the usual words, "A great blood purifier and pleasant tonic." The findings of the court are supported by the evidence, and the order should be affirmed. The order denying the defendants' motion for a new trial is affirmed. The cause is remanded, with directions to the court below to modify the decree in accordance with the views expressed in *Schmidt v. Brieg*, (No. 15,132, this day filed.) As so modified, the judgment will stand affirmed.

We concur: **McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; FITZGERALD, J.**

SCHMIDT et al. v. LIBERTY SODA- WORKS CO. (No. 15,163.)

(Supreme Court of California. Dec. 30, 1893.)

In bank. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by Schmidt and others against the Liberty Soda-Works Company to recover damages for infringement of a trade-mark, and to obtain an injunction. From a decree for plaintiffs, and from an order denying a motion for a new trial, defendant appeals. Order affirmed. Decree modified.

James G. Maguire, E. S. Salomon, and Henry Bickhoff, for appellant. John L. Boone and Langhorne & Miller, for respondents.

PATERSON, J. The label of the defendant in this case is the same in size, form, and general design as the plaintiffs'. It differs from the plaintiffs' in general appearance, chiefly in color; and that, as we stated in the Brieg Case, 35 Pac. 623, is not controlling. Unlike all the other cases we have considered, the larger label bears in the upper margin thereof the words "Phosphate Iron," and in the lower margin the words "and Sarsaparilla." In all the other labels, including the plaintiffs', the word "Sarsaparilla" is in the upper margin, and the words "and Iron Water," or "and Iron Phosphate," are between the marginal lines of the lower half of the label. Between the upper marginal line of the lower half of the label and the lower line of the center space on which the name of the manufacturer is printed are the words "San Francisco, California," and below them the usual legend, "A great blood purifier and pleasant tonic. Taken in quantity, it cures all skin diseases," ornamented below with the familiar flourish or scroll. We think the decision in the Brieg Case determinative of the questions involved herein.

There is another question which we have not passed upon in either of the other cases. It is claimed that the court erred in admitting plaintiffs' alleged letters patent. The contents of the document are not set out in the statement. Error must be shown. It appears fur-

thermore that the paper was introduced only to show the formula used by the defendant in the manufacture of its beverage, and the court does not seem to have attached much, if any, weight to it. The same may be said with respect to the commissioner's certificate of registration. In all of these cases, except the case against Welch et al., (No. 15,136,) 35 Pac. 623, the findings support the judgment, and the evidence supports the findings.

It is claimed by appellant that it is impossible to sustain the court's decision without the finding that, at the time of the adoption by plaintiffs of the words "Sarsaparilla and Iron," said name was not in use, or known or adopted, as a designation of the same, or of any similar article of manufacture on sale; that the whole decision of the court rests and turns upon that finding. This contention cannot be sustained. The judgment of the court below does not rest upon the appropriation and use by the defendant of the words "Sarsaparilla and Iron," but upon fraud perpetrated by it in intentionally counterfeiting plaintiffs' labels as a whole, and thereby deceiving the public, and pirating upon the business of the plaintiffs. Were the labels, marks, and devices of the defendant calculated, by reason of their close resemblance to those used by the plaintiffs, to deceive purchasers, and lead them, although exercising ordinary care and prudence in purchasing, to believe that the article contained in the defendant's packages was the article manufactured and sold by the plaintiffs? This question being answered in the affirmative upon sufficient evidence, the only other material question in the case relates to the amount of damages. The order denying the defendant's motion for a new trial is affirmed. The cause is remanded, with directions to the court below to modify the decree in accordance with the views expressed in the case of *Schmidt v. Brieg*, (No. 15,132, this day filed.) As so modified, the judgment will stand affirmed.

We concur: **McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; FITZGERALD, J.**

MARCEAU v. TRAVELLERS' INS CO. OF HARTFORD. (No. 18,199.)

(Supreme Court of California. Feb. 15, 1894.)

ACCIDENT INSURANCE—ACTION ON POLICY—CONDITIONS—"INTENTIONAL INJURIES" TO INSURED—INSANITY OF INSURED'S MURDERER—EVIDENCE—INSTRUCTIONS.

1. On an issue as to the sanity of the person who killed insured, the abstract testimony of an expert witness that a person might know a certain act to be wrong, and yet possess no power to resist an insane impulse to commit such act, is not cause for reversal, though such "insane impulse" is not recognized as a defense to a charge of felony.

2. Where the sanity of the person who killed insured was the issue in an action on an accident insurance policy conditioned to be void if death resulted from "intentional injuries inflicted by any person," it was proper to refuse an instruction which intimated that the plea of insanity has led to abuse in the administration of justice, and which advised the jury that it must be examined with care.

3. A judgment roll which showed the trial and conviction of the person who killed the insured was inadmissible to show his sanity when he committed the homicide, by showing that it was not questioned during the criminal trial.

4. While the right to give an opinion as to a person's sanity is limited by Code Civ. Proc. § 1870, subd. 10, to experts and intimate acquaintances, such limitation does not extend to testimony of witnesses as to his peculiar conduct and language.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Amanda J. Marceau against the Travellers' Insurance Company of Hartford, Conn., on an accident insurance policy. From a judgment for plaintiff, defendant appeals. Affirmed.

Edward Lynch, for appellant. Dunne & McPike and W. D. Grady, for respondent.

GAROUTTE, J. The plaintiff and respondent, Mrs. Marceau, was the wife of John D. Fiske, of Fresno. In July, 1890, Fiske was shot to death by one Stillman, who was subsequently convicted of the crime, and sentenced to imprisonment for life. At the time of Fiske's death he was carrying a life insurance policy for the sum of \$10,000 in the Travellers' Insurance Company, and this action is brought to recover from such company the amount of the policy. The policy contained a clause declaring it invalid if death resulted from "intentional injuries inflicted by the insured or any other person;" and, while the death of Fiske is not questioned by the defendant, it is claimed that his death resulted from causes that bring it within the prohibition of the clause of the policy we have just quoted, and that consequently plaintiff is not entitled to recover.

It is contended upon the part of plaintiff that Stillman was insane at the time he committed the homicide, and consequently the injuries resulting in the death of Fiske were not "intentional injuries," within the meaning of the policy. It is conceded by opposing counsel that, if Stillman was insane at the time he fired the fatal shot, the policy remains in full force and effect; and thus it appears the insanity of Stillman at the time of the homicide is the fulcrum upon which the entire case rests. Judgment went for plaintiff, and this appeal is prosecuted from that judgment, and also from an order denying defendant's motion for a new trial.

1. An expert witness upon the subject of insanity was placed upon the stand, and the following occurred: "Q. You understand, of course, that insanity is the result of a diseased mind, do you not? A. Yes, sir. Q. That if a person is insane, while they may theoretically know the difference between right and wrong, that they are incapable of judging or resisting an impulse to do wrong? (The defendant objected to the question on the ground that it is incompetent, the witness is incompetent, and the fact is irrelevant and immaterial, as contradicting the rule of insanity established by the supreme court of this state. The court overruled the objection, and the defendant excepted.) A. They have no power to resist the insane impulse they have, although they know it was wrong, and they will hide and conceal the evidences of their crime, very often with more particularity and ingenuity than a

sane person would do." In Hoin's Case, 62 Cal. 120, insanity, as recognized in our criminal law, is declared to be such a diseased and deranged condition of the mental faculties as to render the person incapable of distinguishing between right and wrong in relation to the particular act with which he is charged. The foregoing appears to be the true rule, as declared by the courts of England, and certainly is the settled law of this state; and we cannot recognize the so-called plea of "irresistible impulse," of itself, as a legal defense to any charge of felony. Upon an examination of the particular question and answer now under consideration, we see nothing to justify a reversal of this judgment and a retrial of the case. Upon a close analysis of the question we are not prepared to say exactly what it does mean. It certainly is not so clear as to be fully comprehended by the average jury of the present day; yet, whatever construction may be given it, (and it is probably susceptible of more than one,) the harm to appellant, if harm was done him, is found in the answer. However objectionable a question may be, if the answer in no way prejudices appellant's rights, then the error of the court in allowing the answer to be given is harmless error, and affords no ground for complaint. By his answer the witness testified, in the abstract, to a certain phase or kind of insanity. His evidence was not addressed to the mental condition of the man Stillman, but was directed to principles touching a certain branch of insanity in general. In order that the jury might intelligently and fully understand the particular issue of insanity that was to be submitted to them, we see no possible objection to a practice of placing before them general information bearing upon this most metaphysical and abstruse subject; and, although the witness testified that a person might know a certain act to be wrong, and yet possess no power to resist an insane impulse to commit the act, still it was for the court, in its instructions to the jury, to furnish the rule by which Stillman's mental condition was to be measured. The test is inexorable; he is sane or insane, tried by that rule alone, and all the evidence upon the subject of insanity is pertinent, and pertinent only, for the purpose of determining whether or not the party's mental condition satisfies the test prescribed.

2. Appellant complains of the court's refusal to give two certain instructions. The first of these instructions embraced the principle we have quoted from the Hoin Case as to the true rule to be applied upon a plea of insanity in criminal cases, and it was substantially given, in various forms, by the court in its charge to the jury. It was not error to decline to again reaffirm the law bearing upon that question. The other instruction contains an intimation that the plea of insanity has led to abuse in the administration of jus

tice, and advises the jury that it must be examined and considered with care. This instruction, in effect, was given in the criminal case of *People v. Pico*, 62 Cal. 54; but we see no place for it in a civil action, especially in view of the fact that the party charged with being insane is neither a party to the action, nor even indirectly interested in the final result of the litigation.

3. Previous to the trial of the present action, Stillman had been tried and convicted of the murder of Fiske, and sentenced to imprisonment in the state prison for life. Defendant's counsel offered in evidence what he termed the judgment roll in that case, and, under objection, the evidence was not admitted. As stated by counsel, this evidence was offered for the purpose of showing that, during the pendency of the murder trial, no proceedings were had indicating that Stillman was insane at that time; that no suggestion was made to the court by counsel that he was then insane; that the statute regarding the insanity of defendants at the time of trial was not invoked, and that the record offered indicated no suggestion of insanity; and counsel argues therefrom that the presumptions arise from these facts, first, that the public officials did their duty, and also that the defendant's attorneys in that case did their duty, and that the plea of present insanity not being suggested, either by the public officials or private attorneys, the second presumption follows that Stillman was not insane at the date of his trial; and, further, those presumptions being established, an additional presumption follows therefrom that, if he was not insane upon the day of his trial, he was not insane upon the day of the homicide. We are entirely agreed that the record in the criminal action was properly rejected. The last and material presumption—the one which defendant seeks to invoke to his advantage in this case—arises from no fact, but, on the contrary, is itself based upon a foundation of presumptions; and such a foundation is too unstable to support evidence of the character here sought to be invoked. Again, we think the plaintiff could not be prejudiced by anything done, or omitted to be done, in that case. She was not a party to the action, in no manner interested in the result of the litigation, and her pecuniary interests could in no way be affected by the result of that trial. A striking illustration of this principle is found in *Burke v. Wells, Fargo & Co.*, 34 Cal. 62. One Driscoll was convicted of robbing Wells, Fargo & Co. The parties arresting Driscoll brought an action against that company to recover a reward offered for the arrest and conviction of the thief. It was held by the court that, as against the defendant, Wells, Fargo & Co., that company being a stranger to the action, the record of conviction was no evidence that Driscoll was the thief, and that plaintiff should be required to establish that fact by independent evidence *de novo*. In the present case, if, in accord-

ance with the statute, the question of Stillman's insanity at the time of the trial had been suggested, and a jury impaneled to pass upon that issue, and after investigation the jury had rendered a verdict declaring him not insane, that verdict would not be evidence in this action against the plaintiff; and, if a verdict upon the direct issue would not be evidence here, it certainly follows that the record offered was properly rejected.

4. It is insisted that the court erred in allowing certain witnesses to give their opinions as to Stillman's insanity, because it is claimed they were not intimate acquaintances, within the provisions of section 1870, subd. 10, Code Civ. Proc. The testimony of some of these witnesses, to the extent of their opinion as to Stillman's insanity, was subsequently stricken out upon motion of counsel offering the evidence, and, inasmuch as the court at the time directed the jury to disregard such testimony of the witnesses, we see no valid objection to the course pursued. It is insisted that the evidence as to the conduct and conversations of Stillman, as testified to by these witnesses, also should have been taken from the consideration of the jury; but we do not understand the law to be that none but intimate acquaintances are allowed to testify to the peculiar conduct and language of a party charged with insanity. The right to give an opinion as to a person's sanity or insanity is limited to the expert and the intimate acquaintance; but the limitation goes no further, and this distinction is recognized in *Estate of Carpenter*, 94 Cal. 406, 29 Pac. 1101, cited by appellant. Referring to matters, not of opinion, but merely of observation, it is there said: "As to such obvious appearances, I presume it was not intended that the rule should apply." The record is quite voluminous, and appellant has called our attention to but one witness, viz. Graham, who gave an opinion as to Stillman's insanity, based upon an acquaintanceship with him. We have found no other in the record, and, as to Graham, there is no question but that he was an intimate acquaintance, within the provision of the Code, and also within the principles declared in *Estate of Carpenter*, supra.

5. The following instruction is attacked as stating an unsound proposition of law: "The court instructs you that if you believe, from a preponderance of the evidence, that the said John D. Fiske came to his death by reason of injuries inflicted upon him by one J. L. Stillman on or about July 28, 1890, in this county, and without fault or provocation on the part of said Fiske, and that the said Stillman, at the time of inflicting said injuries, was insane and incapable of discerning between right and wrong in regard to the act he was committing, or that he was then impelled in so doing by an insane impulse which the reason that was left him did not enable him to resist, or to understand its nature, then the injuries were unintentional on the part of said Still-

man, and accidental in that respect, within the meaning of said policy." The latter portion of this instruction, beginning with the conjunction "or," does not strictly follow the beaten paths established by this court in declaring what constitutes insanity, and beaten paths are always safer than new and untried ones; and while, owing to the peculiar wording of the instruction, it is not probable that it in any degree enlightened the jury as to the law of the case, yet upon a fair construction we think it comes within the law of insanity as legally applicable to the present case, and vaguely states, in a different form, the same principle found in the former portion of the instruction. If a man commits a homicide under an insane impulse, and at the time does not possess sufficient reason to understand the nature of the act, he certainly is in such a condition of mind that he is incapable of weighing the moral qualities of the act, and determining therefrom whether it is right or wrong; and we think this to be its legitimate construction. The instruction surely bears no relationship to the theory of irresistible impulse, frowned upon and rejected in *People v. Hoin*, and does not, either in letter or spirit, countenance the doctrine, which is there cast out, as having no place in the law of insanity in this state. In addition to this instruction, the court fully and correctly stated to the jury the law of insanity in numerous other portions of its charge, and we are satisfied that no material injury resulted to defendant from the charge we have just considered.

3. We will not enter into a discussion of the evidence in detail for the purpose of indicating that it is sufficient to support the verdict of the jury. It is enough for us to say that upon a careful examination of it we find it ample and sufficient. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

ANTHONY v. GRAND. (No. 19,256.)
(Supreme Court of California. Feb.'6, 1894.)

ACTION FOR ASSAULT—EVIDENCE—COSTS.

1. In an action for assault, where it was shown that defendant violently assaulted and injured plaintiff, evidence of defendant's reputation for being peaceable was immaterial.

2. Code Civ. Proc. § 1025, providing that no costs can be allowed in an action for damages, where the plaintiff recovers less than \$300, forbids the recovery of costs by either party on a recovery of less than \$300.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county.

Action by Adolph Anthony against Fred Grand. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Tuppett, Boone & Neale, for appellant. Utley, Thorpe & Holcomb, for respondent.

BELCHER, C. This is an action to recover damages for personal injuries sustained by the plaintiff. The court below found that on the 4th day of July, 1892, the defendant "did willfully and violently assault the plaintiff, Adolph Anthony, and the said defendant did then and there willfully and violently bite off with his teeth, and sever, from said plaintiff's right hand, a portion of the fourth finger of said hand, to wit, said defendant did so bite off the said finger of plaintiff just below the first joint thereof; that by reason of said assault and biting, as aforesaid, said plaintiff has at all times since said 4th day of July, 1892, been disabled from following his usual occupation of a miner, and has been disabled from attending to his business as such," and has been damaged in the sum of \$250, for which he is entitled to judgment. Judgment was accordingly entered against the defendant for the sum named, from which, and from an order denying a new trial, he appeals.

It appears from the bill of exceptions that when the plaintiff rested his case, at the trial, a witness was called for the defendant, and testified that he had known defendant for 18 years, and knew the people where he lived. He was then asked, "Do you know his reputation for being peaceable and quiet?" The question was objected to by the plaintiff on the ground that the evidence sought was irrelevant and immaterial, and the objection was sustained, and an exception reserved. It also appears from the bill of exceptions that, before the findings were filed and the judgment entered, "the defendant presented to the court findings of fact and conclusions of law and judgment for signature by the judge of said court, accompanied by a memorandum of costs and disbursements sworn to by the defendant," copies of which are set out. The copies presented are substantially the same as those filed, except that the conclusions of law are "that plaintiff is entitled to judgment against said defendant for said sum of \$250, and that said defendant is entitled to judgment against said plaintiff for his costs in this behalf laid out and expended." And the judgment is substantially the same as that entered, except that there is added to it: "It is further ordered and adjudged by the court that the defendant have and recover of and from the plaintiff his costs in this behalf laid out and expended, taxed at the sum of \$254.65." The court refused to adopt the findings and judgment so presented, and the defendant excepted to the ruling. It is claimed in support of the appeal that the court erred in excluding the offered evidence, and in refusing to give the defendant judgment for his costs; and these are the only points presented for decision.

We see no merit in either of the points made. The court found that the defendant

willfully and violently assaulted the plaintiff, and bit off his finger. The correctness of this finding is not questioned, nor is any of the evidence in support of it brought up in the record. It must therefore be presumed to have been fully justified by the evidence introduced. But, if the defendant committed the wrong complained of in the manner stated, then his reputation for being peaceable and quiet was wholly immaterial, since, however good it may have been, the judgment must necessarily have gone against him.

As to the second point: The allowance of costs is a matter of statutory regulation. Our statute provides that: "No costs can be allowed in an action for the recovery of money or damages when the plaintiff recovers less than three hundred dollars." Section 1025, Code Civ. Proc. This evidently applies to both parties to the action, and forbids the recovery of costs by either of them. The judgment and order appealed from should be affirmed.

McFARLAND and FITZGERALD, JJ. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

DE HAVEN, J. I concur in the judgment.

ESHLEMAN v. MALTER. (No. 18,174.)
(Supreme Court of California. Feb. 6, 1894.)

DEEDS—DESCRIPTION—BOUNDARIES.

Where the description of land in a deed calls for a legal subdivision of a section of surveyed land, the quarter section corners being lost, and the section exceeding 640 acres in area, the division lines of the fractions of the section are determined by a division pro rata of the lines of the section as they appear upon the ground.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by M. D. Eshleman against G. H. Malter. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

W. D. Tupper, for appellant. Edward Lynch, for respondent.

GAROUTTE, J. This is an action to quiet title to a small strip of land containing about 2.88 acres. Plaintiff, being the owner of section 17 of a certain township and range, sold to defendant the west one-half of the northwest one-quarter of said section, and the location of defendant's eastern boundary line thereof is the point in dispute. It is insisted that the evidence is insufficient to support the finding of the court as to the ownership of the land being in the plaintiff; but, upon an examination of the record, we think the evidence in this regard sufficient. The four corners of the section are established by the evidence with reasonable cer-

tainty, and, these four corners being located, any legal subdivision may be readily ascertained. The evidence disclosed that the section contained about 664.43 acres, and that the north line of the section was 82.21 chains in length. Appellant appears to concede that, if the north line of plaintiff's land exceeds 60 chains in length, then the land is litigation is included in her holding; and that the north line of her land is of greater length than 60 chains is very evident. When the description of land in a deed calls for a legal subdivision of a section of surveyed land, the quarter section corners being lost, and the section exceeding 640 acres in area, the division lines of the fractions of the section are determined by a division pro rata of the lines of the section as they appear upon the ground. This is the doctrine laid down in *Miller v. Land Co.*, (Kan.) 24 Pac. 420, and in the cases there cited. Applying that principle to the present case, the northwest corner of the plaintiff's land would be located at a point upon the north line of the section distant from the northeast corner thereof three-fourths of the length of the north line, and this would give the length of plaintiff's north line to be about 61.65 chains. The fact that defendant claimed by his answer to have made valuable and permanent improvements upon this tract of land while he was in possession thereof is immaterial to the case, and a finding as to such allegation of the answer was not required. *Helm v. Wilson*, 89 Cal. 593, 28 Pac. 1103. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: **PATERSON, J.; HARRISON, J.**

PEOPLE v. LYNCH. (No. 21,037.)
(Supreme Court of California. Feb. 6, 1894.)

ASSAULT—JUSTIFICATION—INSTRUCTIONS.

1. One person cannot assault another in self-defense, since an assault is in itself unlawful, and since any act done in self-defense cannot be an assault.

2. The fact that a person thinks another is going to inflict bodily harm on him does not justify him in attempting to take such other's life; it being necessary that there should be some act by the other, such as would induce an ordinarily prudent man to believe that he was in immediate danger of death or great bodily injury.

3. On a trial for an assault committed in a street, the refusal of an instruction that defendant had a right to be there, and the presumption was that he was there for a lawful purpose, if error, was not prejudicial, as it was but another form of the charge given by the court,—that defendant was presumed to be innocent till found guilty.

4. A refusal to permit defendant to tell what he understood by prosecutor's threat, a few days before the assault, to "fix" defendant, if error, was not prejudicial, where defendant testified that, immediately before that assault, prosecutor threatened to kill him, and made demonstrations as if to draw a weapon.

Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Defendant was convicted of assault with a deadly weapon, and from the judgment, and an order denying a new trial, appeals. Affirmed.

James H. & J. E. Budd, for appellant.
Atty. Gen. Hart, for the People.

GAROUTTE, J. The defendant was convicted of an assault with a deadly weapon, and appeals from the judgment and order denying his motion for a new trial. He claims the shooting to have been done in self-defense, and contends that the court committed error in its instructions to the jury upon the law of the case.

1. An exception was taken to the following instruction: "If, however, you are satisfied from the evidence in the case, and beyond a reasonable doubt, that the defendant did, at the time charged, and as charged, make an assault on one T. O'Connor with a deadly weapon,—that is, one likely to produce, in the manner in which it is used, death or great bodily injury,—with intent to do him great bodily injury, but are not satisfied that the assault was made with malice, or if you have any reasonable doubt whether such assault was with malice aforethought, your verdict will be, 'Guilty of an assault with a deadly weapon.'" Counsel say: "Suppose defendant had assaulted the prosecuting witness with a deadly weapon, with intent to do him great bodily harm. If it had been done in necessary self-defense he was entirely justified. Yet this instruction clearly directs the jury to find him guilty if such assault alone be proven." A complete answer to this supposition is that no such a state of facts could exist. One person cannot assault another in self-defense. An assault, in itself, is unlawful, and any act done in self-defense cannot be an assault.

2. The court gave the following instruction: "The bare fear that the said T. O'Connor, if defendant had had such fear, was going to inflict bodily injury upon the person of the defendant, would not justify defendant in attempting to take the life of the said T. O'Connor, if he did so attempt; but there must have been some act or acts of the said T. O'Connor such as would induce an ordinarily prudent man to believe that he was in great and immediate danger of death or great bodily injury at the hands of the said T. O'Connor; and, unless you so find, you will find the defendant guilty." We think the instruction entirely correct. To be sure, it says nothing about threats, but threats alone never justify a homicide. Words, however grievous, do not even reduce a homicide from murder to manslaughter. While threats are always admissible as evidence, yet some act or acts of the deceased, indicating danger to the defendant, as a reasonable man, at the time of the

shooting, must be present, or the plea of self-defense will be made in vain. The instruction in no way intimates that threats of the prosecuting witness towards the defendant are not admissible as evidence tending to throw light upon the circumstances surrounding the moment of the affray.

3. The following instruction was asked by the defendant, and refused: "The court further instructs the jury that Sacramento street is a public highway in the city of Stockton, and that the defendant had a perfect right to be on said highway at the time and place where he was met by the prosecuting witness, and was under no necessity to leave or depart from said street in order to avoid meeting with the prosecuting witness; and, in the absence of evidence showing that defendant was in said street for improper and unlawful purposes, the court instructs you that the presumption of law is that the defendant was in said street, at the time and place where he was met by the prosecuting witness, for a lawful and legitimate purpose." In the abstract, we are not prepared to say that the mere fact of a man walking upon a public street justifies the presumption that he is there for a lawful purpose. But in the present case, where the defendant was charged with a crime committed upon the public street, we see no legal objection to this instruction, and perhaps it would have been the better course to have given it. At the same time, it was but another form of instructing the jurors that the defendant is presumed to be innocent until he is proven guilty, and that matter was fully explained to them in another portion of the charge.

4. Defendant testified that some days prior to the alleged assault the prosecuting witness, among other things, said to him, "I'll fix you." His attorney then asked him, "What did you understand him to mean by those words?" and an objection was sustained to this question. We assume the purpose of the question was to show that defendant construed the language as a threat of physical injury; and, without deciding the merits of the ruling of the court in this regard, it is sufficient to say we think the defendant was not injured to any degree by such ruling, even conceding that his answer to the interrogatory would have been as indicated. A threat of the prosecuting witness at this time could only be material as bearing upon the circumstances immediately surrounding the shooting, and material only for the purpose of indicating that the defendant fired in self-defense. But the defendant further testified that immediately prior to the affray the prosecuting witness, in a violent manner, said to him, "I'll kill you," and made demonstrations as if to draw a weapon. Under these circumstances, it is plain that defendant was not injured before the jury by the ruling of the court, whatever may have been his understanding of the

the court, both as to instructions given and refused, and also as to evidence admitted and rejected; but, after careful consideration, we see no error, and find nothing further demanding extended notice. It is ordered that the judgment and order denying a new trial be affirmed.

We concur: PATERSON, J.; HARRISON, J.

PEOPLE v. WALLACE. (No. 21,026.)
(Supreme Court of California. Feb. 7, 1894.)
CRIMINAL LAW—PLEA—SUFFICIENCY—JURIES—
CHALLENGE TO PANEL—HARMLESS ERROR.

1. A plea of defense, entered on the minutes, reciting that "defendant thereupon interposes a plea of not guilty as stated in the information," is sufficient, under Pen. Code, § 1017, which provides that such entry shall recite that "the defendant pleads that he is not guilty of the offense charged."

2. Under Pen. Code, § 1064, providing that when the panel is formed from persons not named as jurors a challenge may be taken to the panel on account of bias of the officer summoning them, a challenge to a panel summoned by special venire will not lie on the ground that the panel were nonresidents of the county.

3. The giving of an erroneous instruction is harmless where defendant is acquitted of the offense charged to which the instruction applied.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

John Wallace was convicted of assault with a deadly weapon with intent to murder, and appeals. Affirmed.

R. E. Bledsoe, for appellant. Atty. Gen. Hart, for the People.

VANOLIEF, C. The defendant was tried, in the county of San Bernardino, on an information by the district attorney, for an assault with a deadly weapon with intent to murder, but was convicted of only an assault with a deadly weapon. He appeals from the judgment and from an order denying his motion for a new trial.

1. It is contended that the plea of the defendant, as entered in the minutes of the court, was not in form or substance such as required by section 1017 of the Penal Code, viz.: "Every plea must be oral and entered upon the minutes of the court substantially in the following form: * * * (2) If he plead not guilty: 'The defendant pleads that he is not guilty of the offense charged.'" The minutes of the court show that the defendant was regularly arraigned on March 6, 1893, and, upon being asked whether he was guilty or not guilty, his attorney asked further time to plead, and was given until March 8th. On March 8th the following entry was made in the minutes: "The People of the State of California v. John Wallace.

defendant interposes a demurrer to the complaint, the same being overruled by the court. Defendant thereupon interposes a plea of not guilty of the charge as stated in the information." I think the plea entered in the minutes is "substantially" in the form prescribed by section 1017 of the Penal Code. It is claimed that the plea is improper, limited to the charge "as stated in the information," as if the defendant was required to plead to a charge as stated elsewhere in the information.

2. The jury was not drawn, but was summoned by the sheriff by authority of a special venire facias regularly issued by order of the court. Before any jury was sworn the defendant challenged the jury "on the ground that the panel of the jury served and returned are nonresidents of the county of San Bernardino." The district attorney said, "Prosecution denies the challenge." Thereupon the court overruled the challenge, for the reason that the ground of challenge to the panel of a jury summoned by special venire is "bias of the officer who summoned them," as provided in section 1064 of the Penal Code. That seems to be warranted by the case of *People v. Welch*, 49 Cal. 177; but appellant contends that, inasmuch as the district attorney denied the challenge, the court was bound to try the issue of that is to say, the court was bound to try an immaterial issue, a decision of which would have been of no consequence to the challenge of the panel, on the sole ground that the jurors summoned were nonresidents of the county. I think the mere denial of this proposition is a sufficient refutation of it.

3. While the jury was being impaneled John Schliesman was called as a juror. Upon examination as to his qualifications he answered that he was a resident of that part of the territory which had lately been taken off from San Bernardino county into the county of Riverside. Thereupon the defendant challenged the juror on the ground that he was not a resident of the county of San Bernardino. It is contended by appellant that the court erred in overruling the challenge. No evidence was offered in support of or in opposition to the challenge, and the testimony of the juror above stated. The only question involved in the ruling of the court on this challenge, or discussed by the court, is whether or not the county of Riverside had been created and existed at the time of the trial of this action; and whether that county had been created and existed at the time of the trial must have been generally known to the trial court at the time of the trial, and is so known by this court (*Brumagim v. Bradshaw*, 39 Cal. 231, Civ. Proc. § 1875,) since the fact of its creation upon the effect of an act of the legis-

approved March 11, 1893, entitled "An act to create the county of Riverside," etc., and the official action of the board of commissioners appointed by that act to organize the county of Riverside, which board was required by the act to "keep a full record of their proceedings, transmitting to the secretary of state a certified copy thereof." The commissioners were required to call an election of the qualified voters residing in the territory of which the new county was to be composed, to be held on May 2, 1893, "at which election shall be submitted to the said qualified electors of said county of Riverside, as herein provided, whether there shall be formed and organized the county of Riverside, as herein provided for." The act further provides that if two-thirds of the vote cast shall be in favor of creating the proposed new county, "then the said territory hereinabove described shall be and become the organized county of Riverside, from and after the day upon which the returns of said election shall be ascertained and declared by the said board of commissioners." In the certified copy of the proceedings of the board of commissioners transmitted to the secretary of state and filed in his office, appears the following: "And now at this time, that is to say, May 9, 1893, Commissioner John McLaren offers the following resolution: 'Whereas, the board of county commissioners of Riverside county, in pursuance of the directions contained in section 5 of the act to create Riverside county, approved March 11, 1893, caused the election referred to in said section to be held at the time and in the manner therein appointed; and whereas, the said board has canvassed the votes cast at said election, and by said canvas has ascertained and do hereby declare the returns of said election to be as follows: The new county of Riverside, Yes, 2,277 votes; the new county of Riverside, No, 681 votes,—and it appearing that said votes cast in favor of the new county of Riverside exceed two-thirds of the votes at said election on said question: Resolved, that in pursuance of the power and authority vested in us by said above-named section, we, the said board of commissioners, do therefore declare that from and after this date the territory described in said act shall be, and it hereby is declared to be, the organized county of Riverside. Dated this 9th day of May, 1893.'" Thus it appears that the returns of the election were "declared" on the 9th day of May, 1893, three days after the trial of this action; and, consequently, the county of Riverside did not exist until after the trial.

4. Appellant further contends that the court erred in giving to the jury the following instructions: "Murder is the unlawful killing of a human being with malice aforethought. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take the life of a fellow creature. It is im-

plied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." Conceding that implied malice is not equivalent to the actual intent to murder, essential to the offense charged, and that the instruction was therefore erroneous, it was, nevertheless, harmless, since the defendant was acquitted of the offense charged, to which alone the instruction applied; and the instruction had no bearing upon the lower offense, of which the defendant was convicted. In the case of *People v. Mize*, 80 Cal. 42, 22 Pac. 80, cited by appellant, the defendant was convicted of an assault with intent to murder, and was presumably injured by the instruction held to be erroneous in that case. I think the order and judgment should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

McCONOUGHNEY v. JACKSON et al. (No. 19,281.)

(Supreme Court of California. Feb. 7, 1894.)

PLEADING—CONCLUSIONS OF LAW—INFORMATION AND BELIEF—TRUSTEES OF CITY—ALLOWANCE OF CLAIMS—DUTY OF CLERK.

1. A denial of an "indebtedness," without denying the facts on which it is based, is simply a denial of a conclusion of law.

2. The action of the trustees of a city on the presentation of a claim which they have jurisdiction to hear and determine is a judicial act, and, whether right or wrong, is binding on the clerk.

3. On an alternative writ of mandamus requiring the clerk of a city of the sixth class to countersign and deliver a warrant or show cause, an allegation by defendant, on information and belief, of insufficient funds in the treasury to pay the warrant, is defective, since he should, of his own knowledge, know the exact amount in the treasury.

4. A valid claim, properly presented to the trustees of a city, and allowed, and the action accepted by the claimants, is a binding contract, and can be avoided only for such causes as invalidate other contracts.

5. An allegation by defendant that petitioner was a city officer, and "interested, both directly and indirectly, in the pretended contract upon which is based the pretended claim," without alleging any facts upon which the conclusion is based, does not constitute a defense.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Application by O. H. McConoughey for a writ of mandamus to compel W. H. Jackson and others to issue a city warrant. Judgment for petitioner, and defendants appeal. Affirmed.

J. S. Callen, Callen & Neale, and Gibson & Titus, for appellants. A. M. McConoughey, for respondent.

SEARLS, C. The city of Coronado is a city of the sixth class. M. R. Vanderkloot was president of the board of trustees, and W. H. Jackson was clerk of said city. In April, 1892, the petitioner filed a claim in writing with the board of trustees for \$500 on account of expenses incurred by him in procuring, at the request of said city, through the board of trustees thereof, counsel and legal services for said city. The bill was approved by the board of trustees, and ordered paid, and a warrant on the city treasurer, payable to petitioner, for the same, was ordered. Vanderkloot and Jackson, the clerk, refused to draw, sign, or countersign the warrant. There was sufficient money in the treasury to pay said warrant. Upon this showing, on petition, the superior court, on the 8th day of February, 1893, issued an alternative writ of mandate to the president and clerk, requiring the president to draw and sign the warrant, and the clerk to countersign and deliver said warrant, or to show cause, etc. The defendants appeared, and demurred to the petition, which demurrer was overruled by the court, whereupon M. R. Vanderkloot, the president of the board, drew and signed the warrant, and made default herein. Defendant Jackson filed an answer, and subsequently an amended answer, to which a demurrer was interposed, and sustained by the court. Defendant thereupon declined to amend, and a peremptory writ of mandate issued, from which he appeals.

The amended answer, for cause why the writ should not issue, (1) denied that the city was indebted to the petitioner; (2) averred upon information and belief that there was not sufficient available money in the treasury that could be legally appropriated to its payment; (3) set up the fact that on the 2d of May, 1892, the board of trustees repealed and rescinded the allowance of the claim and order to draw the warrant; (4) alleged that plaintiff was an officer of the city, and interested in the claim; (5) that the matter is still under consideration by the board of the trustees, and that since the pendency of this action, and on the 30th of January, 1893, the board of trustees determined the warrant had been ordered drawn through mistake, inadvertence, and misapprehension, rescinded the former action, and ordered that the warrant drawn and signed by the president be canceled, annulled, etc. The affidavit, which in proceedings of this character stands as a complaint, is lacking in preciseness of detail and fullness of statement, but was still sufficient as against the general demurrer interposed to its sufficiency. In addition to the merely formal parts of the pleading, it in fact and effect avers an indebtedness of \$500 on the part of the city to petitioner for expenses by him incurred in procuring counsel and legal services for the former, at its order and request by its board of trustees; and, being so indebted, the board ordered his

bill and written demand therefor paid, and ordered a warrant drawn in his favor for the amount, etc., which the president and clerk refused to draw and countersign; that there was money in the treasury to pay it, etc. These are the essential facts giving to petitioner a right to the writ, and the demurrer to the complaint was properly overruled.

The first defense set out by Jackson, the clerk of the board, denies the indebtedness to petitioner. This, as defense, is wholly insufficient for two reasons: (1) It is the denial of a conclusion of law, and not of the facts, viz. the expenses incurred by petitioner for the city. (2) The law has not constituted the clerk either the guardian of the board of trustees or an appellate court to pass upon the facts once decided by the board. The claim was one which the board of trustees had jurisdiction to hear and determine. Such determination was a judicial act, and involved a determination of the fact of indebtedness, and when so determined, whether right or wrong, its action was binding upon the clerk. A like question was involved in *McFarland v. McCowen*, 98 Cal. 329, 33 Pac. 113, and reference is made to that case for a more full expression on this subject.

The allegation in the second defense, of a want of funds in the treasury on the 18th of April, 1892, etc., is upon information and belief, and, being a fact peculiarly within the knowledge of defendant, should have been positive in form. As clerk of a municipal corporation of the sixth class one of the duties of defendant was to keep an exact account of all moneys received and disbursed, and a "treasurer's account," which, if correctly kept, showed to a fraction the moneys in the treasury, the warrants drawn thereon, etc. To this extent he discharged one of the functions of an auditor. The treasurer must give duplicate receipts for all moneys received, one of which must be filed with the clerk; and the treasurer can only pay out money on warrants countersigned by the clerk, etc. In short, he is the financial accountant of the city, and practically the only check upon the treasurer. Mun. Corp. Act, §§ 876, 878.

No doubt the legislative department of a municipal corporation, viz. the board of trustees, may at any time before the rights of third persons have vested, if consistent with the law of its creation and its rules of action, rescind previous votes and orders. Dill. Mun. Corp. § 290. Thus it has been held that a resolution to construct a public sewer may be rescinded at a subsequent meeting. *People v. City of Rochester*, 5 Lans. 11. The right of reconsidering a last measure at the same meeting, or pursuant to its rules at a subsequent one, is a right inherent in all legislative assemblies. *Jersey City v. State*, 30 N. J. Law, 521. So, in *Estey v. Starr*, 56 Vt. 690, it was held that a vote of a town meeting rescinding its ac-

tion at a former meeting in authorizing a subscription in aid of a railroad, was lawful, no rights of third parties having vested, and nothing having been done under the authority to subscribe. *Tucker v. Justices*, 13 Ired. 434, goes as far as any case we have examined. In that case a public bridge had been constructed, and an order made by the county court upon the proper officer to make payment, which was not done for want of funds. At the next term of court, the bridge having fallen down, the order was annulled, and the action of the court was upheld, and a mandamus denied. A valid claim, however, properly presented to the trustees of a municipal corporation, and allowed and approved by them, and their action accepted by the claimant, becomes a valid and binding contract, and can only be avoided for such cause as invalidates other contracts. Corporations can no more play fast and loose over their contracts than can individuals. In *Brown v. Winterport*, 79 Me. 305, 9 Atl. 844, it was held that a vote ratifying a contract made by town officers without due authority could not be rescinded so as to affect the validity of the contract. In the present case, when the trustees, upon the presentation of petitioner's demand, allowed it, and ordered a warrant drawn on the treasurer for the amount, it established his right to a recovery; and, being the amount asked for by him, he will be presumed to have accepted the action of the board, or, at any rate, such presumption will arise from his demand of the warrant and thereafter the board was not at liberty, without the consent of petitioner, to rescind its action, except for some cause which would defeat the claim, treated as a contract. Nothing of that kind is shown in the answer. The attempt at a defense by averring upon information and belief that petitioner was a city officer, and "interested both directly and indirectly in the pretended contract, upon which is based the pretended claim referred to in the complaint herein," without the statement of any facts upon which the conclusion is based, or the nature of the contract referred to, cannot be said to rise to the dignity of a defense. There is no contract set out in the petition, except such as is implied from the statement of expenses incurred in procuring counsel and legal services for, etc., at the request of the board of trustees. There being no showing that the order or warrant was irregular on its face, or one which the board was not authorized to draw, it was the duty of the clerk to countersign it, and the judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

v.35P.no.8—55

BARCLAY et al. v. SEVERANCE et al. (No. 19,254.)

(Supreme Court of California. Feb. 7, 1894.)

APPEAL—FINDINGS—REVIEW.

The findings of the court will not be disturbed where the evidence is conflicting.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by H. A. Barclay and others against Caroline Severance and others. From a judgment for defendants, and from an order denying a motion for a new trial, plaintiffs appeal. Affirmed.

Chapman & Hendrick and R. B. Carpenter, for appellants. Lee & Scott and W. P. Gardiner, for respondents.

PER CURIAM. Action to recover broker's commissions for negotiating a sale of defendants' land. Defendants had judgment, and plaintiffs appeal therefrom, and the order denying their motion for a new trial. It is claimed by appellants that the findings attacked by the specifications are not sustained by the evidence. This claim cannot be maintained, for the reason that an examination of the record shows that the evidence is substantially conflicting. The findings, therefore, under the well-established rule of this court, cannot be disturbed. Judgment and order affirmed.

SANFORD v. EAST RIVERSIDE IRRIGATION DISTRICT. (No. 19,290.)

(Supreme Court of California. Feb. 7, 1894.)

CONTRACT—INTERPRETATION—ACTION FOR BREACH—DAMAGES—SUFFICIENCY OF EVIDENCE—APPEAL—VERDICT—REVIEW.

1. The finding of a jury will not be disturbed where there is a substantial conflict in the evidence.

2. A contract for sinking wells recited that defendant called for proposals for bids for sinking "one or more" wells, and that plaintiff's assignors filed a bid to sink "said wells," and were awarded the contract for sinking "five wells." It provided that they should furnish material to complete "said five wells," that no payment was to be demanded on "any well" until it was sunk 200 feet, and that 25 per cent. of the price was to be detained until "each well" was completed, etc. *Held*, that the contract was for the sinking of five wells.

3. In an action by the assignee of the contractors for damages caused by defendant's refusal to allow such assignors to sink more than one well, it appeared that there were a number of other wells on the same ranch where the wells in dispute were to be sunk, which averaged about 400 feet in depth. Plaintiff's damage was established by evidence of the profit on wells of the average depth of 400 feet, and the verdict for plaintiff was for a less sum than the profits would have been as thus shown. *Held*, that the verdict was supported by the evidence.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by John E. Sanford against the East Riverside Irrigation District, (a corporation.) From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

R. E. Bledsoe, Purington & Adair, J. S. Noyes, and Elmer E. Rowell, for appellant. C. J. Perkins and Paris & Saterwhite, for respondent.

SEARLS, C. Action to recover for work and labor in sinking a well, and damages for violation of a contract. Plaintiff had judgment for \$2,300.35 and costs, from which judgment, and from an order denying a motion for a new trial, defendant appeals.

There are two counts in the complaint, in each of which the same contract is set out. One is to recover for services rendered under such contract, the other to recover damages on account of defendant's refusal to comply with the terms of the contract and to permit plaintiff's assignors to prosecute work thereunder. On the 12th day of November, 1891, the corporation defendant, as the party of the first part, entered into the contract in question with J. E. Sanford & Co., as parties of the second part. The contract recites that defendant has published proposals for bids for sinking one or more artesian wells upon its lands, known as the Garner and McKenzie places, on Lytle creek, San Bernardino county, Cal.; that Sanford & Co. have filed bids to sink said wells; and that defendant has, by resolution of its board of directors, awarded to them the contract for sinking five wells, and has authorized its president and secretary to sign a contract therefor. It is thereupon agreed that the party of the second part (Sanford & Co.) shall commence immediately sinking a well on said Garner tract, commencing with a 10-inch casing, and continue as far as such casing can be practicably sunk; then with an 8-inch casing as far as practicable; then with a 6-inch casing as far as practicable; the various depths to be according to the best judgment of the party of the second part; the well to be sunk to the depth of 500 feet, if practicable and possible in the judgment of the second party. Then follows the price to be paid per foot for sinking, which is \$4.10 per foot for first 200 feet, \$5.75 for third 100 feet, \$6.50 for fourth 100 feet, and \$7.50 for fifth 100 feet. Party of the second part to furnish all material, labor, and machinery to complete said five wells. It is further agreed that if the engineer of defendant shall direct that said wells shall stop at any point under 275 feet, 25 cents per foot is to be added to price, but if, by reducing the size of pipe, the party of the second part cannot go beyond the depth of 275 feet, nothing is to be added to the price per foot. Payments to be made monthly from time of placing machinery at first well, at the rate of 75 per cent. of contract price for distance sunk, and residue when each well is completed

No payment to be made on any well until 200 feet has been sunk. The pipe, workmanship, and other conditions not specified shall be according to the specifications of the engineer, which are attached to and made a part of the agreement. The specifications are lengthy, and their provisions need not be set out except as questions arise under them. To that extent they are as follows: (1) The particular places on the McKenzie and Garner places where the wells are to be sunk are to be designated by the engineer of defendant. (2) All wells are to be sunk to a depth of 500 feet, unless obstacles are encountered which make this impossible; and the contractor shall use his utmost endeavor to attain such depth, but, when impossible to do so, the engineer may receive a well of less depth, after requiring the contractor to perforate the pipe, to admit such streams as are passed in boring; but the engineer must not accept a well of less than 200 feet in depth. The contractor shall perforate the pipe to admit all streams as desired by the engineer. (3) If by accident, without negligence or fault of contractor, any well of 200 feet in depth cannot be reduced and sunk deeper, it may be accepted and paid for on being perforated. But accidents from incompetence or carelessness of contractor or his subordinates must be borne by him.

According to the complaint the contractors commenced to sink the first well about November 12, 1891, and reached a depth of 253 feet, when they met obstacles rendering it impossible and impracticable, according to their best judgment, to go deeper, of which, on May 3, 1892, they notified the defendant in writing, and requested its engineer in charge to notify them if he desired the pipes perforated; but he failed to notify them; that they have been willing and able to do so since. Defendant was requested to designate through its engineer the particular spot or place for starting a second well, or any one of the remaining four wells, all of which were refused. The rights of the contractors, including the right to damages for a breach of the contract, are averred to have been assigned to plaintiff. The answer, according to the contention of appellant, raised three issues: First, that there had never been an assignment of the contract and alleged indebtedness to the plaintiff; second, that said well had not been sunk as deep as possible or practicable; third, that, even if the defendant had failed to carry out the contract, the plaintiff or his assignors had suffered no actual damage thereby. There was an assignment to the plaintiff in evidence, dated February 2, 1892, whereby the money due the firm and the interest of plaintiff's copartner in the contract were transferred to him. In justice to counsel for the appellant, it should be stated that he does not urge this point in his brief.

Under the head of insufficiency of the evidence it is urged that there was no evidence

that plaintiff reduced the well to a 6-inch pipe or casing, as required by the contract, or that he attempted to do so; and does show that, if a 6-inch pipe had been used, the well could have been sunk to a greater depth than 253 feet. The testimony involved a substantial conflict. F. C. Finkle, the engineer of defendant, testified, in substance, that he was desirous of having the well sunk deeper than the 253 feet, and that, when he found the bottom of the 8-inch pipe was mashed, he told the plaintiff, if he could not straighten it out, to pull it, and put in a 6-inch pipe, but that plaintiff thought he could straighten it. On the part of plaintiff there was testimony tending to show that they struck granite boulders in the bottom of the well, which crushed the 8-inch pipe, and broke or injured the ring and shoe, which were of steel, and as a result they could not remove or break up the obstacle so as to get a smaller pipe through; that he worked for 20 days with pumps and drills, and 1,500 pounds of iron, trying to break it up and get it out of the way, and failed. There was also testimony tending to show that the 8-inch pipe could not be pulled out of the well. Under these circumstances it was a question of fact for the jury to determine whether or not plaintiff performed on his part all that was requisite under the contract; and, having found in favor of the plaintiff, such finding cannot be disturbed.

It is further objected that the contract did not provide for sinking more than one well, and hence that defendant is not liable for damages beyond those sustained on account of one such well. The contract recites that defendant has called for proposals for bids for the sinking "of one or more artesian wells;" that Sanford & Co. "have filed a written bid to sink said wells," and "was awarded the contract for sinking five wells." Then follows the agreement in which it is provided that plaintiff's assignors agree to furnish all the material, etc., to "complete said five wells." It also provides that the engineer of defendant may direct that said wells may stop at any point under 275 feet. "No payment is to be demanded on any well until it shall have been sunk over 200 feet," and 25 per cent. of the price is to be detained until "each well is completed." The specifications provide where the wells are to be located,—the places "where each well is to be sunk shall be designated by the engineer in charge." There are many other allusions to the different wells, but the foregoing quotations are deemed sufficient to indicate the intention of the parties in the premises to include the sinking of five wells. As a basis for the damages sustained by plaintiff in not being permitted to sink the four other wells provided for in the contract, it was shown that there are a number of wells on the same ranch and in the vicinity of a depth averaging about 400 feet, some of them being as deep as 600 feet, and others not over 200

feet. The damage of plaintiff was established by evidence tending to show the profit upon wells of this average depth of 400 feet, and, as the verdict of the jury was far below the sum which would be reached by the profits shown by the witnesses, it cannot be said the verdict was not supported by the evidence.

It is quite apparent that the problem of profit upon the sinking of artesian wells is not one susceptible of solution with anything like mathematical certainty. The different strata to be pierced, the difficulties to be met with of one kind and another, are factors which are likely to affect the result, but cannot be foretold with certainty. In the present instance the number and character of the wells driven in the vicinity shed light upon the question, and would seem to afford the best means for its solution. The court below seems to have taken this view, and I think correctly. The damages were fairly ascertainable, both in their character and origin, within the purview of section 3301 of the Civil Code. This disposes of the alleged errors urged by appellant. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

PEOPLE ex rel. HOWLAND v. DREHER.
(No. 19,201.)

(Supreme Court of California. Feb. 7, 1894.)
NUISANCE—OBSTRUCTING PUBLIC STREET—ACTION BY PEOPLE—ESTOPPEL—REVIEW OF FINDING OF FACT.

1. In an action by the people on the relation of an individual to abate an obstruction in a public street, where it appears that the street was never dedicated or accepted, plaintiff cannot invoke an estoppel on the ground that relator, an abutting property owner, acted on an agreement with defendant to open the street, since the action by the people is not to vindicate relator's private rights.

2. A finding on conflicting evidence, that an alleged public street was never dedicated, will not be reviewed.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. P. Wade, Judge.

Action by the people, on relation of James L. Howland, against P. J. Dreher, to abate a nuisance caused by obstructing an alleged public street. Judgment for defendant, and plaintiff appeals. Affirmed.

Westerman & Broughton and Atty. Gen. Hart, for appellant. W. A. Bell, for respondent.

SEARLS, C. This is an action to abate a nuisance, alleged to have been committed by defendant by obstructing the south half of a public street for a distance of 660 feet, which

street is situate in the city of Pomona, county of Los Angeles, Cal. The cause was tried by the court without the intervention of a jury, written findings filed, and judgment rendered thereon in favor of defendant, from which judgment, and from an order refusing a new trial, plaintiff prosecutes this appeal. The court, upon the issues made by the pleadings as to whether the street in question had been dedicated and accepted as a public street, found that in the month of May, 1887, the locus in quo "was laid out and graded by private citizens, who offered to dedicate the same to the public as and for a public street, but the same was never dedicated as a public street, or used or accepted by the public as a public street, or known by the public as Green street, or any street." The court further found, in substance, that in May, 1891, defendant plowed up the south half of the strip of land in question, planted trees thereon, and surrounded the same by a ditch, so as to render such south half of said proposed street impassable for vehicles, etc., but that the land was not a public street, and was never used or accepted as such; also that the relator, James L. Howland, owns land abutting on said proposed street, opposite the portion so plowed up and obstructed; that he has been in the habit of using it as a mode of egress and ingress to the land of him, the said Howland; and, were it a public street, it would be the only street running by or to his land by which he could have egress and ingress thereto. The court further finds that the public does not, and has not been accustomed to, use said strip of land in any manner; is not discommoded or inconvenienced by said obstructions, etc. A common-law dedication is the setting apart of land for the public use, and, to constitute a valid and complete dedication, two things are necessary, to wit, an intention by the owner, clearly indicated by his words or acts, to dedicate the land to public use, and an acceptance by the public of the dedication. Elliott, Roads & S. 85; San Francisco v. Canavan, 42 Cal. 553; San Francisco v. Calderwood, 31 Cal. 585; Harding v. Jasper, 14 Cal. 647; People v. Reed, 81 Cal. 70, 22 Pac. 474. And, before it has been accepted, the owner of the land is not precluded from revoking at any time the offer to dedicate. Holdane v. Trustees, 21 N. Y. 478; San Francisco v. Canavan, supra. Dedication is a question of fact, to be determined by a jury, or by the court sitting as such. Harding v. Jasper, 14 Cal. 648. This being so, and the court below having found the fact of acceptance against the appellant, upon testimony involving a substantial conflict, the result, upon well-established principles, will not be disturbed by this court.

Much of the argument of appellant is directed to the point that the relator, James L. Howland, who, with the defendant, Dreher, agreed to open a public highway upon the line dividing their respective lands, and who was at expense in grading such contemplated

highway, and who is claimed to have altered his condition in view of such proposed highway, so that pecuniary injury will ensue to him if the road is not opened, may invoke the doctrine of estoppel as against the defendant. This action is not brought to vindicate the private rights of the relator, or to secure to him any privilege not enjoyed equally by others. It is brought by the people, to conserve the rights which the general public have in the locus in quo as a highway. The predicate of those rights is that it is a highway. Failing in this, the public has no rights to conserve. In Clements v. West Troy, 16 Barb. 251, the proprietors of the village had laid out the same by a plan, upon which an alley was laid down, and house lots conveyed, bounded by the alley. The court said: "As between the original proprietors and those to whom they conveyed, this act of the proprietors secured a right of way. But the alley thus designated, and in respect to which the purchasers had acquired an indefeasible right of way, did not thereby become a public highway. The dedication must be accepted. The highway must be laid out. Until that is done, the alley would remain the property of the original proprietors, subject to the right of way in those who had taken the deeds of lots bounded upon the alley." To much the same effect are Underwood v. Stuyvesant, 19 Johns. 186; Child v. Chappell, 9 N. Y. 257; Oswego v. Oswego Canal Co., 6 N. Y. 257; Trustees v. Otis, 37 Barb. 50. Whether the relator, by reason of the transactions between himself and defendant, has or has not acquired rights peculiar to himself as an individual, which he can enforce, is not a question which, under the pleadings and issues, can be passed upon here. The findings are all supported by evidence, and are conclusive of the case. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

FLETCHER et al. v. DENNISON et al. (No. 19,301.)

(Supreme Court of California. Feb. 8, 1894.)

MORTGAGES—OPTION TO DECLARE PAYABLE—
WAIVER.

1. The complaint in an action to foreclose a mortgage, giving the holder the option to compound the interest, or to declare the principal payable, upon any default in interest, alleged that, on the failure of defendant to pay the interest due on a certain day, "plaintiff elected to declare, and did declare, the principal sum due and payable." Held, as against a demurrer, a sufficient allegation of election when the interest became due.

2. The holder of a mortgage note containing a condition giving him the option to compound the interest, or declare the principal due,

upon any default in interest, does not waive his right to make an election by a delay of 59 days after a default.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Julia M. Fletcher and others against Lucius Dennison and others to foreclose a mortgage. Judgment for plaintiffs. Defendants appeal. Affirmed.

E. C. Bower, for appellants. A. R. Metcalfe, for respondents.

McFARLAND, J. On October 21, 1891, the defendants gave their negotiable promissory note to plaintiffs for \$3,000, due two years after date, with interest at 10 per cent. per annum, payable semiannually, according to coupons attached. The note contained this clause: "If any interest or any installment thereof be not paid when due, it may be compounded semiannually and added to said principal, and thereafter bear interest at the rate of ten per cent. per annum; or, at the option of the holder of this note, if said interest or any installment thereof be not paid when due, the whole of said principal sum shall immediately become due and payable, without notice to us." At the same time, defendants executed to plaintiffs a certain mortgage to secure said note. Interest not having been paid when due, plaintiffs commenced this action to foreclose the mortgage, for a deficiency judgment, etc. Those of the defendants who did not suffer default demurred to the complaint, upon the general ground of want of statement of sufficient facts, and upon the special ground of ambiguity and uncertainty. The demurrer was overruled; and, defendants declining to answer, judgment was rendered for plaintiffs. Defendants appeal from the judgment upon the judgment roll alone, relying upon the alleged insufficiency of the complaint.

Appellants' counsel argues that respondents' election to consider the principal due was not declared until 59 days after such election might have been declared, and that, by thus waiting, they waived their right to elect at all. This contention is based upon the fact that this suit was not brought until 59 days after the election might have been made, and upon the theory that there was no election until it was declared by the institution of the suit. The record before us shows that the time was only about 39 instead of 59 days. But, in the first place, assuming the time to be as stated by counsel, and that there was no election until the suit was brought, still we could not hold that, as a matter of law, 59 days was an unreasonable time within which to make the election. *Hewitt v. Dean*, 91 Cal. 5, 27 Pac. 423. In the second place, it is averred in the complaint "that on the failure of the defendants to pay the installment of interest which, by the terms of said promissory note and the said coupons, became and was due

on the 21st day of October, 1892, the plaintiffs elected to declare, and did declare, the said principal sum and the interest thereon due and payable." This, as against a demurrer, was a sufficient averment of election at the time the interest became due. There is an averment in the complaint that the principal sum, together with interest "to be compounded semiannually from October 21, 1891, is now due and payable." This averment was evidently made upon the notion entertained by respondents, or their counsel, that, after having elected to consider the principal due, they could nevertheless, according to the terms of the note, recover compound interest. But, assuming this notion to be wrong, still the averment did not make the complaint vulnerable to the assault of either the general or the special demurrer; and, as a fact, judgment was not rendered for compound interest. To reverse the judgment in this case for any of the reasons urged by appellants would be to establish a precedent that would tend to make mortgage securities exceedingly insecure. The judgment is affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

SPEARS v. MODOC COUNTY et al. (No. 18,204.)

(Supreme Court of California. Feb. 9, 1894.)
CONVICTION UNDER ORDINANCE—REPEAL PENDING
APPEAL—EFFECT.

A judgment of conviction under an ordinance cannot be enforced if, pending an appeal therefrom, the ordinance is repealed.

Department 1. Appeal from superior court, Modoc county; C. L. Claffin, Judge.

Action by one Spears against the county of Modoc and others to restrain the enforcement of an execution. From a judgment entered upon an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Goodwin & Goodwin, for appellant. D. W. Jenks, E. E. Copeland, and Spencer & Raker, for respondents.

HARRISON, J. The plaintiff was convicted in a justice's court, January 27, 1890, of violating an ordinance of the county of Modoc forbidding the keeping of a saloon where spirituous liquors were sold, and on the same day judgment was entered against him, by which he was sentenced to "pay a fine of five hundred dollars, and, in default of payment thereof, be imprisoned in the county jail of said county of Modoc for the period of one day for each dollar of said fine, or until such fine be satisfied." From this judgment he appealed to the superior court. On the 19th of February, 1891, that court affirmed the judgment of the justice's court. Before the hearing of the appeal the

January 24, 1891. June 3, 1891, an execution upon this judgment was issued out of the justice's court, under which the sheriff levied upon certain property of the plaintiff herein, and was proceeding to sell the same when this action was brought to restrain the enforcement of the execution. A demurrer to the complaint was sustained by the court, and from the judgment entered thereon the plaintiff has appealed.

By the appeal to the superior court the enforcement of the judgment appealed from was stayed until after the determination of the appeal. Pen. Code, § 1470. As no undertaking on appeal was required, the appeal itself operated as a supersedeas. *McGarrahan v. Maxwell*, 28 Cal. 91. The effect of the appeal was, therefore, to preserve the rights of the parties in the same condition as they were prior to the entry of the judgment, (*Dulin v. Coal Co.*, 98 Cal. 304, 33 Pac. 123;) and, until the determination of the appeal, the proceeding was a pending action, in which the rights of neither party had been conclusively determined. In *People v. Frisbie*, 26 Cal. 135, an appeal had been taken from a judgment for delinquent taxes, rendered in favor of the plaintiff, and the judgment of the district court was affirmed. Pending the appeal, and before decision thereon, the legislature passed an act authorizing an additional defense to be interposed by the defendant in pending suits, and it was held that the appeal had suspended the operation of the judgment, so that the action was still pending, and that the rights of the plaintiff were limited to its cause of action, and that it did not have a vested right to the judgment. See, also, *People v. Treadwell*, 66 Cal. 400, 5 Pac. 686. In *Kay v. Goodwin*, 6 Bing. 576, 4 Moore & P. 341, it was said by Tindal, C. J., that the effect of repealing a statute is "to obliterate it as completely from the records of the parliament as if it had never passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law." This principle has been applied more frequently to penal statutes, and it may be regarded as an established rule that the repeal of a penal statute, without any saving clause, has the effect to deprive the court in which any prosecution under the statute is pending of all power to proceed further in the matter. "The repeal of a statute puts an end to all prosecutions under the statute repealed, and to all proceedings growing out of it pending at the time of the repeal." *Sedgw. St. & Const. Law*, 130. See, also, *End. Interp. St.* § 479. The proceeding is arrested at the very point where it is at the date of the repeal; if before indictment, no indictment can be found; if after indictment, and before trial, no conviction can be had; if after

appealed from, and its enforcement is suspended until the determination of the appeal, the power to enforce the judgment falls with the repeal of the statute, and the appellate court will direct a dismissal of the proceedings. "If a penal statute is repealed pending an appeal, and before the final determination of the appellate court, it will prevent an affirmance of a conviction, and the execution must be dismissed, or judgment reversed." *Suth. St. Const.* § 163. Until the determination of the appeal, the proceeding is pending in court, and the judgment does not become final until affirmed by the appellate court. If, during the interim, the legislature repeals the statute under which the prosecution is had, it operates as a discharge of the defendant. "The repeal of the law imposing the penalty is of itself a release." *Per Taney, C. J., State v. Baltimore & O. Railroad Co.*, 3 How. 552. In *Spears v. City of Louisville*, 78 Ky. 287, an appeal had been taken from a judgment against defendants for violating a city ordinance. Pending the appeal, the ordinance under which the penalty was imposed was repealed, and, upon that fact being brought to the knowledge of the court, the judgment was for that reason reversed, with directions to dismiss the proceeding, the court saying: "The effect of the appeal was to suspend the judgment, and while the judgment was regarded as final for the purposes of the appeal, its execution cannot be enforced until the appeal is disposed of. It is well settled that no judgment can be rendered in violation to enforce a penalty when the statute under which the proceeding is had has been repealed. When such a statute is repealed it ends all the litigation under it, and the judgment is not final,—that is, if the defendant is seeking to recover the penalty is not disposed of, the right to the penalty depending upon the affirmance or reversal of the judgment,—and the repeal is brought to the knowledge of the court, it must necessarily result in a dismissal of the action." The same doctrine is maintained in *Text. State*, 4 Tex. App. 472; *Monroe v. State*, Tex. App. 343.

The judgment rendered in the justice's court was the infliction of a penalty for violation of a law, and not the determination of any rights of the parties arising out of contract or obligation; and the court has no right to take the property of the plaintiff under an execution issued on that judgment, but only the enforcement of the penalty in the county, by its repeal of the statute, has been remitted. The county has no right to enforce the penalty in this manner than it would have to arrest and execute the appellant under a warrant issued upon the same judgment. Section 329 of the Penal Code is limited in its application to the repeal of a "law," and does not extend

repeal of a municipal ordinance. See *People v. Tisdale*, 57 Cal. 104. The judgment is reversed.

We concur: PATERSON, J.; GAROUTTE, J.

WEBSTER v. SAN PEDRO LUMBER CO.
(No. 19,273.)

(Supreme Court of California. Feb. 9, 1894.)
EVIDENCE—ACCOUNT BOOKS—PRELIMINARY PROOF.

1. The determination of the trial court as to the insufficiency of the preliminary proof necessary for the introduction of any documentary evidence will not be disturbed if there has been no abuse of discretion.

2. The mere fact that defendant's bookkeeper manipulated its books in order to defraud it does not, of itself, necessitate a reversal of the lower court's ruling that they were sufficiently correct to be used in evidence against plaintiff.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by E. W. Webster against the San Pedro Lumber Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Graff & Latham, for appellant. Stephen M. White and R. H. T. Variel, for respondent.

McFARLAND, J. This is, in form, an action to recover certain moneys alleged to have been deposited by plaintiff with defendant at various times from January 1, 1887, to November 1, 1889, to be held by defendant in trust for plaintiff. The answer denies that any moneys were deposited with defendant in trust, and avers, substantially, that, during the times mentioned in the complaint, defendant was engaged solely in the business of buying, selling, and dealing in lumber; that it was not engaged in banking business, and was not in any respect a trust company; that from August 31, 1887, to October 31, 1889, plaintiff was an employee of the defendant in the lumber business; that between August 31, 1887, and April 29, 1889, plaintiff did make certain deposits of money with defendant, but that they were made at the request of plaintiff, and for his accommodation and convenience, and not for the accommodation of defendant; that, during said times, plaintiff made purchases of lumber from defendant; that defendant has fully paid plaintiff for his services, and for all money deposited; that defendant kept a full and accurate account of all transactions between it and plaintiff, and that upon a settlement of the accounts between them on October 31, 1889, there was due and owing from plaintiff to defendant the sum of \$81.24. The answer also set up the statute of limitations as to all items prior to April 29, 1889. The court found, substantially, that all the averments of the answer were true, except, perhaps, as to the statute of limitations, and gave judgment for defendant for the \$81.24. Plaintiff appeals from the judgment and

from an order denying a motion for a new trial.

The main contention of appellant is that the evidence does not support the findings, but this contention cannot be maintained. Appellant does not pretend to have kept, himself, any general account of the various transactions between him and the respondent. He relied upon the books of account kept by respondent of its general and current business, and made no objection to the state of his accounts with respondent, as reported from its books, until long after he had gone out of its employment. The only evidence of importance offered by him was his own testimony, based mainly upon written memoranda which he said he had made from memory of a certain book in which he had made some entries, and which had been destroyed. His recollection of the things to which he testified was so uncertain, and his testimony in chief was so modified in his cross-examination, that, if there had been no other evidence in the case, we would not be justified in disturbing the findings of the court.

Appellant contends that the court erred in admitting in evidence the account books of respondent. The objection to the introduction of the books was not upon the general ground that the books of respondent were not competent evidence, but upon the ground that the preliminary proof of their correctness, etc., was not sufficient. The general rule is that, where certain preliminary proof is necessary to the introduction of any kind of documentary evidence, the sufficiency of such proof is to be determined in the first instance by the trial judge, and that his determination of the matter will not be disturbed unless there has been an abuse of discretion. *Bryce v. Joynt*, 63 Cal. 378; *Butler v. Beech*, 55 Cal. 28; *Verzan v. McGregor*, 23 Cal. 342. In the case at bar there was clearly sufficient evidence of the correctness, etc., of the books to warrant the court in admitting them in evidence. Afterwards, one of the chief bookkeepers of respondent absconded, and it appeared that he had made certain manipulations of some of the books, particularly the cash book, for the purpose of defrauding the respondent and embezzling some of its funds; but there was clearly sufficient evidence as to the correctness of the books, so far as the accounts and rights of those dealing with the respondent were concerned. The evidence as to the acts of the absconding bookkeeper is not sufficient to upset the ruling of the court as to the sufficiency of the preliminary proof to warrant the introduction of the books. There is nothing in the objections to questions asked witnesses about the correctness of the books, and there is no other point in the case which needs notice. Judgment and order affirmed.

We concur: FITZGERALD, J.; DE HAVEN, J.

HOLLENBACH v. SCHNABEL (No. 19,-
248.)

(Supreme Court of California. Feb. 9, 1894.)

REPLEVIN—EVIDENCE—JUDICIAL NOTICE.

1. The affidavit, bond, and sheriff's return, being filed by the sheriff, as required by Code Civ. Proc. § 520, each describing the property as in the complaint, and the latter reciting its taking and delivery to plaintiff, need not be formally introduced as evidence, but the court may take judicial notice of them as showing the fact of plaintiff's possession.

2. A finding that plaintiff did not rescind certain sales to defendant is one of fact, and not a conclusion of law.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Claim and delivery by Phil Hollenbach, trading as Phil Hollenbach & Co., against E. C. Schnabel. Judgment for defendant. Plaintiff appeals. Affirmed.

Henry Bleeker, for appellant. Graff & Latham and M. E. C. Munday, for respondent.

SEARLS, C. This is an action of claim and delivery, to recover possession of certain liquors sold and delivered by plaintiff to defendant Schnabel, and which it is claimed were procured by fraudulent representations of defendant. The cause was tried by the court, written findings filed, and judgment ordered in favor of defendant (1) for the return of the property; (2) for the sum of \$721.75, the value thereof, in case a return cannot be had. Plaintiff moved for a new trial, and, his motion being overruled, appeals from the order denying such new trial. The court found, among other things, that on the 28th day of December, 1889, the sheriff of Los Angeles county, under and by virtue of an affidavit, undertaking, etc., filed by direction of the plaintiff, took possession of the property, and thereafter and on the 3d day of January, 1890, delivered the same to the plaintiff, and that the value thereof was and is \$721.75. Appellant contends that there was no evidence in support of these findings. There was on file, among the papers in the case, the affidavit and undertaking on behalf of plaintiff for a return of the property, describing it as in the complaint; the return of the sheriff duly certified, showing the taking of the property from defendant, and describing it precisely as in the complaint and affidavit; and the statement that he delivered it to the plaintiff, as found by the court. These papers were not formally offered in evidence at the trial, but, being on file as papers in the case, were used by the court in making its findings. Treated as evidence, they showed conclusively the delivery of the property to plaintiff, and the question arises, should a new trial be granted for this cause?

The Code of Civil Procedure (section 520) requires the sheriff to file the affidavit, no-

tice, and undertaking, with his proceedings thereon, with the clerk of the court in which the action is pending. The answer demanded a return of the property, or a recovery of its value and damages. I am of opinion the court was at liberty to take judicial notice of the previous proceedings had in the cause, the evidence of which, under the official signature of its sheriff, was, as provided by the Code, on file in the case. Courts will take judicial notice of their records and officers. The case of *Blum v. Stein*, 68 Tex. 608, 5 S. W. 454, involved a like principle. The plaintiffs had brought an action, and wrongfully sued out a writ of attachment, under which property of the defendant had been levied upon, sold, and the proceeds paid into court. Defendant had answered, averring the wrongful issue of the attachment, and asking damages on account thereof, which he recovered. The court entered judgment, without reference to the fund arising from the sale of the attached property. On appeal, the supreme court held this to be error, and said: "The court knew judicially that the money was in court;" and, after specifying what should have been done with it, added: "To have authorized the court to do this, it was not necessary that the evidence rejected should have been introduced." In *State v. Bowen*, 18 Kan. 475, it was held that the court will take judicial notice of all prior proceedings in a case, and hence that, on a plea in bar of "once in jeopardy," it was unnecessary to introduce evidence of a former trial and the verdict rendered on such trial. In every case where a demurrer is interposed to a complaint upon the ground that the cause of action is barred by the statute of limitations, the court must and does, for the purpose of passing upon the question thus presented, take judicial notice of the date at which the action is commenced. And we think it may be said generally that, when necessary for the administration of justice in a given case, the court will take such notice of all previous and undisputed proceedings therein as appear of record, certified or authenticated as required by law, and required by law to be on file or of record in the cause.

The findings of the court show that defendant is the owner of and entitled to the possession of the property in dispute. Plaintiff introduced in evidence the proceedings in insolvency of defendant, which showed his claim of right to the property, and that it was taken from him by the sheriff, and was held by the latter for the plaintiff. Its value was averred in the complaint, and not denied by the answer; hence the only question was as to the possession by plaintiff. To prove this, the return of the sheriff was proper evidence, and, that return being of record, the court might well avail itself of it in determining the fact, or, if the fact had not been found, in determining the right of defendant as a question of law to a judgment for its

the findings of fact cover all the material issues made in the case. The finding "that plaintiff did not rescind said sales, or either of them," was one of fact, and not a conclusion of law, as contended by appellant. It is the ultimate fact, of which the other facts mentioned in the complaint were but identify. See *Levins v. Rovegno*, 71 Cal. 3, 12 Pac. 161, where the distinction between conclusions of law and deductions of fact is discussed at some length. This fact being found, manifestly all the others become important, for the reason that, if plaintiff failed to rescind the contract, he was not in a position to recover the property sold in an action for claim and delivery, even had the court found the defendant guilty of fraud. The order appealed from should be affirmed.

We concur: HAYNES, C; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

EGENER v. JUCH et al. (No. 19,155.)
Supreme Court of California. Feb. 10, 1894.)
On bank.
On rehearing. For original opinion, see 12 Pac. 432.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause. The affidavits upon which the attachment was dissolved present no real or substantial conflict as to the facts. The attorney for the respondents made an affidavit stating in general terms that at the time the attachment issued they were actually residing in Los Angeles. But this was merely his conclusion or opinion. The affidavits filed by the plaintiffs, on the other hand, are full and specific as to the facts from which the question of residence is to be determined, and they are not contradicted. They show clearly and beyond any question or room for doubt that the defendants had been, for many years, residents of New York; that they were in California at the time of the attachment as members of a theatrical troupe, traveling from place to place, giving performances according to a definite programme, and intending to leave the state within a few days. The case is in substantial particular like *Hanson v. Grant*, 23 Pac. 56, or any of the cases upon the authority of which it was decided; and the order of the superior court cannot be upheld upon any theory except that the mere presence of a defendant in the state at the time an action is commenced, under circumstances which enable the plaintiff to serve a personal service of the summons, make him a resident within the mean-

ing of this proposition, and the court, I am sure, would hesitate to affirm it.

EAMES v. CROSIER et al. (No. 19,288.)
(Supreme Court of California. Feb. 7, 1894.)
ACTION ON NOTE — SUFFICIENCY OF COMPLAINT — ISSUES RAISED BY PLEADINGS — CONFORMITY OF FINDING — BURDEN OF PROOF.

1. A complaint alleging that plaintiff is the owner and holder of the note in suit, and that the payee, for value and before maturity, assigned it by indorsement in blank, sufficiently shows plaintiff's title.

2. The complaint alleged that the note was indorsed in blank, and delivered by the payee to plaintiff, which the answer denied, averring that the payee indorsed and delivered the note to one R., who "is still the owner of the note." The evidence showed that the note was indorsed in blank by the payee, and delivered to R., who assigned it, before maturity, to T., and that T. transferred and delivered it to plaintiff. *Held*, that a finding that T. purchased and received the note in good faith, and without notice of any of the facts stated in the answer, was not outside of the issues raised by the pleadings.

3. Where fraud in the inception of a note is shown, the burden of proof is on the indorsee to show that he is an innocent holder; but the burden is discharged, and a prima facie case made in his favor, where he shows that he purchased for value in the usual course of business.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Eames against Crosier and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal.

Thomas J. Carran, for appellants. Chas. Lantz, for respondent.

PATERSON, J. The plaintiff recovered judgment in the court below for the sum of \$681.52 and costs of suit on two promissory notes for \$250 each, dated May 9, 1889, payable in 6 and 12 months, respectively, after date. It is claimed by the appellants that the second count does not state a cause of action. The point made is that it is insufficient to allege that the "plaintiff is now the holder and owner of said promissory note." The point would be well taken if this were the only allegation showing ownership in the plaintiff. It is alleged, however, that at the time the note was made it was delivered to Bandholt, the payee named therein, and "that thereafter J. F. Bandholt, for value and before maturity, assigned said note by indorsing same in blank on the back thereof." This, taken in connection with the allegation of possession, was sufficient to show the plaintiff's title; the effect of an indorsement in blank being to make the paper payable to the plaintiff, not as an indorsee, but as bearer. *Poorman v. Mills*, 35 Cal. 120; *Curtis v. Sprague*, 51 Cal. 241.

It is alleged in the first count that the note was indorsed in blank, and delivered by Bandholt to the plaintiff; but the findings and evidence show that the note was in-

dorsed in blank by Bandholt, the payee, and delivered to one Runels, who, before the maturity thereof, assigned and delivered the same to M. M. Talmage, and that the latter afterwards sold and transferred the note to the plaintiff. It is claimed by appellants that, inasmuch as the plaintiff acquired the note after maturity, he can recover only upon showing title in a prior bona fide holder, and that this cannot be done because of the allegation of a direct assignment of the note from Bandholt to himself. The court found that Talmage "purchased and received and paid for said notes in good faith, without notice of any of the facts stated in the answer." This finding, it is claimed, is outside of the issues raised by the pleadings; and this would be the fact if there were nothing more in the pleadings on the subject than the allegation of the complaint that the note was indorsed and delivered by Bandholt to the plaintiff. In the answer, however, it is denied that Bandholt ever assigned or delivered said note to the plaintiff, and it is alleged that the note was indorsed and delivered by Bandholt to Runels, and that the latter "is still the owner of said note." The finding, therefore, is not outside of the issues raised by the pleadings.

The court found, in accordance with the allegation of the answer, that the defendants were induced to make and deliver the notes by false representations as to the value and character of certain lands, but that Talmage "purchased and received and paid for said notes in good faith, without notice." Appellants contend that this finding that Talmage "purchased and received and paid for said notes in good faith, without notice," is not supported by the evidence. It is admitted that the notes were acquired by both Talmage and the plaintiff for value; but it is claimed that proof, on the part of the defendants, that the notes were procured from the defendants through fraud, cast upon the plaintiff the burden of showing that the plaintiff or Talmage purchased without notice of the equities set up in the answer. Authorities are cited which support this contention, but later decisions qualify the rule as to the burden of proof. Upon proof by the defendant of fraud or illegality in the inception of the note, the burden is cast upon the indorsee to show that he is an innocent holder. This the latter may do by showing that he purchased the note before maturity, or from an innocent indorsee for value, in the usual course of business. When this is done, unless the evidence shows that the note was taken by the plaintiff under circumstances creating the presumption that he knew the facts impeaching its validity, the burden is cast upon the defendant to show, if he would defeat the plaintiff in his action, that the latter took the instrument with notice of the defendant's equities. This view is entirely consistent with what was said by the court in *Jordan v. Grover*, (Cal.) 33 Pac. 889. The

statement of the learned justice who wrote the opinion therein, that the plaintiffs, in order to sustain the burden cast upon them, must show that they purchased the note before maturity, in good faith, for value, in the usual course of business, and "under circumstances which create no presumption that they knew the facts which impeach its validity," is merely appositional to the rule which had already been stated, that, "where fraud or illegality in the inception of the note is shown by the maker, the burden of proof is then cast upon the indorsee to show that he is an innocent holder." As before stated, this burden is discharged, and a *prima facie* case is made in his favor, when he shows that he purchased for value in the usual course of business. In *Davis v. Bartlett*, 12 Ohio St. 541, the court, referring to *Munroe v. Cooper*, 5 Pick. 412, cited by appellants herein, said: "And the judge refers to the case of *Munroe v. Cooper*, 5 Pick. 412, as particularly in point to sustain this view. If to show that he purchased the negotiable paper in the usual course of trade, before due, and for a valuable consideration, in such a case, be understood by the judge as a fair *prima facie* showing that he acted honestly and without a knowledge of the fraud, the correctness of the remark must be admitted, but, if the remark is to be understood as meaning more, it must be regarded, I think, at variance both with authority and correct reasoning;" and, in summing up, the court used the following language: "But it is certain that it cannot be maintained, either upon authority of the cases, English or American, that, from the fact of the defendants proving a fraudulent diversion or transfer of the paper, it then becomes incumbent upon the plaintiff to prove, not only payment of value and a purchase in the usual course of trade, but also his own ignorance of the fraudulent diversion or transfer." In 1 Daniel, Neg. Inst. (4th Ed.) § 819, the author says, speaking of the holder: "He makes out a *prima facie* case by proving that the instrument was indorsed to him for value before maturity. Nothing else appearing, a presumption arises that he purchased the note in good faith, without notice of the fraud, because it is not likely that he would give full value for a note which he believed to be fraudulent, taking the hazard upon himself, and because it would be difficult to prove good faith in any better way. These, at least, are the conclusions of well-considered decisions, which rest, as we think, on sound reasoning; but in others the courts have indicated a more stringent rule, and a disposition not to relieve the plaintiff of the burden of proof by mere proof that he gave value. Unless there were circumstances which seemed to bring home to him notice of the fraud or illegality imputed, the requirement of further proof than the giving of fair value seems unreasonably harsh and exacting." This, we think, states the true rule. No circumstances were shown in this

plaintiff paid \$500, for the notes. We have referred to Talmage particularly, because, to recover on the first note, plaintiff, who took the note when overdue, must show that a prior holder took the note for value before maturity. It is a settled principle that if the party who transferred the instrument to the older took the note for value, and before maturity, unaffected by any infirmity in it, the older acquired as good a title, although he took the note when overdue. The findings support the judgment, and we find no error in the record. The judgment and order are therefore affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

LEONIS v. BISCAILLUZ. (No. 19,013.)
Supreme Court of California. Feb. 12, 1894.)

APPEAL—INTERVENTION BY CREDITOR.

Since Code Civ. Proc. § 387, permits any one interested to intervene before trial, and a judgment confessed to defraud a creditor does not bind the latter, a stranger to the record cannot oppose a motion to reverse and remand, to which the parties of record assent, on the ground that, since rendition of the judgment appealed from, intervenor has recovered a money judgment against respondent, and levied on the land in controversy; that she believes that the technical merits the judgment should be affirmed, but that the parties are colluding, as against intervenor, for a judgment to divest respondent of title; and that respondent is insolvent and has no other property to satisfy intervenor's judgment.

Department 2. Appeal from superior court, Los Angeles county; William P. Wade, judge.

In the matter of the appeal of Jean Leonis against M. V. Biscailuz. Motion for reversal and remand for new trial, opposed by Victoria J. de Yorba. Motion granted.

Reymert & Orfila and Smith, Winder & Smith, for appellant. R. Dunnigan, J. R. Dupuy, and E. H. Bentley, for respondent.

DE HAVEN, J. The parties to this action have filed a stipulation herein to the effect that the errors assigned by the appellant in the record in this case are well taken," and at the judgment and order appealed from all be reversed, and the cause remanded to the superior court for a new trial, and we moved for a judgment in accordance with this stipulation. The motion is opposed by one Victoria J. de Yorba, who has filed an affidavit to the effect that, since the rendition of the judgment appealed from, she has recovered a money judgment against respondent here, and has caused an execution thereon to be levied upon the land in controversy in this action; "that she informed and believes that, upon the technical merits of this appeal, the respondent,

believes that, since her said levy on the said interest of Biscailuz in said Leonis' lands, an arrangement has been arrived at between the appellant, Leonis, and respondent, Biscailuz, that by some form of consent judgment, or by some device, the particulars of which cannot be ascertained by affiant, a judgment of this court shall be suffered by said Biscailuz to be taken against him, as respondent, in favor of the appellant, Leonis, the effect of which arrangement will be to divest the said Biscailuz of title to the lands and property levied on by affiant, and thereby prevent the affiant from the collection of her said judgment from the said Biscailuz." It is also stated in the affidavit that the respondent, Biscailuz, is insolvent, and has no other property than that in controversy here out of which to satisfy the judgment of the affiant, and she asks to be allowed to intervene in the action in this court, and to file briefs on the technical merits, and that the court dispose of the cause on its merits, and without reference to the stipulation of the parties to the record.

The application is certainly a novel one. Under section 387 of the Code of Civil Procedure, one who has an interest in the matter in litigation may be permitted to intervene before the trial of an action, but there is no authority for such intervention after judgment, and while the cause is pending in this court on appeal; nor has a stranger to the record any right to call upon this court to investigate and pass upon the merits of an appeal, when the parties to the record have consented to an affirmance or reversal of the judgment without such investigation and decision. Nor is it at all necessary that the judgment creditor in this case should be permitted to obtrude herself into the case at this time in order to protect her rights. The cause is to be reversed, and when it is remanded to the superior court she will have the right, at any time before judgment in the action, to present her petition for intervention in accordance with section 387 of the Code of Civil Procedure, and have the same determined in accordance with what may then appear to be her rights in the premises; but, if it were otherwise, and final judgment was to be rendered in this court or in the superior court against the respondent herein, upon his confession or stipulation, such judgment, if fraudulently confessed by the alleged judgment debtor for the purpose of preventing the application of the property in controversy to the satisfaction of the claim of the judgment creditor, and the appellant herein participating in such fraudulent purpose, would not conclude the rights of such creditor, although her rights were acquired by the levy upon such property during the pendency of this litigation. It is to "fair and bona fide judgments,

and not to fraudulent ones, that the right of their enforcement against purchasers pendente lite is given. For no obligation, either legal or moral, withholds one from setting up his vendor's title as against him who has fraudulently contrived with his vendor to weaken or destroy it after he has conveyed the property to him. No principle of policy or convenience requires that such judgment should conclude his rights." *Haywood v. Sledge*, 3 Dev. 338.

It follows from what has been said that the motion for leave to intervene, and to file a brief herein, must be denied, and the judgment and order appealed from will be reversed in accordance with the stipulation. Judgment and order reversed.

We concur: **McFARLAND, J.; FITZGERALD, J.**

ST. LOUIS NAT. BANK v. GAY. (No. 19,202.)

(Supreme Court of California. Feb. 8, 1894.)

SET-OFF—WHEN ALLOWABLE—ASSIGNED CLAIMS.

1. Civ. Code, § 1459, provides that the assignee of a nonnegotiable written contract for money takes it subject to all defenses existing in favor of the maker at the time of the indorsement. Code Civ. Proc. § 368, provides that in the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off existing at the time of or before notice of the assignment. *Held*, that the one section is merely an enlargement of the other, and that a defendant may avail himself of a set-off acquired before notice of assignment.

2. "Set-off," as used in section 368, applies to demands independent in their nature and origin, and not arising out of the note or contract sued on.

3. To constitute a "set-off existing at the time of or before notice of the assignment" of the chose in action, within the meaning of Code Civ. Proc. § 368, the set-off need not be actually due at the time of such notice.

Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the St. Louis National Bank against John H. Gay, Jr., to recover on notes. Defendant pleaded as a counterclaim another note, and the court deducted the amount thereof from plaintiff's judgment. Plaintiff appeals. Affirmed.

Burnett & Gibbon, for appellant. Conklin & Hughes, for respondent.

McFARLAND, J. On February 4, 1891, defendant Gay made and delivered to D. D. Dare two nonnegotiable notes, each for \$2,500 and interest, and each payable one year after date. On February 24, 1891, Dare assigned these notes to the plaintiff. On February 12, 1891, Dare made and delivered to J. M. Collins his negotiable promissory note for \$5,000 and interest, payable one year after date; and on October 21, 1891, said note to Collins was purchased by and regularly assigned to defendant. At the time of this purchase defendant had no notice that his note

to Dare had been assigned to plaintiff, but several months afterwards, on February 1, 1892, he was notified of such assignment, and at the time of such notice the note from Dare to Collins was not quite due; the date of its maturity being February 12, 1892. The two notes sued on matured February 4, 1892. The present action was commenced August 1, 1892, several months after all the notes had matured. The defendant pleaded as a counterclaim the said note from Dare to Collins, and the court allowed it, and deducted its amount from the judgment in favor of plaintiff. The plaintiff appeals from the judgment upon the judgment roll, and contends that the court erred in recognizing said Collins' note as a legal set-off.

The first contention of appellant is that the set-off was not available, because it was not acquired until after the said assignment from Dare to appellant, notwithstanding the fact that it was acquired before notice of such assignment. This contention is based on section 1459 of the Civil Code, which provides that the assignee of a nonnegotiable written contract for money or personal property takes it "subject to all the equities and defenses existing in favor of the maker at the time of the indorsement." But section 368 of the Code of Civil Procedure provides as follows: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defense existing at the time of or before notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before maturity." These two sections must be construed as though they "had been passed at the same moment of time, and were parts of the same statute." Pol. Code, § 4490. Section 1459 is not restrictive; and the maxim, *expressio unius, etc.*, does not apply to it when considered in connection with said section 368, which became law at the same moment. The two sections are not contradictory, and therefore the rules of construction which aid in cases of contradictory provisions need not be invoked. The one section is merely an enlargement of or addition to the other, and the law as declared by the two sections is that a defendant may avail himself of a set-off acquired before notice of assignment, provided the set-off be in other respects good. It was so held in *McCabe v. Grey*, 20 Cal. 510, and has been assumed to be the law ever since. Appellant refers to the fact that in *Pomeroy on Remedies and Remedial Rights*, (section 166) *McCabe v. Grey* is hostilely criticized; but, in this instance at least, the opinion of the text writer has not overruled the decision of the court. We see nothing in the contention that one of the sections should be construed as referring to choses in action different from those embraced in the other. Section 368 embraces every kind of things in action except negotiable paper, which paper alone is excluded.

from its operation. Appellant seems to contend that there can be a value set-off to a nonnegotiable note only when the matter of set-off arises out of the note itself, as want of consideration, etc., and that it cannot arise out of another distinct, independent contract; but this is not the meaning of "set-off," as used in section 368, although such meaning might be not inaptly given to what was once commonly called "recoupment." The meaning of set-off is correctly stated in Abbott's Law Dictionary, with authorities cited, as follows: "Set-off differs from recoupment in that it is more properly applicable to demands independent in their nature and origin while recoupment implies a cutting down of a demand by deductions arising out of the same transaction." "Counterclaim," as used in our Code, includes both recoupment and set-off, and is, strictly speaking, a pleading by which matters arising out of recoupment or set-off are averred. It may be used by defendant to plead, as against the plaintiff: "(1) A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the cause of action; (2) in an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action." Code Civ. Proc. § 438.

The only point of any difficulty in the case at bar is raised by appellant's contention that respondent cannot use the note from Dare to Collins as an offset, because it was not due at the time he received notice of the assignment from Dare to appellant, although full title to it had been acquired before such notice. His position is that a set-off is not available against an assignee unless it be due, payable, and suable at the time of notice of assignment. There are New York authorities to this effect, but the statute law of New York upon the subject is essentially different from that of California. The New York cases go upon the theory that the statute there provided that the counterclaim must be such as might have been set off while the contract belonged to the assignor. *Myers v. Davis*, 22 N. Y. 401; *Martin v. Kunzmüller*, 37 N. Y. 396; *Fuller v. Steiglitz*, 27 Ohio St. 355. But there is no such statute in this state. By section 438 of the Code of Civil Procedure, in an action on contract the defendant may set up any cause of action arising upon contract and "existing at the commencement of the action." If Dare had kept his note and sued on it in August, 1892, respondent could unquestionably have set off the Collins note; and it seems a clear proposition of law, under the sections of our Code above stated, that, in an action by the assignee of a chose in action not negotiable, the defendant may successfully plead any set-off which he could have so pleaded against the assignor, if he had retained and brought suit on it, provided he acquired it before notice of assign-

ment, and provided, further, that it was "existing at the commencement of the action." It is contended that at the time of the notice of assignment the Collins note was not an "existing" set-off because it was not then quite due, and therefore not presently suable. But the thing itself—the note, the chose in action—was then existing, and it was pleadable by counterclaim when this action was commenced. The point under review has not been definitely determined in this state; and it may be considered *res integra*. There has been a diversity of decisions on the subject in other states, and, as was said by the supreme court of Ohio, in *Fuller v. Steiglitz*, *supra*, "the phraseology of different statutes gives rise to this diversity in the cases." Under our statutory provisions we think that the correct rule is that stated in *Bank v. Balliet*, 8 Watts & S. 311. In that case suit was brought upon a bond given by defendant to the bank, and assigned to one Swader, and defendant set up certain obligations of the bank which he had acquired before notice of the assignment—some of such obligations, it seems, not being due at the time of such notice. The court say: "The court was right in admitting the evidence, because, although the liability of the bank was not complete when the defendant had notice of the assignment, yet the transaction out of which the defense arises commenced before he was informed of the transfer of the bond." And, again, the court say: "The time the contract begins between the assignee and the obligor is when the latter has notice of the assignment. It is the duty of the obligee or assignee to inform the obligor that he has parted with the bond, and if this is omitted they are in default, and not the obligor, who, until he is informed otherwise, has a right to suppose that the bond is still the property of the obligee, and to act and contract with the obligee, or others, under that reasonable supposition." This rule seems to us to be just and right. A debtor may fortify himself against the coming suit of his creditor by the purchase of any cross demands which may be counterclaimed when that suit shall come, and between them an assignee has no standing until he shall have given notice of the assignment. When a stranger voluntarily interferes with relations between third parties, and takes an assignment of an obligation from one of the latter to the other, he is in no position to beg for equitable consideration, and has only such right in the premises as the statute gives him, and under the statute he stands in the shoes of his assignor until he gives notice of the assignment; but such notice in no way destroys or impairs any right which the debtor had acquired against the creditor prior to such notice. The relative times at which the notes in the case at bar matured is of no consequence, since they were due at the commencement of the action; for, under the

rule invoked by appellant, a debtor could not use a note falling due before his own obligation, if before its maturity he received notice of assignment. Moreover, under such rule, if A. should give B. his nonnegotiable note for a certain sum of money, due in six months, and B. should afterwards employ A. to render certain services, to be paid for at the maturity of said note, the latter could not safely rely upon the value of the services as a set-off to the note; because, after the services had been rendered, the set-off could be defeated by an assignment of the note and notice of the assignment before compensation for the services was in praesenti due and payable. The judgment is affirmed.

We concur: FITZGERALD, J.; DE HAVEN, J.

PENN PLACER MIN. CO. et al. v. SCHREINER et al.

(Supreme Court of Montana. Feb. 19, 1894.)
APPEAL—STATEMENT ON MOTION FOR NEW TRIAL
—TIME OF FILING—AMENDMENTS.

1. Where amendments to a statement on motion for a new trial comprise additional matter, which is complete and intelligible in itself, the statement will not be disregarded because the amendments are not engrossed with the record, but occupy a separate position at the end of such statement. *Canal Co. v. Lay*, 26 Pac. 1001, 10 Mont. 528, distinguished.

2. A statement on motion for a new trial will not be stricken from the record because the evidence is not all in narrative form, unless admonition is unheeded, and the abuse exceeds a just indulgence to litigants, unaware of the improper practice.

3. Where an order extends the time for filing a statement on motion for a new trial, or for doing any act in court practice, "to" a specified day, the day specified is part of the time within which the act may be done.

Appeal from district court, Jefferson county; Thomas J. Galbraith, Judge.

Action by the Penn Placer Mining Company and others against John Schreiner and others. From a judgment for plaintiffs, defendants appeal. Plaintiffs move to strike from the record appellants' statement on motion for a new trial. Motion denied.

Cowin & Parker and Toole & Wallace, for appellants. McConnell, Clayberg & Gunn, for respondents.

HARWOOD, J. This case stands on motion to strike from the record the statement on motion for new trial—First. Because the statement on motion for new trial was not served within the time prescribed by the statute, or within the period of time provided by order of court. This alleged ground is based upon the respondents' construction of the order of court extending time. They insist that where the court, by order, extends time to a date named, as "to December 2d," the period of extension expires at the close of the day preceding the date named in

the order,—in this instance at the close of December 1st, because December 1st reaches to December 2d. We think the contemplation of such an order of court or stipulation providing time to a certain date within which to do an act in court practice, such as the filing or service of a paper, includes the date named, as the close of the period prescribed. Secondly. It is contended that service of statement on motion for new trial was not made in time, although made within the period stated in the order of court extending time to file statement. The order extending time reads, "For filing statement on motion for new trial;" and it is contended that this order did not suffice to extend the time for service of said statement. The record shows that service of statement was waived by telegram from respondents' counsel to appellants' counsel on the 1st day of December,—the day the order of court was made extending time to "file statement." This telegram was made part of the record by amendment, allowed by the trial court, accompanying the objections to the settlement and allowance of the statement, on the alleged ground that it was not served in time.

It is further urged that the statement on motion for new trial should be disregarded by this court, because the evidence is not entirely reduced to narrative form; and that the amendments are not engrossed in the record, but occupy a separate position at the close of the statement on motion for new trial. These amendments embody several instructions given to the jury by the court; the special findings of the jury; some estimates used by counsel in argument of the case, which the jury was, by agreement of counsel, allowed to take to the jury room; some record entries in relation to notice of motion for new trial, extending the time for preparation of statement, etc., together with objections to the settlement and allowance of the statement inserted in the record, and made part thereof by way of amendment allowed by the court. All these amendments comprise additional matter, complete and intelligible in itself, and not of the character referred to in the case of *Canal Co. v. Lay*, 10 Mont. 528, 26 Pac. 1001. Apparently no greater convenience or certainty would result from these amendments being in one part of the statement instead of another.

As to the objection that the testimony is not all in narrative form, other records have offended more grievously on that score than this one, and yet have been tolerated by this court. This record may be subject to some criticism on the ground that the testimony is not all reduced to narrative, but it is well understood that there are examples of testimony very difficult to reduce to narrative form without losing or gaining some force thereby; and, where such is the case, this court has been in the habit of indulging the statement of evidence by question and answer, as given on the trial. It is somewhat

ward to draw the line between the cases which should and those which should not be dismissed on this particular ground. It is a ground which the court should and will act upon on its own motion. And when admonition is unheeded, and the abuse exceeds a just indulgence extended to litigants unaware of the improper practice, rather than to counsel, who are the real offenders, we shall then apply the pruning knife of dismissal to sever from this appellate jurisdiction such records as unwieldy, cumbrous, and improper ingraftments thereon. From our examination of this record we do not consider it one which should be thus dealt with. The motion to strike out the statement, in our opinion, should be overruled. An order will be entered accordingly. Motion overruled.

PEMBERTON, C. J., concurs.

BROPHY v. WHITE, (MEYER, Intervener.)
(Court of Appeals of Colorado. Feb. 12, 1894.)

INTERVENTION—JUDGMENT.

Where goods replevied are delivered to plaintiff, and defendant defaults, a judgment against intervener, who never had possession, that plaintiff recover of him possession, or in default thereof, the value, is erroneous.

Error to district court, Phillips county.

Replevin by Thomas White against James P. Brophy. Alexander F. Meyer intervened. Defendant defaulted, and judgment was rendered for plaintiff against intervener. Intervener brings error. Reversed.

Hedley V. Cooke and Munzing & Barnes, for plaintiff in error.

REED, J. Thomas White (defendant in error) brought suit by replevin against James P. Brophy to recover some horses, of which he claimed to be the owner, stating the value of the property at \$250. The writ was served, and the property delivered to the plaintiff. Meyer (plaintiff in error) claimed the property by virtue of a chattel mortgage executed by Brophy, and filed his petition as intervener. It appears that Brophy made no defense to the action of White or the intervention of Meyer,—left White and Meyer to adjudicate and settle the title. The case was tried to a jury. Verdict for plaintiff for the possession of the property, or, in default of possession, for \$373,—exceeding the value laid in the complaint \$123. Motion was made to set aside the verdict, and for a new trial. Plaintiff's counsel remitted the excess of \$123. The motion was overruled, and judgment entered, as follows: "It is considered, ordered, and adjudged that the said plaintiff do have and recover of and from the said intervener, Alex. F. Meyer, the possession of the property in controversy herein, to-wit, * * * or, in case a return of said property cannot be had, that

he do have and recover of and from said intervener, Alex. F. Meyer, the sum of two hundred and fifty dollars, the value of said property, together with his costs by him laid out and expended in this behalf, taxed at seventeen and 33-100 dollars; and let execution issue therefor." When we realize that the suit was brought by White against Brophy, and that the sheriff delivered the property to White, who retained it, and that the intervener had never had the possession, such a result would not seem to be conducive to the happiness of an individual who was unfortunate enough to file a petition of intervention, and would rather have a tendency to discourage efforts of that kind in that vicinity. It also appears that the plaintiff, while retaining the replevied property, sued out a writ of execution to make the amount of the judgment against the intervener, and was stopped by the suing out of this writ of error. It seems to this court, that the ambition of the district court should have been fully satisfied by awarding judgment against the defendant, Brophy, finding against the intervener and dismissing his petition, and charging him with the necessary costs of intervention. The judgment of the district court will be reversed as to all the parties, and remanded. Reversed.

FREEDMAN v. GORDON.

(Court of Appeals of Colorado. Feb. 12, 1894.)

REAL-ESTATE AGENTS—RIGHT TO COMMISSIONS.

A real-estate agent who offers his services to F. to effect an exchange of F.'s stock of goods for land is not entitled to compensation for bringing F. and T. together, where the negotiations fell through because T. had no title to the land which he proposed to exchange.

Appeal from Arapahoe county court.

Action by Jesse B. Gordon against Pauline Freedman. Judgment for plaintiff. Defendant appeals. Reversed.

Osborn & Taylor, for appellant. Sheridan & Short, for appellee.

THOMSON, J. About the month of August, 1891, Pauline Freedman, the defendant below, was the owner of a stock of goods in the city of Denver supposed to be worth \$6,000 or \$7,000, which was in charge of her husband, as her agent. The plaintiff, who seems to have been a real-estate and merchandise broker, offered Mr. Freedman, the agent, his services in effecting a trade of this stock for real estate and cash. Plaintiff had a man in view, with whom he thought he would be able to negotiate the deal, and took Mr. Freedman to Evanston, where he showed him certain lots which were to go into the trade. Freedman was pleased with the lots, and was willing to take them. Plaintiff then sent for the purported owner of the lots, whose name was Tinkel, and who lived in

the eastern part of the state. Tinkel came to Denver, and conferred with Freedman. They agreed on the price of the lots, and the amount of cash to be paid. The value of the goods was to be determined by invoice. The title to the lots was to be clear, subject only to the result of a suit which had been brought against the entire tract, of which the lots were a part. It turned out, however, that Tinkel did not own the lots, nor any of them, and could make no title of any kind to them, and the trade was abandoned. Freedman afterwards sold the stock to other parties. This action was brought by the plaintiff to recover compensation for his services in the attempted transaction. The court gave him judgment for \$208, from which the defendant appealed. There is nothing in the foregoing facts which would entitle plaintiff to any compensation, but, even if the proof were otherwise, the value of the services is not shown. Plaintiff says that 5 per cent. was the usual commission for deals of that size; but the value of the goods was never ascertained, so that there was no sum upon which commissions could be calculated, nor was there any other evidence from which it could be said what the services were worth. The \$208 for which judgment was given was a mere arbitrary sum found by the court in its independent wisdom. The judgment is clearly erroneous, and must be reversed. Reversed.

ROBESON v. MILLER.

(Court of Appeals of Colorado. Feb. 12, 1894.)

MASTER AND SERVANT—WAGES—PAYMENTS.

A judgment for wages, for a sum less than plaintiff claims and defendant admits, cannot stand against plaintiff's objection.

Error to Arapahoe county court.

Action by Andrew J. Robeson against Alexander Miller for balance on account for wages. Judgment for plaintiff for \$50. Plaintiff brings error. Reversed.

N. M. Laws, for plaintiff in error.

THOMSON, J. Suit for balance due for wages by Robeson against Miller. Judgment for plaintiff for \$50. Plaintiff comes here by writ of error. The principal witnesses were the parties. Both agree that plaintiff worked ten months at \$25 per month. They disagree as to payments. Defendant says he paid plaintiff \$174.65, and plaintiff says he only received \$133.50. Ten months' labor at \$25 per month amounts to \$250. If plaintiff's figures were correct, he was entitled to judgment for \$116.50. If defendant was more worthy of belief, plaintiff was entitled to judgment for \$75.35. The court gave judgment for \$50. How it found this sum, or why it rendered such a judgment, we are unable to guess. If the plaintiff was right, the judgment was wrong; if the defendant

was right, the judgment was wrong; and being wrong upon any hypothesis, it must be reversed.

HENDERSON, County Clerk, v. BOARD OF COMRS OF PUEBLO COUNTY.

(Court of Appeals of Colorado. Feb. 12, 1894.)

COUNTY CLERK — COMPENSATION — SERVICES AS CLERK FOR COMMISSIONERS — PAYMENT OF FEE TO TREASURER.

1. The fact that the county clerk is ex officio recorder of deeds and clerk of the board of county commissioners does not entitle him to compensation for his services in the two latter capacities, in addition to the annual salary of a county clerk as fixed by Act April 6, 1891, § 12.

2. The per diem allowed a county clerk for his services as clerk of the board of commissioners is a fee, within the meaning of Act April 6, 1891, § 22, requiring all the fees collected by such officer to be paid into the county treasury.

3. The board of county commissioners cannot make it a condition of allowing the clerk the per diem allowed him by law for serving as clerk of such board that he pay the amount into the county treasury, since the county is protected by the clerk's bond against any failure of duty in that regard.

Error to district court, Pueblo county.

Claim by C. D. Henderson against the board of county commissioners of Pueblo county. His claim was in effect disallowed, and he appealed to the district court. Judgment affirming such disallowance, and said Henderson brings error. Reversed.

B. F. McDaniel, for plaintiff in error. Geo. Salisbury, for defendant in error.

THOMSON, J. The plaintiff in error was county clerk of Pueblo county. On March 7, 1892, he presented to the board of county commissioners of that county his bill for services, as clerk of the board, for 17 days in January and 24 days in February of that year, at five dollars per day. The bills were conditionally allowed by the board, the condition being that the amount be paid into the county treasury. Plaintiff declined to accept the condition, and payment was therefore not made; so that the action of the board amounted to a disallowance of the bill. From this order of the board an appeal was taken to the district court, where the order was sustained, and judgment given against the plaintiff. The law fixes the amount to be paid by the county for such services at five dollars per day, and it is conceded that the services were rendered as stated.

The arguments of counsel are, for the most part, addressed to the interpretation of the general laws relating to the office of county clerk, and of the salary act of April 6, 1891, (Sess. Laws 1891, p. 307.) This act, which is entitled "An act to provide for the payment of salaries to certain officers, to provide for the disposition of certain fees," etc., was passed in pursuance of section 15 of article 14 of the constitution, and sub-

stantially carries out its provisions and requirements. It is provided by section 12 of the act that the county clerks in the several counties shall receive, as their only compensation for their services, an annual compensation, to be paid out of the fees and emoluments of their respective offices, actually collected, and not otherwise, which compensation or salary is, in counties of the second class, fixed at \$3,500. Pueblo county is made by the act a county of the second class. Section 22 requires all fees collected by the several officers named in the act to be paid over to the county treasurer, to be kept by him in separate funds, appropriately designated; the fees so paid by the county clerk to be known as the "County Clerk's Fee Fund." The salary of each officer is to be paid out of his own fund, and no other; and any balance left to the credit of any fund, after the salary for the year is paid, goes into the general county fund. Section 573, and the sections following, of the General Statutes of 1883, relate to the office of county clerk, and define his duties. He is *ex officio* recorder of deeds, and clerk of the board of county commissioners. His duties are, among other things, to attend all sessions of the board of county commissioners; to keep the county seal and the records and papers of the board; to keep a record of the proceedings of the board, under its direction; to record all deeds and other instruments authorized by law to be recorded, and preserve the books, records, etc., deposited or kept in his office.

Counsel for plaintiff, in an argument which may be said to possess the merit of ingenuity, contends that the county clerk holds three offices, namely, those of county clerk, clerk of the board of commissioners, and recorder of deeds, and that the salary to which he is limited by section 12 applies to him only as county clerk, leaving him the right to independent compensation for his services in his other two offices. Counsel, in undertaking to separate the clerk of the board of commissioners and the recorder of deeds from the county clerk, and from each other, has, we think, misconceived the law. The county clerk holds but one office. He discharges the duties of clerk of the board and recorder of deeds *ex officio*. These services are required of him solely by virtue of his office of county clerk. The law imposes these duties upon the county clerk, and the fees and emoluments which arise from their performance are the fees and emoluments of his one office. They are required by law to be paid over to the county treasurer; and the salary, payable out of his fee fund, is the only compensation to which the county clerk is entitled for all the services with which his office is charged.

For his services as clerk of the board of commissioners, the law allows the county clerk a fixed sum *per diem*; and counsel argues that charges for these services are not fees, but are in the nature of a salary

receivable by him for special services, which he is nowhere specifically required to pay into the treasury, and which he is therefore entitled to, in addition to the salary mentioned in section 12; and he finds an absurdity in the idea of the clerk collecting money from the county, paying it back to the county, and then receiving it again from the county. The difficulty which counsel has elaborated here is not apparent. Conceding that, technically, a *per diem* is improperly called "fees," yet the legislature has classified it as such, and it is with the legislative intent, only, that we are concerned. On the same day of the approval of the salary act, (April 6, 1891,) an act was approved, entitled "An act concerning fees," etc., (Sess. Laws 1891, p. 200.) It prescribes the fees of county officers for the various services required of them, and, among them, those of county clerk, to which section 7 is devoted. By this section the charges for recording instruments, making abstracts of title, making copies of records, making tax lists, serving as clerk of the board of county commissioners, and for the performance of other services required of him, are separately defined. For serving as clerk of the board, he receives a *per diem*, but this service is placed in the same category with his other services, and the section applies the term "fees" to all the charges authorized, without distinction or discrimination; and it is the fees or charges here provided for, including his *per diem* as clerk of the board, that the county clerk is required by the salary act to turn over to the county treasurer. Nor is there any absurdity in receiving fees from the county, paying them back to the county, and receiving them again as salary. The same thing occurs with the sheriff and county judge. Each of them, in the exercise of the duties of his office, may become entitled to fees from the county, which it must pay, notwithstanding they are immediately returned, and eventually paid back to the same officer, when his salary is allowed. The legislature has prescribed this method for the transaction of such business. The law is valid, and courts have no alternative, except to declare it, when called upon for that purpose.

But the condition upon which the board of commissioners approved the bill was unwarranted. The amount charged by the plaintiff for his services as clerk of the board was payable to him absolutely, and the board had no authority to annex to its payment a condition that it be paid into the treasury, or any other condition whatever. The salary act makes it the duty of the clerk to collect every fee for services performed by him, and provides a forfeiture if he shall willfully or negligently fail to do so. It also requires him, individually, to pay the fees collected by him to the treasurer, and imposes a penalty upon him for his default in that particular. On the first Monday of each month, during his term of office, he must make to the chairman of the board of commissioners a re-

port in writing, under oath, of all the fees, commissions, and emoluments of his office, of every name and description, stating fully the manner in which such fees and emoluments accrued. Section 573, Gen. St. 1883, requires from him a bond, with approved security,—conditioned for the faithful performance of all the duties of his office, and the payment of all moneys that may come into his hands as clerk, as required by law. No duty is devolved upon any individual, corporation, or board to see that he makes the proper disposition of the fees which he collects. He alone is responsible for that, and against any malfeasance, misfeasance, or nonfeasance on his part the county is amply protected. But the commissioners have no right, upon any pretext or in any manner, to withhold from him payment for services rendered to the county. The plaintiff's bill should have been unconditionally allowed, and the amount paid to him; and, if he had failed or refused to pay it into the treasury as the law requires, then the commissioners could have instituted the necessary and proper proceedings for the protection of the county. Upon the facts the plaintiff was entitled to judgment, and, because it was given against him, it must be reversed. Reversed.

TERRITORY ex rel. SAMPSON et al., Board of County Commissioners, v. CLARK, Township Trustee.

(Supreme Court of Oklahoma. March 2, 1894.)

SUBMISSION OF CASE WITHOUT ACTION—STATUTES—CONSTRUCTION—TAXATION—IMPROVEMENTS ON PUBLIC LANDS.

1. Under the provisions of section 541 of article 21 of chapter 66, p. 852, of the Statutes of Oklahoma of 1893, parties to a question which might be the subject of a civil action may agree upon a case containing the facts of the controversy, and submit the same to any court which would have jurisdiction if an action had been brought, and the court shall render judgment as if an action were pending.

2. In the construction of statutes, it is a cardinal rule that the intention of the legislature must govern.

3. In the construction of statutes, when the intention of the legislature can be gathered from the statute, words may be modified, altered, or supplied to give to the enactment the force and effect which the legislature intended.

4. Also, in such interpretation, the intention of the legislature must be ascertained by a construction of the whole act, or enactment or enactments of the legislature on the same subject.

5. In construing an act the court should, if possible, so interpret all of the provisions of an enactment or enactments of the legislature as to harmonize their various provisions and, so far as possible, to give reasonable effect to all.

6. Construing the seventh subdivision of section 2 of article 1 of chapter 70, p. 1032, of the Statutes of Oklahoma of 1893, which provides that "all breaking, wells or fertilizing upon lands upon which final proof has not been made" shall be exempt from taxation, together with subdivision 15 of section 3 of the same article, which provides that "all other property, real and personal, of any kind not including improvements upon government lands, or lots not deeded,"

shall be subject to taxation; also, together with subdivision 15 of section 1 of article 2 of the same chapter, which provides that the list of taxable property made by the assessor and assessed to each person shall contain "all other property not specially enumerated in this section by its actual cash value, except such as is specially exempted by section two of this chapter,"—it is held that the legislature intended that all improvements upon government lands, except all breaking, wells, or fertilizing, and also lots not deeded, on lands where final proof and final entry had been made, are subject to taxation.

(Syllabus by the Court.)

Original application at the relation of John J. Sampson and others, as board of county commissioners of Logan county, for mandamus to compel A. Z. Clark, trustee and assessor of Spring Creek township, to list for taxation certain property. Granted.

Harris Houston, for plaintiff.

BIERER, J. This is an agreed case in mandamus, submitted as an original proceeding in this court to determine in a summary manner the legal question involved under the provisions of general section 4419, (section 541, art. 21, c. 66, p. 852, St. Okl. 1893,) which provides: "Sec. 541. Parties to a question, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court, which would have jurisdiction if an action had been brought. But it must appear, by affidavit, that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The court shall thereupon hear and determine the case, and render judgment as if an action were pending." All of the provisions of this section have been fully complied with, and we will determine the question involved the same as if it had been brought before us by an original action in the usual form. The sole question involved in this controversy is as to whether or not improvements upon government lands and lots not deeded, excepting the breaking, wells, and fertilizing upon lands upon which final proof has not been made, are subject to taxation; and this question involves the construction of certain sections of the revenue law of this territory.

The legislature of 1893 passed an act, which took effect March 14, 1893, entitled "An act to provide for the raising and collecting of revenue, and repealing chapter 70 of the Statutes of Oklahoma, entitled 'Revenue.'" St. Okl. 1893, p. 1031. The seventh subdivision of section 2 of article 1 of said act (c. 70, p. 1032, St. Okl. 1893) is, with the heading of the section, which must be read to get the meaning thereof, as follows: "Sec. 2. The following classes of property shall be exempt from taxation, and may be omitted from the list herein required to be given:—
"Seventh. All breaking, wells or fertilizing upon lands upon which final proof has not

been made." Section 3 of the same article, excepting the first 14 subdivisions thereof, is as follows: "Sec. 3. All other property, real and personal, shall be subject to taxation in the manner provided in this act:" "Fifteenth. All other property, real and personal, of any kind, not including improvements upon government lands, or lots not deeded." Subdivision 15 of section 1 of article 2 of said act, which provides for the manner of listing property, and what the list of taxable property made by the assessor and assessed to each person shall contain, provides as follows: "Fifteenth. All other property not specially enumerated in this section by its actual cash value, except such as is specially exempted by section two of this chapter." This last provision, referring to "section two of this chapter," was evidently intended to refer to section 2 of article 1 of this chapter, for that is the only section 2 contained in any part of this chapter which refers to the exemption of property from taxation.

This controversy depends upon the construction to be given by the court to the fifteenth subdivision of section 3 of article 1, above given. It is contended by the assessor that the subdivision referred to exempts from taxation all improvements upon government land, and all lots not deeded. This part of this statute upon its face seems to read that way, but in construing it we must consider the well-known rules for the construction of statutes. In the construction of statutes it is a cardinal rule that the intention of the legislature must govern. *Suth. St. Const. § 218; Sedg. St. & Const. Law, p. 325.* Also, that when the intention can be gathered from the statute, words may be modified, altered, or supplied to give to the enactment the force and effect which the legislature intended. *Suth. St. Const. § 218.* In the *Eureka Case*, 4 *Sawyer*, 302-317, *Fed. Cas. No. 4548*, Judge Field, delivering the opinion of the court, said: "Instances without number exist where the meaning of words in a statute has been enlarged, or restricted and qualified, to carry out the intention of the legislature. The inquiry, where any uncertainty exists, always is as to what the legislature intended, and when that is ascertained it controls." Another rule for the interpretation of statutes is that the intention of the legislature must be ascertained by a construction of the whole act, and all of the enactment or enactments of the legislature on the same subject must be so construed as to "harmonize their various provisions and, so far as possible, to give reasonable effect to all." *State v. Cobb*, 2 *Kan.* 32; *State v. Young*, 17 *Kan.* 414; *Commissioners v. Morrall*, 19 *Kan.* 141; *Gardenhiro v. Mitchell*, 21 *Kan.* 83; *Wenger v. Taylor*, (*Kan.*) 18 *Pac.* 911; *Pond v. Maddox*, 38 *Cal.* 572. In the light of these rules, reading the fifteenth subdivision of section 3 of article 1 of chapter 70 in connection with

the seventh subdivision of section 2 of article 1, and in connection with the fifteenth subdivision of section 1 of article 2, all of the same chapter, it will be manifest that there is an apparent conflict between the fifteenth subdivision of section 3 of article 1, and all the other provisions of the same enactment; and we must, if possible, harmonize them so as to give effect to all provisions of this enactment of the legislature in accordance with the legislative intent. It will be observed that the seventh subdivision of section 2 of article 1 is contained in an article, entitled "Property Subject to Taxation," the first section of which gives the general classes of property subject to taxation, the second section, under which the seventh subdivision occurs, relates to specific property which is exempt from taxation. Under this provision, the legislature, when it had under consideration the question as to what property in the way of improvements upon government lands upon which final proof had not been made, designated three specific items which should be exempt from such taxation. These were breaking, wells, and fertilizing. The fifteenth subdivision of section 3, which is the bone of contention and makes the trouble, is contained under section 3 of article 1, which relates to the kinds of property which shall be subject to taxation, and does not relate to the exemption of property from taxation; and we believe, construing the statute and these provisions together, that, if the legislature had intended that all improvements upon government lands and all lots not deeded should be exempt from taxation, they would have shown such intent by enumerating these articles as exempt from taxation under the seventh or some other subdivision of section 2 of article 1. This chapter 7 of our revenue law is a substantial re-enactment of the provisions of chapter 75 of the Laws of Oklahoma of 1890, relating to revenue, with certain modifications. The two enactments are drawn under the same heading and the same title, excepting the addition of the repealing part that is added to the last enactment. They have the same number of articles, excepting that to the present chapter 70 is added an article relating to the extension of the time for the payment of the taxes of 1893, and each article is given the same title as the old one; and we can gather the intention of the legislature somewhat by a comparison of the two. The twentieth subdivision of section 3 of article 1 of chapter 75 of the Laws of 1890, for which this subdivision (fifteenth) of section 3 of article 1 of the present law is substituted, reads as follows: "Twentieth. All other property, real and personal, of any kind, including all improvements upon government lands, or lots not deeded."

It will be observed that this present subdivision (fifteenth) is couched in the same language as the old enactment, excepting that

after the word "kind" the word "not" is inserted, and the word "all" is omitted. When the legislature were revising the old chapter of our revenue law, and came to this subdivision, (twentieth,) they found that it provided that all improvements upon government lands and all lots not deeded were subject to taxation. They evidently did not desire to continue to tax all improvements upon government lands, for they had said, in the seventh subdivision of the section with reference to the exemption of property from taxation, "that all breaking, wells or fertilizing" upon lands not deeded should be exempt from taxation, and they then inserted the word "not" and omitted the word "all;" evidently intending not that all improvements upon government lands should be exempt from taxation, also intending not that all improvements upon government lands should not be subject to taxation, but actually intending that all other property than that specifically mentioned in the subdivisions before that contained in the same section, real and personal, of any kind, not including exempt improvements upon government lands, also including lots not deeded, should be subject to taxation. This construction makes all of the sections of this article consistent one with the other. A construction exempting from taxation all improvements upon government land, or lots not deeded, makes subdivision fifteenth of section 2 of article 1 inconsistent with the other provisions of this chapter referred to. After the legislature had passed along in their revision of this statute, and had come to subdivision fifteenth of section 1 of article 2, relating to the manner of listing property, they provided that all property than that which had in the same section been specifically enumerated should be listed at its actual cash value, except such as was specifically exempted in section 2 of the same chapter, (meaning section 2 of article 1;) that is, they meant that all property should be listed except such as they, by their own enactment, had specifically exempted by said section 2. The legislature evidently did not mean that the fifteenth subdivision of section 3 should be taken as a provision for exemption, and as granting a much broader exemption than the provision specifically made upon that subject; but they meant that no property should be exempted except that which was made specifically exempt by section 2 of article 1. The change in subdivision fifteenth of section 3 of article 1 of the present statute was evidently made, not to extend the exemptions of section 2 of article 1, but in order that there might be no question that the improvements which had been exempted should not be subject to taxation. We do not believe that, so far as the language of this subdivision fifteenth of section 3 of article 1 of this act is concerned, there can be any serious question as to whether or not the legislature intended that "lots not deeded"

should be subject to taxation. The expression, "not including improvements upon government lands" is not intended also to include the designation of "or lots not deeded." Those are two distinct expressions, separated by a comma between "lands" and "or," and were not intended by the legislature to be considered together, or else the comma would have been omitted; and the expression would have read, "not including improvements upon government lands or lots not deeded," omitting the comma. The expression, "lots not deeded," was evidently intended to refer to property which consisted of lots in a town site upon which the entry had been made, and the lots of which had not been deeded to the beneficiaries; and this species of property was intended to be taxed, independently of any question of improvements thereon, the same as any other real estate. It was undoubtedly given the specific designation in order that no technical question of its actual status in law might prevent it from being made subject to taxation. The reference to improvements upon government lands cannot be said to be confined to government lands covered by a homestead entry or subject to a homestead claim; for improvements upon a town lot upon which entry has not been made are as much improvements upon government lands as would be the case if the improvements were on a tract of land subject to homestead entry, but upon which final proof had not been made. The legislature evidently intended to make their provision, with reference to improvements upon government lands, to include both government lands held by homestead entry and government lands held under a town-site claim, but where, in such cases, final proof and entry had not been perfected. The "lots not deeded" referred to another class of property, as above stated. We do not believe that there is any substantial ground for the claim of the defendant that "lots not deeded" were intended to be exempt from taxation. This enactment of the legislature was passed for the purpose of raising revenue, and not for the purpose of relieving valuable properties from their proper share in contributing to the burdens of taxation. The history of this country makes us know, as the legislature must have known in passing this law, that many of the most valuable lots in the cities of this territory are yet not deeded. The litigation concerning some has not yet passed beyond the control of the land department and the deeds given, or, in the newer portion of the territory, sufficient time has not elapsed in which the trust imposed upon the town-site trustees could have been administered and the deeds passed. Yet those lots are private property. They are liable to execution for debt. They are a valuable property, of which the occupant under the land laws is the owner, but has not the legal title. Why should such property be exempted from taxation? We can see no reason, nor do we

believe the legislature saw any, or intended so; for their enactments exhibit an entirely different intent.

This conclusion on our part to interpret this revenue law by restricting the meaning of subdivision fifteenth of section 3 of article 1, and adding the word "exempt" thereto, so as to interpret it as if it read: "Fifteenth. All other property, real and personal, of any kind, not including exempt improvements upon government land, and lots not deeded,"—the phrase "and lots not deeded" relating back to the phrase "all other property, real and personal, of any kind," so as to give it the meaning of including in the property subject to taxation also lots not deeded,—is sustained not only by what we believe the legislature actually meant in passing this law, as we gather their meaning from the entire enactment, but also by ample authority. Sutherland, in his work on Statutory Construction, (section 246,) says: "The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute. * * * General words or clauses may be restricted to effectuate the intention, or to harmonize them with other expressed provisions. * * * The sense in which they were intended to be used furnishes the rule of interpretation, and this is to be collected from the context; and a narrower or more extended meaning is to be given, according to the intention thus indicated. In an act providing for raising state taxes, railroads were taxed on the basis of passenger traffic, and it was provided that every railroad paying such tax should not be assessed 'with any tax on its lands, buildings, or equipments.' This exemption was confined to the taxes of the kind provided for in the act, and was held not to conflict with another act for a municipal tax." The words "or" and "and" are very often loosely used in legislative enactments, and one is often read in the place of the other in order to give the real meaning to the legislative enactment. *Suth. St. Const. § 252.* In the interpretation of legislative enactments a word is often rejected as surplusage, or a word substituted, in order to give full effect to the law. In the case of *Palms v. Shawano Co.*, 61 Wis. 211, 21 N. W. 77, the supreme court of that state, in construing the statute, substituted the word "north" for the word "south," and announced the rule to be: "The court will inspect the whole act, and, if the true intention of the legislature can be reached, the false description will be rejected as surplusage, or words substituted, in the place of those wrongly used, which will give effect to the law,"—citing numerous authorities from different states in support thereof.

Another well-known rule of interpretation of statutes, which guides us in our conclusion in this case, is that where there are specific provisions in the act, relating to a particular subject, they control, as against general provisions in other parts of the statute, although the general provisions, standing alone, would give to the act another meaning. *End. Interp. St. § 216; Felt v. Felt*, 19 Wis. 208. In this last case the court say: "But it is a well-settled rule of construction that specific provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law, which might otherwise be broad enough to include it." Now, in the case at bar a provision exempting "all breaking, wells, or fertilizing" upon public lands is a specific provision with reference to the property that should be exempted from taxation. The language in the other part of the statute, "not including improvements upon government lands, or lots not deeded," is a general expression made, not with reference to the exemption of property from taxation, but with reference to property that should be subject to taxation; and we consider that the specific provisions relating to exemption, also the specific provision in the fifteenth subdivision of article 2 with reference to the listing of property, except that specifically exempted in section 2 of article 1 of the chapter, should control over this general provision contained in the first part of the statute referring to property that should be taxed, and not to property that should be exempted from tax.

Another illustration of the doctrine which the courts have established, in substituting one word for another, or adding another word, in the legislative enactment, in order to harmonize all the provisions of the enactment and give to it the meaning which the legislature evidently intended, is found in the case of *Moody v. Stephenson*, 1 Minn. 401, (Gil. 289,) where it was held that the word "final" should be substituted for the word "penal" in one section of a chapter providing for the removal by appeal or writ of error of causes from the district courts to the supreme court of that state. Entertaining these views, it is our judgment that all improvements upon public lands upon which final proof has not been made, excepting "breaking, wells, or fertilizing," and all lots not deeded where final proof and final entry have been made, are subject to taxation, and should be listed with the other property subject to taxation, when the lists are taken by the assessors, under the law.

The judgment of the court is rendered accordingly, and the peremptory writ of mandamus prayed for will be allowed, with costs. All the justices concurring.

SPROAT v. DURLAND.

(Supreme Court of Oklahoma. March 1, 1894.)

For majority opinion, see 35 Pac. 632.

BIERER, J., (dissenting.) My dissent in this case is entered, not to the action of this court in affirming the judgment of the court below, but to the reasons assigned for the affirmance of the judgment. From the facts found by this court, applying the uniform doctrine of the courts in holding that the courts have jurisdiction to restrain one contestant for the right to enter a tract of government land from forcible intrusion upon the actual possessions of another claimant to such tract, the decision of the court below should be affirmed. The findings of fact of the court showing that both Sproat and Durland were opposing claimants for the prior right to enter this tract of land, the title to which is in the government of the United States, contained among other things, the following: "That he (Sproat) was an actual settler upon said land prior to and at the time Durland filed his homestead entry; that on April 28, 1893, Sproat began occupying all of that portion of the land, except the tract heretofore mentioned as the 20 acres used for cultivation by Woodruff. Sixth. Immediately after the filing by Durland of his homestead entry, to wit, April 29, 1893, Durland entered into possession of the house formerly occupied by Woodruff, and began using all of the tract, except that formerly occupied by Lawrence, for pasture and otherwise. Sproat claimed the right to the possession of all the tract, except the twenty acres referred to. Sproat drove Durland's stock off from the premises, and Durland insisted upon his right to hold the same upon the land, and to the control of all the tract except that formerly used by Lawrence." These findings, together with the other findings to the effect that Durland had purchased the improvements of Kate A. Woodruff, including her fence, which constituted the inclosure in controversy, amount to a finding that Durland had the prior possession of the inclosure, and that Sproat was seeking by force to enter thereupon; and, this being true, the court below adjudged rightly in enjoining him from the commission of such a trespass. The strongest claim that could be made by Sproat, upon such findings, would be that Durland had ousted him (Sproat) from a prior possession, he (Durland) actually having possession at the time of the action, by having his stock thereon; and if Sproat had had the prior possession, and Durland had actually dispossessed him, when Sproat's remedy was by an action of forcible entry and detainer, and not by an action of injunction, and the court ruled properly in dissolving Sproat's injunction. It is to the reasoning of the court in holding that Sproat could be enjoined, not because

of Durland's prior possession, but because of Durland's right by virtue of his homestead entry, that I dissent.

The decision of the court is as sweeping in its character and results as it is barren of any cause or necessity therefor; and I want to enter my earnest protest against the action of the court in voluntarily assuming jurisdiction of matters which involve the contesting claims of parties litigant before the land office prior to the time that the parties have exhausted all of their rights before the land department,—the department specially designated by congress to hear and determine these contesting claims,—and to the action of the court in reasoning itself into such jurisdiction by an analysis of the homestead right contrary to the uniform and unanimous holdings of all the courts of last resort, including those of the United States supreme court and of the states and territories of this country. This decision is sweeping in its results, because it tears away the barrier which the courts have uniformly maintained against land litigants, to their entrance of its forum until after the title—at least the equitable title—had passed from the government. It is barren of necessity, therefore, because the case could rightfully have been decided upon the question properly, before the court,—as to whether Sproat or Durland was interfering with the actual possessions of the other. It gives jurisdiction to the court by an analysis of the land laws,—a thing which this court has heretofore positively refused to do. In *Commager v. Dicks*, 1 Okl. 82, 28 Pac. 864, the court say: "It is not necessary to enter into an analysis of the land laws. The question of jurisdiction over such matters was thoroughly discussed in the case of *Adams v. Couch*, 1 Okl. 17, 26 Pac. 1009, and the effects of a receiver's receipt, such as the plaintiff holds." It is only by an analysis of the homestead right that the court, in this case, is able to come to the conclusion that it has, upon the ground upon which it is based, and I consider this an overruling of this court, without any necessity being shown for such action; and, in my judgment, decisions of supreme courts should not be overruled, except in cases which necessarily require an overturning of prior holdings. It is the taking of jurisdiction of any matters involved in the litigation of contesting claimants before the land office, and which do not involve the intrusion by one party upon the actual possessions of another, that I am opposed to. This question has twice, already, been squarely before the supreme court of this territory: First, in the case of *Adams v. Couch*, 1 Okl. 17, 26 Pac. 1009,—the third decision rendered by the supreme court of the territory,—and in *Commager v. Dicks*, 1 Okl. 82, 28 Pac. 864, also decided at an early day. It is true that the case of *Adams v. Couch* only involved the question as to whether Adams, by virtue of his homestead entry, had the right to dis-

possess the other contending claimants by action of ejectment. But I consider that the form of action was immaterial, for it was squarely held that the right did not pertain to Adams, by virtue of his homestead entry receipt, to dispossess the other parties, and the case did not turn upon the form of remedy sought; and if the right did not exist, as it was held in that case it did not, certainly the form of remedy would be immaterial, for courts of equity were never instituted for the purpose of creating rights, but were instituted for the purpose of enforcing them by remedies which the courts of law, by reason of their rigid adherence to established forms, were unable to afford. It was never held that a court of equity could create a right, but only that it could enforce one; and, if there was an absence of right, a court of equity has always been held as powerless to grant relief as a court of law itself. But the question of jurisdiction, while not the principal one involved, was the principal one passed upon, in *Adams v. Couch*; and I think the court rightly considered it at that time, because of the urgent request of most able counsel, based upon the great public necessity for having this question settled in the early jurisprudence of this territory. The court, in giving its reasons for passing on this question, said: "While we regard it, ordinarily, as the better course to pass only upon such questions as are decisive of the case, we feel that for the public good, and for the purpose of checking, so far as it is within the scope of our power and duty, unnecessary and expensive litigation, we should at least give our views on the question of jurisdiction raised by the pleadings, the decision of which will dispose of the other questions, preceding it." And, after summing up the leading cases of the courts of the states and of the supreme court of the United States, the court said: "Here is a strong array of federal decisions announcing the doctrine as to when the court will exercise jurisdiction over the decisions of the land department,—the time when it will be, and the time when it will not be, exercised. The courts have uniformly held that they will not exercise such jurisdiction while the matter is still in fieri, and prior to the time when the United States has parted with the title." "To declare the plaintiff out of court in this case is to give effect to the doctrine here laid down." That is to say, the plaintiff was declared out of court, not entirely because of the failure of his homestead entry to vest him with the right which he claimed,—to dispossess others also claiming the same land,—but because of the fact that the courts were without jurisdiction in such matters. In *Commager v. Dicks*, Commager claimed the right to dispossess Dicks from a part of the land held by him, because of the existence of Commager's homestead entry on the quarter section. The learned chief justice who rendered the opinion in

the court below, giving to the homestead entry a similar inherent power as that which is given by the court in this case, sustained the action of Commager, and entered a judgment dispossessing Dicks. On appeal to this court the learned chief justice joined with his associates in overruling the judgment of the court below, not after an analysis of the homestead right, because that was squarely refused, but upon the ground that the court had no jurisdiction of the action.

These decisions of the supreme court of this territory already rendered are in harmony and accord with the decisions of the other courts on which they are based; and the case, in my judgment, is not changed now because of the fact that the question determined goes no further, and can go no further than the matter of possession of the tract of land, and because the decision of this case cannot be held to bind the officers of the land department in any of its branches. While a decision here cannot bind the parties there, it cannot but help to encourage the one and deter the other,—a thing which congress never contemplated, in giving jurisdiction to the courts of this territory. The very fact that such decision cannot bind the litigants before the land office also shows how fruitless will be all of the expensive litigation carried on in the courts, under the doctrine laid down by the court in this case, by contending claimants; how fruitless will be the judgments rendered at the behest, probably, of the party who has the money to carry on this useless litigation against his brother, who can illy afford, or possibly not bear, the expense thereof. But I do not consider that the right to possession of a tract of government land is a question so independent of his right to enter as that it may be determined by the courts in advance of the decision of the land department in the case, in such a manner as that the court shall say that the one claimant shall possess all, and the other none. The policy of the land laws, for the last half century, has been to induce and require, on the part of a claimant, the actual occupancy and improvement of the land to which title is sought. The pre-emption law required residence, improvement, and payment for the land. The homestead law required residence and improvement, without payment. It was a later law than the pre-emption law, giving the land to him who sought it, without money and without price, in order to get him to actually cultivate and improve the land. The timber culture law, passed later, provided the cultivation and growing of trees as the only conditions precedent to the actual procurement of title. And in all these acts, of course, proof of the performance of these conditions was required, but the tenor and effect of these laws show that what the government sought, in giving this bounty, was that the grantees should actually occupy and improve; and it was never in-

entry; that the right was given to the entryman to refrain from occupying the land himself, and at the same time keep from the possession of such land another, who sought, in any form, to enter it, nor to dispossess another claimant already in possession of a part of the land which he (the homestead entryman) might also desire to occupy. The inherent right to occupy did not give a legal or equitable right to dispossess, and such right to dispossess was not acquired by the conditional equity vested in the homestead entryman prior to his complete compliance with all the requirements of the law. I find no authority holding that the homestead law grants any such right. The homestead law has been in force for more than 30 years. All of the rights inherent and pertaining to it, with reference to the occupancy of land and the right to the exclusive possession, if at all, are the same now as they were on May 20, 1862, when the law was passed. But no court of last resort, so far as I can find,—and I am cited to none in the learned decision to which I dissent,—has ever held that there was inherent in the homestead entry any such right, and the reasoning of the decisions which have approached the question are all the other way. In *Marqueze v. Frisbie*, 101 U. S. 473, the court say: "After the United States has parted with its title, and the individual has become vested with it, the equities subject to which he holds it may be enforced, but not before. *Johnson v. Towsley*, 13 Wall. 72; *Shepley v. Cowan*, 91 U. S. 330." Again the court say: "We have repeatedly held that the courts will not interfere with the officers of the government while in the discharge of their duties in disposing of the public lands, either by injunction or mandamus. *Litchfield v. Register*, 9 Wall. 575; *Gaines v. Thompson*, 7 Wall. 347; *Secretary v. McGarrahan*, 9 Wall. 298." "And we think it would be quite as objectionable to permit a state court, while such a question was under the consideration and within the control of the executive departments, to take jurisdiction of the case, by reason of their control of the parties concerned, and render decree in advance of the action of the government which would render its patents a nullity when issued." It seems to me it would be quite as objectionable for the territorial court to take jurisdiction of the parties litigant, and render a judgment which would affect the rights of the parties concerning the particular thing which congress sought to induce the intending entrymen to do; that is, to improve, occupy, and cultivate the land, based upon the conclusion of the existence of a valid entry, which is sworn to be tainted with an infirmity which renders it void from the beginning.

The act approved March 2, 1889, by which these lands were opened to settlement, contains the following language: "But until said lands are opened for settlement by proclama-

and no person violating this provision shall be permitted to enter any of said lands to acquire any right thereto." Now, the record shows that Sproat filed his affidavit duly corroborated, to the effect that Durland entered upon and occupied the Oklahoma lands in violation of this section of the act of congress. If that is true, what right can Durland get? The act says that he shall acquire any right thereto. Can the land department, in advance of the action of the court, say that he shall acquire a right by virtue of an entry which is void from the beginning, unless Sproat and his wife committed perjury, which certainly we must not assume? The right to dispossess another does not exist at all,—which I do not believe is true,—exists by virtue of the homestead law, and, if that entry is void, then no right can exist. If a fraud has been perpetrated upon the government by Durland, then the government has granted him no right, but this must only be determined by the land department, and the courts cannot, in advance of the action, issue an order which will deprive him of such right. This question of jurisdiction is squarely before the court in the case of *Pay v. Plugert*, 64 Wis. 603, 25 N. W. 271, cited by the supreme court of this territory in *Adams v. Couch*, wherein it was decided that the right existed in the homestead entryman—who had had the homestead entry recorded on the tract, but which had been canceled, as he alleged, through the fraud and perjury of the defendant, and who had also resided upon the land, and furnished his proof of compliance with the law, to entitle him, as he believed, to the certificate therefor, but whose proof had been rejected by the secretary of the interior, and his right to the certificate denied on the cause of the fraud and perjury of the defendant—to dispossess the defendant. He then had the homestead entry upon the tract. In this case the supreme court defined the right given to a party by virtue of an existing homestead entry, and said: "If the courts of this state have jurisdiction of the case, it is not perceived what remedy could be administered. There has been an adjudication of the land claim by the department against the claim of the plaintiff, and the defendant has settled on the land as a homestead claimant, and obtained a first certificate as such. That certificate gives the defendant no right to the land. He must thereafter perform all of the conditions of the homestead law before he will be entitled to a certificate upon which the title can be issued." If the certificate of the land department gives the defendant no right to the land, can it be said that there is inherent in the right to dispossess another, who is in the procedure provided by the land department, is contesting for the prior right to enter the land, and procure the title thereto from

quity enforce a right which does not exist in law or equity? If so, then the jurists of this country and of England have been very delinquent, in failing to discover this principle. Further along, the court say: "The defendant has made and filed such affidavit, and paid the initiation fee, and entered upon the settlement of the land. He has yet to secure a homestead therein by residence and cultivation. He has yet secured no right to the land, but a mere privilege or permission to enter upon it for the purpose of obtaining title to it by the performance of such conditions. He may never secure or be entitled to the land. The title still remains in the government, and may so remain." This decision is squarely in point upon the question of the right inherent in a homestead entry, and I am certainly unwilling to join in overruling this construction of the homestead law of the United States, made by the decision of one of the foremost supreme courts of the states of this country, and concurred in and followed by the supreme court of this territory, especially when it is done in a case which can more properly be decided upon a principle which has for years been unquestioned by the courts. The supreme court of Dakota, in the case of *Forbes v. Driscoll*, 31 W. 632,—and which is also cited and approved by the supreme court of this territory in *Adams v. Couch*, which is cited and proved in *Commager v. Dicks*,—went even beyond the question as to whether or not a contest was pending, and held that the court had not jurisdiction of a controversy concerning the possession of land between contesting pre-emption claimants, which did not involve an intrusion by one upon the actual possessions of the other, irrespective of the question as to whether or not it is even that such contest existed. The court there said: "Here the defendant alleged and tried to prove that a contest was then pending before the local land office between the plaintiff, Forbes, and the defendant, Driscoll, for the same land, which offer was rejected as immaterial. Perhaps, as a mere matter of fact, it was immaterial, for the mere fact as to whether a contest was or was not pending was immaterial; the jurisdiction of the court depending, not upon the fact of whether a contest was or was pending, but upon the fact of whether jurisdiction of the department was or was not ended by the issue of the patent. We have the jurisdiction of the land department been exercised no further than to permit the filing of the declaratory statement by a contesting claimant. The matter was in fieri, and the decision of the court on the issue framed by the pleadings, determining in advance of the department the pre-emption right in favor of Forbes, was an unwarranted interference with the jurisdiction

of the court. It is most comprehensive in its scope, and has almost universally been considered as determining against the jurisdiction of the court to interfere with the contesting claimants for public land, except in cases where one intruded upon the actual possessions of another. It matters not that this was a pre-emption case, if the right did not inhere in the homestead entryman to have and hold the exclusive possession of the tract covered by the entry. This question was determined adversely to the existence of such right in *Adams v. Couch* and in *Empey v. Plugert*. In the case of *Schoolfield v. Houle*, 22 Pac. 781, the supreme court of Colorado held substantially to the same effect, and says: "Under the homestead act, no person, by filing upon a piece of land, acquires any ownership in the same. He obtains an inchoate title, which is only completed when he has resided upon the land the period of time mentioned in the statute, and proved his right to the title, and paid for the same." In the case of *Streeter v. Rolph*, 13 Neb. 388, 14 N. W. 186,—an action brought by Rolph against Streeter to recover the possession of a tract of land,—Streeter had settled upon the land under the homestead law, made final proof, and procured his entry certificate, which the commissioners of the general land office had attempted to cancel, Rolph procured judgment in the district court, which was, upon appeal to the supreme court, reversed, the supreme court saying: "In any event, the plaintiff in error [Streeter] has rights in the land itself which can only be determined in a proper action in a court of general jurisdiction. The defendant in error entered the land as a timber claim in 1881, and claims the land under his certificate of entry. Both parties thus claiming the land itself, forcible entry will not lie." So, in the case at bar, both parties are claiming the better right to procure the title of this land from the government; both parties are claiming the right to possess the land, or parts thereof, during the litigation; and the court has no jurisdiction to interfere by a preliminary determination of rights which can only be determined by the land department. In the case of *Belk v. Meagher*, 104 U. S. 279, Belk brought an action to recover the possession of a certain alleged quartz lode-mining claim which had been in the prior possession of another under the mining laws, which gave the right to the locators "to have the exclusive right of possession and enjoyment of all the surface included within the lines of their location," which the supreme court of the United States say "is to continue until there shall be a failure to do the requisite amount of work within the prescribed time." By very statutory enactment, it will be seen, the locator under the mineral law was given "the ex-

clusive right of possession and enjoyment of all the surface" of his claim,—a right which has nowhere been granted under the homestead law. Notwithstanding this right of exclusive possession on the part of another claimant, the supreme court held with reference to Belk: "If he actually held possession and worked the claim long enough, and kept all others out, his right to a patent would be complete. He had no grant of any right of possession. His ultimate right to a patent depended entirely on his keeping himself in, and all others out; and, if he was not actually in, he was, in law, out. A peaceable adverse entry, coupled with the right to hold the possession which was thereby acquired, operated as an ouster, which broke the continuity of his holding, and deprived him of the title he might have got if he had kept in for the requisite length of time. He had made no such location as prevented the lands from being, in law, vacant. Others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force." Now, here it is substantially held that Belk might have acquired a right to prove up and acquire title to this mineral claim by actual occupancy during the period of time when another, by the law, had the exclusive right of occupancy, but which right he did not actually exercise. In other words, it seems that the exclusive right of occupancy could not prevent another right attaching, if the holder of the exclusive right did not actually exercise his right by actual possession. If an entry could be made peaceably upon lands to which another had the exclusive right of possession, a right could be acquired which would be only subject to the existence of a better right on the part of an adverse claimant. The court in this case say, in speaking of *Atherton v. Fowler*, 96 U. S. 513: "We also all agree that, if a peaceable entry had been made on lands which had been inclosed or improved, a good right might have been secured." This, it is true, was said of the rights under the pre-emption law, in applying the same doctrine to the mineral law; but I will show hereafter, by the holdings of the land department, that the same right existed as to lands covered by a homestead entry, except as against the homestead entryman, and certainly it would also exist, as against him, if he had done an act which would not permit him to enter "any of said lands or acquire any right thereto," or if the parties were contestants for the better right to make entry of the land, and the matter was undetermined in the land department.

Having now given my reasons for my opinion that the courts have no jurisdiction to entertain any action affecting the rights of parties contesting for a better right to be awarded the title to a tract of government land, excepting to restrain one party from interference with the actual possessions and improvements of the other, I desire now to

show that there is nothing in the law or the rulings of the land department which would make Sproat a trespasser upon any right of Durland, whereby a court of equity could acquire jurisdiction to restrain a trespass of one party on the lands or possession of another party. He is not only not a trespasser upon the possessions or right of possession of Durland, but he is in such position as that by virtue of his acts of settlement and improvement, if his allegations are true, and if his contention is true,—which contention this court has no power now to determine, to any extent, one way or the other,—he may, by the performance of all the requirements of the laws, procure the final receipt and patent for the tract of land in controversy. Would not an interference with the claim for the right to enter a tract of public land—an interference with the acts which he deems it proper and important that he should perform in complying with the law, and in showing his good faith in his efforts to remove the claims of the alleged fraudulent claimants to this tract of land—be an interference with the absolute and exclusive jurisdiction of the land department in its disposal of the public domain? It seems so to me, and for that reason I am unwilling to acquiesce with the jurisdiction sought to be exercised. Among other facts found by the court are the following: "On April 21, 1893, Sproat filed in the land office at Oklahoma City an affidavit of contest against the entry of Woodruff and Durland, alleging that both Woodruff and Durland were disqualified from entering the land as a homestead; that on the 24th day of April, 1893, Sproat purchased from Lawrence his improvements upon the land, and on the same day went into possession of such improvements. On May 1, 1893, Sproat filed in the land office a contest against Durland for the land, and, as a ground of such contest, alleged that Durland was disqualified from entering the same by reason of having entered upon lands in Oklahoma after March 2, and prior to April 22, 1889, and, further, that he (Sproat) was an actual settler upon said land prior to and at the time Durland filed his homestead entry." In the tenth paragraph of Sproat's affidavit for a temporary restraining order, he sets up the following: "Upon the 1st day of May, 1893, this plaintiff filed in the United States land office at Oklahoma City an affidavit of contest against the said homestead entry of Otto C. Durland, duly corroborated, charging that the said Otto C. Durland did, after March 2, and before noon of April 22, 1889, enter upon and occupy portions of the lands described in and declared open to settlement by, the president's proclamation of March 23, 1889, opening said lands to settlement, and further charging that said Otto C. Durland was within said lands before and up to the hour of twelve o'clock noon of April 22, 1889, in violation of law, and further charging that the plaintiff was a homestead settler on the said

land at and before the time that defendant made homestead entry thereon, and that such contest is now pending in the United States land office at Oklahoma City. Said settlement was made and said contest was filed by this plaintiff in good faith, and for the purpose of acquiring title to said land." This paragraph of the plaintiff's contention seems entirely to have been overlooked by the court in its findings of fact, but I cannot believe it should be disregarded, for it goes to the very basis of Sproat's claim of right of possession; and I can see no reason why, if he has a claim recognized by the land department as giving him a right to the present and ultimate use, enjoyment of, and title to this land, he should be abstractly held as a trespasser thereon by virtue simply of the claim of right inherent in the homestead entry of Durland. I consider this allegation of contest and of claim of prior right to the land by virtue of settlement as very material, when the court insists in going beyond the question of jurisdiction, which has ended all similar actions, or actions on principle the same, and enters into an analysis of the rights of these parties, which can only be determined by the land department. If, under the regulations and rulings of the land department, Sproat could acquire any claim of right by virtue of his settlement or his acts performed, then, certainly, he cannot be held a trespasser upon this land, either as against the government or as against Durland. The holdings of the land department are to the effect that the right of a settler upon a tract of government land covered by a homestead entry of another attaches as such settler eo instanti upon the relinquishment of such prior entry.

In the case of Zaspell v. Nolan, 13 Dec. Dep. Int. 148, it is held: "You sustained the action of the local officers dismissing the protest, and held that, Nolan being a settler on the land at the date of the filing of the relinquishment, his rights attached eo instanti, and are superior to those of a homesteader who enters the land immediately after the filing of a relinquishment; citing Wiley v. Raymond, 6 Dec. Dep. Int. 246. From this decision, Zaspell appealed. It appears from the record in the case that Nolan was a settler upon the land at the date of the filing of the relinquishment, and it is not claimed by the protestant that he was then, or ever had been, an actual settler on the land; but he contends that it was not necessary for him to be an actual occupant of the land, for the reason that, the land being covered by his timber-culture entry, he was as much in actual possession as if he were living upon the land, and, further, that the case should be determined by the rule announced in Tilton v. Price, 4 Dec. Dep. Int. 123, which was the rule in force when his homestead entry was made. The rule announced in the case of Wiley v. Raymond, supra, to the effect that on the relinquish-

ment of an entry the right of a settler then residing on the land attaches eo instanti, and is superior to that of a homesteader who enters the land immediately after said relinquishment, is decisive of the issue presented in this case, and is not in conflict with the rule announced in Tilton v. Price, 4 Dec. Dep. Int. 123, relied on by the protestant." The Wiley v. Raymond Case, referred to, was a case where Grassick made homestead entry on the land, and Wiley, upon the relinquishment and cancellation of this entry, made another homestead entry, and Raymond contested upon the ground of being a settler at the instant of relinquishment, he having been a settler upon the tract of land before that time. The secretary of the Interior sustained his claim, and he was awarded the land. It will therefore be apparent that there is no difference, in this regard, whether the entry was a homestead or a timber-culture entry. Under this doctrine, then, (and we cannot controvert its correctness, because it is a matter of regulation within the exclusive control of the land department,) Sproat, if his allegations are true, was an actual settler on the land at the date of Durland's entry, and the conflicting right between him and Durland can only be determined by the contest filed by him in the land office. But it is contended that the rule is changed because Durland had the right of a preferred contestant under section 2 of the act of May 14, 1880, (21 Stat. 140.) It might be conceded that, on the face of the record, Durland had the preference right, yet that would not be giving him such absolute right of possession of all the land as that he might eject a person claiming by virtue of a bona fide settlement therefrom. The regulations of the department do recognize Sproat as a prior settler; and there has been no decision of any court, so far as I have been able to find,—and none is cited by the court in this case,—which holds that a preference right is an equity in the land. If it was not an equity of sufficient force and validity to deprive any and all other contesting claimants from the right to hold possession of all or a part of the land, then such equity is not sufficient to warrant the court in dispossessing Sproat by injunction. Sproat was upon the land, claiming the right by virtue of his settlement, at the time that Durland made his filing. It may be that he anticipated the action which was taken by Woodruff and Durland. It may be that he knew that both of these parties were disqualified, by reason of having violated the law. It may be that he desired to thwart the fraudulent entry on the part of Durland, who, under the form and fashion of an inchoate right called a "preference right," intended to, and was expecting to, violate the law. Had he not a right to anticipate and thwart such fraudulent conduct? Has it come to pass that the courts of this country must protect a fraudulent entryman—one who

is alleged, by an affidavit duly corroborated, duly sworn to, to be a fraudulent entryman—merely because of the fact that under the forms of the law he may have a better right to the tract of land, if his entry is not fraudulent, than the one who brings his fraudulent acts to the notice of the department of the interior for investigation? I cannot believe so, and, not believing so, I cannot assent to any such doctrine. I do not believe that the homestead entry carries appurtenant to it the right to dispossess all other claimants to the land, no matter by what form their contest may proceed. Neither do I believe that the right of a contestant bears any such power. If the homestead entry carries with it this right, by virtue of being of record, then, if Sproat had procured the relinquishment of Woodruff, Durland, not being a prior settler, might have been dispossessed by Sproat, notwithstanding the existence of his preference right; notwithstanding that, if his acts had all been valid, he would, under the law, have been ultimately absolutely entitled to the right to finally enter this land. It would be an absurdity to hold to such position. No court has so held, and I cannot. The rights of parties litigant to government land under such a construction would depend upon mere jugglery,—upon the caprice or whim of somebody who had an inchoate right, however fraudulent it might be. But it may be said that Sproat could not have placed his entry on the land because of the existence of Durland's preference right. This is not the law, because it is not the practice of the land department, and these matters are within its regulation, and are binding until title passes.

In the case of *O'Conner v. Hall*, 13 Dec. Dep. Int. 34, Hall made timber-culture entry. James O'Conner filed an affidavit of contest against the same, and made application under the law to enter the tract. The entry was afterwards canceled, and Volney D. Throop was allowed to make entry. The matter was proceeded with to a hearing by the department requiring Throop to show cause, if any he could, why O'Conner was disqualified to make the entry, and why the heirs of O'Conner—he having deceased—should not be given a preference in the entry of this land. This is an illustration of the practice that pertains in not requiring 30 days, in which the preferred contestant may enter, to lapse, before the entry of another party may be made. In the case of *Westenhaver v. Dodds*, 13 Dec. Dep. Int. 193, will be found another case which exhibits the practice of the land department in allowing a third party to make entry on a tract of land during the period of the existence of the preference right of a preferred contestant. This may or may not be the rule of the land department. If it is the rule, then it cannot be said that the preference right is recognized by the department as bearing an equity which prevents any other person from

becoming in the regular way a litigant before the land office for the right to make the final entry. If it is not the rule, then it exhibits the fact that the regulations must be too vacillating for us to establish a rule of equity thereon. In this decision the highest branch of the land department said: "The act of May 14, 1880, (21 Stat. 140,) provides that, when a claimant files a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry. The second section of the act gives a contestant who has procured the cancellation of such entry a preference right to make entry for the land, provided he does so within thirty days after receiving notice of such cancellation. If the contestant applies to make entry within the time allowed, and some other person has in the mean time made entry, the prior entryman should be required to show cause why his entry should not be canceled, on account of its conflict with the preference right of the contestant. * * * I am of the opinion that the rights of these respective parties can be determined only by a hearing had for that purpose."

Nor was it necessary that Sproat should have made an application at the land office to enter this tract of land, and tendered the fees for such entry to the register and receiver, within three months from the date of the cancellation of the Woodruff entry, and from the date that his settlement attached upon the cancellation of the prior entry, in order to maintain his status as a prior settler in his contesting claim for the better right to enter this tract of land, and acquire the title thereto. In the case of *Rumbley v. Causey*, 16 Dec. Dep. Int. 236, the secretary says: "After pointing out the particulars in which your decision is contrary to the evidence, it is alleged that you erred in not sustaining the motion of the defendant to dismiss said action, for the reason that plaintiff did not apply to enter said tract, and tender the fees for such entry to the register and receiver, within three months from the date of his alleged settlement. There is no merit in this point. Land covered by one entry is not subject to another at the same time; and it would therefore have been an idle ceremony for Rumbley to have applied to make entry for the land already covered by the entry of Causey, as an application to enter land not subject to entry at the time the application is made confers no rights upon the applicant. Rumbley initiated contest against the entry of Causey within three months after his (Rumbley's) settlement upon the land, and by such proceeding preserved his settlement rights as effectually as he could by an application to enter, as, before his entry could be allowed, that of Causey must be removed from the land. A prior settler who initiates contest within three months after settlement, and who applies to enter within thirty days after

receiving notice that he has succeeded in his contest, is in time. It would have been error, therefore, to have granted defendant's motion to dismiss the contest, upon the grounds stated by him." See, also, *Huntsbarger v. Eickman*, 16 L. D. 270.

This, being the practice in the land department, I think it also controls this case; and I think that the rights of the parties can only be determined after hearing in the land department, and their possessions ought not to be interfered with by the courts, nor ought they to be allowed to interfere with each other, to the detriment of the one or the benefit of the other, until the land department has finally passed upon the case.

The question as to whether a settlement right can be acquired by the personal act of the party, or by the procurement of another, has no place in this case. The findings of fact show that Sproat did actually sell; and there are no decisions which hold that a settler may not purchase the improvements of another, or procure another person to make improvements for him. It is only the settlement—the actual attaching of himself to the soil—that he is required to do personally. The bounty of the land laws is given as much to the decrepit, to the invalid, to the cripple, as they are to the strong, the robust, and the powerful. If a settler might not purchase the improvements of another, or might not procure another to place them there, the cripple, the invalid, and the decrepit might be entirely deprived of the government's bounty. This was never intended.

I do not believe that Sproat was a trespasser upon this land, nor can I find anything in any of the decisions cited by the learned court that indicate this. The first decision cited is that of the opinion of the attorney general (MacVeagh) found in 1 Dec. Dep. Int. 59. This is also presented by the supreme court of the United States in *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. 350, and I will consider it in reviewing that decision. The second is the case of *Oliver v. Thomas*, 5 Dec. Dep. Int. 289. None of the language of that decision is quoted in support of the proposition, but I have examined it carefully, and find no claim there to either of the claimants being a trespasser. The department, through that eminent jurist, Secretary Lamar, determined the question of the prior rights of the parties litigant, and held that no rights under the pre-emption law are acquired by the settler to lands segregated from the public domain. This is a proposition that has hardly been controverted in recent years, but it is not this case, for the reason that when Woodruff's entry was canceled the land was released from segregation; and, as we have found before, the right of a settler at that moment could immediately attach to the land. The third decision cited is that of *Gudmundson v. Morgan*, 5 Dec. Dep. Int. 147. There is no language in this decision which would indicate that Sproat

would be held by the department to be a trespasser because of the fact of his being upon the land during the existence of Woodruff's entry. On the contrary, it is said in the syllabus, which seems to be the point of the case: "As between two settlers on land covered by the entry of another, priority of right is held to be with the one who first settled and filed application for the land, together with a relinquishment of the former entryman." This not only does not hold, by application to this case, that Sproat was a trespasser, but, on the contrary, holds that, excepting as to Woodruff, he (Sproat) might acquire a valid, subsisting, and better right to make entry of this tract of land by virtue of his settlement thereon, although made while the land was covered by the existing entry of Woodruff. It is only as against the record entryman that a valid and better right to make entry of the land may not be acquired by settlement on the land during the existence of the entry. As between other parties, the priority of settlement may determine priority of right. In this case, then, Sproat being a settler on the land, and Kate A. Woodruff having relinquished her right of entry, and Lawrence having sold his improvements to Sproat, the only better right that could attach to the land would be that of Durland, by virtue of his preference right of entry; but, as we have seen, Sproat might contest (I mean contest in the sense of oppose or litigate) that preference right of Durland by his (Sproat) placing an entry upon the land, even during the existence of the 30-days preference right on the part of Durland; and, if he might contest Durland's preference right by placing an entry of record for the land prior to Durland's entry, why may he not also contest it by his claim of prior settlement, which may exist and be valid, as against all other persons than the record entryman, at the date of such settlement? And if Sproat's better right may exist at all, how can this court say, by a preliminary determination of the matter in advance of the action of the land department, that it does not exist? If Durland has done an act, as Sproat alleges he has, which absolutely disqualifies him from making entry of this land, then he had a preference right only in name, because he had no capacity or qualification to exercise such right, and Sproat could regard it as if it did not exist at all. If it did not exist at all in fact, it did not exist in law, and its existence at the moment that Sproat's settlement right could attach upon the relinquishment of the Woodruff entry can be determined only by the hearing in the land department. If it was possible, under the rulings of the land department in the administration of the land laws, that a settlement right on the part of Sproat could be acquired by his settlement upon this land while covered by the Woodruff entry, as against all other parties than Woodruff, then a superior right must be

found to exist on the part of Durland, in this case, before it can be held that no right on the part of Sproat was acquired by such settlement, and certainly, pending such controversy, the right would not exist in Sproat's adversary to dispossess him from a possession actually and peaceably acquired. There is nothing in the law which prohibits Sproat from occupying, residing upon, and improving the land, or a part of it, if he so desires, during the existence of this land litigation with Durland; and if there is nothing in the law which prohibits such occupancy, and nothing in the law which gives to Durland an ownership in the land, then Sproat could not be a trespasser. If Sproat violated no law, and did not trespass upon any property right, then he violated no right; and, if he violated no law and violated no right, no person could enforce any remedy against him, for the law gives no remedy where no law and no right are violated. This case specifically cites the case of *Geer v. Farrington*, 4 Dec. Dep. Int. 410, where it is held that while no right by virtue of a settlement can be obtained, as against the record entryman or the United States, yet, as between such settlers, priority of settlement will be considered in determining priority of right. This is another patent exposition of the policy of the government in inducing, by all proper means, parties who desire, under any enactment, to procure the right of final entry to government land, to speedily occupy and improve the same, and gives the reward to him who first settles upon, cultivates, and improves the land, irrespective of the technical question (which I think is not in this case) as to whether or not the act segregates the land from the public domain,—a proposition which is conceded upon conceding the existence of an entry.

The fourth case is that of *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. 350. In this case, John Smith made homestead entry on the land in controversy on the 28th of March, 1879. On or about the 15th day of May, 1880, the plaintiff, Daniel Sturr, who was an occupant of an adjacent tract, without any grant from Smith, the occupant and claimant, went upon the homestead claim of Smith, and located a water right on Smith's homestead, and dug a ditch thereon; diverting the water from its natural channel, and conveying it on his own (Sturr's) homestead. After final entry, Smith sold to Beck, the defendant. Beck interfered with Sturr's using the water by means of this artificial channel, and Sturr brought an action to enjoin such interference. It is in this case that the opinion of Atty. Gen. MacVeagh, cited in 1 Dec. Dep. Int. 30, is also found, and in which this language is used with reference to the homestead right: "This right amounts to an equitable interest in the land, subject to the future performance by the settler of certain conditions, in the event of which he becomes invested with full and complete

ownership; and, until forfeited by failure to perform the conditions, it must prevail not only against individuals, but against the government." There is no contention but what this is the law, but there is nothing in this which recognizes that the homestead right carries with it any such equity as will give the courts jurisdiction to dispossess another claimant for the land from a part of the land until after the title has passed from the government. It is, in equity, "subject to future performance by the settler of certain conditions;" and it is that very subjection that renders the equity an inchoate one,—one which slumbers during the existence of a controversy in the land department, and awakens, by relation back to the moment of its existence, with all the powers of a vested right, after the conditions have been performed and the title procured. It is worthy of note that, in the conclusions of law of the court below, it is held that Smith had the prior right to that of Sturr by virtue "of his homestead filing or entry made on the 25th day of March, 1879, he having made final proof for entry thereafter." It was the fact of his having made final proof and entry thereafter which gave him the vested right, which he might have enforced in the court, of having the water flow in the regular channel of the creek over and across the land. If it had been held in this case that Smith, during the existence of the homestead entry, as it existed prior to final proof, had such a vested right as that he might divest even Sturr himself, who claimed no right to the land, of the right to use the water as he did, then I would consider the case in point. As it is, I do not. The similar nature of the vested right of a homestead and of a pre-emption claimant is clearly recognized by the supreme court in this case, where it cites the case of *Shepley v. Cowan*, 91 U. S. 330, which is a pre-emption case, and says: "And as to mere settlement with the intention of obtaining title under the pre-emption laws, while it has been held that no vested right in the land, as against the United States, is acquired until all the prerequisites for the acquisition of title have been complied with, yet rights in parties, as against each other, were fully recognized as existing, based upon priority in the initiatory steps, when followed up to a patent. 'The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants.' *Shepley v. Cowan*, 91 U. S. 330, 337." From a reading of that decision, it seems to me it is clearly shown, not that the supreme court of the United States mean that, during the existence of Smith's homestead entry, he had an equity which would warrant him in enjoining Sturr from any actual possession, (which view, alone, could make it applicable to this case, in the present condition of the parties,) but that after final proof had been made, final cer-

tificate had issued, and patent given, then his conditional equity would ripen into a vested right, which would relate back, and by the relation back, rather than by present existence during the life of the entry, before proof, cut off all intervening claimants.

Again, congress, by the act of February 25, 1885, (23 Stat. 321,) passed an act, the first section of which defined what was an unlawful occupancy of the government land, as follows: "That all inclosures of any public lands in any state or territory of the United States, heretofore or to be hereafter made, or erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure of the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or by an asserted right thereto, by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any state or in any of the territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited." What was the necessity of passing such an act, if, as a matter of law, any person who had not shown some legal means of acquiring title to the land would be a trespasser upon such lands? If the person having such inclosure before this act was passed was not a trespasser as against the government, which owned the land, and had the fee-simple title thereto, certainly he could not be a trespasser against a party who had not any ownership therein, as the courts have said, but a mere inchoate right or equity, subject to conditions. I construe this act to mean that, but for it, persons settling upon the government land, without claim of right, and occupying any of the government land, were not trespassers, as against the government. I cannot believe that congress was engaged in useless legislation, and this would be useless if the proposition that such settler was a trespasser were true. It will be noticed, however, in defining a trespass upon government land, there is excluded from such prohibition any person who has "claim, or color of title, made or acquired in good faith, or an asserted right thereto, by or under claim made in good faith with a view to entry thereof at the proper land office, under the general laws of the United States." No exception from the ban of the law could be made broader than this. It does not mean that the person must come within any prescribed or technical rules of

judicial construction, but it need only be "by or under claim made in good faith with a view to the entry thereof." Is not the claim of Sproat made "in good faith with a view to the entry thereof." It does not need to be a prior settlement, it does not need to be a preferred or preference right, but it needs only to be a claim made in good faith, with a view to final entry of the land. What right, then, have the courts, in the exercise of equity powers, to extend against the plaintiff a prohibition which the law never intended? Is it the proper exercise of equity jurisdiction to brand the claimant as a trespasser, when the law clearly exempts him from such odium? If that is equity, the sooner we get back to the rigors of the common law the safer will the rights of the people be.

This act of February, 1885, just above cited, came before the supreme court of California for construction in the case of *Whittaker v. Pendola*, 20 Pac. 680, where the court said: "The defendant, not having shown any capacity in himself to acquire the government title to the demanded premises, nor any effort or intention to do so, stands in the position of a mere naked trespasser upon the public domain, with an inclosure erected and maintained contrary to the express provisions of the act of congress of February 25, 1885, (Stat. 1883-85, p. 321;) and the main question in the case is whether, by such unauthorized inclosure, he can prevent a homestead entry of the land by a citizen of the United States who goes peaceably upon a portion of the tract, and in other respects complies with the law." And, under a particular statute of California giving a remedy by a possessory action in such case, the court held that he could not, by such acts, prevent the homestead entryman from going upon the land, but, rather, should put the entryman in possession. The language of the court there is inferentially to the effect that if the defendant had shown capacity in himself to acquire the government title to the demanded premises, or an effort or intention to do so, he would not be a trespasser, within the meaning of this law. Is there anything in this case which shows that Sproat did not have the capacity—that he was not qualified—to make entry? His capacity and his qualifications are not disputed. Is there anything in this case to show that Sproat was not making any effort, and had no intention of acquiring the government title to this tract? Certainly not, but, on the contrary, it is shown that he had purchased the actual improvements placed upon the land by another party, and had made actual settlement thereon; that he had filed two affidavits, duly corroborated, charging both Durland and Woodruff with a most serious violation of the law,—so serious, if true, as to render them disqualified to ever make entry of this land. He had done everything which he could do to show his "good faith with a view to entry thereof at the proper

land office," and, having done so, he could not be a trespasser upon the land, merely because of the existence of Durland's entry, and he could not be enjoined from this ground. When, however, he did attempt to intrude on the possession of another, no matter how tainted with fraud his claim might be, he should be restrained from such intrusion pending the litigation in the land department.

Nor do I believe that there is anything in the circumstances of the administration of the land laws of Oklahoma which warrants our courts here, in the exercise of their equity powers, in extending the well-defined jurisdiction of courts of equity, and the well-defined jurisdiction of the courts in this case. We are not starting out here upon a new equity jurisprudence, but rather should be following the doctrines of equity, which are as clearly defined as the laws themselves. "Since the combination of legal and equitable remedies in one judicial proceeding, which has been effected in many of the states, the notion seems to have been revived—somewhat vague and undefined, perhaps, but still widely diffused among the legal profession—that equity is nothing more or less than the power possessed by judges—and even the duty resting upon them—to decide every case according to a high standard of morality and abstract right; that is, the power and duty of the judge to do justice to the individual parties in each case. This conception of equity was known to the Roman jurists, and was described by the phrase 'Arbitrium boni viri,' which may be freely translated as the decision upon the facts and circumstances of a case which would be made by a man of intelligence and of high moral principle; and it was undoubtedly the theory in respect to their own functions commonly adopted and acted upon by the ecclesiastical chancellors during the earliest periods of the English court of chancery. It needs no argument to show that, if this notion should become universally accepted as the true definition of equity, every decision would be a virtual arbitration, and all certainty in legal rules and security of legal rights would be lost." Pom. Eq. Jur. § 43. Again, in section 46, the same author, in speaking of the extravagant conceptions of old writers and judges as to the system of equity jurisprudence which now exists and has existed, says: "These definitions attribute to equity an unbounded discretion, and a power over the law unrestrained by any rule but the conscience of the chancellor, wholly incompatible with any certainty or security of private right. For the purpose of illustrating these loose and inaccurate conceptions, I have placed in the footnote a number of extracts taken from the earlier writers." Then following, in section 47, he says: "It is very certain that no court of chancery jurisdiction would at the present day, consciously and intentionally, attempt to

correct the rigor of the law, or to supply its defects, by deciding contrary to its settled rules, in any manner, to any extent, or under any circumstances, beyond the already settled principles of equity jurisprudence."

I can see in all the facts and circumstances of this case no reason for going beyond the clearly-defined jurisdiction of the courts with reference to the regulation of parties upon tracts of government land, for the ultimate title to which all are contesting claimants. Entertaining these views, it is unnecessary for me to express my opinion upon the other matters decided.

REDONDO BEACH CO. v. BREWER et al (No. 19,243.)

(Supreme Court of California. Feb. 9, 1894.)

GARNISHMENT—WHEN LIES—EQUITABLE CLAIM.

Where the vendee of land makes a part payment on the purchase, and fails to make the deferred payments as agreed, he has no claim against his vendor for the amount of his part payment, or for the value of improvements placed by him on the land, which can be the subject of a garnishment in favor of his judgment creditor.

Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by the Redondo Beach Company against R. G. Brewer, the California Loan & Trust Company, and others. From a judgment for plaintiff, defendant loan and trust company appeals. Affirmed.

Walter Bordwell, for appellant. Sheldon Borden, for respondent.

McFARLAND, J. This is an action to quiet title to a certain parcel of land. R. G. Brewer, Ernest A. Miller, and certain other persons were made defendants, and suffered default. The California Loan & Trust Company was also made a defendant, and filed an answer and cross complaint, to each of which plaintiff interposed a general demurrer. The demurrers were sustained, and judgment was rendered for plaintiff. The said loan and trust company appeals from the judgment. The answer and cross complaint set up substantially these facts: On October 1, 1889, plaintiff and the defendant Brewer made a written contract for the sale by the former to the latter of the land described in the complaint. By this contract Brewer was to pay, and did pay, at its date \$120, and was to pay \$325 on April 1, 1890, and \$325 on October 1, 1890, when plaintiff was to give him a conveyance of the land. No part of either of the said deferred payments was ever made. On May 27, 1890, Brewer assigned all his interest in the contract to the defendant Miller, who, prior to October 1, 1890, erected a building on the land worth \$400. No part of the \$150 or \$400 has been repaid to Miller or any other person. Subsequent to October 1,

1800, plaintiff, it is averred, elected to declare the contract forfeited and at an end. Subsequent to said alleged election, the defendant and appellant, the said loan and trust company, recovered a money judgment against said defendant Miller for \$950, upon which he caused an execution to be issued, and the sheriff "by virtue of said writ of execution duly attached the debt then due from the plaintiff, the Redondo Beach Company, to the said defendant E. A. Miller." And it is averred that, by virtue of the said levy under execution, said loan and trust company is entitled to recover from the plaintiff the said \$120 paid on said contract, and the said \$400, value of said building erected by Miller, with interest, and that it has a lien on said land for said two amounts of money.

We think that the demurrers were properly sustained. The briefs of counsel contain quite an elaborate discussion about the respective rights of parties to contracts for the sale and purchase of land, when the vendee, having made the first payment, fails to make any of the deferred payments. But we do not think it necessary to deal with this discussion, for we think that counsel for respondent is right in his contention that, under any view of the subject, appellant did not acquire anything by the garnishment under his execution, which he can use as a defense or cross claim in the present action. We may assume that Miller, although he had utterly failed to comply with the contract with respondent, had still some sort of a claim against the latter with respect to the \$150 paid by Brewer. (We find no authority for any claim for improvements in such a case.) We may assume, also, that if respondent had been "indebted" to Miller, or had owed him a "debt" within the meaning of sections 717 and 720, Code Civ. Proc., the appellant could have set up such debt directly in the answer and cross complaint, without resorting to proceedings supplementary to execution, or to a creditor's bill, which proposition is doubtful. See *Herrlich v. Kaufmann*, (Cal.) 33 Pac. 857. Still, whatever right Miller had in the premises was nothing more than an equitable claim upon \$150, paid by Brewer, subject to respondent's right to recoup damages for breach of contract. It was, at best, a mere equity, and not a cause of action upon which he could have maintained a common-law action of debt, or indebitatus assumpsit, and, therefore, was not the subject of garnishment under the execution. "It is well settled that the word 'debt' as used in the law of garnishment includes only legal debts—causes of action upon which the defendant in the attachment, under the common-law practice, can maintain an action of debt, or indebitatus assumpsit—and not mere equity claims." *Hassie v. Congregation*, 35 Cal. 385, 386. There is an averment in the complaint that appellant, prior to the judgment against Mil-

ler, had caused a writ of attachment to be issued, and had, under said writ, attached the interest of Miller in the land; but nothing further seems to have been done under said attachment, and no right under it is insisted on in the briefs of appellant. He rests his case on the garnishment under the execution. Judgment affirmed. ●

We concur: DE HAVEN, J.; FITZGERALD, J.

FRANDZEN v. SAN DIEGO COUNTY. (No. 19,289.)

(Supreme Court of California. Feb. 9, 1894.)

COUNTY CLERK—POWERS — CONTRACT FOR PRINTING.

Pol. Code, § 1115, providing that the clerk shall have printed a sufficient number of copies of the lists of voters, taken in connection with Laws 1891, p. 309, (County Government Act, § 34,) providing that the board of supervisors must provide printed copies of the "great register" and of other books and papers there mentioned, does not empower the clerk to make a contract for the printing of the "great register" which shall be binding on the county.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Eugene Frandzen against the county of San Diego. From a judgment for plaintiff, defendant appeals. Reversed.

M. L. Ward, Dist. Atty., for appellant. Shaw & Holland, for respondent.

HAYNES, C. This is an appeal from the judgment upon the judgment roll, and the only question presented by the record is whether the county clerk had authority, as the law stood in 1892, to bind the county by his contract with the plaintiff to print the great register for that county. In July, 1892, the board of supervisors fixed the price for printing the great register for that year at 15 cents per name for the first 500 copies, and 75 cents for each additional copy. On August 26, 1892, W. M. Gassaway, then county clerk, contracted with the plaintiff to print the register at the prices fixed by the board. On September 26th, and before any of the copy had been furnished the plaintiff, Gassaway was superseded as such clerk by C. W. Thompson, who refused to permit the plaintiff to print the register, and employed other parties to do the work; and this action is to recover damages from the county for the breach of said contract. The cause was tried by the court, and resulted in findings and judgment for the plaintiff. The question to be decided is raised by demurrer to the complaint, and upon the findings.

The opinion of the learned judge who tried the cause is printed in respondent's brief, (and which constitutes the principal part of it,) and the conclusion reached is based upon his construction of section 1115 of the Politi-

cal Code, and of subdivision 23 of section 25 of the county government act, (Laws 1891, p. 305,) and section 34 of the same act, (page 309.) By section 236 of the act of 1891, (page 422,) all acts and parts of acts inconsistent with it are repealed. By section 1115 of the Political Code it is provided that "within fifteen days after making such lists, [of voters,] the clerk must have printed a sufficient number of copies thereof," etc.; and section 1116 directs the clerk to distribute them. These sections are in that part of the Political Code which provides for the government of the state and the registration of electors. Section 1115, as well as other sections of the chapter, show that the board of supervisors have a general control over the matter, and may order new registrations, or, if a sufficient number of former registers are on hand, may direct the clerk "to cancel all names thereon required to be canceled," and to prepare a supplement of additional names; that assistants may be employed by the clerk, for such times and at such compensation as shall be fixed by the board, which shall be paid out of the county treasury; but no other expense is provided for by this chapter of the Code. The county clerk is the clerk of the board, and by the Code is specially charged with the duty of preparing the great register, and, having performed that duty, is very appropriately charged by the statute with the printing of it; but this does not necessarily imply that he has the power to contract, on behalf of the county, for the expense of printing. All these statutes should be construed in the light of the general scheme of county government created by the act; not that a positive provision clearly expressed should be nullified because it is not, in our opinion, in consonance with the general frame of the act, but, where a provision is not clear, it should be read in the light of the whole act and of its purposes, and the whole brought into harmony and consistency, if that can be done without violence to its provisions. It is much easier for a legislator to conceive a harmonious scheme of county government than it is to frame a bill for that purpose that shall be clearly consistent in all its provisions. The board of supervisors are the chief legislative and executive authority of the county. They have not only the powers expressly given, but such powers, also, as are necessary to the discharge of duties imposed by law. Unless, therefore, the county clerk is clearly authorized to make a contract on behalf of the county, so as to charge it, not only with the duty of performing it, but with damages for its breach, this judgment cannot be sustained.

Section 34 of the county government act (Laws 1891, p. 309) is as follows: "The board must provide printed copies of the great register, poll lists, poll books, blank returns and certificates, proclamations of elections, and other appropriate and necessary appliances for holding all elections in the county, and

allow reasonable charges therefor, and for the transmission and return of the same to the proper officers." This is the only section in the act which in terms refers to the great register. Whether such work as the great register can be properly classed as "job printing," as used in subdivision 23 of section 25 of the same act, is not material. It is clear that it is not necessary to "fix the price" of printing the great register "annually," as our elections are biennial, and the statute does not require the great register to be printed at every election, though at least a supplement may be necessary at each election. This subdivision does not, in express terms, require bids for job printing and advertising, though after requiring the board to annually fix the price at which the county shall be supplied with job printing, blank books, and advertising; and after stating that "each county officer shall procure such blank books, job printing, and advertising at a price no greater than is so fixed, and certify the bills therefor to the board of supervisors," it is immediately added: "And in all cases bidders shall estimate by ems or squares for each character or class of work to be done; and no greater price shall be charged for similar work when done by authority of law, whether said work is done for the city, city and county, or for private individuals." It is not necessary to hazard a guess at the meaning of the above provisions. There is nothing in them which clearly or necessarily includes the printing of the great register, while it could not come within the direction to bidders to "estimate by ems or squares." There are, however, many things to which it can apply, aside from the great register; and hence there is no conflict between that subdivision and section 34 above quoted. The learned judge whose opinion we have referred to thought it necessary, in order to harmonize these provisions, to interpolate the word "for" between the words "provide" and "printed" in section 34; but that suggestion concedes that, as section 34 appears in the statutes, the board is required to procure the great register to be printed; and, if that is the true construction of the section, (and we think it is,) the controversy is ended.

Counsel for respondent cites *Publishing Co. v. Whitney*, 97 Cal. 283, 32 Pac. 237; but there is no conflict between our conclusion here and that case. That case involved the printing of the delinquent tax list, which was there held to be county advertising, and so within the provisions of subdivision 23. *Maxwell v. Board*, (Cal.) 32 Pac. 443, (not reported in the California Reports,) was mandamus to compel the board to advertise for bids for county advertising. The writ was refused on the authority of *Publishing Co. v. Whitney*, supra. As suggested by counsel for appellant, if the legislature intended the printing of the great register to be included and provided for in subdivision 23 of

section 25, there was no occasion for again alluding to it, or providing for it in section 34. Besides, "where there are, in an act, specific provisions relating to a particular subject, they must govern, in respect to that subject, as against general provisions in other parts of the statute, although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate." *End. Interp. St. p. 288.* We think the county clerk had no power to make the contract in question, and that the judgment should be reversed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed.

**FIRST NAT. BANK OF SAN LUIS OBISPO
v. HENDERSON et al. (No. 19,253.)**

(Supreme Court of California. Feb. 9, 1894.)

PENAL STATUTE — REPEAL PENDING APPEAL — EFFECT.

Since the provision of Act April 1, 1876, that a corporation engaged in the banking business should not maintain any action in the courts of the state unless it had filed or published certain statements as required by the act, was in the nature of a penalty, and intended merely to secure compliance with the statute, the repeal thereof pending the appeal in an action brought by such corporation deprived the appellate court of the power of rendering a judgment enforcing the provision.

Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by the First National Bank of San Luis Obispo against M. F. Henderson and others. From a judgment for plaintiff, defendant Greenberg appeals. Affirmed.

Graves & Graves, for appellant. Wilcoxon & Bouldin and J. M. Wilcoxon, for respondent.

HARRISON, J. The plaintiff is a banking corporation, and brought this action upon an account stated between it and the defendants for the amount of certain payments made upon their checks. Judgment was rendered in its favor, and the defendant Greenberg has appealed therefrom. One of the defenses set forth in his answer is the failure of the plaintiff to comply with the provision of the act of April 1, 1876, (St. 1876, p. 729,) in that it had failed to file with the county recorder or to publish the statements therein required. It sufficiently appears from the findings and evidence that this defense was established at the trial; but it is contended by the respondent that, inasmuch as the legislature has repealed the statute since the appeal was taken herein, the error has been thereby released, and the judgment should be affirmed. The judgment

herein was entered January 12, 1893, and the appeal therefrom was taken January 21, 1893, and the statute referred to was repealed March 9, 1893, without any saving clause.

Ordinarily, it is the province of an appellate court to review the judgment of the inferior court as of the time when it was rendered, as ordinarily the judgment of a trial court is a determination of the rights of the parties as they existed at the commencement of the action. This rule is not, however, inflexible. Matters may arise, subsequent to the commencement of an action, which will affect the rights of the parties thereto and the judgment to be rendered therein, and supplemental pleadings are authorized in order that these matters may be properly brought before the court. So, too, matters may arise subsequent to an appeal affecting the judgment appealed from; and, although additional pleadings are not permitted in the appellate court, yet upon proper suggestion and proof of such matters they will be considered by it. See *Dakota Co. v. Glidden*, 113 U. S. 222, 5 Sup. Ct. 428. An appeal from a judgment will be dismissed upon it being properly shown that the trial court had granted a new trial subsequent to the appeal, and had thereby vacated the judgment appealed from. When the jurisdiction of the appellate court depends upon a statute, the repeal of the statute takes away its jurisdiction. In actions of a penal character, depending upon a statute, the repeal of the statute pending the appeal will deprive the appellate court of any power to render a judgment by which this penalty may be enforced. Cooley, in his treatise on Constitutional Limitations, says, (page 469:) "If a case is appealed, and, pending the appeal, the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered." In *U. S. v. The Peggy*, 1 Cranch, 103, a decree of condemnation had been made, from which an appeal was taken, and pending the appeal the United States entered into a treaty with France, by which the two nations mutually agreed to restore all property that had not been definitely condemned. To the argument that the court could only inquire whether the judgment of condemnation was erroneous when delivered, and that, if it was then correct, it could not be made otherwise by anything subsequent to its rendition, Chief Justice Marshall said: "It is, in general, true that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not; but if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes, and positively changes the rule which governs, the law must be obeyed or its obligation denied. In such a case the court must decide according to existing laws, and, if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in viola-

Con of law, the judgment must be set aside." This principle was again affirmed by the same court in *Yeaton v. U. S.*, 5 Cranch, 281, where the law under which the condemnation was rendered had expired pending the appeal; and again in *The Rachel v. U. S.*, 6 Cranch, 329, although the vessel had been sold, and the proceeds paid over to the United States. See, also, *U. S. v. Preston*, 3 Pet. 57; *Price v. Nesbitt*, 29 Md. 263; *Lewis v. Foster*, 1 N. H. 61; *Speckert v. City of Louisville*, 78 Ky. 287; *Musgrove v. Railroad Co.*, 50 Miss. 677. In the latter case the court say, (page 682:) "If there has been a change or alteration or repeal of the law applicable to the rights of the parties, after rendition of the original judgment, and pending the appeal, the case must be heard and decided in the appellate court according to the then existing law. If, therefore, the judgment of the court of original jurisdiction was wrong on the law as it then stood, although there may have been error, if the law has been repealed, the court will not reverse and remand, because the inferior court must recognize the repeal, and conform, on the second trial, to the law as it then was, and not to the law as it may have been at the time of the first trial." In *Atwell v. Grant*, 11 Md. 101, a promissory note had been received in evidence without the revenue stamp which was required by a statute in force at the time of the trial, and upon appeal this was assigned as error. This statute was repealed after the entry of the judgment, and before the hearing of the appeal; but the court refused to reverse the judgment, for the reason that upon a subsequent trial no stamp would be necessary to render the note a valid instrument of evidence. In *State v. Norwood*, 12 Md. 195, a bond offered in evidence had been excluded for want of a stamp, and the court, upon appeal, reversed the judgment, for the reason that the exclusion of this evidence was in the nature of a penalty for a failure to comply with the statute, and that the repeal of the statute made the contract as valid, in law, as if the stamp act had never been passed. The statute in question in the present case was intended to secure a compliance with the requirements that the legislature had prescribed for persons or corporations engaged in a banking business, and the provision prohibiting them from maintaining any action in the courts of this state without such previous compliance was in the nature of a penalty, which it was competent for the legislature to remit at any time. The privilege which the defendant had, under this statute, to avoid the enforcement of his contract, was not given with the view of giving him any advantage, but was conferred upon him by the state for its own purposes. Only the state, and not the defendant, had any interest in the enforcement or remission of this penalty; and, after the state has remitted it, the appellant

is no longer able to avail himself of the privilege which it conferred. See *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. 408. It would be an unjust hardship upon the parties, and would be sacrificing substance to form, to reverse the judgment of the court below, and send the case back for a new trial, when the only result would be that the court would render the same judgment that it has already given. Code Civ. Proc. § 475.

Upon the facts constituting the plaintiff's cause of action, the appellant is not in a position to question the sufficiency of the evidence to sustain the findings. There is no plea on his part of the statute of limitations, and by his answer he admits the allegations of the complaint that, at the time when the account was stated, and also at the commencement of the action, the defendants were partners. At the trial he himself testified that the account was correct, and that the partnership owed the plaintiff the amount sued for. The judgment and order are affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

In re OGIER'S ESTATE. (No. 19,332.)
(Supreme Court of California. Feb. 24, 1894.)

WILLS—SELECTION OF ATTORNEY—EXECUTORS.

1. A provision in a will, whereby testator selects a certain person as the attorney of his estate, and directs that his executrix consult and employ him in all matters pertaining, does not constitute a selection binding on his executrix, but is merely advisory.

2. Such provision gives no power to the attorney to act as executor.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Petitions of J. De Barth Shorb and John W. Mitchell that the will of Anna Ogier be admitted to probate, etc. From an order denying the petition of Mitchell, he appeals. Affirmed.

John W. Mitchell, in pro. per., (Wellborn & Hutton, of counsel,) for appellant. Chapman & Hendrick and Graves, O'Melveny & Shankland, for respondent.

BELCHER, C. Anna Ogier died on the 16th day of March, 1893, in the county of Los Angeles, leaving an estate therein, consisting of real and personal property, of the value of more than \$60,000, and also leaving a duly-executed last will and testament, which contained, among others, the following provisions: "Twenty-seventh. I appoint the said Mrs. J. De Barth Shorb the executrix of this my last will, and direct that she may be exempt from giving bonds as such, but charge her faithfully to see that my estate is distributed as herein directed." If she

should die, or be unable to act, then I appoint John M. Elliott my executor, with the same conditions. Twenty-eighth. I hereby select as the attorney of my estate John W. Mitchell, and direct my executrix to consult and employ him in all matters pertaining to the distribution of my estate, and the requirements of this, my last will. Twentyninth. If my said executrix and my said attorney deem it advantageous to my estate, and those interested therein as legatees and devisees, not to sell my real property, other than sufficient to pay my just debts, immediately after my demise, then I desire the sale of my property, for the purpose of paying legacies, delayed to such time, not exceeding two years after my demise, as my executrix and my said attorney may mutually agree. And my said executrix is hereby authorized to sell any and all of my said real property at public or private sale, and at such price and upon such terms as she and my said attorney may deem advantageous and to the best interest of my estate. And, if my said executrix and my said attorney deem it advisable, my executrix may sell my real property for part cash and part deferred payments, secured by mortgage on the property so sold. And in that event there shall be distributed pro rata to the devisees named herein the cash so received, and at the time it be received: provided, however, that such sales shall be made so that my estate can be finally closed and distributed within three years after my demise, if it be possible to do so without detriment to any interest involved." On March 24th the said will was filed in the superior court of Los Angeles county, accompanied by a petition of Mrs. Shorb, who was named as executrix, asking that the will be admitted to probate, and that she be appointed executrix thereof. The petition was signed by the petitioner, and by Graves, O'Melveny & Shankland, as her attorneys. On April 5th, John W. Mitchell filed a petition alleging that he was interested in the said estate, being named in the will as attorney in the administration thereof, and, according to its tenor, coexecutor thereunder, and praying that said will be admitted to probate, and that joint letters testamentary be issued to Mrs. Shorb and himself, and that he (the petitioner) be declared to be, and be entered as, the attorney of record for said estate, in the matter of the administration thereof, in lieu of, and in place and stead of, said Graves, O'Melveny & Shankland. To this petition, Mrs. Shorb filed an answer denying that Mitchell was interested in the said estate, or was named in the will, according to its tenor, as coexecutor thereof; admitting that she had employed Messrs. Graves, O'Melveny & Shankland as her attorneys to present the said will for probate, but denying that this was done in disregard of the terms or directions of the will, or in disregard of the rights of Mitchell, and praying that the petition of

Mitchell be denied. The two petitions were heard together, and on May 12th the court filed its findings of fact and conclusions of law, and entered its order admitting the will to probate, and appointing Mrs. Shorb executrix thereof, and denying the petition of Mitchell. From this order denying his petition, Mitchell appeals.

The first question presented is, Was appellant entitled to be entered and recognized as the attorney of record for said estate, in the place of the attorneys employed by Mrs. Shorb? No cases are cited in support of appellant's contention in this regard, and it is admitted that none can be found; but it is said that, "since it was the declared will of the testatrix that appellant should act as the attorney of her estate, it is both reasonable and just that the will should be observed in this, as well as in other respects." There is no such office or position known to the law as "attorney of an estate." When an attorney is employed to render services in procuring the admission of a will to probate, or in settling the estate, he acts as the attorney of the executor, and not of the estate; and for his services the executor is personally responsible. Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession, (section 1613 Code Civ. Proc.) and while, in the settlement of his account, he will be allowed all necessary expenses in the care, management, and settlement of the estate, including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in courts, (section 1616, Id.) still, such allowance can be made only to him, and not to the attorney, (Henry v. Superior Court, 93 Cal. 569, 20 Pac. 230.) And if the attorney employed should be derelict in his duty, and should receive and misappropriate funds of the estate, the executor would be liable therefor to the legatees under the will. This being so, it would seem to be neither reasonable nor right to hold that the executor of a will must necessarily accept the services of an attorney selected by the testator. Our conclusion, therefore, is that the language employed by Mrs. Ogier, "I hereby select, as the attorney of my estate, John W. Mitchell, and direct my executrix to consult and employ him in all matters pertaining to the distribution of my estate, and the requirements of this, my last will," did not constitute a selection which was binding on the executrix, but was simply an advisory provision, which she could disregard, if she chose to do so. In Young v. Alexander, 16 Lea, 108, the will under review contained the following clause: "I hereby nominate and appoint my nephew, M. B. Young, of Jackson county, Tennessee, as advisory and counsel of my said executors, who will assist them in winding up my unfinished and unsettled business." The executor refused to recognize or employ Young as counsel in the administration of the estate,

whereupon he instituted the suit to compel such recognition and employment. The supreme court said that, "however persuasive such a provision may or might be, it can only be effective as an advisory provision;" and it was held that the provision was not binding upon the executor, and that he might ignore it, and appoint other counsel, at his discretion. In *Foster v. Elsley*, 19 Ch. Div. 518, the will under review contained the following clause: "And I declare that my solicitor, William Edward Foster, shall be the solicitor to my estate, and to my said trustees in the management and carrying out the provisions of this my will." It was claimed that this clause imposed on the trustees the duty of employing Foster as their solicitor, but it was held that it imposed no such trust or duty.

The second and only other question presented is, did the court err in refusing to direct letters testamentary to be issued to appellant as coexecutor with Mrs. Shorb? The contention that appellant was entitled to have letters so issued is based upon section 1371 of the Civil Code, which provides: "Where it appears by the terms of a will that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, although not named executor, is entitled to letters testamentary in like manner as if he had been named executor." Does the will show that it was the intention of Mrs. Ogler to commit to appellant the execution of her will and the administration of her estate? To this question there can be, in our opinion, but one answer, and that must be in the negative. The only paragraphs of the will relating to the matter are those above quoted. The twenty-seventh paragraph appoints Mrs. Shorb executrix, and charges her "faithfully to see that my estate is distributed as herein directed." The twenty-eighth paragraph selects appellant as the attorney for the estate, and directs the executrix to consult and employ him in all matters pertaining thereto. And the twenty-ninth paragraph speaks of "my said executrix" and "my said attorney," and directs what "my said executrix" may do, if she and "my said attorney" deem it advantageous and advisable. By these paragraphs, no power to act as executor is given to appellant; and it seems evident that the intention of the testatrix was simply to make him the attorney and counselor of the executrix, and not to commit to him the administration of the estate. The order appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

ROBINSON v. DUGAN. (No. 19,241.)
(Supreme Court of California. Feb. 24, 1894.)
CLAIMS AGAINST DECEDENT'S ESTATE — EVIDENCE
— COMPETENCY OF WITNESS.

1. In an action against the estate of decedent, a brother of plaintiff, there was in evidence a paper in the handwriting of decedent, headed "S. R. [plaintiff] in Acct. with W. R. [decedent.] Cr.," reciting by cash a certain amount, and by certain articles certain other amounts. A witness testified that he saw decedent hand plaintiff a paper like that in evidence; plaintiff having just before asked decedent what plaintiff had to show that decedent owed him. A witness testified that, on several occasions before and after decedent's death, plaintiff said that decedent did not owe anything. *Held*, that a finding that decedent was not, at the time of his death, indebted to plaintiff was justified by the evidence.

2. There was no error in refusing to allow plaintiff to state that the paper introduced by him was in his possession at decedent's death, he having already been permitted to testify that the paper had been in his possession ever since decedent's death, which was, in effect, the same thing.

3. Under Code Civ. Proc. § 1880, subd. 3, forbidding a party to an action on a claim against a decedent's estate to testify to facts occurring before decedent's death, plaintiff cannot testify that a paper showing a debt from decedent to him was unpaid at decedent's death.

4. A witness who had stated that plaintiff on several occasions said that decedent owed no debts was properly allowed to state that in those conversations plaintiff made no exception in favor of himself.

Commissioners' decision. Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by S. G. Robinson against John R. Dugan, administrator of William Robinson, deceased. Judgment for defendant. Plaintiff appeals. Affirmed.

Eugene W. Squier, for appellant. E. B. Hall and J. W. Taggart, for respondent.

BELOHER, C. The plaintiff brought this action to recover the sum of \$814.50 upon an account alleged to have been stated between himself and William Robinson, in October, 1891. William Robinson died intestate in March, 1892, leaving a small estate, and thereafter the defendant was duly appointed and qualified as administrator thereof. The usual notice to creditors was published, and within the time prescribed the plaintiff presented his claim to defendant as such administrator for allowance, and the same was allowed and approved for \$4.50, and disallowed as to the balance. The answer of defendant denied that at the time named, or at any other time, an account was stated, or settled, or agreed to, by or between the plaintiff and said intestate, or that the said estate was indebted to the plaintiff in any sum, other than the \$4.50, which was allowed; and averred that all and every indebtedness or liability on the part of said intestate to the plaintiff, except the said \$4.50, had been fully paid and discharged before the death of said intestate.

The case was tried by the court without a jury, and among other things it found: "(5) That there was no account stated as between the plaintiff and said deceased, and that said William Robinson, deceased, was not indebted to said plaintiff, and his estate is not liable to plaintiff in any sum or amount other than said \$4.50, approved and allowed by defendant as administrator, as aforesaid, and that none of the allegations contained in paragraph 1 of plaintiff's complaint are true."

And as conclusions of law from the facts the court found: "(1) That plaintiff is entitled to be paid, in due course of administration, the sum of \$4.50, approved and allowed by said defendant before the commencement of plaintiff's action herein. (2) That defendant's intestate, William Robinson, deceased, was not at the time of his decease indebted to said plaintiff in any sum or amount other than said \$4.50. (3) That defendant is entitled to judgment," etc.

Judgment was accordingly entered that the plaintiff be paid, in due course of administration, the \$4.50 allowed him, and that his action be dismissed, and defendant recover his costs. From this judgment, and an order denying his motion for a new trial, the plaintiff appeals.

It is contended that the judgment should be reversed, because the finding above quoted was not justified by the evidence, and portions of it were inconsistent with other portions thereof, and because the court erred in making certain rulings on the admission of evidence. To show that an account was stated between himself and the decedent, plaintiff introduced in evidence a paper (marked "Plaintiff's Exhibit No. 1") which was proved to be in the handwriting of decedent, and was as follows:

S. G. Robinson in Acct. with Wm. Robinson.
Cr.

By cash on settlement.....	\$560 00
By cash from McAllester.....	250 00
Fruit cans	75
Pasturage	1 75
Pasturage	2 00

\$814 50

The plaintiff then called as a witness one McLaughlin, who testified that he knew the plaintiff and decedent in his lifetime; that decedent was sick in Santa Barbara, and went to San Francisco for medical treatment about the month of October, 1891. That, four or five days before he went, witness heard a conversation between him and the plaintiff in which he stated that if he did not get better he would never return to Santa Barbara. That plaintiff then said: "What have I to show that you owe me money?" That decedent then went to his house, and in about 15 minutes returned and handed to plaintiff a paper which looked exactly like his Exhibit No. 1, and that plaintiff said

nothing, looked at the paper, and folded it up. "It was about as large as that, [Exhibit No. 1.] It was about as wide as that. I can't say how long it was." "He didn't let me see the writing." "I was about as far from them as from here to the stove, [across the courtroom.] I couldn't swear whether it was just as long as that or not." "It might have been twice as long as this. I couldn't tell." The plaintiff was then called as a witness, and was asked by his counsel: "Mr. Robinson, will you look at this paper, [showing witness paper marked "Plaintiff's Exhibit No. 1,"] purporting to be an account stated, and state whether or not this paper was in your possession and unpaid at the time of your brother's death?" The question was objected to, and the objection sustained, and thereupon the witness testified: "This paper [Exhibit No. 1] has been in my possession ever since the death of William Robinson. The amount, \$814.50, has not been paid. None of it has been paid since the death of my brother." It was further proved that decedent stopped in San Francisco about three months, and then returned to Santa Barbara, and remained there until he died. One Palmanteer was then called as witness for defendant, and, after stating that he was acquainted with the decedent in his lifetime and with the plaintiff, said: "I have had conversations with S. G. Robinson both before and since his brother's death. * * * The conversations were about William Robinson's affairs. I had a conversation with S. G. Robinson,—I think it was the day before his brother's death,—and, among other things, he told me that his brother had money in the bank and owed no debts. I also had some talk with S. G. Robinson a week or so after his brother's death in regard to his brother's affairs. * * * He stated that there were no debts. He said he had some money in bank. I think six or eight or ten hundred dollars." On cross-examination the witness testified: "I think I had eight or ten conversations with S. G. Robinson,—some before and after his brother's death,—in relation to settling up the estate. * * * He told me twice that his brother owed no debts when we were talking about the administration, and once when we were talking about a filly that his brother had given him. * * * He said that William Robinson was not a man that owed debts; he was not that kind of a man; he did not owe anything; something of that kind." And on redirect examination the witness was asked by counsel for defendant: "Did he (S. G. Robinson) ever, in any of those conversations, make any claim that William Robinson owed him anything?" The question was objected to by counsel for plaintiff, and the objection overruled, and the witness then answered: "I never heard him." In rebuttal, the plaintiff testified: "I may have said to Mr. Palmanteer that William Robin-

son did not owe any debts, but I did not mean to include myself in it when I was speaking to him."

In view of this evidence,—and there was more in the same line,—it is not necessary to determine whether the paper introduced by the plaintiff constituted an account stated; for, conceding that it did, still the account may have been paid and discharged before the decedent's death. The only question, therefore, that need be decided is, was the finding that "William Robinson, deceased, was not indebted to said plaintiff, and his estate is not liable to plaintiff, in any sum or amount other than said \$4.50," justified by the evidence? The question whether all indebtedness from decedent to the plaintiff, other than the \$4.50 allowed, had been paid, and whether there was any existing indebtedness on the part of the estate to plaintiff, was one of fact, to be passed upon by the trial court; and on this question the evidence introduced by the defendant raised, in our opinion, at least a substantial conflict. This being so, the finding cannot, under the well-settled rule of this court, be disturbed on appeal. The objection that portions of the finding quoted are inconsistent with other portions thereof is based upon the fact that, by his complaint, the plaintiff sought to recover only on an account stated; and it is said that the finding that no account was stated is wholly inconsistent with the further finding, in effect, that the estate was liable to plaintiff for the sum of \$4.50. But there was no issue as to the \$4.50. The complaint alleged that that sum was allowed to the plaintiff on presentation of his claim, and the answer admitted and alleged the same facts. We see no merit, therefore, in this objection.

The errors in law relied upon for a reversal of the judgment are: (1) the refusal of the court to permit the plaintiff to answer the question propounded to him as to whether or not the paper (Exhibit No. 1) was in his possession and unpaid at the time of his brother's death; and (2) the overruling plaintiff's objection to the question asked of the witness Palmanteer, as to whether the plaintiff in any of the conversations related made any claim that William Robinson owed him anything. We see no error in either of the rulings complained of. When the plaintiff testified, as he did without objection, that the paper had been in his possession ever since the death of his brother, he in effect stated that it was in his possession at the time of his brother's death. The balance of the question, as to whether the account was then unpaid or not, was intended to elicit evidence which was clearly inadmissible under section 1880, subd. 3, of the Code of Civil Procedure. The witness Palmanteer had stated that, in the conversations which he had had with the plaintiff, the latter had more than once said that his brother owed no debts,—that he did

not owe anything,—and it was therefore entirely proper to ask him if, in any of those conversations, the plaintiff made any exceptions in favor of himself. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

WHITTAKER v. CITY OF HELENA.

(Supreme Court of Montana. Feb. 19, 1894.)

IMPUTED NEGLIGENCE—DRIVER OF VEHICLE.

The negligence of the owner and driver of a private conveyance is imputable to one who is voluntarily riding with him, and the latter cannot recover damages against a city for injuries caused by its negligence, where the negligence of such driver contributed thereto.

Appeal from district court, Lewis and Clarke county; Horace R. Buck, Judge.

Action by Will F. Whittaker against the city of Helena for personal injuries caused by defendant's negligence. From a judgment for plaintiff, and from an order denying its motion for a new trial, defendant appeals. Reversed and remanded.

S. H. McIntire, for appellant. Adkinson & Miller, for respondent.

PEMBERTON, C. J. This is an action to recover damages for personal injuries sustained by plaintiff by being thrown from a buggy in the streets of said defendant city. Among other things the complaint alleges, substantially, that on the 30th day of August, 1890, and for some days prior thereto, the defendant wrongfully and negligently authorized and permitted a certain show to be maintained and conducted in a tent or canvas-covered wagon, on Grand street, in said city; that said show was such an obstruction as to render travel along said street unsafe and dangerous, and was of such character as to frighten gentle and well-broken horses driven along said street; that, on said 30th day of August, plaintiff was riding in a buggy drawn by a safe and gentle horse, which was being driven with due care and caution along said street, when said horse, without any fault or negligence of plaintiff, became frightened at said show tent or wagon, became unmanageable, and ran away, upsetting said buggy, and throwing plaintiff to the ground with great force, whereby he was greatly injured and damaged; that plaintiff, in the lawful transaction of his business, had necessarily to pass along said street. The allegations of the complaint are denied by the answer. The case was tried in the court below with a jury, and resulted in a verdict for the plaintiff for \$1,000, for which sum judgment was rendered. Defendant moved for new trial,

which was denied. This appeal is prosecuted from the judgment and order denying the motion for new trial.

The evidence clearly shows that the plaintiff, at the time of the accident set forth in his complaint, was riding with one James S. Dunn, who owned the buggy and horse, and was driving the same. Dunn, it seems, was on his way to lunch, and invited plaintiff, who lived in the same part of the city, to ride with him, as it seems he did almost every day prior thereto. The evidence does not show that plaintiff knew of the existence of the alleged obstruction to travel on the street, but Dunn swears that he knew of it. Dunn was, at the time, an alderman of the city. It appears from the evidence that the accident to plaintiff occurred at about 1 o'clock p. m. on the 30th day of August. At 12 m. of said day there was a meeting of the city council of said city. Dunn swears that he was at that meeting, and in an earnest and excited manner called the attention of the council to the fact that this show in the tent or wagon was located and doing business on Grand street, and also called the attention of the council to its dangerous character; that the mayor stated that he would see to its removal at once; that thereupon the council adjourned, and that he went immediately to Edwards street, got his horse and buggy, drove to Main street, took the plaintiff into his buggy, as he was in the habit of doing every day, and started up Grand street, and, in attempting to pass this tent or wagon, the accident happened which resulted in plaintiff's being injured and damaged; that the tent or wagon was on one side of the street, and a pile of rock the city was using in work on the street was on the opposite side of Grand street from the tent or wagon; that, in attempting to pass between the tent or wagon and said pile of rock, the horse became frightened, and ran the buggy over the rock pile, turning the buggy over, throwing the occupants out, and inflicting upon the plaintiff the injuries for which he sues in this action. This evidence of Dunn is in no way questioned. That he knew the obstructed and dangerous condition of Grand street (if it was in a dangerous and obstructed condition) when he drove upon it is beyond dispute. Under this state of facts, could Dunn recover if he were prosecuting this suit against the city? If he could not recover, can this plaintiff, who was voluntarily riding with him in his buggy, recover? Was Dunn guilty of such contributory negligence as would defeat his right to recovery, when he drove upon the street, knowing the condition thereof? If so, was his negligence imputable to the plaintiff, so as to defeat a recovery on his part? In *Prideaux v. Mineral Point*, 43 Wis. 513, a case involving the question under discussion, the court says: "One voluntarily in a private conveyance voluntarily trusts his personal safety in the conveyance to the person in control of it. Voluntary entrance into a private

conveyance adopts the conveyance, for the time being, as one's own, and assumes the risk of the skill and care of the person guiding it. Pro hac vice, the master of a private yacht, or the driver of a private carriage, is accepted as agent by every person voluntarily committing himself to it. When paterfamilias drives his wife and child in his own vehicle, he is surely their agent in driving them, to charge them with his negligence. It is difficult to perceive on what principle he is less the agent of one who accepts his or their invitation to ride with them. There is a personal trust in such cases, which implies an agency. So, several persons voluntarily associating themselves to travel together in one conveyance not only put a personal trust in the skill and care of that one of them whom they trust with the direction and control of the conveyance, but appear to put a personal trust each in the discretion of each against negligence affecting the common safety. One enters a public conveyance in some sort of moral necessity. One generally enters a private conveyance of free choice, voluntarily trusting to its sufficiency and safety. It appears absurd to hold that one voluntarily choosing to ride in a private conveyance trusts to the sufficiency of the highway; to the care and skill exercised in all other vehicles upon it; to the care and skill governing trains at railroad crossings; to the care and skill of everything except that which is most immediately important to himself,—and trusts nothing to the sufficiency of the very vehicle in which he voluntarily travels; nothing to the care and skill of the person in charge of it. His voluntary entrance is an act of faith in the driver; by implication of law, he accepts the driver as his agent to drive him. In the absence of express adjudication, the general rules of implied agency appear to sanction this view. * * * A woman may, and should, refuse to ride with a man, if she dislike or distrust the man, or his horse or his carriage. But, if she voluntarily accept his invitation to ride, the man may, indeed, become liable to her for gross negligence; but, as to third persons, the man is her agent to drive her,—she takes man and horse and carriage for the jaunt; for better, for worse." *Otis v. Town of Jamesville*, 47 Wis. 422, 2 N. W. 783, is to the same effect. In *Railroad Co. v. Miller*, 25 Mich. 274, a case involving the question whether or not the negligence of the driver of a private team was imputable to one who was riding voluntarily with the driver, Mr. Chief Justice Christy, speaking for the court, says: "The materiality of this question must depend upon another,—whether the plaintiff's own negligence, or that of Eldridge, who was driving the team, contributed to the injury, within the meaning of the generally settled rule upon this subject; for, as she was riding with Eldridge, the owner and driver of the team, any negligence of Eldridge equally affects her rights in this suit, as was properly held by the

court." These authorities all hold that if the negligence of the party injured, or of his driver, which is imputed to him, materially contributed to the injuries, he cannot recover, although the party complained of has not been free from negligence. In the case at bar it seems clear that Dunn was not only guilty of contributory negligence, but that he was reckless in driving into a street which he swears he knew to be dangerously obstructed. His negligence must be held as imputable to plaintiff. If Dunn could not recover under the facts and circumstances of the case, neither could the plaintiff, although the defendant may have been guilty of negligence on its part, which it is not necessary in this case to determine. There are other assignments of error in the record, but we do not consider it necessary to consider them, as we think the treatment above decisive of the case. The court below recognized the law as stated above as applicable to this case, and so declared it to the jury in the instructions given. But the verdict seems to us to have been rendered in disregard of the law as given by the court, as well as of the evidence in the case. We think the court should have granted, for these reasons, the motion of the defendant for a new trial. The judgment is therefore reversed, and cause remanded for new trial. Reversed and remanded.

HARWOOD, J., *concura*.

CASE v. SCHOOL DIST. NO. 3, MISSOULA COUNTY.

(Supreme Court of Montana. Feb. 26, 1894.)

"SUPPLY TEACHER"—EMPLOYMENT—SALARY.

A person engaged as "supply teacher" at \$70 per month, an amount equal to that paid some of the regular teachers, made no application for pay during the first four months of the year, during which she was called on to teach only seven days, and nothing was paid her, though the teachers were paid monthly. There was also evidence that during that time she applied for a position as regular teacher at \$70 per month. *Held*, that under the engagement she was to receive pay only for the time she taught, at the rate of \$70 per month.

Appeal from district court, Missoula county; Theo. Brantley, Judge.

Action by Mary E. Case against school district No. 3, Missoula county. From an order granting plaintiff a new trial, defendant appeals. Reversed.

Henry C. Stiff, for appellant. Webster & Wood, for respondent.

HARWOOD, J. This action is founded on an account wherein plaintiff demands of defendant school board \$280 for four months' services as school teacher in district No. 3 of Missoula county. That demand is made under an alleged contract of employment of plaintiff by the board of trustees of said school district at the compensation of \$70

per month. Payment of the demand being refused, this action was brought to enforce the same; and in the justice's court, where the action was first prosecuted, plaintiff recovered judgment against said school district in the sum of \$280. From that judgment, defendant appealed to the district court of said county, wherein the case was tried to the court, a jury having been waived; and upon consideration thereof the court found plaintiff entitled to recover the sum of \$24.50 on her demand against said school district, for services rendered under the contract of employment in question, and entered judgment accordingly. Thereafter, motion for new trial was granted on a statement of the case containing all the evidence offered. From that order the trustees of said school district appealed to this court, insisting that there is not sufficient ground shown to justify the order granting a new trial. This we conclude, upon careful consideration of the case, must be sustained, for we are unable to find in the record a sufficient showing to warrant an order granting a new trial. The record purports to contain a transcript of all the evidence offered on the trial. It is not claimed that there is any newly-discovered evidence; nor is it urged that the court erred in any ruling; nor is there any conflict in the evidence, except some slight difference between the testimony of plaintiff and that of her principal witness. The motion for new trial is founded upon the proposition that the decision of the court upon the trial is not warranted by the evidence, and therefore, if a new trial were granted, and the same evidence submitted again, the court or jury, on consideration thereof, ought to arrive at a different decision. The question, then, is narrowed to the consideration whether a different decision, under the law applicable to the facts as presented, should be made, or could be sustained if made; and our investigation leads us to a negative conclusion on that proposition. It is not a question of the weight of evidence, or the belief which ought to be accorded to, or withheld from, the testimony of witnesses. All the material and important facts are practically conceded, according to this record; and the real question now is, shall these facts be interpreted, and given the effect in law, as respondent contends, or as appellant urges?

The record discloses the following facts: In the spring of 1891 plaintiff applied to the board of trustees of said school district for a position as teacher in one of the schools thereof at the succeeding term, to commence on the 1st of the following September, in her application expressing her preference for a position in the primary department. Plaintiff's application, with others, being referred to a committee of said board, designated as "Committee on Teachers and Salaries," that committee selected from the applicants a full corps of teachers for the district for the term

of 10 months, commencing with the month of September of that year, without selecting plaintiff as one of the regular teachers; but she was chosen as "supply teacher," and in the report of said committee, after naming the several teachers chosen, and the amount of the salary of each, respectively, it contained the following: "Supply teacher, Mary Case, salary per mo., \$70." This report of the committee was adopted by said board of trustees. Soon after that event, plaintiff was, by letter from the clerk of said board, notified of her selection as supply teacher at the compensation mentioned, requesting her in such notice to signify her acceptance of the appointment if the same was agreeable. Plaintiff accordingly wrote a note to the clerk of the school board, accepting the same. Thereafter it transpired that plaintiff was called upon and served as supply teacher on two occasions during the four months for which compensation is claimed, being the first four months of said term, teaching altogether seven days,—four days in October and three days in November.

The report of the committee, its adoption, the notice to plaintiff, and her acceptance of said appointment are claimed to constitute the contract to be interpreted in this action; and counsel concede that the decision of this case depends upon an interpretation of the engagement, service, and compensation to be rendered by each party, as evidenced by these documents. On the part of plaintiff and respondent here it is contended that the contract contemplated her engagement for the whole term at \$70 per month, whether she rendered any service in teaching or not. "That," she asserts in her testimony, "was what the contract called for;" that she was in readiness to teach when notified, during said four months, but did not claim compensation after the close of December, as she was sick in January, and a considerable portion of the remainder of the year. On the contrary, the defendant board of trustees (appellant here) contends that the contract contemplated that plaintiff was engaged as supply teacher to fill any vacancy which might occur by reason of sickness, or absence from other cause, of any teacher in the schools of said district. The district in question, as we understand, includes the city of Missoula. That a board of trustees of a school district has power, under the provisions of law governing its action, to bind the district, by contract, to pay supernumerary teacher or teachers a fixed salary while not rendering service as teacher, but merely waiting a contingency, which might or might not happen, to require some service, is extremely doubtful. According to the interpretation of this contract contended for by plaintiff, said trustees engaged to pay her \$700 for acting as supply teacher during said term, when her services might not be required at all, and, as actual experience showed, were only required seven days in

four months of the term. This was the same compensation as was paid some of the teachers in said district for constant service, which fact plaintiff admits she knew. It might be proper enough to pay those who came at the eleventh hour, or came not at all, equally with those who "have borne the burden and heat of the day," if the trustees, like the master of the vineyard, were dispensing of their own; but, in our view, the law governing them forbids such munificence in their stewardship for the people of their district.

Aside from that view of the case, it seems hardly reasonable, in the light of the circumstances, that plaintiff should conclude, from her selection as "supply teacher" at the compensation stated, that she was elected to a sinecure, the principal duty of which, prospectively and practically, was to draw a salary equal in amount to that paid teachers for constant service. In adopting that conclusion, so far as the record shows, plaintiff made no inquiry as to the understanding or contemplation of the trustees. Indeed, the implication appears quite strongly, from what is shown, that plaintiff and her advisers avoided raising that question, for, although plaintiff knew the teachers of said district were paid at the close of each school month, plaintiff made no application for the amount claimed. This was not made at all until May or June following the months for which the salary is now claimed. Plaintiff's father, in testifying on her behalf, assumed to state the reason why plaintiff did not apply for her alleged salary at the close of the school months as they progressed by saying that he had been trustee for 35 years, "and it was the custom for the clerk to pay the teachers without an application from them." If such was understood by plaintiff and her advisers to be the custom, it seems to us that the failure to receive payment would have aroused inquiry without such long delay; and it seems also that that very fact, if plaintiff was really counting upon such payment without service, would have tended, at least, to lead her to the conclusion that the officers of the district did not contemplate paying a regular salary for plaintiff's occasional service, or no service at all. The statute of this state contains a just rule of interpretation in this connection, in the provision that, "when the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it." Section 636, Code Civ. Proc. The clerk of said district, in his testimony on behalf of plaintiff, states that in December (one of the months for which she claimed salary) she again applied by letter for appointment as regular teacher in one of the schools of said district, the salary for which was \$70 per month; that such application, with some others, was delivered by the clerk to the committee on teachers and salaries, and was not returned to him; therefore, he

was unable to produce it at the trial. Plaintiff disputed her witness in this particular, denying that she made that application. Nevertheless, the testimony of Mr. Musgrave, the clerk of the district, who was called by both parties, sounds very frank and disinterested. Indeed, if any leaning is discoverable at all, it is towards the plaintiff; and that circumstance is told with so much detail that it seems quite improbable he should be mistaken. However, that incident may only show that plaintiff was seeking more work, and not more compensation. The court found the plaintiff, under said engagement, was entitled to compensation for the time served at the rate of \$70 per month. In our opinion, this was the proper interpretation. The case is therefore remanded, with directions to overrule plaintiff's motion for new trial. Costs may follow the judgment.

PEMBERTON, C. J., concurs.

MONTANA MILLING CO. v. JEFFERIS, Sheriff.

(Supreme Court of Montana. Feb. 26, 1894.)

SHERIFFS — FAILURE TO EXECUTE ATTACHMENT — GARNISHING DEBTORS.

Under Code Civ. Proc. § 184 et seq., requiring a sheriff, on receiving an attachment, without delay to attach all defendant's nonexempt property, including debts, named in the writ, and (section 188) on receiving information in writing from plaintiff or his attorney that any person has any credits or other personalty of defendant, or is owing him any debt, to serve on such person a copy of the writ, and notice that such property is attached, a sheriff who has attached the debtor's stock in trade, and taken possession of his books of account, is liable for failure to garnish those who appear therein as debtors, without written notice from plaintiff or his attorney.

Appeal from district court, Lewis and Clarke county; William H. Hunt, Judge.

Action by the Montana Milling Company against Charles M. Jefferis, sheriff of Lewis and Clarke county, for damages for failure to execute a writ of attachment. Judgment for defendant. Plaintiff appeals. Reversed.

Edward C. Russell, for appellant. Leslie & Craven and McConnell, Clayberg & Gunn, for appellee.

PEMBERTON, C. J. This is an action for damages, brought against the defendant for neglect and failure to execute a writ of attachment in his hands as sheriff of Lewis and Clarke county. The case was tried in the court below on an agreed statement of facts, which is as follows:

"(1) That the Montana Milling Company was, at all the times hereinafter mentioned, and now is, a corporation organized under the laws of the state of Montana, doing business at Helena, in said county of Lewis and Clarke; that Charles M. Jefferis was, at all times hereinafter mentioned, and now is, the

sheriff of said county of Lewis and Clarke. (2) That on the 15th day of September, 1890, the Montana Milling Company commenced an action against Kuphal & Schumacher, and a writ of attachment was issued in said action and placed in the hands of Charles M. Jefferis, sheriff, on the same day, and judgment against said defendants in favor of said plaintiff was thereafter rendered. (3) Six other writs of attachment, in as many suits against the same defendants, were in the hands of said sheriff when he received that of the Montana Milling Company, and six or more writs, in as many more suits against the same defendants, were placed in the hands of said sheriff after that of the Montana Milling Company. (4) In pursuance of the first and subsequent writs, including that of the Montana Milling Company, the store of defendants Kuphal & Schumacher, together with stock of goods and fixtures therein, was attached by said sheriff on said 15th day of September, 1890. (5) The books of account of said defendants Kuphal & Schumacher were in the said store at the time of said levy, were taken possession of by said sheriff, no one having made a demand for them, but were never attached by said sheriff. (6) No written praecipe or notice, as contemplated by section 188 of the Revised Statutes of Montana, for garnishing debtors of said defendants Kuphal & Schumacher, was given to said sheriff by the said Montana Milling Company, nor has any ever been given. Though the said Montana Milling Company did, at the time of bringing said suit, have reason to believe that certain parties were indebted to said Kuphal & Schumacher, yet it failed to give said sheriff a written notice containing the names of said parties so indebted, and the amounts of said indebtedness. (7) Said sheriff attached no moneys due said Kuphal & Schumacher by garnishment until the 20th day of September, 1890, and then, under writs of attachment issued in the suits, respectively, of Geo. R. Newell & Co. v. Kuphal & Schumacher, placed in his hands September 24, 1890, and Franklin McVeagh & Co. v. Kuphal & Schumacher, placed in his hands on the 17th day of September, 1890, a written praecipe for such garnishment having been filed with said sheriff in the case of Franklin McVeagh & Co. on or about the 29th day of September, 1890, and in the case of Geo. R. Newell & Co. on the 1st day of October, 1890. A copy of said praecipies are hereto attached, marked, respectively, 'Exhibit A' and 'Exhibit B,' and made a part hereof. (8) That under the last-mentioned writs the sheriff collected the sum of \$959.27, which he paid to said plaintiffs Geo. R. Newell & Co. and Franklin McVeagh & Co., under their writs of attachment, which were subsequent to that of the Montana Milling Company, which said sum was collected from debtors of said Kuphal & Schumacher, who appeared to be such debtors by the said books of account of said Kuphal & Schumacher.

macher in the hands of said sheriff as aforesaid. (9) That, if said sum collected under said garnishments, and paid over to said subsequent attaching creditors, had been paid by said sheriff to the attaching creditors in the order of their priority, the said judgment of the Montana Milling Company would have been paid in full. (10) That the said judgment of the Montana Milling Company is still unsatisfied, and there is no property in the sheriff's hands, or under his control, of said Kuphal & Schumacher, to satisfy it."

The points of contention submitted to the court below were as follows: "The Montana Milling Company claims that Charles M. Jefferis, as sheriff, is liable to it for the amount of its said judgment against said Kuphal & Schumacher by reason of his negligence in not levying, under its said writ of attachment, on the said credits of said Kuphal & Schumacher. Charles M. Jefferis, sheriff, claims that he is not so liable, for the reason that he was under no obligation to said Montana Milling Company to levy upon such credits under said writ, not having received any written precept or information in writing from said plaintiff or its attorney, as contemplated in section 188 of the Revised Statutes of Montana, (page 74;) that if there was any negligence it was on the part of said Montana Milling Company, and not said sheriff."

Upon this statement of facts and these points of contention the court rendered judgment in favor of the defendant. From this judgment this appeal is prosecuted.

From the contention of the parties, as shown above, it will readily be seen that the appellant contends that it was the duty of the respondent, as sheriff, to attach the debts owing to Kuphal & Schumacher, as shown by the books of account of that firm, taken possession of by him under the writs of attachment against said firm, without any written notice, while the respondent contends that he was not required to attach such debts, or garnish the debtors of said firm, without a written notice so to do. The law of this state requires a sheriff, when a writ of attachment is placed in his hands, without delay to attach and safely keep all the property of the defendant, including debts, named in the writ, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand. Sections 184-186, Code Civ. Proc. Subdivision 5 of said section 186 prescribes the manner of attaching debts and credits in the hands of persons owing such debts, or having in their possession such credits. Appellant contends that under these provisions of the statute it was the duty of the sheriff to attach the debts due the said firm of Kuphal & Schumacher in the hands of the persons owing them, as shown by the books of account of said firm in the possession of the sheriff under the writ of attachment issued against said firm without written notice.

The respondent contends that section 188 of the Code of Civil Procedure, which is as follows: "Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession, or under his control, any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff shall serve upon such person a copy of the writ, and a notice that such credits or other property or debts, as the case may be, are attached in pursuance of such writ,"—controls and is decisive in this case. In other words, the respondent contends that a written notice under said section 188 was a *sine qua non* to the fixing of the liability of the sheriff for failing to garnish the debtors of said firm of Kuphal & Schumacher. Why was it necessary to give the respondent notice in writing to garnish any of the debtors of said firm? He had possession of the books of account of said firm under the writs of attachment in his hands. He had all the information necessary as to who were the debtors of said firm. The books of account of the attached firm gave him that information. It was his duty, under the law, to attach, without delay, all the property of the defendants in his county not exempt from execution, or so much thereof as would be sufficient to pay the demand of the plaintiff. The debts of the firm were as much property, and as much subject to attachment, as any other character of property. Then, why was it not as much his duty to attach the debts in the hands of the persons owing them, in the manner prescribed by law? If he failed to use due diligence in attaching property, or did not attach sufficient to satisfy the demand of plaintiff, he rendered himself liable to plaintiff for damages. Drake, Attachm. §§ 188, 190-191a. Nor was the plaintiff required to notify him in writing, or otherwise, as to whom he should garnish, or what property to attach. It was the duty of respondent to make reasonable effort to find sufficient property and effects of the defendant to satisfy the demands of the plaintiff. This he did not do. He could as well have garnished the debtors of said firm, under the writ issued in the suit of plaintiff, without written notice, as he did under subsequent writs with written notice; for the written notice, in the subsequent attachments, to garnish debts, reads as follows: "Geo. E. Newell & Co. vs. Kuphal & Schumacher. To the sheriff: We understand that you have a list in your possession of the creditors of the above-named defendants. Since the plaintiffs in the above-named cause are probably the last on the list in the general attachment on the goods, will you please garnish a sufficient number of those indebted to the defendants who have not been garnished, in order to have enough secured by the writ to secure our demand." This notice did not designate any particular debtor or debtors. It simply called the sher-

iff's attention to the list of debtors of said firm contained in the books of account, and asked that they be garnished. This was merely calling his attention to information he already had, and to property which it was his duty to have attached under former writs. We do not think the plaintiff was required, under said section 188, to give the respondent written notice to garnish the debtors of the defendant firm, under the facts and circumstances of this case, or that such written notice was a prerequisite to the liability of the respondent. See *Hargrave v. Penrod*, 12 Am. Dec. 201, and authorities cited in note. Crock. Sher. § 851. It was the duty of the sheriff to have attached the debts due said firm, as shown by the books of account of said firm in his possession, and to have paid out the proceeds or amounts so collected in the order of the priority of the writs of attachment in his hands; or, having garnished said debtors, and collected the amount owing said firm, if he had any doubt as to how he should proceed in paying out the same, he should have brought the money into court, and asked for an order as to the disposition thereof. In this manner he could have protected himself as well as this appellant. The judgment of the court below is therefore reversed, and the cause remanded with instructions to enter judgment in favor of the plaintiff. Reversed.

HARWOOD, J., concurs.

DENVER, T. & FT. W. RY. CO. v. PULASKI IRRIGATING DITCH CO.¹

(Supreme Court of Colorado. Jan. 15, 1894.)

TRESPASS—PERMANENT AND TEMPORARY DAMAGES—PLEADING—OPINION EVIDENCE.

1. The first count of a complaint was for damage to plaintiff's irrigating ditch, and alleged that defendant railway company destroyed it in many places, laid its track over and along it, built bridges over it, and changed the natural drainage of the adjacent land so as to cause floods to strike the ditch and render it worthless. The second count was for abatement and injunction; but the parties stipulated that the cause should be dismissed as to the second count, and proceed on the first count for permanent damages, on the understanding that the railroad should remain permanently as located. *Held*, that plaintiff was not entitled to recover temporary or special damages.

2. The estimate of a witness as to the extent to which the carrying capacity of an irrigating ditch was diminished by the building of a railroad over and along it was admissible, when he was familiar with the ditch, had examined it before and after the railroad was built, and had observed how the building of abutments and the placing of other obstructions in its channel affected its carrying capacity.

Appeal from district court, Las Animas county.

Action by the Pulaski Irrigating Ditch Company against the Denver, Texas & Ft.

Worth Railway Company for damages to plaintiff's ditch. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

The other facts fully appear in the following statement by GODDARD, J.:

This is an action to recover damages for an alleged trespass. The appellee, on and prior to the 1st day of August, 1887, was the owner of an irrigating ditch taken out of the south side of the Las Animas river. It was about 15 miles in length, 15 feet wide at the top, and 12 feet wide at the bottom, and covered with water to the depth of 2 feet, and was used in irrigating a large area of land, and was of the alleged value of \$30,000. As its cause of action, plaintiff avers "that on or about said date the defendant entered upon said irrigating ditch with teams, plows, and scrapers, and dug up and destroyed said ditch in many places, and afterwards laid its railroad track over, on, and along said ditch, and built bridges across, over, and on said ditch, and changed the natural drainage of the adjacent lands so as to cause great floods to strike said ditch, so as to totally destroy and render worthless said ditch, to the damage of the plaintiff in the sum of thirty thousand dollars." The complaint originally contained a second count and prayer for equitable relief, but the same was dismissed upon the trial, in pursuance of the following stipulation: "It is here in open court stipulated between the counsel for plaintiff and defendant, and agreed that the same be made part of the record in said cause, as follows, to wit: 'Dismissed as to second count, and prayer for abatement and injunction. Cause to proceed on first count for permanent damages, and upon understanding that road remain permanently as located, and acquire rights thereby to remain permanently as located.'" The trial was to a jury, and resulted in a verdict in favor of plaintiff for the sum of \$2,400. Motion for new trial was overruled, and judgment rendered on the verdict. To revise this judgment, defendant below prosecutes this appeal.

Teller & Orahood, for appellant. John McKeough, for appellee.

GODDARD, J., (after stating the facts.) The principal question presented by the assignment of errors is as to the character and amount of the damages recoverable under the complaint. It is insisted by counsel for appellant that such damages, if any, as resulted from the temporary interference of the flow of water in the ditch occasioned by appellant while constructing its road, are not recoverable under the pleadings, and that no recovery can be had for damages accruing from the alleged wrongful acts subsequent to the commencement of the suit. We are clearly of the opinion that under the complaint, especially as supplemented by the stipula-

¹ Rehearing denied March 7, 1894

le of the damage that resulted therefrom. By virtue of the stipulation the appellant was relieved from any further actions on his character on account of the location of construction of its road, and acquired right to have its road remain as located, consideration of submitting to full and recovery in this action. Competent evidence of general damages, both present and prospective, that were naturally or reasonably incident to the acts complained of, was before admissible, and the rule for assessing such damages was properly stated to the jury by the court in its general charge. Upon the question of temporary or special damages the following instruction was given:

2. The damages thus claimed are of a temporary and permanent character. Now, you believe, from a preponderance of the evidence adduced herein, that the plaintiff, through the construction of said railway, was deprived of the use of the said ditch and waters conveyed thereby, so far as the deprivation was of a temporary character due to temporary causes, and not one of permanent effects of the construction and maintenance of said railway, and existed from December 10, 1887, you will allow the plaintiff the value of the use of said water during such time as the plaintiff was deprived thereof, provided you believe, from a preponderance of the evidence, that the plaintiff was thus deprived, and that such use had value." The complaint contains no averment that will sustain a recovery for temporary or special damages, and by the stipulation the recovery was expressly limited to permanent damages, and from the testimony adduced it does not appear how, or in what respect, the appellee suffered any loss or damage by reason of the temporary interruption of the flow of water during the construction of the railroad. It was therefore clearly erroneous to submit the question of temporary damages to the jury. We think the giving of this instruction constitutes error that necessitates a reversal of the judgment.

On a review of a retrial of the case it is proper for us to notice the error predicated upon the admission of certain testimony. The witnesses

Garner, Fuller, and Grassmuck were called to give estimates as to the extent of the carrying capacity of the ditch was diminished by reason of the interference with the flow of water therein, caused by the change of the channel and the various obstructions therein by appellant in building its

It is insisted by counsel for appellant that his testimony was inadmissible because it was the mere opinion of witnesses who were not experts. While the general rule is that the testimony of a witness is inadmissible except where the inquiry involves a question of skill, experience, and the witness possesses a peculiar knowledge of the subject, acquired by

description or estimate of magnitude, size, dimension, velocity, value, etc., and when, from the nature of the subject under investigation, it is difficult or impossible to state with sufficient exactness, or in detail, the facts, with their surroundings, in such a manner as to produce upon the minds of the jury the impression that a personal observation has produced upon the mind of the witness. In such cases it is permissible for the witness, who has had the benefit of personal examination, to supplement the statement of facts detailed by him with his opinion or conclusion. Such testimony is not an "opinion," in its ordinary sense, which is an inference as to what will follow from a given state of facts, but rather the statement of a result that has happened, and is observable as an existing condition. It appears from the examination of these respective witnesses that they were familiar with the ditch in question, had examined it before and after appellant's road was built, and had observed the effect that the changes made in its course, the building of abutments and placing of other obstructions in its channels had upon its capacity to carry water; and we think their estimates as to the extent such capacity was diminished were properly admitted.

It is unnecessary to notice the other errors assigned, as the questions they present may not arise on another trial. For the reasons given, the judgment will be reversed, and cause remanded. Reversed.

GOODYKOONTZ, State Auditor, v. ACKER.
(Supreme Court of Colorado. Jan. 15, 1894.)

INSPECTOR OF METALLIFEROUS MINES—APPROPRIATION FOR SALARY—MANDAMUS TO AUDITOR—CONSTITUTIONAL LAW—RECITALS IN PRIVATE ACTS—CONCLUSIVENESS.

Const. art. 5, § 33, provides that no money shall be paid out of the treasury except upon appropriation, and on warrant drawn by the proper officer. Mills' Ann. St. § 1827, provides that "no warrant shall be drawn by the auditor or paid by the treasurer unless the money has been previously appropriated by law." Act April 1, 1889, § 13, provides that "the inspector of metalliferous mines shall receive a salary of \$3,500 per year, to be paid monthly by the state treasurer out of any moneys appropriated for that purpose, on certificate of said inspector." *Held*, that mandamus will not lie to compel the state auditor to issue warrants for the salary of the inspector of metalliferous mines where no appropriation has been made therefor.

On Rehearing.

The preamble of an act (Sess. Laws 1893, p. 42) for the relief of a former inspector of metalliferous mines recites: "Whereas, the appropriation for the salary and expenses of officers was made in said act approved April 1, 1889." *Held*, that such recital is not conclusive that the act of April 1, 1889, constituted an appropriation, within the meaning of the constitution.

Error to district court, Arapahoe county.

Mandamus proceedings by Henry L. Acker, as inspector of metalliferous mines, against Floyd M. Goodykoontz, as state auditor, to compel the issuance of warrants for petitioner's salary. From a judgment for petitioner, respondent brings error. Reversed. Petition for rehearing denied.

The other facts fully appear in the following statement by HAYT, C. J.:

Mandamus proceedings against the auditor of state to compel the issuance of warrants for the salary of the inspector of metalliferous mines. Judgment in the district court for petitioner. The state constitution provides that there shall be established and maintained the office of commissioner of mines. The legislature has, however, never created an office by this title, but by an act passed in 1883, and still in force, it did create the office of inspector of coal mines, and by a subsequent act, passed in the year 1889, it created the additional office of inspector of metalliferous mines, and provided for an inspector to be appointed by the governor, by and with the advice and consent of the senate, who should hold his office for two years, or until his successor shall be appointed and qualified. See Sess. Laws 1889, p. 254. This act also provides, in section 13, that "the inspector of metalliferous mines shall receive a salary of three thousand five hundred (3,500) dollars per year, and ten cents per mile for mileage actually and necessarily traveled in the discharge of his official duties, said mileage not to exceed one thousand (1,000) dollars in any one year, to be paid monthly by the state treasurer out of any moneys appropriated for that purpose, on the certificate of said state inspector of metalliferous mines, showing services rendered and the amount thereof; and on presentation of such certificate to the state auditor by the person entitled thereto, he shall issue his warrant for the amount thereof, to be paid out of any appropriation as aforesaid. * * *

It is admitted by the pleadings that the defendant in error was duly appointed inspector of metalliferous mines, his commission bearing date April 20, 1893, and he at once accepted and entered upon the discharge of the duties of the office, and has ever since continued to, and still does, discharge the duties thereof. On the 2d day of November, 1893, the inspector, having performed the duties of his office for the preceding months of August, September, and October, presented vouchers for his salary, in due form, to plaintiff in error, the state auditor, and requested the issuance to him of warrants on the state treasurer for the salary. The auditor of state declined and refused to issue such warrants, upon the ground that no appropriation had been made for the payment of any salary to the inspector, whereupon the inspector presented his petition to the district court of Arapahoe county, praying for a writ of mandamus to compel plaintiff in error to

issue warrants upon the state treasurer in payment of the salary as aforesaid. The auditor, by way of answer thereto, pleaded that no appropriation had been made by the ninth general assembly for the salary of the inspector of metalliferous mines, and also that there was no state fund out of which said salary could be legally paid. As the result of a hearing upon these pleadings, the district court ordered a peremptory writ of mandamus to issue against plaintiff in error, commanding him to issue warrants as prayed for in the petition. To this judgment the plaintiff in error duly excepted and brings the case here upon error.

Eugene Engley, Atty. Gen., and H. F. Sale for plaintiff in error. W. D. Wright, for defendant in error.

HAYT, C. J., (after stating the facts.) Was the defendant in error entitled to the peremptory writ of mandamus? It is admitted that no appropriation was made by the ninth general assembly of the state of Colorado for the payment of any salary to the inspector of metalliferous mines for the year 1893, and also that there is no state fund out of which such salary can be paid. Section 33 of article 5 of the constitution provides that "no money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof." Among the statutes passed in furtherance of this constitutional provision are the following: "In all cases of accounts audited and allowed against the state, and in all cases of grants, salaries, pay and expenses, allowed by law, the auditor shall draw a warrant on the treasurer for the amount due, in the form required by law; provided, an appropriation has been previously made for such purpose." Mills' Ann. St. § 1826. "No warrant shall be drawn by the auditor, or paid by the treasurer, unless the money has been previously appropriated by law; nor shall the whole amount drawn for or paid under one head ever exceed the amount appropriated by law for that purpose." Id. § 1827. The primary object of the foregoing provision of the constitution, and of the statutes passed in aid thereof, is to prevent the expenditure of the money of the people without their consent, expressed in the organic law or by constitutional acts of their legislature. An appropriation is made a prerequisite to payment in every instance. *Institute v. Henderson*, 18 Colo. 98, 31 Pac. 714.

Is there an appropriation out of which the salary of defendant in error should be paid? The argument in support of the affirmative is, in substance, as follows: No set form of words is necessary to constitute an appropriation; it is sufficient if the legislative intent to appropriate money for a specific purpose clearly appears from the statute; and when the salary of a public

officer is fixed by law, together with the time and method of payment, this constitutes an appropriation, within the terms of our constitution and statutes. Although the decisions are not uniform, it must be admitted that the trend of the more recent cases is in support of this argument. *Carr v. State*, (Ind.) 26 N. E. 778; 22 Am. St. Rep. 624, and notes; *State v. Burdick*, (Wyo.) 33 Pac. 125; *In re Continuing Appropriations*, 18 Colo. 192, 32 Pac. 272. Whether the peculiar provisions of our constitution with reference to general appropriation bills should be held as rendering inapplicable the reasoning upon which the foregoing decisions are based, when applied to the expenses of the legislative, executive, or judicial departments of this state, we are not called upon to determine, in view of the conclusion at which we have arrived in regard to the statute relied upon to establish an appropriation in this case. In answer to a legislative question, this court, in the case last above cited, expressed the opinion that the statutes then under consideration were sufficient to warrant the disbursement of certain special funds when collected; but the opinion is not to be taken as upholding the right of the auditor of state to draw warrants in anticipation of the collection of taxes levied for any year in advance of the years usually covered by the biennial appropriations. The statute providing for the inspector's salary is peculiar. It differs from the provisions usually employed with reference to the compensation of state officers. It reads as follows: "The inspector of metalliferous mines shall receive a salary of three thousand five hundred (3,500) dollars per year, and ten cents per mile for mileage actually and necessarily traveled in the discharge of his official duties, said mileage not to exceed one thousand (1,000) dollars in any one year, to be paid monthly by the state treasurer out of any moneys appropriated for that purpose, on the certificate of said state inspector of metalliferous mines, showing services rendered and the amount thereof. * * *". The essential difference between this and the provisions of nearly every other statute fixing the salary of public officers arises from the addition in this statute of the words, "out of any moneys appropriated for that purpose." There is but one apparent purpose of this innovation, which is that, for reasons satisfactory to the legislature, that body was of the opinion that the payment of the salary and expenses of this officer should be dependent upon further legislation.

Were it necessary to advance reasons that might have had weight in the legislative mind, it would not be difficult to do so. This field of legislation being new, the provisions of this bill were largely experimental, and it was but natural that the legislature should, for this reason, delay the appropriation necessary to carry the same into effect. This act not only provides for the creation of the

office of mining inspector, designating the amount of his salary and the rate of mileage to be allowed, but also provides for the appointment of three assistants, each to be allowed a fixed salary in addition to mileage; and it was but natural that provision for all these outlays should be deferred, to be considered in connection with the general appropriation bill, as was afterwards done at that session. But, whether these or other reasons operated to produce the result, we must construe the act as written. Although no set form of words is necessary to constitute an appropriation, it being sufficient if the legislative intent to appropriate clearly appears, on the other hand, the courts invariably refuse to infer an intention to appropriate from doubtful or ambiguous language. *In re Continuing Appropriations*, supra. In the act before us there is not only an absence of language that may be considered either doubtful or ambiguous in favor of the appropriation claimed, but the legislative intent that the act should not of itself constitute an appropriation is clearly manifest. The judgment of the district court is accordingly reversed, and the cause remanded. Reversed.

On Rehearing.

(March 7, 1894.)

PER CURIAM. Upon the petition for rehearing in this case our attention is for the first time called to an act of the ninth general assembly entitled "An act for the relief of James Hutchinson, formerly inspector of metalliferous mines, and for D. L. McCarthy, John Truan and George Kislingbury, formerly assistant inspectors of metalliferous mines, and making an appropriation therefor." Sess. Laws 1893, p. 42. In the preamble to this act the statute under consideration in this case is referred to, by way of recital, as follows: "Whereas, an appropriation for the salary and expenses of officers was made in said act approved April 1, 1889." It is now urged that the foregoing statement is conclusive upon the question that the prior act referred to constituted an appropriation, within the intent and meaning of the constitution. Such is not the law. The recital is in the preamble of a private statute for the relief of certain individuals named therein; and it is well settled that recitals, even in the body of such an act, bind no one but those who applied for it. Moreover, a mere recital of fact or law in a public act is not conclusive upon the courts, while such recitals, if found in a mere preamble, are of still less weight. *Branson v. Wirth*, 17 Wall. 32; *State v. Beard*, 1 Cart. (Ind.) 460; *Elmendorff v. Carmichael*, 3 Litt. (Ky.) 473. The rules of construction invoked by counsel are mere aids, to be relied upon only when the language of an act is doubtful or ambiguous. The wording of the statute of 1889 leaves no room for construction. No conclusion can be reached other than the one ar-

rived at in the previous opinion of this court, if all the words of the statute are given effect. No appropriation can be deduced from the language of the act unless the qualifying phrases, "out of any moneys appropriated for that purpose," and "to be paid out of any appropriation as aforesaid," be held to be meaningless. The language is plain, and admits of but one meaning, and the task of interpretation can hardly be said to arise. To give this act the construction contended for would not be to interpret the law, but for this court to make it. The constitution of Colorado contains numerous restrictions upon the power of the legislature, to make appropriations. These wise and beneficent provisions have in many instances had but slight weight with the legislative department of the government. Appropriations in excess of the constitutional limits have been so frequently made as to cease to create surprise. Such acts embarrass the disbursing officers of the state, and crowd the dockets of the courts with cases brought for the purpose of determining the priority of different appropriations, or the validity of warrants issued in obedience thereto. We are now asked to add to this embarrassment and confusion by construing an appropriation out of an act, contrary to its express terms. The act, by its peculiar phraseology, gives evidence of a caution which is to be encouraged as an indication of more conservative legislation, and this court would be derelict in its duty if it failed to give effect to the legislative intent which is clearly apparent from the language of the act. The petition for rehearing will be denied. Rehearing denied.

MORTGAGE TRUST CO. OF PENNSYLVANIA v. ELLIOTT.¹

(Supreme Court of Colorado. Feb. 5, 1894.)

APPEAL FROM PROBATE COURT—BOND AND NOTICE.

1. Mills' Ann. St. § 1097, providing that appeals from county courts sitting in probate shall be prosecuted like appeals from justices of the peace, does not require such appeals to be taken in the same time as those from justices, and the county court may extend the time for filing bond. *Lusk v. Kershow*, 30 Pac. 62, 17 Colo. 481, followed.

2. The act of 1885 as to notice, etc., in appeals from county courts, does not apply to probate cases. *Lusk v. Kershow*, 30 Pac. 62, 17 Colo. 481, followed.

Error to district court, Costilla county.

In the matter of the estate of William B. Clancy, deceased. Appeal to the district court of the Mortgage Trust Company of Pennsylvania against D. J. Elliott, administrator, from a decree disallowing a claim against the estate. Appeal dismissed. Appellant brings error. Reversed.

Statement by the Court:

On and prior to the 10th day of May, 1889, the estate of William B. Clancy, deceased, was in process of administration in the county court of Costilla county, and on that date plaintiff in error, the Mortgage Trust Company of Pennsylvania, filed a claim in due form against the estate. A hearing upon this claim resulted in its disallowance by the court. From such disallowance the plaintiff in error gave notice of appeal to the district court. Thereupon the county court made and entered an order fixing the amount of the bond upon appeal at \$500, and designating 20 days as the time within which the bond might be filed. Within the 20 days the appeal bond was filed, duly approved, and the transcript of the proceedings filed in the district court. After the case reached the district court, appellee (the present defendant in error) filed a motion to dismiss the appeal because—First, the appeal was not taken on the day the judgment was rendered, and appellee had not within five days, nor at all, served defendant with notice in writing stating that an appeal had been taken; second, that appellee had not complied with section 4 of the act relating to appeals from county to district courts, approved April 14, 1885; third, the appeal was not taken in apt time, nor in accordance with the requirements of law. This motion was sustained, and the appeal dismissed as not having been taken in accordance with the requirements of the statute, to which judgment of dismissal the plaintiff duly excepted, and brings the case into this court upon error.

R. H. Gilmore, for plaintiff in error. C. M. Corlett, for defendant in error.

PER CURIAM. The questions presented upon this case are identical with those determined by this court in the case of *Lusk v. Kershow*, 17 Colo. 481, 30 Pac. 62. It was there held that, under the statute, two methods were provided for taking appeals from judgments of the county courts to the district courts,—one method being applicable to appeals in ordinary civil actions; the other prescribing the manner of perfecting appeals from judgments and orders entered in probate proceedings. The appeal from the county to the district court in this case was from a judgment entered in a probate proceeding, and the court had power to extend the time within which the appeal bond could be filed. In the *Lusk-Kershow* Case it was also held that the requirements of the law of 1885 as to notice, etc., were not applicable in cases of appeals from orders and judgments of the county courts in probate proceedings. The distinction between the county courts sitting for ordinary business and such courts when sitting for probate purposes has been pointed out in a number of cases. *Lusk v. Kershow*, supra; *Wyman v. Felker*, 18 Colo. 882, 33 Pac. 157. The appeal in this case appears to have been properly taken, within

¹ Rehearing denied March 7, 1894.

the time fixed by the court, and in accordance with the statute providing for appeals from orders and judgments entered by the county court when sitting for probate business, and the judgment of dismissal rendered by the district court was therefore erroneous. This judgment is accordingly reversed.

In re PENITENTIARY COM'RS.

(Supreme Court of Colorado. March 5, 1894.)

EXECUTIVE QUESTIONS—EX PARTE OPINION.

1. Any question submitted by the governor to this court for its opinion is entitled to respectful consideration; but the court must determine for itself as to the importance of the question, the solemnity of the occasion, and the nature of the answer proper to be returned under the particular circumstances of each case.
2. This court should not give an ex parte opinion in relation to a controversy that has already arisen, especially if actual litigation involving private rights is likely to arise from such controversy.

(Syllabus by the Court.)

The opinion of the court is in response to the following communication and question from the governor:

"To the Honorable, the Supreme Court of the State of Colorado—Sirs: A question of serious import has arisen in the executive department of the state, upon the following facts: The seventh general assembly, April 19, 1889, passed an act to establish the Colorado State Reformatory, which was afterwards established at Buena Vista. The question of serious import referred to arises wholly from the different manner in which the act to establish the state reformatory (Laws 1889, commencing page 418) is construed by the state executive and by the penitentiary commissioners in reference to the paroling of prisoners transferred from the state penitentiary to the state reformatory. There is no intention, on the part of the executive, to question the right of the board of commissioners to make requisition upon the warden of the state penitentiary to transfer convicts in the penitentiary to the state reformatory for education and treatment, and that, while confined in the reformatory, such transferred convicts should be subject to the rules and regulations of the reformatory; but, in the opinion of the executive, prisoners so transferred should be detained in the reformatory during 'the term of their sentence at the state penitentiary,' as is provided in section 24 of the reformatory act, and subject, also, to the penitentiary rules as to the commutation of time of imprisonment. The penitentiary commissioners maintain, notwithstanding the provision in section 24 referred to, that convicts thus transferred become so subject to the rules and regulations of the reformatory that the board of commissioners may exercise the same powers as to the absolute re-

lease of such transferred convicts from imprisonment as is provided in sections 25 and 26 of the reformatory act. This view of the board of commissioners is fully sustained by an opinion of Atty. Gen. Maupin, a copy of which opinion is hereto attached. Such a construction of the law seems, to the executive, unwarranted by the terms of the reformatory act, and the past and present policy of the board of commissioners in paroling convicts transferred from the penitentiary to be an unconstitutional invasion of the prerogative of the governor of the state in relation to reprieves, commutations, and pardons of criminals after conviction; and therefore I certify that the question submitted is important, and arises upon a solemn occasion, wherein I, as the executive of the state of Colorado, in defense of the prerogatives which appertain to my office, and to prevent further violations of the constitution and laws in this respect by the board of penitentiary commissioners, require the opinion of the supreme court. I respectfully request the opinion of the honorable supreme court in answer to the following question: Are the board of penitentiary commissioners, in paroling convicts transferred from the penitentiary to the state reformatory, obliged to comply with the requirements of section 24 of the reformatory act, and detain such convicts in the reformatory during the term of their sentence at the state penitentiary, less commutation according to penitentiary rules?

"Very respectfully yours,

"Davis H. Walte."

"State of Colorado, Attorney General's Office.

"Denver, Colo., June 3rd, 1891.

"Hon. William A. Smith, Warden Colorado State Penitentiary, Canon City, Colorado—Dear Sir: I beg leave to acknowledge receipt of your letter of May 31, wherein you request an opinion from me as to whether or not the commissioners have authority, under the law relating to the state reformatory, to parole any prisoners who are now inmates of that institution. Upon careful examination of the act creating the state reformatory I find that section 24 of the act authorizes the commissioners to make requisition upon the warden of the state penitentiary, who shall thereupon select, from among the convicts of the state penitentiary who are well behaved and most promising, the number required by the commissioners, and transfer them to the reformatory for education and treatment 'under the rules and regulations thereof.' Section 23 of the same act provides that 'said commissioners shall also have power to establish rules and regulations under which prisoners in the reformatory may be allowed to go upon parole outside the reformatory buildings and inclosure, but so remaining while on parole in the legal custody and under the control of the board

of commissioners, subject at any time to be taken back within the inclosure of such reformatory.' There is nothing in this language last quoted above which indicates that the rules and regulations relating to the parole of prisoners shall be applicable to those inmates of the reformatory who may be sentenced thereto by the courts. On the contrary, I infer from this language that these rules and regulations should apply to all prisoners in the reformatory, regardless of the question as to whether they have been sentenced thereto directly by the courts, or whether they have been transferred thereto in accordance with section 24 of the act. I am therefore of the opinion that the commissioners have full power and authority to parole any prisoners who are now inmates of the reformatory, under such rules and regulations as may be established by the commissioners.

"Very respectfully,

"Jos. H. Maupin, Attorney General."

ELLIOTT, J. 1. Under section 3 of article 6 of the constitution as amended, the governor may submit to this court, for its opinion, any question he may deem proper, and, when submitted, such question is entitled to respectful consideration; but the court must, of necessity, determine for itself the importance of such question, as well as the solemnity of the occasion under which such opinion is sought to be obtained. The nature of the answer proper to be returned under the particular circumstances of each case is a matter for judicial determination. This has been held in several cases. Opinion of the Court, 49 Mo. 216; *In re District Attorneys*, 12 Colo. 468, 21 Pac. 478. In some instances we have given opinions in response to executive inquiries in respect to the management of public affairs, where no objections were interposed, (*In re Board of Capitol Com'rs*, 18 Colo. 220, 32 Pac. 278,) and sometimes in cases of great emergency, where objections were interposed, (*In re Speakership of House of Representatives*, 15 Colo. 524, 25 Pac. 707.) So, also, we sometimes answer legislative questions concerning the constitutionality of pending bills, with the view to prevent the enactment of unconstitutional legislation and the evils that might result therefrom. The question now submitted, however, does not relate to a pending bill, but to a statute already enacted; a statute which has been acted upon for several years, and under which it appears private rights or claims have arisen, which rights or claims might be seriously affected by an *ex parte* opinion of this court. *In re House Resolution No. 25*, 15 Colo. 602, 26 Pac. 145.

2. The question now propounded does not seek to obtain an opinion of the court as to the constitutionality of a statute. Upon oral argument the governor expressly dis-

claimed any intention to question the constitutionality of the act relating to the state reformatory, but he does question the constitutionality of the construction placed upon a single section of that act by Atty. Gen. Maupin, and acts thereunder by the board of penitentiary commissioners. An *ex parte* judicial opinion upon such a subject can scarcely be said to be contemplated by the constitution. The jurisdiction conferred by the constitution upon this court to answer executive and legislative questions is extraordinary; the construction of statutes is within the ordinary jurisdiction of the courts. One of the most common subjects of judicial consideration is the construction of legislative acts as they arise in due course of litigation. If we were to extend the extraordinary *ex parte* jurisdiction of this court to executive questions involving the construction of legislative acts, it would be a most serious innovation, and the tendency would be to transfer, in a great measure, the management of our state institutions from the executive to the judicial department of the government. Again, it is apparent from the executive communication accompanying the question submitted that the object of the inquiry in this case is not merely to obtain information by which the conduct of the penitentiary commissioners shall be guided in the future; it is not intimated that the commissioners desire an opinion of the court upon the subject; on the contrary, some of them were present by their attorneys upon the argument, and, in the presence of the court and the governor, protested against the promulgation of an opinion in this *ex parte* proceeding. We cannot ignore the fact that serious differences have existed for some time between the executive and some of the officers of the state penitentiary in respect to the management of that institution, and that executive orders adverse to some of said officers have been made in reference thereto. It is possible that actual litigation in the courts may arise in consequence of such differences, as in the case of *Trimble v. People*, 19 Colo. —, 34 Pac. 981. It is of the utmost importance, therefore, that this court should not in any manner indicate, in advance, its opinion as to the rights or claims of the parties which may be involved in such controversy. While we cannot avoid the exercise of jurisdiction in respect to such controversies when they actually arise, and are brought to this court in the ordinary course of litigation, we may, and manifestly ought to, abstain from the expression of any opinion, in advance, which could possibly prejudice the rights of the parties, or embarrass the court in case its jurisdiction should hereafter be invoked in the regular course of judicial proceedings. We must, therefore, under the circumstances, respectfully decline to say more in response to the communication and inquiry submitted.

In re AMENDMENTS OF LEGISLATIVE BILLS.

(Supreme Court of Colorado. Feb. 27, 1894.)

STATUTES—AMENDMENT—ORIGINAL PURPOSE.

The governor's call of a special session having asked for legislation to reduce by one-half the rate of penalties and interest on delinquent taxes, a bill introduced in the house for that purpose, and entitled "To amend section 124 of chapter 94," was amended in the senate so as to attain the same object by amending that and other sections of the chapter. *Held*, that there was no change in the bill's original purpose. (Const. art. 5, § 17,) and the title could be amended to cover such purpose as extended.

Opinion on question submitted by the house of representatives.

The opinion of the court was delivered in response to the following resolution and interrogatory: "Whereas, house bill No. 26 having passed the house, as the same is hereto attached, and was transmitted to the senate; and whereas, the same was considered and amended by the Senate, and passed as hereto attached. Therefore, be it resolved by the house of representatives that the opinion of the honorable supreme court be requested on the following matters, to wit: Can a bill be so altered or amended during its passage in either house, as is contemplated in this bill by senate amendments, under section 17 of article 5 of the constitution? That is to say, can a bill, introduced and entitled 'A bill for an act to amend section 124, of chapter 94,' be legally amended so as to amend other sections of chapter 94, or be made a general bill on revenue?"

HAYT, C. J. Section 17 of article 5 of the state constitution, to which our attention is specifically directed by the question propounded, reads as follows: "No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose." By another provision of the same article of the constitution, the introduction of bills is limited to a certain specified time. Section 19. This is a wise, precautionary measure, designed in part to secure ample time for the consideration of all matters upon which legislation is proposed. It is apparent, however, that this provision would be of little practical benefit if bills may be introduced dealing with a certain subject, and afterwards amended so as to relate to an entirely different subject. This furnishes, we think, the controlling reason for the existence of the section now under consideration. Like other constitutional inhibitions upon the exercise of legislative power, it is not intended to unnecessarily embarrass proper legislation, nor will it do so if given a reasonable construction.

The house bill before us was evidently introduced in pursuance of the thirty-third subdivision of the governor's call, convening the general assembly in special session, viz.: "To

provide to reduce the penalties and interest on delinquent taxes to one-half the present rates." The general subject submitted for legislation by the executive is the reduction of the penalties and interest on delinquent taxes. The words following are to be treated as advisory merely. The subject having been particularly designated in the call, the extent to which legislation shall extend is primarily for legislative, and not for executive, determination. In re Governor's Proclamation, (Colo. Sup.) 35 Pac. 530. Keeping in mind this general subject, and the answer to the question propounded is not difficult. The house bill seeks to attain the object by amending a designated section of the revenue act. By the senate amendments the same object is sought by amendments to this and other sections of the same act. While by these amendments the provisions of the original bill are extended, the designated subject of legislation has been kept clearly in mind, and the original purpose of the bill in no manner changed. It is unlike the amendment proposed at the sixth session of the general assembly by which it was attempted to amend a bill to create a new county in the northern part of the state so as to establish a new county out of territory 500 miles distant. The purpose of the original bill in that case was to give the citizens of a certain designated territory a separate corporate existence, while by the amendments proposed this purpose was entirely abandoned; and the fact that such a bill had been introduced within the time limited for the introduction of bills was sought to be made available for the purpose of ingrafting thereon a bill designed to create a county out of other and different territory and for a wholly distinct community,—a manifest violation of the spirit and letter of the constitution. The original purpose of the bill was entirely lost sight of or disregarded, while here the general purpose, as evidenced by the original bill, has apparently been kept in mind and adhered to by the senate in formulating the amendments proposed. Neither do the proposed amendments fall within the practice so justly disapproved by Judge Coolidge in note 3, p. 167, of his work on Constitutional Limitations. The trick denounced by the learned writer and expounder of constitutional law is where a member, entertaining an idea that he may at some future date desire legislation upon some subject not thought of within the time limited for the introduction of bills, introduces one or more sham bills, for the purpose of using the same as stocks to graft upon, as occasion may arise, without reference to the character or contents of the parent bill. The case of *Hall v. Steele*, 82 Ala. 562, 2 South. 650, is more nearly in point upon the question submitted. In that case, under a constitutional provision identical with the one now under consideration, a bill which, as originally introduced, prohibited the sale of spirituous liquors in a single county or locality, by an amendment

during its passage was made to embrace other places in different counties. This was held to be no more than an extension of the original purpose of the bill, and consequently not obnoxious to the constitutional provision.

In the oral argument, with which we were favored by the members selected by the honorable senate and house to aid us in our investigation, it was conceded that the right of amendment could be exercised with equal freedom by either house, irrespective of the question as to the particular body in which the bill originated. In fact, the constitutional provision under consideration is so framed as to leave no doubt of the correctness of this conclusion. We have not investigated the title of the amended bill for the purpose of ascertaining whether or not it is free from constitutional objection, as we were informed at the hearing that the senate proposed to amend the title and give the bill an appropriate title of sufficient scope to cover the bill as amended. As this matter of title has been alluded to, although not specifically covered by the question propounded, we add that, in our judgment, the title may be so amended as to cover the original purpose of the bill as extended by the proposed amendments, and when this is done the act will not be obnoxious to the constitutional inhibition under consideration.

BOARD OF COM'RS OF PHILLIPS COUNTY v. CHURNING.

(Court of Appeals of Colorado. Feb. 12, 1894.)

ACTION AGAINST COUNTY—NOMENCLATURE OF DEFENDANTS—APPEAL BY COUNTY BOARD.

1. Since Gen. St. 1883, § 525, provides that in all suits against a county the name in which the county shall be sued shall be "the board of county commissioners of the county of _____," a judgment for plaintiff in a suit against "P. county" is a nullity.

2. Since the board of county commissioners of the county is not a party to such a suit, and cannot be affected by the judgment, a writ of error by such board will be dismissed.

Error to Phillips county court.

Action by Fred C. Churning against Phillips county. Judgment for plaintiff, and the board of county commissioners of the county of Phillips brings error. Dismissed.

O'Neill & Allen, for plaintiff in error. J. S. Bennett and P. J. Dempster, for defendant in error.

THOMSON, J. Fred C. Churning brought suit against Phillips county to recover for certain services alleged to have been rendered by him as bailiff by appointment of the county court of that county. Judgment was rendered in his favor. The county was sued by the name of "Phillips County, Colorado." It was so designated in all the subsequent proceedings, and judgment was given against it by that name. The writ of error was sued out, and a reversal of the judg-

ment is sought here, by the "Board of County Commissioners of the County of Phillips." Section 525, Gen. St. 1883, provides as follows: "In all suits or proceedings, by or against a county, the name in which the county shall sue or be sued, shall be, the board of county commissioners of the county of _____." A county is a political subdivision of the state for governmental purposes, and, at common law, could neither sue nor be sued. It is only by virtue of statutory enactment that any action can be maintained, either in its behalf or against it. The right to sue a county being purely statutory, where the mode of instituting the suit is prescribed by statute, it must be strictly followed. *Schuyler Co. v. Mercer Co.*, 4 Gilm. 20; *Gilman v. Contra Costa Co.*, 8 Cal. 52, note to same case, 68 Am. Dec. 291; *Monroe Co. v. Flynt*, 80 Ga. 489, 6 S. E. 173; *Rock Island Co. v. Steele*, 31 Ill. 543. We have but one statutory provision concerning the manner in which a suit shall be brought against a county. It must be brought against the board of county commissioners of the county sued. That is the corporate name of the county for the purposes of the suit, and there is no authority to sue it by any other name. In this case, the statutory requirement having been disregarded, the judgment is a nullity. But the plaintiff in error is the "Board of County Commissioners of the County of Phillips." It was not a party to the proceedings below. It cannot, in any way, be affected by the judgment. The statute provides no method for the enforcement of such a judgment, and neither directly nor remotely is the plaintiff in error interested in it, or in any disposition which might be made of it. The case is therefore improperly in this court, and the writ of error is dismissed. Dismissed.

PELTON et al. v. BAUER.

(Court of Appeals of Colorado. Feb. 12, 1894.)

REVIEW OF EVIDENCE—BILL OF EXCEPTIONS—CERTIFICATE.

The evidence cannot be reviewed where the bill of exceptions is not certified by the trial judge to contain all the evidence; the certificate of the stenographer being of no avail.

Appeal from district court, Rio Grande county.

Action by John George Bauer against Abbe R. Pelton and Lewis H. Halstead. Judgment for plaintiff. Defendants appeal. Affirmed.

Lee Champion, for appellants. R. D. Thompson and E. F. Richardson, for appellee.

BISSELL, P. J. This action was brought by Bauer against Pelton and Halstead to recover the price of some horses and a buggy and harness and feed, alleged to have been sold to the defendants as copartners, trans-

acting business in the valley, under the firm name and style of the San Luis Valley, illustrated. The sale and delivery and the copartnership were sufficiently alleged. No issue was taken on the sale and delivery of the materials, except a special one denying a sale to the copartnership. The answer denied the existence of the firm as such, and averred that the concern had no dealings whatever with the plaintiff, or his assignor from whom he acquired the right of action for the price of the buggy and the feed. The trial was entirely confined to proof of the circumstances under which the sales were made. The case was tried to a jury, and was submitted to them under instructions which stated the law correctly concerning the proof necessary to establish a copartnership, and what was essential in order to hold the defendants liable as a firm. Some complaint is made concerning the instructions, but the criticisms are not well founded, and there is nothing in these statements of the law by the court which would justify a reversal of the case. There are some 22 assignments of error, which are all separately discussed, but which are based generally upon the rules of law governing the right of copartners in nontrading partnerships to issue commercial paper. It transpired at the trial that the stuff was bought by Halstead, and that he gave his own notes for the price, but the plaintiff disregarded the notes and brought suit against the firm for the original consideration of the debt. His right to do this cannot be questioned, providing it sufficiently appears that the transaction was a firm one, for which Pelton could be held liable. In so far, then, as the argument concerns the legal questions which spring from the execution of a note by one member of a nontrading partnership, and the suit is brought on the written promise against the firm, and the defense is a want of authority, we may dismiss it from our consideration. There is nothing in the case except the one question,—whether Pelton and Halstead were partners, and the property was bought on the firm credit and under circumstances which would make Pelton liable for the price. There are two considerations which prevent us from reviewing this question, or passing on the sufficiency of the testimony to support the verdict. In the first place, the case was tried to a jury, submitted to them under proper instructions, and the evidence which was received was competent for the purposes for which it was offered, and when the jury rendered the verdict against Pelton, this court was concluded thereby from any consideration of the questions of fact. It is quite possible that some little evidence may have crept in which would be open to criticism, but no such errors were committed by the court in admitting it as would permit us to disturb the judgment. Under our well-settled practice, the verdict of a jury is always binding unless we are

able to discover, upon inspection of the record, that it has resulted from bias or prejudice, or we have from some other conceded good reason a right to disturb the verdict. The present case can be brought within none of the exceptions. The record as it comes to us is not in such shape as to permit any consideration of these matters, because, so far as we are advised, all the evidence taken on the trial below is not before the court. The parties have preserved no exception to the judgment, nor have they obtained from the trial judge a certificate that the bill of exceptions contains all the evidence received upon the trial. The certificate of the stenographer is of no value for the purposes of a certification, nor does it in terms state that the bill contains all the evidence. It is well understood by the profession that the certificate of the judge to this fact is a prerequisite to any determination by the appellate tribunal of the sufficiency of the evidence to support the verdict and judgment. So far as we are able to determine, there might have been evidence introduced which would relieve any doubt we might entertain concerning it. However much we may be inclined to question the extent of the proof, and even though we might be well convinced that the verdict ought not to stand, we would not, under these circumstances, be at liberty to question it. These considerations dispose of the appeal, and render it entirely unnecessary to review or resolve the many matters suggested in the argument of counsel. On the record presented, the judgment cannot be successfully assailed, and it must accordingly be affirmed.

STECK v. NORTHERN COLORADO IRR. CO.

(Court of Appeals of Colorado. Feb. 12, 1894.)

VOLUNTARY PAYMENTS—RECOVERY.

Where one, with knowledge of all the facts, makes a contract, and for three years makes payments thereunder, he cannot recover the sums paid, on the ground that he was entitled to what he received without payment.

Error to district court, Arapahoe county.

Action by Amos Steck against the Northern Colorado Irrigation Company to recover money paid. Judgment for defendant. Plaintiff brings error. Affirmed.

Carpenter & McBird, for plaintiff in error. Hugh Butler, for defendant in error.

BISSELL, P. J. According to our view of the law, the court ruled correctly on the demurrer, and the judgment must be affirmed. Many grave constitutional and statutory questions were suggested on the arguments which cannot be considered or determined. While they may be of great moment to the people of the state, and under some circumstances we might be compelled to decide them, yet, as the case is presented by the

record, if we should undertake to discuss or determine the respective rights of the users of water, and of companies organized to carry it, our declarations would be obiter, and of no binding force. The circumstances surrounding the payment made by the plaintiff, Steck, entirely conclude him in this suit. In 1884, Amos Steck was the owner of 40 acres of land in Arapahoe county, located in proximity to the canal constructed by the Northern Colorado Irrigation Company. On the 3d of March of that year, Steck and the irrigation company entered into a written agreement, which in general terms provided for the delivery of water by the company to irrigate Steck's land. There were many conditions and limitations annexed to the right, but these are wholly unimportant. Thirty-six dollars interest was paid by Steck when the agreement was signed; the balance of the price was payable in three annual installments, falling due on the 3d of March in each year thereafter, and amounted to \$120 annually, with interest in the sums of \$24 and \$12, payable in advance, together with an annual rental per acre of not less than \$1.50, and not more than \$4. These are all the terms of the contract with which we have anything to do. The only legal inquiry concerns these payments. As a general proposition, it may be safely stated that where a party, with a full knowledge of all the facts of the case, voluntarily pays money in liquidation of an unjust demand, he cannot afterwards insist that the payment was made by compulsion, and recover the money. The reason of the rule is a plain one. The parties meet on even terms, and, if the parties desire to contest the right and litigate the result, this action must precede the payment. As was stated in the well-considered case below cited: "If it were not so, the effect would be to leave the party who pays the money the privilege of selecting his own time and convenience for litigation, delaying it, as the case may be, until the evidence which the other party would have relied upon to sustain his claim may be lost by the lapse of time and the various casualties to which human affairs are exposed." *Awalt v. Association*, 34 Md. 435; *Williams v. Colby*, 44 Vt. 41; *Patterson v. Cox*, 25 Ind. 261; *Cook v. Boston*, 9 Allen, 393; *Benson v. Monroe*, 7 Cush. 125; *Boston & S. Glass Co. v. Boston*, 4 Metc. (Mass.) 181. The rule is both useful and wholesome. To justify a departure from it, the case presented must rest on one of the plain and obvious distinctions recognized and settled in those cases which permit a recovery where money has been voluntarily paid. No benefit would be derived from a statement of the various exceptions which have been ingrafted on the rule. It is enough to decide that there are no facts set out in the complaint which will bring it within any of them. We do not determine what would have been the law if the party had executed the contract, made his first

payment of \$36, and immediately brought suit for the annulment of the agreement, and to enforce what he now maintains were his statutory and constitutional rights. He would then have proceeded promptly, availed himself of the first opportunity to assert his claim, and, if he ever had the rights which he now contends for, he might possibly have been in a position to maintain them. He took no such steps. He made the three successive annual payments, paid his water rent as it fell due, in the shape of an assessment of so much per acre, and now brings suit to recover the entire sum which he thus voluntarily paid. It is impossible to evade the force of the annual and successive payments. The authorities are all against it. He is concluded by his own acts, and cannot escape the effect of what he did when his performance accorded with his agreement, and so fully evidenced his assent. The judgment must be affirmed. Affirmed.

DAVIDSON v. DENVER TRAMWAY CO.
(Court of Appeals of Colorado. Feb. 12, 1894.)
ELECTRIC STREET CARS—COLLISION WITH TEAM—
CONTRIBUTORY NEGLIGENCE.

Plaintiff, without noticing whether any car was approaching, turned his team in the middle of a block to cross a street-railroad track, and was struck by an electric car traveling in the direction he had been going. He was familiar with travel on the railroad, and, when at the preceding street crossing, saw a car 900 feet in front, on a switch, waiting for a car coming in the same direction he was. He testified that at that point he looked back, and saw no car, but a car could be seen for three-quarters of a mile, and the one which struck him, had it not been in sight, would not have reached the point of collision till three minutes after he had crossed. *Held*, that he was guilty of negligence.

Error to district court, Arapahoe county.

Action by David Davidson against the Denver Tramway Company. Judgment for defendant. Plaintiff brings error. Affirmed.

Felker & Dayton, for plaintiff in error. James H. Brown and Milton Smith, for defendant in error.

BISSELL, P. J. An electric car operated by the tramway company collided with the wagon in which Davidson and his wife were riding, and did considerable damage to their persons and property. Davidson brought suit, but at the conclusion of his proof he was nonsuited, and has brought error to reverse the judgment. He was evidently nonsuited because of his negligence, which contributed to the injury. Only so much of the evidence will be stated as bears upon this single proposition, and is necessary to an easy apprehension of our conclusions respecting it. The tramway company operated an electric line out Broadway for several miles beyond the limits of Denver. That street runs due north and south, and at the point of the accident consists of a single track, with turn-

outs or switches to enable the cars to pass each other. Davidson had lived at Petersburg for nearly a year prior to the accident, and was accustomed to drive to town several times a week. The streets crossing Broadway run at right angles to it, and this was true of Myrtle street, along which Davidson drove eastwardly on the morning of the 10th of April, when he was hurt. In pursuing his journey, he crossed the railway track at the intersection of Myrtle and Broadway, to the east side of the road, turned to the left, and went north along the line to a point some 210 feet beyond Myrtle, where he attempted to cross the track to a store on the other side of the way. His course was some 7 or 8 feet distant from the track, and of course coincident with that of the car coming from the south, which afterwards struck his vehicle. According to his testimony, when he crossed the track at Myrtle, he looked south, and saw no car coming. As he turned and went north, he saw a car on the switch, about 900 feet from that point, headed southward, and waiting for a car which was coming from the south, headed in the opposite direction, but which, as he states, he did not see. He noticed the car on the switch, and evidently knew it was waiting for the car bound north to pass, which, of necessity, was coming behind him, running in the same direction that he was traveling. At this part of Broadway the road is comparatively level, and, as Davidson testifies, any one could see southward from Myrtle street a distance of three-quarters of a mile. There was a grocery store on the west side of Broadway, between Myrtle and the next street crossing Broadway to the north, at which Davidson and his wife were in the habit of trading. It would appear, although the evidence is not very clear upon this subject, that travel was somewhat common across Broadway at that point, and that the customers who drove on the eastwardly side of the road at about the location of the grocery crossed the track to do their trading. Davidson and his wife both testified that such was their custom, and on this particular morning they started to cross the track, and were run into by the car. They were driving in an open wagon between 8 and 9 o'clock in the morning, and neither was bundled up, nor had their ears covered. The morning was fair, although somewhat cloudy, but there was nothing in the conditions of the weather to prevent these persons from either hearing or seeing the approaching car. Davidson says that, after he crossed the track at Myrtle, he noticed the car standing on the switch, but that when he turned to cross the road he neither listened nor looked back, to discover whether a car was coming from the south. After they got onto the track, his wife looked, and discovered the car almost onto them, when Davidson did the best he could to get out of the way, but failed, and was injured. One of his witnesses testified that the car was

coming along at the rate of 10 or 12 miles an hour, while, according to Davidson, his horse was being driven in a sharp walk or a slow trot, at the rate of 4 or 4½ miles an hour. This is only important as bearing upon the degree of watchfulness or care which Davidson used at the time.

The great development of rapid surface transportation, and the almost universal appropriation of the streets of the cities, and the roads running therefrom to the suburbs, by the various cable and electric systems, have resulted in the springing up of a very large and increasing class of suits for personal damages, and in the development of a new body of the law, which has been formed by the application of old rules to the new conditions, and the evolution of some relatively modern doctrines applicable to the use of streets and highways. The roads have always been the king's highway, along which all persons had an equal right to pass. The learning which has been expended in the settlement of the rights of the pedestrian and the driver of a vehicle, and their relative duties and obligations when passing or meeting upon the highway, has developed a most interesting branch of the law. In this action, we are concerned with but a very slight element of it. The difference between the rights of steam railways and street railways is marked and unquestioned, although in many respects somewhat similar. The distinguishing difference is in the exclusiveness of the right of a steam-railway company to occupy its track as against all other persons or modes of locomotion. The street railway, however, occupies the surface of the highway subject to the common use, not only of the balance of the road, but also of that part covered with the tracks by either the pedestrian or the driver of a vehicle. The cases are not entirely agreed in their description of the easement enjoyed by the transportation company. It is always conceded not to be exclusive, but is generally held to be superior. Whether or not this is an accurate description of their right, their privilege is undoubtedly a preferential one, as against all other modes of locomotion along that part of the highway occupied by the track. This concession is absolutely essential to the preservation of the rights conferred by their franchise, the development of the objects for which they were organized, and for the great benefit of a very large proportion of the population of the cities which must make use of it for the purposes of business and travel. It is evident from the later decisions that the preferential use of the lines of their track by cable and electric companies closely approximates the right of exclusive use granted or conceded to steam railways. All the courts agree, however, that there still remains with the pedestrian and the users of vehicles and of horses, the old right which they always enjoyed,—to use all of the king's highway at their pleasure, and for their convenience. It

is only insisted that they shall yield the track to the railway company, and shall keep out of the way of the cars, so far as may be possible, barring the accidents of sudden emergency. Neither of the rules which have been the outgrowth of the litigation springing from accidents happening along the line of steam railways has been, save in a limited manner, applied to these rapid modes of transit by cable and electricity. It is pretty universally adjudged that, before one can cross a steam railway, he is bound to stop, look, and listen, to discover the approach of a train, before he shall be permitted to cross the track and escape the responsibility of his own negligence if he fails in any of these particulars. While, in a sense, and a very limited one at that, this rule has been applied to the acts of the pedestrian or the driver of a vehicle in crossing the transportation company's line, the difference between the steam railway and the electric or cable line must be borne in mind. The absence of the exclusive right to the occupancy of the street compels the distinction. The grant of a franchise to the company in no manner takes away from the other users of the highway their right to its entire occupation, save that their right to enjoy is limited by the contractual right of the transportation company, and its preferential privilege in the use of that part of the road occupied by the tracks. If the pedestrian or the driver of a vehicle were compelled to stop, look, and listen, before he crossed the tracks, it would be an unnecessary and an unusual burden and restriction upon his common-law right to use the king's highway, which still remains with him. Notwithstanding this exception, neither the pedestrian nor the driver of a vehicle may undertake to cross a track heedlessly and recklessly, and without the exercise of the greater care which he is bound to use in crossing the tracks of a company lawfully using powerful, rapid, and dangerous modes of locomotion. There is some difference among the authorities, in their expression of this principle. Pennsylvania lays it down as an absolute rule that, if one heedlessly makes the attempt to cross such a track, he is guilty of negligence per se, which will absolutely bar his right of recovery. Other states hold the failure to look to be proof of negligence which will bar the recovery, where there is nothing in the case which would in any manner qualify this proof of negligence, and leave a fairly debatable question open for the consideration of a jury. Others, again, as in Minnesota, say that there is no hard and fast rule in a case of this description, and that a failure to look would not, as a matter of law, and regardless of circumstances, be treated as negligence. This case does not compel us to definitely and absolutely express our notions respecting this matter, although it is very difficult to imagine circumstances which would excuse the injured party for his neglect to use his eyes as well as his

ears to guard against an accident occurring while he is crossing the track. *Ward v. Railway Co.*, (Sup.) 17 N. Y. Supp. 427; *Carson v. Railway Co.*, 147 Pa. St. 219, 23 Atl. 38; *Ehrisman v. Railway Co.*, 150 Pa. St. 19, 24 Atl. 506; *Wood v. Railway Co.*, 52 Mich. 402, 18 N. W. 124; *McClain v. Railway Co.*, 116 N. Y. 459, 22 N. E. 1062; *Dolan v. Canal Co.*, 71 N. Y. 285; *Railroad Co. v. Righter*, 42 N. J. Law, 181; *Adolph v. Railway Co.*, 76 N. Y. 530; *Shea v. Railway Co.*, (Minn.) 52 N. W. 903; *Beach, Contrib. Neg.* §§ 251-259 et seq.; *Booth, St. Ry. Law*, § 316; *Meyer v. Railway Co.*, 6 Mo. App. 27; *Sheets v. Railway Co.*, (N. J. Sup.) 24 Atl. 483. These cases all unite in holding that a person must use his senses in order to prevent accident and escape injury. If the proof show that he failed to do either, and that this contributed directly to the injury, the law will be applied to the facts, and the plaintiff will not be permitted to recover. The plaintiff's right to go to a jury upon the questions of fact concerning his negligence depends so much upon the question whether the matter is a debatable one, and whether the proof leaves room for different inferences in men's minds respecting his conduct, that he cannot complain of a nonsuit when he has been guilty of what the law says is negligence on his part. In a case of that sort, there is nothing for a jury to determine, and the court applies the law to the facts. The present case comes directly within the rule. Confessedly, the plaintiff did not look to the south, along which he was advised the car was approaching; and evidently neither he nor his wife used their ears, or any of their senses, to protect themselves against danger. Davidson saw the car standing on the switch a few hundred feet distant, waiting for one approaching from the south. He had driven up and down the line of the road almost daily for 10 months, and knew that these cars, propelled with great force and much speed, went along the line at frequent and almost regular intervals. These circumstances and this knowledge advised him of the necessity to be on the alert and the lookout to see if the car was coming, before he crossed the track. Neither he nor his wife looked, and apparently neither of them heeded the sound of the approaching car. He turned upon the track without consideration, and a collision resulted from his negligence. It is not easy to reconcile his statement of his conduct at Myrtle street with reference to looking up and down the track with the evidence in the case. The proof was that the car was running at a speed of 10 or 12 miles an hour; that from Myrtle street, southward, he could see $\frac{3}{4}$ of a mile; that he was going at the rate of 4 or $4\frac{1}{2}$ miles an hour, and went from where he crossed at Myrtle street to a point some 210 feet distant, where he attempted to cross to the grocery store whither he was journeying. Either he was mistaken in regard to the fact concerning the approach of

the car, or else he was mistaken in stating that he looked. At the speed at which the car was traveling when he crossed Myrtle street, if it was not in sight for a distance of three-quarters of a mile, the car would not have reached the point of accident within 3 minutes, while he would travel the distance between Myrtle and the point of crossing in about 35 seconds. This fact very greatly disturbs our confidence in the accuracy of his statement that he looked southward along the line of the track when he crossed at Myrtle. This might not be conclusive, though it bears strongly upon the question whether he was reasonably attentive and prudent in his conduct. The railroad company cannot be chargeable with negligence for failing to slacken the speed of their car as they approached the crossing, for the driver was pursuing the same direction in which the car was going, and it is not to be supposed that the motorman could reasonably be expected to anticipate that the driver would change direction, and cross in the middle of a block immediately in front of an approaching car. Davidson did not look, and apparently did not use his ears; and, crossing the track under such circumstances, his act must be deemed a negligent one, which contributed to the injury, and, as a matter of law, bars his recovery. The nonsuit was right, and the judgment will be affirmed. Affirmed.

UNION PAC. RY. CO. v. KELLEY.

(Court of Appeals of Colorado. Feb. 12, 1894.)

RES ADJUDICATA—ABATEMENT—FELLOW SERVANTS—NEGLIGENCE.

1. Dismissal of an action against a railroad for damages for personal injuries caused by defendant's negligence, on the ground that it abated on the injured person's death, is no bar to assumption by his administrator for the loss resulting to his estate from defendant's failure to perform its implied contract of safe carriage.

2. An express messenger, who, by a contract between the express company and railroad, also handles the latter's baggage on the train, and is required by a rule of the road to consider himself its servant in matters relating to the movement and government of the train, and to obey the conductor, may recover from the railroad for injuries caused by the negligence of a brakeman.

3. The court cannot say that an express messenger was negligent because his car, with others, detached from the engine, having started down grade, he failed to jump off when he became aware of the situation, and the cars had reached a speed of only four or five miles an hour.

Appeal from district court, Arapahoe county.

Action by Ella Kelley, administratrix of the estate of Edward S. Kelley, deceased, against the Union Pacific Railway Company, for damages resulting to the estate from defendant's breach of contract for safe carriage. Judgment for plaintiff. Defendant appeals. Affirmed.

For former appeal, see 27 Pac. 1058.

Teller, Orahood & Morgan, for appellant. Charles M. Campbell and Frank C. Goudy, for appellee.

THOMSON, J. This is a suit by Ella Kelley, administratrix of the estate of Edward S. Kelley, deceased, against the Union Pacific Railway Company, to recover damages sustained by the estate in consequence of injuries received by the deceased through the fault of the defendant. The complaint alleges the incorporation of the defendant, the management and operation by it of a line of railroad, which is described, and then proceeds as follows: "That theretofore the said defendant had entered into a contract with the Pacific Express Company, a corporation organized and existing under and by virtue of the laws of the state of Nebraska, and lawfully doing business in the state of Colorado, for a valuable consideration to it paid by the said Pacific Express Company, to transport its express packages and express messengers over the line of defendant's said railroad between the points aforesaid, and undertook, promised, and agreed, in consideration of the premises aforesaid, to safely carry the express packages and the express messengers of the said the Pacific Express Company. That on, to wit, the 11th day of November, 1885, the deceased, the said Edward S. Kelley, was a route express messenger in the employ of the said the Pacific Express Company, and was then and there, while in the line and in the discharge of his duty as such express messenger, being carried over the said railroad, so managed and controlled by the said defendant, in a car attached to one of the defendant's trains, and set apart for the use of the said the Pacific Express Company, its messengers and employees. That at the date last aforesaid the defendant, not being mindful of its said contract and agreement to safely carry the said Edward S. Kelley pursuant to the agreement aforesaid, carelessly and negligently stopped its train, to which the said car so set apart for the use of the said Edward S. Kelley and the said the Pacific Express Company was attached, upon a steep grade on the line of the defendant's said road at or near the town of Breckenridge, in said county of Summit and state of Colorado, and detached the locomotive or locomotives therefrom, and did not properly set the brakes so as to securely fasten the said train, and removed all of the brakemen and employees from said train, without giving the said Edward S. Kelley any notice, information, or warning as to what had been done, or any warning of the danger that he was in by reason of the careless management of said train, as aforesaid, and that, while said train was so left unguarded, it, in some manner unknown to plaintiff, started down said steep grade, and soon acquired a rapid velocity, and continued to run down the said grade

for a distance of, to wit, four or five miles, when the same was thrown from the track, and the said Edward S. Kelley was, without any fault or negligence on his part, so greatly injured by the shock therefrom as to produce insanity, by reason of which he was adjudged insane, by proceedings duly instituted in the said county court of Arapahoe county, and, by an inquisition duly made, ordered by the said court to be confined in the State Lunatic Asylum at Pueblo, in said state of Colorado, at which place he died at the date aforesaid, but not from the injuries caused by the negligence for which this suit is brought. That by reason of the injuries aforesaid the said Edward S. Kelley became, and during all of his lifetime thereafter remained, sick, sore, lame, and disordered in mind and body, so as wholly to unfit him for following his usual occupation, or from engaging in any business of any kind whatever, and earning wages of any kind, in consequence of which, a loss and damage have occurred to the personal estate of the said deceased in the sum of one thousand nine hundred and sixty-four dollars, (\$1,964,) and in the further sum of thirty-five dollars (\$35) incurred by the said Edward S. Kelley in medical expenses in attempting to effect a cure of his said sickness resulting from the injuries aforesaid. Wherefore, the plaintiff, as such administratrix, prays judgment against the defendant for the sum of one thousand nine hundred and ninety-nine dollars, (\$1,999,) together with costs of this action." To this complaint a demurrer was filed, the grounds of which were that it did not show any right in Ella Kelley to bring and maintain the action, and because Ella Kelley had no right to bring or maintain the action. The demurrer was sustained, and judgment given for the defendant. The plaintiff took the case to the supreme court by writ of error, where the judgment was reversed, and the cause remanded. *Kelley v. Railway Co.*, 16 Colo. 455, 27 Pac. 1058. The defendant then answered—First, a denial; second, former adjudication, in the United States circuit court for the district of Colorado, of the same cause of action, in a suit between William F. M. Lyon, as conservator of Edward S. Kelley, who was then a lunatic, and this defendant; and, third, that the injury to deceased was caused by his own negligence, and the negligence of his co-employees in the same general line of employment. Plaintiff replied, denying the second and third defenses. A trial resulted in a verdict and judgment for plaintiff of \$1,999. 35 Fed. 111. The defendant brings the cause here by appeal.

A number of questions are presented by the record,—some of them of considerable importance. The question raised by the demurrer to the complaint is no longer in the case. They are the identical complaint and the same demurrer which were before the supreme court, and the questions presented

by these pleadings were the only ones decided. It was there held that the action, having been brought upon a contract, survived to the plaintiff, and that the facts stated were sufficient in law. This adjudication is conclusive of any question concerning the sufficiency of the complaint. It is, however, contended that the cause of action in this case is *res adjudicata*. On the 21st day of February, 1888, William F. M. Lyon, as conservator of Edward S. Kelley, brought an action in the United States circuit court for the district of Colorado to recover for injuries received by Kelley through the negligence of the defendant, its agents and servants; being the same injuries described in the complaint in this cause. The complaints in that case and in this, except as to the allegation of the contract for safe carriage, and its breach, are substantially the same. The answer there, as here, denied the complaint, and averred that the injury was caused by Kelley's own negligence and that of his fellow servants in the same general line of employment. As in this case, the affirmative defense was denied by the replication. Pending that suit, Kelley died; and the plaintiff, having been appointed administratrix of his estate, made application to the court to continue the action in her name as such administratrix. The court denied the motion, and dismissed the suit, without costs. The reason for this action of the court is not disclosed by the record of the case; but we are informed by the defendant, in its answer, that it was because the suit did not survive to the administratrix, and we assume that this is true. The action in the circuit court was for a tort. The complaint alleged injuries to the person of the lunatic, suffered through the wrongful negligence of the defendant, and the damages claimed were solely on account of these injuries. It is clear that the action died with the plaintiff, and hence the refusal of the court to revive it in the name of the administratrix, and its judgment dismissing the cause. The contention is that the judgment in that case is a bar to this action. Whether this is true or not depends upon several conditions. In the first place, the judgment is conclusive evidence only of the matter determined by it; and to enable the defendant to interpose that matter, to that extent, in this case, as *res adjudicata*, it must appear that the cause of action in both cases was the same, and that it was between the same parties, in the same right or capacity, or their privies claiming under them. *Bigelow v. Winsor*, 1 Gray, 299; *Aspden v. Nixon*, 4 How. 467; 2 Black. Judgm. 610; 1 Herm. Estop. §§ 115, 134, 135. There was no trial in the former case. As to whether the matters alleged were true or not, or as to their sufficiency to authorize a recovery; there was no adjudication. The sole decision was that by reason of the death of the plaintiff the cause of action was extinguished. To this extent it may be said

that the judgment is conclusive, but no further. But counsel seem to think that this is an attempt to accomplish the same purpose which was sought in the federal court, by simply changing the form of action. There is a class of cases in which a party may elect to sue in tort or in assumpsit, and by selecting one remedy he waives the other. This is true in case of the wrongful conversion of money or property; and the party entitled to it may, instead of bringing an action in trover, sue upon an implied promise to pay, and this the law will not permit the wrongdoer to deny. But, in either form, the subject-matter of the suit and the cause of action are precisely the same, so that one final adjudication determines the controversy forever. But an action for an injury to the person must be in tort. In the nature of the case, there can be no implication of a promise to pay for the wrong. If a plaintiff should attempt to bring an action in assumpsit for injuries done to his person, he would be compelled to allege, in effect, that he permitted the defendant to inflict the injuries upon him in consideration of the promise of the defendant to pay him a reasonable compensation for them. Mr. Cooley characterizes such a suggestion as an absurdity. Cooley, Torts, (2d Ed.) 107 et seq. The action in the federal court was in tort for the injuries, and the present action is for loss sustained by reason of the failure of the defendant in the performance of its implied contract to safely carry the deceased. The two causes of action are essentially different, and the measure of recovery in each is different. In one case the jury, in estimating the damages, would be entitled to consider the nature of the injuries, and the pain and suffering caused by them, while in the other the damages would be confined to the actual pecuniary loss occasioned by the resulting disability. This survives, and that does not. This is therefore not a suit in another form upon the same cause of action, which abated in the federal court, and a judgment there could be no bar here. If an adjudication were necessary to make it any more conclusive than the law makes it, the judgment of the federal court is conclusive that the action brought there could not be maintained in the name of plaintiff as administratrix, while the judgment of the supreme court in this case is equally conclusive that this action can be maintained in her name; and, for the reason that this plaintiff could not maintain that suit, it is evident that the right or capacity in which the two plaintiffs sued was not the same. The record of that case was inadmissible for any purpose, and was properly rejected.

Did the injuries received by the deceased result from the negligence of his coemployees in the same general line of employment? The evidence is that he was in the employ of the Pacific Express Company as messenger. The express cars were furnished by the defendant. By virtue of an agreement

between it and the express company, he acted as baggageman for the defendant, the railroad company furnishing the express company other service in exchange. He performed the baggage service under instructions from the express company; but his baggage duties were defined by the railroad company's baggage department, and, as baggageman, he was under its direction. He was in the sole employ of the express company. It paid him his wages, and it, alone, could discharge him, either as messenger or baggage agent. If his baggage service was unsatisfactory to the railroad company, it could request his discharge, but the discharge came from the express company. Rule 92 of the defendant was read in evidence as follows: "Agents in charge of the United States mails, express messengers, sleeping-car conductors and porters, news agents, individuals in charge of private cars, and persons in charge of stock, while with the trains of the Union Pacific Railway, must consider themselves employees of the Union Pacific Railway Company, in all matters connected with the movement and government of trains, and must conform to the directions of the conductors thereof." The accident occurred on February 11, 1885. The train consisted of a number of loaded freight cars, and one express car at the rear, of which the deceased was in charge. The train was at Breckenridge, having come for some distance over a heavy, ascending grade, with a heavy grade in front of it to the top of the mountain, and it was too heavy to proceed entire. The conductor therefore divided the train, detaching a number of the rear cars, including the express and baggage car, and set the brakes upon some of them. After they had been detached, the brakes, for some reason, became loose, the detached portion of the train broke away, and ran down the grade, which it had ascended, for a distance of about five miles, where it left the track, and was wrecked, causing the injuries suffered by the deceased. There belonged to the train a brakeman, whose duty it was to remain with the rear end of the train, look after it, protect it from other trains, and prevent it from getting away and going down grade. When the train commenced to run away, this brakeman was not at his post. The argument of counsel is that under the facts in evidence the deceased was a fellow servant with the employees of the defendant, and that, therefore, the injuries having been caused by the negligence of his coemployees, or some of them, no responsibility or liability could attach to the railroad company. "Fellow servants" are defined to be those who serve the same master, work under the same general control, derive authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades or departments of it. *Wonder v. Railroad Co.*, 32 Md. 411; *Coul-*

ter v. Board, 4 Hun, 569; Abraham v. Reynolds, 5 Hurl. & N. 142; Foster v. Railway Co., 14 Minn. 360, (Gil. 277;) Wood, Mast. & S. § 424. Applying this test to the facts before us, leaving the rule in question out of view for the present, we do not think that the deceased and the railroad employees were fellow servants. He was not in the employ of the railroad company for any purpose. Both as express messenger and baggage agent, he was the servant of the express company. It hired him, and paid him his compensation. It alone could dismiss him, and it was to its general control that he was subject. The effect of the agreement between the two companies was that the express company, for a consideration, handled the baggage of the railroad company, and the deceased was simply its agent for that purpose. In caring for the baggage, he was under the direction of the railroad company; but this qualified subjection to the latter company grew out of the agreement with the express company, and not out of any contract between him and the railroad company. The railroad company had no general control of him. It did not employ him, it did not pay him, it could not discharge him, and he was not responsible to it for the manner in which he performed his duties. If it desired his dismissal, it must procure it through his employer, the express company. The deceased and the railroad men were therefore not servants of the same master, or under the same general control. Rule 92 could not affect him, unless he had knowledge of it. It may be conceded that the employees of the railroad company were presumed to know its rules; but that presumption does not extend to persons not in its employ, and there is no evidence that the deceased knew, or might have known, of this rule. But we are unable to see that, even if he had known it, it would have affected his relations with that company, in alteration of its liability in this action. Certain classes of persons—among them, express messengers—are required by the rule to consider themselves employees of the defendant, in all matters connected with the movement and government of trains, and must conform to the directions of the conductors thereof. If it can be said that this rule would place the persons named under the control of the company, such control is limited, and not general. It is not the same character or degree of control which a master exercises over his servants. The rule is perhaps proper, for the purpose of insuring the safety of trains and of those upon them. Passengers are also subject to rules having the same purpose in view. But such a rule does not make the persons it specifies employees of the company, in the sense that its paid servants are, so as to absolve it from lia-

bility for injuries received by those persons in consequence of the negligence of its regular employees. There is no definition of the term "fellow servants" which includes persons doing business with a railroad company, who, temporarily, for the purposes of the safety of the train, are to consider themselves as employees; and, if the deceased did not occupy the relation of fellow servant, then his rights were those of a passenger.

We are asked to say, as a matter of law, that the deceased was guilty of negligence contributing to his injuries, and that, therefore, a recovery is precluded. The only evidence of what the deceased did is contained in his own statements, made shortly after the accident. He said that, after the detached portion of the train commenced to run away, he first thought it was going up hill, but upon looking out he saw it was going the other way. He then went upon the top of his car, to see if any one was on the train, and unsuccessfully tried to set the brakes. The train was going at the rate of four or five miles an hour. At that speed, he might safely have left it, but he did not. He went back into the baggage car, and there remained until the wreck. As the train was going down hill, of course, its speed was being constantly accelerated. What constitutes contributory negligence is somewhat dependent upon circumstances. A man, upon suddenly realizing that he is in peril, is liable not to be in the best frame of mind for cool and accurate calculation; and, while he is attempting to determine what action should be taken, it may be too late to act at all. Where practically instantaneous decision is demanded from a person dazed by danger, an error of judgment is not, in law, to be imputed to him as contributory negligence. Whart. Neg. § 304. It is for the jury to determine, from the facts and circumstances shown in evidence, whether the conduct of a man so situated amounts to contributory negligence or not.

The instructions given by the court fairly submitted all the questions in the case to the jury. The questions of the negligence of the defendant, of the contributory negligence of the deceased, of the relations sustained by him to the defendant, and of the measure of damages, were correctly presented. Certain instructions were requested by the defendant, the effect of which was to declare, as a matter of law, that the deceased and the defendant's employees were fellow servants, and that no cause of action had been proven. These were properly refused. We are unable to discover any improper ruling in the admission or rejection of evidence. The record seems to be free from any error of which the defendant can complain, and the judgment must therefore be affirmed. Affirmed.

1. The court properly directed a cause, usually reached, to proceed to trial in the absence of defendant and his counsel, where the only showing accounting for such absence was an unverified letter of defendant requesting a continuance because of his sudden illness.

2. Civ. Code, § 187, which provides that court "shall" give such instructions as may be necessary, does not require the giving of instructions in an action, tried in the absence of defendant, to recover a balance due on an account.

3. In an action on a running account, tried in the absence of defendant, evidence of the balance due on the account is sufficient to support a verdict for plaintiff.

4. The statute of frauds must be pleaded, and is available as a defense.

5. One who has promised to pay for goods furnished another cannot avail himself of the statute of frauds in an action for their price, where he has collected such price from the vendor.

Verdict for plaintiff, Clear Creek county, Colorado, to district court, Clear Creek county, Colorado, by George W. Hall and others against William A. Hamill on an account. Judgment for plaintiffs. Defendant brings error. Affirmed.

The other facts fully appear in the following statement by REED, J.:

Defendants in error (plaintiffs below) brought suit against plaintiff in error, alleging an indebtedness of \$1,893.75 for the balance of a mutual and open account current for (naming the goods) goods sold and delivered by the plaintiffs to the defendant at his request, work done and performed by the plaintiffs for the defendant at his request, and moneys had and received by the defendant for the use of the plaintiffs, between November 1, 1882, and November 4, 1891. Defendant answered—First, traversing each allegation of the complaint, and denying any indebtedness whatever; second, denying that the defendant was indebted to the plaintiffs in any amount whatever, save and except about the sum of three hundred dollars, the same being a balance due on a mutual book account current, accruing before the 1st day of November, 1891; and as special defenses to the following: "This defendant, in answering, alleges that after the commencement of this action he demanded of the plaintiffs a bill of particulars of the account upon which they claimed to be indebted; that the plaintiffs furnished said bill of particulars, from which it appears that there is a charge against the defendant for the sum of three hundred and thirty-four dollars and ninety cents (\$339.90) for goods, wares, and merchandise alleged to have been sold and delivered by the plaintiffs to the defendant, William A. Hamill, at his special instance and request; and that at the time of said sale the plaintiffs were informed by the said Hamill that said goods were wanted by him for use on the said Georgetown and Middle Park Wagon-Road, of which, as plaintiffs are informed and believe, he is or was the owner or principal owner; and the said Hamill then and

the Georgetown and Middle Park Wagon-Road Company; that the defendant is in no wise indebted to the plaintiffs for and on account of the amount claimed to be due on either of said items so charged against him, or any part thereof, and is in no wise responsible for the payment of the same; that it also appears from said bill of particulars, so furnished as aforesaid, that the defendant is charged with being indebted to the plaintiffs in the sum of eleven hundred thirty-four dollars and eighteen cents (\$1,134.18) for and on account of interest alleged to have accrued on the account said plaintiffs claim to be due and owing them from the defendant; that the defendant is not indebted to the plaintiffs for and on account of said interest charged, or any part thereof." To such special defenses the following replications were filed: "They admit that the item of three hundred and thirty-nine dollars and ninety cents (\$339.90) in the said answer mentioned is for goods, wares, and merchandise sold and delivered by the plaintiffs to the said the Colorado United Mining Company, but they allege the fact to be that said goods, wares, and merchandise were furnished at the special instance and request of the defendant, William A. Hamill, the agent or general manager of said corporation in Colorado, and that afterwards, to wit, on November 1, 1884, at Georgetown, in the county of Clear Creek aforesaid, the said defendant informed the plaintiff John H. Husted that in a settlement with the company, the said the Colorado United Mining Company, he had turned in a voucher for the said account, and been allowed credit therefor, and that he was personally bound to pay the same to the plaintiffs; that thereupon the plaintiffs charged the said account to his (the said Hamill's) personal account with them, and that he (said Hamill) then and there, and at divers other times between the said November 1, 1884, and the commencement of the action, promised the plaintiffs to pay the same. Second. They deny that the item of two hundred and fifty-four dollars and ninety-eight cents, (\$254.98,) in the said answer mentioned, is alleged in the said bill of particulars to be, or that it in fact is, for goods, wares, and merchandise sold by the plaintiffs to the Georgetown and Middle Park Wagon-Road Company, and allege the fact to be that the said goods, wares, and merchandise were sold and delivered by the plaintiffs to the defendant, William A. Hamill, at his special instance and request; and that at the time of said sale the plaintiffs were informed by the said Hamill that said goods were wanted by him for use on the said Georgetown and Middle Park Wagon-Road, of which, as plaintiffs are informed and believe, he is or was the owner or principal owner; and the said Hamill then and

there requested the plaintiffs to keep a separate account of said goods, distinct from the general account with the plaintiffs, which they accordingly did." On the day set for trial of the case, defendant failed to appear in person or by attorney. The following appears in the order of the court: "The court having received by mail a request from defendant and defendant's counsel to continue the trial of this cause to another day, and the said plaintiffs refusing to consent to such continuance, and the court deeming the showing by defendant insufficient, the said defendant is three times solemnly called, but comes not, nor does any one appear for him," etc. A jury was called, the two plaintiffs sworn testifying to the amount due; the admission of the defendant that he had received from the Colorado United Mining Company the amount in controversy, and had ordered the amount charged to himself, in default of paying over the money; that it was done, and that the defendant had frequently promised to pay it; that the goods charged the Middle Park Wagon-Road Company were ordered and obtained by the defendant; that the road company was not incorporated; and that the defendant was the principal, if not the sole, owner, etc. The jury found for the plaintiffs in the sum of \$1,959.75, and judgment was entered upon the verdict. Two motions to set aside the verdict were made: First, on the ground of accident and surprise, supported by an affidavit of sudden and severe illness of the defendant, preventing attendance on the day of trial; second, that the amount of judgment was excessive, and "because the evidence is insufficient to justify the verdict, and the verdict and judgment are against the law." Both motions were overruled. The assignments of error relied upon may be summarized as follows: First, refusal of the court to continue the case; second, submitting the case to the jury without instructions; third, the want of evidence to warrant a verdict.

A. M. Stevenson and M. J. Bartley, for plaintiff in error. Thomas Mitchell, for defendants in error.

REED, J., (after stating the facts.) In regard to the first supposed error, section 176 of the Civil Code is as follows: "When a cause is regularly reached upon the calendar either party may bring the issue to a trial or to a hearing and in the absence of the adverse party, unless the court for good cause otherwise directs, the party appearing may proceed with his case and take a finding, verdict or judgment or dismissal of the action as the case may require." The cause having been set and reached for trial, the plaintiff could legally insist upon a trial in the absence of the defendant. Neither defendant nor counsel appeared. The only showing was a letter, in no way verified, received by the judge, stating the sudden ill-

ness of the defendant, and no showing for the absence of counsel. The court had power to continue the trial for "good cause," but the "good cause" must be legally established,—properly authenticated. It was the duty of the court to decide, upon the cause shown, as to its sufficiency, and also whether it was legally established as a fact. In the absence of the counsel and all legal showing, it was not an abuse of discretion to disregard the letter, when that was all there was upon which the court was called to act.

In regard to instructions, the following subdivisions of section 187 of the Civil Code need be considered: "When the evidence is concluded, and either party desires special instructions to be given to the jury such instruction shall be reduced to writing, numbered and signed by the party or his attorney asking the same, and delivered to the court. Before the argument is begun, the court shall give such instructions upon the law to the jury as may be necessary, which instructions shall be in writing and signed by the judge." It is said: "The court shall give such instructions upon the law to the jury as may be necessary." We can find no question of law raised, making any instructions necessary. The only question for the jury was one of fact as to the amount due. No special instructions were asked by either party. Defendant cannot complain that the plaintiff failed to present and ask special instructions, and he did not participate in the proceeding, raised no question of law, nor tendered any instructions. The statute, as claimed by the plaintiff in error, is no doubt mandatory as to the course to be pursued in regard to instructions presented; but it could hardly be considered mandatory to the extent of making it obligatory upon the court to instruct as to the law of the case when no instructions were asked, and no question of law involved.

It is urged in argument that more than half of the aggregate amount being for interest, and the right to exact interest being a statutory right, questions of law were directly presented as to the computation. In answer, it is only necessary to say that no question of law was raised. Had there been defense, questions of law might have been raised, requiring instructions from the court, but, as none were raised, the presumption of legality and regularity in the computation must prevail.

It is ably urged that the evidence was not sufficient to warrant the finding. It is true, the evidence as to the amount due was general, giving results, balances, and aggregates; but it will be observed that an itemized bill, or bill of particulars, was also filed, and a copy furnished the defendant previous to the trial, showing the different items going to make up the aggregate, including the items of interest. If such showing, or any of the items, had been wrong, defendant had ample opportunity to contest them, and, unless attacked or contested, the general evidence in

regard to the correctness was sufficient to make a prima facie case.

As to the issues made by the pleadings in regard to the mining company claim and the wagon-road claim, they were clearly sustained by plaintiffs' evidence. It is claimed in the argument that the mining company matter was a promise to pay the debt of another, and, not having been made in writing, void under the statute of frauds. The statute was not pleaded, which alone is sufficient answer. But there is another equally conclusive. It appears that the defendant collected the amount in money from his company, and, instead of paying it over, retained it; hence, it was so much money received by him to the use of the plaintiffs. I am not aware that it ever before has been contended that the statute of frauds applied under such circumstances. Having received and retained the money, it became his own debt, not that of another. Had proper defense been made, it is possible the amount might have been reduced, but no serious errors warranting a reversal are found. The judgment of the district court will be affirmed. Affirmed.

STATE v. BOARD OF COM'RS OF LARAMIE COUNTY.

(Supreme Court of Wyoming. Feb. 28, 1894.)

STATE COURT — SETTLEMENT BY COUNTY AND STATE OFFICERS—CONCLUSIVENESS—"DOUBLE OR ERRONEOUS ASSESSMENTS."

The annual settlements of county treasurers with state officers are not so conclusive as to prevent the subsequent certification of "double or erroneous assessments," under Rev. St. § 3836, making the county liable to the state for the tax levied for state purposes, except "such amounts as are certified to be double or erroneous assessments." Groesbeck, C. J., dissenting.

On rehearing. For former report see 33 Pac. 992.

CONAWAY, J. The principal point relied upon by plaintiff in error at the first hearing was that the annual settlement made by the county treasurer with the state auditor on the third Monday in December of each year is final and conclusive as to the amount found due to the state treasurer by the auditor. This position is now ostensibly abandoned. It is contrary to all authority and to reason. The amount found by the auditor is prima facie correct. That is all. But the abandonment of the original position by the able attorney for plaintiff in error is only apparent. The full and complete settlement of the county treasurer with the state treasurer on the first Monday in January following the settlement with the auditor, the allowance of interest on any delinquency on the part of the county after January 15th, and the duty of the state treasurer to cause an action to be brought against the delinquent county at once, are relied upon as fixing the amount

of the liability of the county, finally and conclusively. See Rev. St. Wyo. § 3837. This is but another form of stating the proposition that the settlement with the auditor is final and conclusive. The settlement with the state treasurer is on the basis of the settlement with the auditor. The state treasurer has no power to audit any claim, or to correct or change the amount of state taxes for which a county is liable, as settled by the auditor. The settlement by the county treasurer with the state treasurer is but an accounting by the county treasurer for the amount found due from the county to the state by the auditor. If the settlement with the state treasurer is final and conclusive, it makes the settlement with the auditor final and conclusive, to precisely the same extent. It is but the consummation of that settlement. If final and conclusive, it practically annuls the provision of the statute giving an allowance or credit to counties on account of double or erroneous assessments. It is true, rare cases may arise of double and erroneous assessments discovered after the final meeting of the county board of equalization, commencing on the fourth Monday in July, and before the annual settlement with the state auditor on the third Monday in December. But such cases will be rare. Double and erroneous assessments discovered before the final adjournment of the board of equalization will be corrected there. The statute giving credits to the counties on account of double or erroneous assessments practically affects only such assessments as are found to be double or erroneous after the final adjournment of the board of equalization, and after the resulting report of the amount of the assessment to the state board of equalization through the state auditor. If the statute is to be limited to cases of this nature discovered and certified by the third Monday in December of the same year, the purpose of the statute will, in great measure, be defeated. No case arising in the courts for the determination of the question of an alleged erroneous assessment is likely to be finally determined, if contested, before the third Monday in December of the current year. The entire scope of our tax laws is to secure the collection of the tax levy from the taxable property of the state, and to prevent the collection of any tax from property which is not taxable, and to prevent the collection of the same tax twice from the same property. Numerous provisions will be apparent to the careful reader, specially adapted to effect these objects. When we ignore these beneficial purposes of the taxation laws, we fall into error.

The learned counsel for plaintiff in error, in his brief on petition for rehearing, submits the following, among other propositions: "In the construction of a statute, the purposes to be subserved and the evils to be overcome should be taken into careful consideration; and, if possible, such a construc-

tion should be given to the statute as will carry out its evident purpose and intention, and will have the effect of overcoming the evil, if any, which was intended to be averted. If the statute is susceptible of the construction placed upon it by the court in its opinion herein, it ceases to be a remedial statute, and its purpose, if it had any, is entirely taken away." Again: "It seems to us that the purpose of the statutory provisions was to fix the time within which a county shall be entitled to make its claim for credit to the state, such a time being so limited as to take away any possible chance of fraud upon the state." The statutory provisions referred to are those requiring annual settlements and payments of the state's revenue, allowing interest on any delinquency, and requiring suit for its collection. We cannot agree with counsel that the purpose of this statute is that of a statute of limitations. The evil to be remedied is that, without such a statute authorizing it, no county would or could make any such settlement or payment. The evil to be remedied is that, without such a statute, the state could not collect any taxes whatever from the counties. And yet the proposition is made, and urged seriously, that this statute, in its object and purpose, is but a statute of limitations. As a statute of limitations, its period is absurdly short, being but a few weeks or months at most, and this is supposed "to take away any possible chance of fraud upon the state," as if it were easier to make a false certificate of double or erroneous assessments after the third Monday in December than before, or, rather, as if it were impossible to make the false certificates before that time, but that they would be made afterwards if opportunity were given.

It has been seriously suggested that a number of counties are now delinquent to the state, and, if not barred by this statute, false certificates of double and erroneous assessments will be furnished next December to meet such delinquency. This is the "loophole for fraud" spoken of by counsel. County officers disposed to make such false certificates need not make their doing so contingent upon the construction of this statute. They can make their false certificates of double and erroneous assessments as occurring in the current year as well as in former years. The penalty is no greater, the chance of detection substantially the same. It is a crime, partly at least, of record, and easily detected at any time. And the penitentiary is yawning for such officers, and makes no distinction between those who, either before or after the third Monday in December, make false declarations and certificates of double and erroneous assessments as occurring during the current year or in former years. To stop the supposed loophole for fraud, the statute must be repealed. But we cannot include the presumption that county officers

are seeking loopholes for fraud. Honesty is the rule; crime, the exception. An argument that depends upon a presumption of fraud or crime is to be regarded with suspicion.

The learned counsel for plaintiff in error says in his brief on petition for rehearing that "the statute is construed by the supreme court as if it had only provided that a county could obtain a credit for double and erroneous assessments without placing any limitation upon the time when such credit should be given to it." That is precisely what the statute in question has done, without the aid of construction. The limitation, if there be any, must be found elsewhere. It can be found in this statute only by an unprecedented construction. The statute providing for the annual settlement and payment of taxes due the state, and for enforcing the payment of delinquencies, is not a statute of limitations, as suggested. All states have such statutes. Diligent and extensive research by counsel and by members of this court has failed to bring to light a single case construing such a statute as a statute of limitations. Cases to the contrary are not wanting. And such statutes all require, in effect, a full and complete settlement. It would be strange, indeed, if a partial or incomplete settlement should suffice in any such case. The words "full and complete" add nothing to the effect of a statute requiring a general settlement. The provision for suit against the county implies that a defense may be made. If the statute is a statute of limitations, and bars one defense, it bars all. If such is its effect, there is no occasion for a suit. In that case the finding of the auditor has the conclusive effect of a judgment of a court of last resort, and the provision should be merely for a mandamus to the county commissioners to compel them to provide for and pay the delinquency, if they would not do so without mandamus; and, clearly, such mandamus would run without any statute expressly requiring it.

It is seriously urged that to give the county of Laramie, in this instance, an allowance or credit on account of confessed double or erroneous assessments will work a hardship to other counties of the state, and that it should not be done unless the statute plainly directs it. The answer to this is that it does not work a hardship to other counties, and the statute does plainly direct it. The only hardship apparent is to the county where the double or erroneous assessment occurs. The county must rebate or refund to the taxpayer, not only its own share of the double or erroneous assessment, but the entire assessment, including the share of the state; and if there has been a sale of real property, in making the collection of the tax, the county must pay interest and costs. The county is thus held responsible for the blunders of its own officers, as it has been

contended it should be. The state gets all that it is entitled to, and the county alone suffers loss.

It is seriously urged that, the levy of state taxes having been made on the basis of the entire amount of the assessments furnished by the different counties, it will cause a derangement of the financial affairs of the state to reduce the revenue proposed to be raised by the state by giving an allowance or credit on account of double or erroneous assessments. This is an objection to the statute, and, if valid, should be considered by the legislature. And the financial derangement, if perceptible at all, would be just as great if the allowance or credit were given on the third Monday in December as if it be given at a later date.

The learned attorney for plaintiff in error says in his brief: "It is not a question as to whether the state auditor has properly credited the account of the collector of taxes or not, or whether such auditing is conclusive; but the question is whether or not, by the operation of the statute itself, the obligation of the county has not become fixed and limited, and cannot thereafter be changed." But this must mean fixed and limited according to the finding of the auditor. No other authority can fix or limit the amount of the obligation, in the absence of a suit in a court of law. The settlement with the state treasurer is improperly brought into this discussion. Whenever the settlement with the state treasurer is held to be final and conclusive, it makes the settlement with the auditor upon which it is founded final and conclusive. It is doubtful if even fraud could be pleaded as a defense after a statute of limitations has run against every defense. If it may be pleaded at all, fraud is difficult to prove. And for any mistake, inadvertence, or willful negligence of the county treasurer, resulting in failure to properly represent the interest of the county in the settlement with the auditor, as well as for a failure of the board of equalization to detect double and erroneous assessments, there would be positively no remedy. It is a mistake to consider a credit to a county on account of double or erroneous assessments as a matter requiring additional legislative action. It is a matter already provided for by the statute. It is a mistake to regard double or erroneous assessments as part of the state's revenue. They are illegal exactions, and must be credited to the county from which they have been exacted, under existing statutes. The contention of plaintiff in error seems to be without merit. The petition for rehearing is dismissed.

CLARK, J., *concura*.

GROESBECK, O. J., (dissenting.) I see no reason for changing or modifying the views expressed in my dissenting opinion upon the original hearing, (33 Pac. 993,) and

an examination of the authorities submitted since that time confirms me in my conclusion. Our revenue laws provide for a full and complete annual settlement of the tax levy each year between the territorial or state auditing department and the county treasurer, as tax collector, and I think this prevents the reopening of any such "full and complete" settlement so made. Any other view would lead to confusion and delay in securing the revenues of the state. In the case at bar, such a full and complete settlement appears to have been made prior to 1888, and, in the settlement of the tax levy of that year, credits were claimed by Laramie county for double or erroneous assessments in prior years; and, in the settlement for the year 1889, credits were claimed for double or erroneous assessments for the year 1888. The territorial auditor disallowed these credits, and suit was brought for the amount withheld. I think this action of the auditor was correct, as the credits were not preferred within the time fixed by statute for the annual settlements. No other rule, it seems to me, can with safety be laid down, in order to secure to the state promptness and certainty in the collection of its revenues. The county is made responsible for its quota of the territorial tax, with the sole exception of such amounts as are certified to be double or erroneous assessments; and no allowance or credit can be given to any county for any part, other than this, of such tax levy remaining uncollected. Rev. St. § 3836. This clearly refers to a credit upon the tax levy of the year, and does not mean a collection of credits upon the tax levies of a number of years. If there is any doubt upon this proposition, it is explained by the following section of the Revision, enacted at the same time with its preceding section; providing for a full and complete annual settlement of the tax levy of the preceding year, and providing for the prompt institution of a suit for the delinquency of the county, which is that of its collector of taxes. The territory had, and the state now has, a summary remedy against the collector and his sureties in case of a default in the amount found due by the auditor, if it be not paid within 10 days after such finding. The auditor is directed to issue his warrant for such delinquency against the collector and his sureties, to be made by the distress and sale of the chattels and real estate of the delinquent collector; and, if his property be not sufficient to satisfy the amount of the warrant, then distress and sale of the property of his sureties may be made under the warrant. Rev. St. Wyo. §§ 1698-1701. These summary remedies are held to be constitutional. *Cooley, Tax'n*, p. 721; *Casby v. Thompson*, 42 Mo. 133. In a suit against a collector of taxes and his sureties, where the collector is allowed credits for taxes not collected, when he shows that he has exhausted all legal means for their collection, it was

held that such credits or deduction lists must be preferred and filed within the statutory time allowed therefor, or they will not be available for a defense; and, under the same statute, that the auditor has no authority to extend the time for the settlement; and, further, if a tax collector is equitably entitled to relief under such a rigid statute, the legislature alone can grant it. *State v. Lanier*, 31 La. Ann. 423; *State v. Guilbeau*, 37 La. Ann. 718; *State v. Viator*, Id. 734. The reason for this strict rule is that revenue laws are *sui generis*, and are not to be assimilated to those on any other subject. I do not see why the same rule should not prevail in a suit against a county for a delinquency of the collector in nonpayment of any portion of the state taxes. Indeed, the Louisiana cases *supra* all seem to be cases where suits have been brought, and the collector has been unable to make the same defense, or introduce evidence upon it, as is claimed in the suit at bar. The remedy against the county ought to be as effective as a suit against her officer, and I think the legislature has so made it. It was well said in the case of *Com. v. Luzerne Co.*, (Pa. Sup.) 15 Atl. 550, in the language of the *nisi prius* court, adopted by the supreme court: "Some effect must be given to the official action of the accounting departments, and it matters little whether that action be called 'judicial' or 'administrative' or 'ministerial.' At all events, these departments form a tribunal of some sort, to which has been given the power of settling certain accounts with the counties; and, when they exercise the power of settlement upon one of these accounts within their jurisdiction, the result of their action cannot be collaterally attacked." A number of Pennsylvania cases are cited in support of this statement, and a careful review of them will show that the action of the auditing or accounting department has been sustained, and held to be final and conclusive, where no appeal is taken; an appeal lying, in such cases, by force of the statute of that state, to the courts. Our statute does not allow such an appeal, and of course, then, the action of the auditing department would be final, and no relief could be obtained, except through the legislature. *State v. Viator*, 37 La. Ann. 735. This is a provision of our statute: "If any person interested shall be dissatisfied with the decision of the auditor on any claim, account or credit, the auditor shall, at the request of such person, certify his decision, with his reasons therefor, specifying the items rejected, if less than the whole, under the seal of his office, and refer the same to the legislative assembly." Rev. St. Wyo. § 1710. Here is an express provision for bringing a claim or a "credit" to the notice of the legislature through an official channel. This method of procedure has been well understood in the past, and there are two statutes bearing on the question, one approved December 16,

1871, (Comp. Laws 1876, p. 516,) authorizing the territorial auditor to settle with the treasurer of Carbon county, in the matter of paying over territorial taxes collected for the year 1870, upon the basis presented by said county treasurer and approved by the board of county commissioners of his county, and this law was passed under a statute nearly the same as that under consideration, (section 3836, Rev. St.) and the other statute (chapter 70, Sess. Laws 1884) appropriates moneys out of the territorial treasury in full payment to the treasurer of Johnson county for moneys paid into the territorial treasury on the general assessment of 1883, "by reason of a correction in the assessment subsequent to the sending of the valuation to the territorial auditor," and this act was passed when the statute was the same as now embodied in section 3836 of the Revision.

I do not say, in a suit against a county, that the defense might not be interposed that the auditor refused to allow a proper credit claimed at the proper time by the county as a double or erroneous assessment in the settlement of the tax levy of the year when such double or erroneous assessment was made. It seems to me that such defense could be set up, but certainly not one involving the resurrection of stale credits, and those arising upon tax levies of preceding years. My construction of the statute I do not think is "unprecedented." On the contrary, it is based upon the letter and the spirit of the statute, and is in harmony with our entire system of taxation. I think I am supported by the Pennsylvania cases cited in *Com. v. Luzerne Co.*, *supra*, and in the recent cases of *Com. v. Philadelphia Co.*, (Pa. Sup.) 27 Atl. 546, and *Com. v. Philadelphia City and County*, Id. 551, and the Louisiana cases, *supra*. I find nothing in the citation from *Cooley on Taxation* (page 718) that is contrary to these views. Indeed, it appears to me that all the authorities support me in my views.

Nor do I regard the limitations in the statutes as to the time when the full and complete annual settlement of the tax levy of the year shall be made as having the force of a statute of limitations against the county. There was no provision of law permitting the state to be sued, in the territorial statutes; and, although the constitution (article 1, § 8) provides that "suits may be brought against the state in such manner and at such times as the legislature may by law direct," yet no law has yet been enacted for that purpose. The supreme court of Louisiana held in *State v. Guilbeau*, *supra*, that the tax collector of a county could not plead compensation when sued for taxes collected by or chargeable to him, as this would practically allow him to sue the state, and it was said that the proper place to settle the matter was at the auditor's office. *Treasurers v. Cleary*, 3 Rich. Law, 372; *Treasurers v. Hilliard*, 8 Rich. Law, 412. Our revenue

system makes each county the principal debtor, and liable for the territorial or state tax apportioned to it. The state does not deal with individual taxpayers, or assume any responsibility for the collection of the tax, but it deals directly with the county. The primary liability is with the counties, and the state looks to them alone for its revenues. *State v. Baker Co.*, (Or.) 33 Pac. 530; *State v. Multnomah Co.*, 13 Or. 287, 10 Pac. 635; *New York v. Davenport*, 92 N. Y. 604. In addition to this liability of the county, the statutes hold the collector of taxes and his sureties liable for the amount of state revenues, as adjusted and settled by the auditor. This, of necessity, determines the liability of the county, as its default or delinquency can only be measured by the default or delinquency of its tax collector. Our territorial method of taxation is almost identical with the state system, as the laws have practically undergone no change by the transition from the territorial to the state condition. To support the territorial government, a certain rate per centum of taxation was fixed by the territorial board of equalization upon the aggregate property returned by the county authorities, and by original assessment made by the territorial board of telegraph and railway lines. This fixed rate was transmitted to the county officials, and was levied by the county boards. I do not see that this makes any difference in ascertaining the liability of the counties and their tax collectors. It requires but a mere mathematical computation in the auditor's office to determine the amount to be charged against the counties, by multiplying the aggregate property of the county by the rate per cent. of territorial taxation, and this is as direct a charge of the state or territorial tax as if a certain amount of territorial tax had been directly apportioned to the counties. Ordinarily, if double or erroneous assessments have been made by the county boards, the county making the error ought to suffer, as the fault or mistake is that of county authorities. Our statute allows a credit for double or erroneous assessments, if timely interposed; and, with ordinary diligence, these double or erroneous assessments can be ascertained before the time of the annual settlement with the auditor. In Michigan, where the county authorities collect the state taxes, and forward them to the proper state authority with a list of delinquent taxes for the state authorities to collect, the county is held to be a guarantor for the regularity and legality of the taxes; and in case any tax is set aside by proper state authority, in the manner pointed out by law, so that the state does not receive its amount, then it is charged back to the county as so much previously credited without consideration, and the county is bound to make it good. *Auditor General v. Monroe Sup'rs*, 36 Mich. 73. So, in all systems, the state looks to the county either for the full amount of the revenue appor-

tioned to it, or as responsible for the amounts remaining uncollected, as the county is charged with the duty of making legal assessments and legal levies.

The exception and allowance of a credit for double or erroneous assessments should be construed so that it shall be preferred at the proper time, and as excluding state claims, in order that the estimates for state revenues may be correctly made, and the state deprived of no portion of its revenues. The rule adopted by the auditing department, excluding credits for double or erroneous assessments not preferred in the settlement for the year in which they were made, I think is a wholesome one, based upon the letter of the statute, and in harmony with the revenue laws. It has been acquiesced in for many years, and I can be no party to formulating a new rule, that it seems to me will result in great confusion, impair the promptness of the collection of the revenues, and offer a premium to official sloth and negligence. No amount of sophistry will convince me that the state has not lost of its revenues some \$8,000 by the decision of this court. This amount has been or must be borne by the people generally, instead of that district where the mistake was made. This is unjust and inequitable. I trust that my brethren are correct, and that these instances will be "rare;" but I fear it will lead to the resurrection of stale claims, and inject in each annual tax settlement matters not properly connected with it, and this against the plain provisions of the law. The motion for rehearing should have been granted.

CONE v. IVINSON.

(Supreme Court of Wyoming. Feb. 28, 1894.)

PLEADING — ABBREVIATION OF COMMON-LAW RULE BY STATUTE — CONVERSION — INSTIGATING SALE OF MORTGAGED CHATTELS — SUFFICIENCY OF PETITION — MEASURE OF DAMAGES.

1. Rev. St. § 2483, providing that "the allegations of a pleading shall be liberally construed with a view to the substantial justice between the parties," completely abrogates the common-law rule that all pleadings will be construed most strongly against the pleader. 33 Pac. 31, affirmed.

2. A petition alleging that plaintiff held a mortgage on certain sheep, as defendant knew; that the mortgagors, at defendant's instigation, sold and disposed of all the sheep, and that defendant, for the purpose of defrauding plaintiff, collected and retained the proceeds of the sale,—alleges an unlawful sale in hostility to plaintiff's mortgage, and therefore a tortious conversion by the parties making the sale. *Conaway, J.*, dissenting. 33 Pac. 31, affirmed.

3. The petition, further alleging that the mortgage was given to secure payment of certain notes, and that a part of such indebtedness is due and unpaid, sufficiently shows a breach of condition of the mortgage, and such a right of possession in plaintiff as would entitle him to maintain an action for their conversion. *Conaway, J.*, dissenting. 33 Pac. 31, affirmed.

4. In such petition the allegation that the mortgagors sold the sheep implies that they perfected the sale by delivery to the purchaser. 33 Pac. 31, affirmed.

5. One who instigates a conversion is as much a principal as the one performing the act of conversion. 33 Pac. 31, affirmed.

6. It appearing that defendant wrongfully converted plaintiff's property and, as a result, obtained a sum of money in excess of plaintiff's debt, the measure of plaintiff's recovery is the amount of his debt secured by mortgage. 33 Pac. 31, affirmed.

On rehearing. Affirmed.

For prior report, see 33 Pac. 31.

CLARK, J. This cause was decided by this court on the 19th day of May, 1893, and the opinion then rendered is fully reported in 33 Pac., at page 31. Thereafter, upon application of defendant in error, a rehearing was granted by this court, and the cause has been fully reargued. Appended to the former opinion is a statement of the facts, in which is set forth, in *haec verba*, the petition filed in the court below by plaintiff in error, to which a general demurrer was sustained. In view of the evident earnestness with which counsel for defendant in error have, with great courtesy, urged upon this court their contention that the court erred in its former decision, we have carefully re-examined the entire question. Without undertaking to follow the language of the petition, the substantial facts alleged are as follows:

On October 6, 1884, Lawrence & McGibbon were indebted to plaintiff in the sum of \$22,170, evidenced by their two promissory notes of that date for \$11,085 each,—one thereof being payable in 9 months and the other in 21 months after said date, and each bearing interest,—on which notes there is still due and owing, and unpaid, the sum of \$6,128.19, with interest from November 14, 1888. On the date of said notes, to secure the payment thereof, the makers executed and delivered to plaintiff a chattel mortgage conveying to him a large flock of sheep and other personal property. The mortgage was duly recorded, and, except as to 4,000 of the sheep, which were sold by Lawrence & McGibbon, and released from the operation of the mortgage by plaintiff, it continued to be and was in full force and effect at the time of the commencement of this action, to wit, December 19, 1889. On the 28th day of January, 1887, the defendant, Edward Ivinston, to secure what is alleged to be a pretended antecedent indebtedness to him from Lawrence & McGibbon of \$20,000, procured a mortgage from them upon 7,100 head of the sheep mortgaged to plaintiff, being all of the said sheep then remaining unsold; and thereafter, on the 22d day of August, 1888, he procured from them a certain other chattel mortgage upon all of the property mortgaged to plaintiff, excepting only the 4,000 head of sheep which had been sold,—both of which mortgages were duly recorded. Thereafter, and now we quote from the language of the petition, "on the 20th day of May, 1889, said Lawrence & McGibbon, at the request and

instigation of said Ivinston, sold and disposed of all of said sheep theretofore unsold for a large sum of money, to wit, about the sum of twenty thousand dollars, (\$20,000.00,) and that said Ivinston collected and retained the proceeds of said sale, to wit, the said sum of twenty thousand dollars." It is further alleged that, at and before the time of the occurrence of all the matters above stated, and at all times since plaintiff procured his said mortgage, the defendant had full notice and knowledge of plaintiff's claim, of the existence of the indebtedness to him, of the execution of his mortgage, and of the fact that the same constituted a lien upon said sheep; and that he (the defendant) procured each of his said mortgages, and collected and retained the proceeds of the sale of said sheep, without other consideration than said antecedent indebtedness, "and with full knowledge of plaintiff's rights, and fraudulently, for the purpose of hindering, delaying, and defrauding the creditors of the said Lawrence & McGibbon, and especially this plaintiff, of their just debts;" "that plaintiff had no knowledge of the said fraud and fraudulent acts of the said defendant, and did not discover the same until long after the sale and disposal of the mortgaged property;" and that such facts have only recently and since said sale come to his knowledge. It is further alleged that Lawrence & McGibbon, after giving the mortgages to defendant, had no other property out of which plaintiff could recover his debt, and that by reason of the said fraudulent acts of defendant he has been unable to, and still is unable to, collect his said debt. Demand upon defendant for the amount of plaintiff's debt, and refusal thereof, is also alleged.

The principal point in this controversy centers in the allegation, which is above stated in full, concerning the sale on May 20, 1889, by Lawrence & McGibbon of the mortgaged sheep. It is admitted by counsel for defendant in error, in his replying brief filed herein, that "If the allegation of the petition as to the sale, when standing alone, describes an illegal sale, or a sale made in hostility to the mortgage of Cone, then it may be said that the petition states a cause of action; it being understood that every other material allegation in the petition is a mere offshoot of this central proposition." This is not an entirely fair and correct statement of the real question in controversy. We have no right, in examining a pleading challenged as setting forth facts not sufficient to constitute a cause of action, to select out from the body of the pleading a separate allegation, and examine it without reference to other allegations stated. Should such a rule as this prevail, it would be practically impossible for any pleader to draw a sufficient petition, because it would be impossible to set forth a sufficient cause of action in a single allegation or in a single sentence. The whole petition must be looked at, and the allegation of

real question in the case is this: "If the allegation concerning the sale of the sheep, as viewed in the light of the other facts set out in the petition which characterize it, is an illegal sale, or a sale made in violation of plaintiff's mortgage, and the defendant participated in that sale, and received the proceeds thereof, then the petition sets out a cause of action, and defendant should answer. It clearly appears that at the time of the sale there was resting upon the sheep sold a valid, subsisting mortgage in favor of plaintiff, of which defendant had knowledge. Under such circumstances, the mortgagees, at the request and instigation of defendant, sold and disposed of all said sheep," and the defendant collected and retained the proceeds of said sale fraudulently, and with intent to hinder, delay, and defraud the creditors of said mortgagees, particularly this plaintiff. Now, then, coming for the moment,—what the writer has held in the former opinion, and which is earnestly controverted here,—that under the rule that words in a pleading will usually be construed in their popular and ordinary sense, the words "sold and disposed of all of said sheep" must be construed to mean that the sale was an absolute sale of the entire property in the sheep, as distinguished from a sale of the qualified, limited, estate, and property which the mortgagees possessed. If such is the proper construction of the words used, then there is no question but that it was a sale in violation of plaintiff's mortgage,—a sale which is wholly illegal, unless it was made with the mortgagee's consent,—and it needed in the petition no adjectives to explain or characterize it. The facts themselves characterized and stamped it as fraudulent and illegal, and this proposition, we think, is fully sustained by the authorities cited in the former opinion, to which we content ourselves simply referring. A sale of another's property without his knowledge or consent is necessarily wrongful. But it is urged upon us that the allegation with reference to the sale may be fairly construed to mean that the mortgagees sold and disposed of simply a qualified, limited property in the sheep, in other words, that they sold the sheep subject to the mortgage of plaintiff, and made no attempt to do anything more; and for reasons, to which we will hereafter refer, are urged upon us to sustain this conclusion. Let us admit, for the purposes of argument only, that this is so. What is the result? In what shape is the pleading? It cannot be denied that the allegation is so just as fairly be construed to mean that it was what we have called an absolute sale of the general property in the sheep; and if being so, what is the conclusion? It is not other than that the pleading, in

quote the language of our Code, (Rev. St. Wyo. § 2475.) I can see no escape from this conclusion, and, reaching this conclusion, the question naturally arises, what was the defendant's remedy under such a state of facts? The Code (section 2475, Rev. St.) provides that it may be summarily ordered amended by the court upon motion. It may not be and cannot be reached by demurrer. It is well settled,—too well settled to need the citation of authorities,—that a demurrer will lie only for the causes mentioned in the Code, and the fact that a petition in its allegations is ambiguous, uncertain, and indefinite is not one of those causes. In the case of Trustees v. Odlin, 8 Ohio St. 233, Judge Swan, who stands deservedly high as an authority upon code practice, in delivering the opinion of the court, uses this language: "We suppose the common-law rule as to the construction of pleadings under the Code to be entirely abrogated. If pleadings shall be in ordinary language, as contradistinguished from legal technical language, they must be construed as meaning what is generally understood by ordinary language, and hence there can be no established technical mode of stating a cause of action or defense. So, too, the rules of the common law as to the sufficiency of pleadings are abrogated, and in their place is substituted the few and simple rules of the Code. Whatever rules of common-law pleading are in accordance with the rules of the Code, they are still applicable to pleadings under the Code; not, however, as common-law rules, but as rules of the Code. Thus, the rules of common-law pleading which illustrate and vindicate the law that the facts which constitute a cause of action shall be set forth in the declaration may be applicable to a petition under the Code. But the language to be used in stating a cause of action is prescribed by the Code, and the common-law rules in that respect are entirely inapplicable. If what under common law pleadings was denominated a legal deduction or conclusion of law is alleged, it may or may not contain also a fact constituting a cause of action or defense; but if it does, and is indefinite and uncertain, the opposite party may by motion require it to be made definite by motion, (amendment.) He cannot demur, as at common law, nor object to the pleading on error." Mr. Bliss, in his work on Code Pleading, (section 314,) uses this language: "The vice, then, of ambiguity is not fatal on general demurrer or error, unless the obscurity is such that no cause of action or no defense can be made out by a liberal construction in furtherance of the object of the pleader: but still, it is a vice going to the form of the statement, which will be corrected on motion, and at the pleader's costs." See, also, *Id.* § 425; Pom. Rem. & Rem. Rights, § 548 et seq.; Swan, Pl. & Pr. 164-166;

Maxw. Code Pl. 11, 18; *People v. Ryder*, 12 N. Y. 434; *Chambers v. Hoover*, 3 Wash. T. 107, at page 110, 13 Pac. 466. In the case last cited the court uses this language: "The averments of the petition are vague and indefinite, and it is defective in other respects; yet, when bolstered by the rule of liberal construction commanded by the Code, we think we discern a cause of action. A suitor is no longer to be turned out of court if, by making all reasonable intendments in his favor, enough can be seized hold of in his pleadings to show that he has rights which ought to be enforced. He may be required on motion to conform his statement to the rules of good pleadings, and if he refuse may be turned out of court; but, as against a demurrer, the office of which is to raise a substantial issue on the law of the case, and not on the law of practice and pleading, evidentiary facts, and even inferences from averments amounting to mere conclusions of law, will be considered in his favor."

Counsel for defendant urge their contention as to the proper construction of the allegation of sale, and assign two principal reasons for the faith that is in them: First, that it is fundamental that all pleadings are to be construed most strongly against the pleader; and, second, that good faith in business transactions is a settled presumption of the law, and hence it follows that, bearing in mind the latter rule and giving force to the former, the court will be bound to construe the allegations of sale in such way as to let it import a valid, lawful sale of the mortgagor's qualified interest in the sheep. And they say in their brief: "How can the court assume bad faith when none is made to appear by allegation? We cannot believe this court capable of maintaining so monstrous a proposition when their attention is called fairly to it." We will consider these two propositions in the order stated above. Is it a fundamental proposition of law that all pleadings will be construed most strongly against the pleader? If so, then what becomes of section 2483, Rev. St. Wyo., which reads: "The allegations of a pleading shall be liberally construed with a view to substantial justice between the parties?" By what process of reasoning is it possible to make the two rules stand together? How can they be harmonized? Is there any doubt but that they are just as much opposed to each other as two rules relating to the same matter could possibly be? One is a common law rule; the other, a valid enactment of the lawfully appointed lawmaking body of this state. And, such being the case, which of these rules is it the duty of this court, acting under the sanction of their oaths, to obey,—the common-law rule which has been absolutely abrogated by the Code, as stated by Justice Swan in the case of *Trustees v. Odlin*, *supra*, or the rule enacted by the legislature of this state in pursuance of the power conferred upon it by our fundamental laws? It

seems to me that it needs no argument or citation of authority to show that the Code provision is the one that must control, and that the common-law rule as contended for by counsel has no sort of place in the law of this state. But authority upon the subject is not lacking. In *Pomeroy's Remedies and Remedial Rights*, at section 546, the author, in discussing this identical question, says: "This harsh doctrine, unnecessary and illegal in its original conception, and often pushed to extremes that were simply absurd, was the origin of the technicality and excessive precision which, more than any other features, characterized the ancient system in its condition of highest development. All the Codes contain the following provision, or one substantially the same: 'In the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties.' The evident intent of the legislature in this clause was to abrogate at one blow the ancient dogma, and to introduce in its place the contrary principle of a liberal and equitable construction; that is, a construction in accordance with the general nature and design of the pleading as a whole. This mode of interpretation does not require a leaning in favor of the pleader, in place of the former tendency against him. It demands a natural spirit of fairness and equity in ascertaining the meaning of any particular averment or group of averments from their relation and connection with the entire pleading and from its general purpose and object. The courts have uniformly adopted this view of the provision; and although in particular instances they may sometimes have departed from it, yet, in their announcement of the theory, they have unanimously conceded that the stern doctrine of the common law has been abolished, and that instead thereof an equitable mode of construction has been substituted." See, also, section 547. At section 314 of *Bliss on Code Pleading* it is said: "Pleadings should not be ambiguous or equivocal. In construing such pleadings it was once said that, when two different meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading. This rule, however, had come to be so modified as to hardly leave it the force of a rule. Thus says Mr. Chitty: 'The maxim must be received with this qualification: that the language of the pleader is to have a reasonable intendment and construction; and, when an expression is capable of two different meanings, it does not appear to clash with any rule of construction, applied even to criminal proceedings, to construe it in that sense in which the party making the charge used it, if he intended that his charge should be consistent with itself.' The general requirement found in the statutes of all states which have adopted the system, that 'in the construction of a pleading, for the purpose of determining its effect, its al-

principal rule, would at least recognize the qualification thus given by Chitty. Thus, in use in New York, the ambiguous words referred to preceding parts of the complaint, could not be understood without such reference, and they might grammatically refer to that which would make them intelligible, together, state facts which would constitute a cause of action, or to another averment which would create no liability. The court gave it the former reference, both in reliance to the statute and the modification of the rule in common-law pleading, notwithstanding it was most favorable to the pleading.

At page 132 of Swan on Code Pleading said: "The language of pleading, then, should have a fair and reasonable intendment, should be construed, as in a contract, according to the popular sense. When equivocal or ambiguous expressions are used, so that the precise nature of the charge or defense is not apparent, the opposite party on whom it can compel an amendment. But if no motion is interposed, that construction of doubtful or equivocal expressions is to be adopted which will support the pleading."

Further, at page 166 of Swan on Code Pleading, it is said: "We now return to the old rule above stated. The Code, as if contemptuously the special demurrers of common law, does not permit parties to present to the court an issue in the pleading to determine the question whether the pleading is so indefinite and uncertain as not to show the precise nature of the cause of action or defense. The matter is disposed of finally by the court. If the precise nature of the charge or defense is not apparent, the court counts of the indefiniteness and uncertainty of any or all the allegations, the court's motion will require the pleading to be definite." In Maxwell on Code Pleading, page 11, the author, in referring to the common-law rule that pleadings are to be construed most strongly against the pleader, uses this language: "The rule above stated is subject to this qualification: that the language of the pleader is to have a reasonable intendment and construction, and when an expression is capable of different meanings shall be taken which will support the action, and not the other, which will defeat it." And at page 18 the same author states: "If a pleading is ambiguous, uncertain in its statement of facts, quantity, time, place, value, or in any other respect, but, fairly construed, shows a liability of the defendant to the plaintiff, the court provides one remedy for all cases, viz. judgment on, in which the defect complained of is pointed out, and if not objected to at the time it will be waived." The authority cited by the authors quoted from abundantly support their statements of the rule, and will not burden this opinion by quoting

that it is upheld, not only by reason, but by the overwhelming weight of authority. In some of the states,—as California, for instance,—the fact that a pleading is indefinite and uncertain and ambiguous is a ground for demurrer, and made so by statute. It is apparent that decisions under the statutes of such states have no application to our Code.

We will now consider the next reason assigned in support of the argument, viz. that "it is a maxim of the law that good faith in business transactions is a settled presumption of the law." I doubt the entire accuracy of this statement very much, but it is true that it is a presumption of law that every one has conformed to the law. Of course, this is a rebuttable presumption. And it is also true that the law will not presume fraud. It must be clearly proved by the one who alleges it. I do not understand, however, that these rules have any application to the construction of a pleading. Mr. Chitty states, in the quotation above set forth from Bliss on Code Pleading, that, if the pleading "be clearly capable of different meanings, it does not appear to clash with any rule of construction, applied even to criminal proceedings, to construe it in that sense in which the party making the charge must be understood to have used it, if he intended that his charge should be consistent with itself." 1 Chit. Pl. (16th Am. Ed.) bottom page 338. I know of no authority to the contrary. Certainly, counsel have not referred us to any. If this rule of construction will obtain in a criminal case, in order to uphold an indictment, it certainly will in a civil case, brought to obtain redress for a civil wrong. But what application has this so-called presumption of good faith in business transactions to do with this case? Upon what fact stated in the petition is it to be based? It is alleged that, some time prior to the sale, the defendant fraudulently, and for the purpose of hindering, delaying, and defrauding the creditors of the mortgagors, and especially this plaintiff, procured his two mortgages. It is further alleged that, at a time when there was in existence a valid mortgage, prior and superior to defendant's, resting upon the sheep, of which defendant at all times mentioned had full knowledge, the mortgagors, at the request and instigation of the defendant, sold and disposed of all of said sheep. It is then alleged that the defendant fraudulently, and for the purpose of hindering, delaying, and defrauding the creditors of the mortgagors, and especially this plaintiff, collected and retained the proceeds of the sale of said sheep. Words are to be construed in their ordinary, popular sense; and, with this in view, we will examine very briefly into the meaning of the words used to express the defendant's connection with the act of sale. The state-

ment is that it was accomplished at his "request and instigation." To say that one "requested" another to do an act does not imply that there was anything wrong in the act, but to say that one "instigated" another to do any act does imply that the act itself was wrongful. The word is never used properly with reference to a good, virtuous, lawful act. Mr. Crabb, in his learned and scholarly work on English Synonyms, in discussing the use of this word, at page 378, says: "We may be impelled, urged, and stimulated to that which is bad; we are never instigated to that which is good. We may be impelled by curiosity to pry into that which does not concern us; we may be urged by the entreaties of those connected with us to take steps of which we afterwards repent; we may be stimulated by a desire of revenge to many foul deeds; but those who are not hardened in vice require the instigation of persons more abandoned than themselves before they will commit any desperate act of wickedness." Sir William Blackstone, at page 36 of the fourth book of his Commentaries, uses the word thus: "So that if a servant instigates a stranger to kill his master," etc. And wherever the word is properly used the act instigated to be done is always wrongful. And hence it follows that, with reference to every act charged against the defendant in this petition, each one thereof is fairly alleged to be wrongful. The sale alleged can be held to be no other than an absolute sale of all of the sheep, and not a sale of the mortgagors' qualified interest in them. Being an absolute sale, it was necessarily in defiance of and in hostility to plaintiff's mortgage and in fraud of plaintiff's rights. And it follows that the sale comes fully within the allegation "that the plaintiff had no knowledge of the said fraud and fraudulent acts of the defendant, and did not discover the same until long after the sale and disposal of the mortgaged property," etc. It does, then, fairly appear from the petition that the sale was without plaintiff's knowledge, and that being so it is a fair inference that it was without his consent; and the suggestion that, for aught that appears in the petition, it might have been with his consent, falls to the ground of its own weight. But this is immaterial, because it is well settled that while, in an action based upon a wrong, the consent of the plaintiff to the commission thereof is a complete defense, in obedience to the maxim "*volenti non fit injuria*," still, it is the well-settled rule that the defense of leave and license, or consent, is new matter, which must be affirmatively pleaded by the defendant as a defense. Pom. Rem. & Rem. Rights, § 712; 1 Chit. Pl. (16th Am. Ed.) bottom pages 664, 665; Beaty v. Swarthout, 32 Barb. 294; Gronour v. Daniels, 7 Blackf. 108; Snowden v. Wilas, 19 Ind. 10; Chase v. Long, 44 Ind. 427; Alford v. Barnum, 45 Cal. 482-485. I am clearly of opinion that it must

be held that the petition alleges an unlawful sale in hostility to and in defiance of the plaintiff's mortgage, and in fraud of his rights; and I will here add, in order to meet another objection which has been urged, that the allegation that the mortgagors sold the sheep will, on demurrer, be deemed to imply that they perfected the sale by delivery to the purchaser. Clark v. Meigs, 13 Abb. Pr. 467.

It necessarily results from what has been said, in connection with what we will hereafter state, that the allegation of the sale sets forth that character of sale which was, as against the plaintiff, a tortious conversion of the property by the parties making the sale; and here we are met with this contention: "It is believed to be beyond question, as a legal proposition, that there cannot be a conversion of personal property without possession. There is not a word in the petition to show that defendant ever had possession of the property. Therefore, he could not be guilty of a tortious conversion thereof." In answer to this, I have but little to say. It is an astonishing proposition as applied to the facts of this case, as we view the facts. Lawrence & McGibbon did an act which was a tortious conversion of personal property as against the plaintiff. They did this act at the "instigation" of defendant, who had full knowledge of plaintiff's rights. How, then, can it be seriously asserted for one moment that the defendant is not guilty of precisely the same offense, the same trespass, the same wrong, which Lawrence & McGibbon were guilty of? It is useless to discuss the matter; the true doctrine is so entirely elementary. At page 36 of the fourth book of Blackstone's Commentaries the distinguished author states: "In treason all are principals propter odium delicti. In trespass all are principals because the law, '*quæ de minimis non curat*,' does not descend to distinguish the different shades of guilt in petty misdemeanors. It is a maxim that '*accessorius sequitur naturam sui principalis*,' and therefore an accessory cannot be guilty of a higher crime than his principal; being only punished as a partaker of his guilt. So that if a servant instigates a stranger to kill his master, this being murder in the stranger as principal, of course the servant is accessory only to the crime of murder; though had he been present and assisting, he would have been guilty as principal of petit treason, and the stranger of murder." If, under the law, one who instigates another to the commission of a crime is guilty as principal, how can it be doubted that one who instigates another to the commission of a civil wrong is as completely a principal as he would have been had he actually performed the wrongful act himself? Henderson v. Foy, (Ala.) 11 South. 441-442.

But it is further urged that there is nothing in the petition to show that default had occurred in the condition of the mortgage to

plaintiff, and, therefore, he is in no situation to maintain an action for conversion, as it does not appear that his right to the possession of the property had accrued. Let us admit the proposition of law at the foundation of this contention, and apply it to the facts alleged. In section 1 of Jones on Chattel Mortgages, a chattel mortgage is there defined: "A formal mortgage of personal property is a conditional sale of it as security for the payment of a debt or the performance of some other obligation. The condition is that the sale shall be void upon the performance of the condition named." No particular form of words is necessary to a chattel mortgage, if the foregoing elements appear. The petition alleges that, on October 6, 1884, the mortgagors, by their mortgage of that date, conveyed to the plaintiff the sheep described to secure the payment of two notes,—one payable July 6, 1885, and the other payable July 6, 1886. It is further alleged that, of the indebtedness so secured, something over \$6,000 thereof is still due and unpaid. Now, it is clear from the allegation of these facts that the execution and delivery of an instrument of sale is alleged. It is also clear that the condition of the sale, to wit, to secure the payment of a particular, specified indebtedness is alleged, upon the performance of which the instrument of sale should become void; and it is just as clear that a breach of that condition or a default in that condition has occurred, because it is certain that the debt has not been fully paid. Now, when did that default occur? Certainly, not later than the maturity of the last note, to wit, July 6, 1886. It seems to me that there can be no possible doubt about this matter, and that no other conclusion can be arrived at than that a default in the condition of the mortgage had occurred long before the illegal sale of the sheep; and, that being so, it cannot be doubted that under these facts the plaintiff had at least a special property right in the sheep, coupled with a present right to the possession thereof, and under such circumstances a wrongful sale of the sheep was a tortious conversion, as against the plaintiff. 2 Greenl. Ev. § 642; Bish. Noncont. Law, § 404. Counsel for defendant in error, in discussing this matter, have evidently had the above view in mind, for in their brief they say: "Is the court to say, in the absence of allegation, that the time for payment was not extended? Is the court to say that the mortgage itself did not provide for such extension of time?" In reply we have simply to say that we do not say anything of the kind. We do not know anything at all about there having been any extension of time for the maturity of the secured indebtedness; and we never before heard an intimation that there was any rule of construction which would, in the remotest degree, permit a court to indulge in any such speculations. There is, however, a rule of which we are aware, and it is well estab-

lished, that if anything has occurred between these parties which would in any way abrogate, modify, or change the original contract, or if the mortgage provides otherwise than is alleged, it is for the defendant to set it up as a defense. In that way, and in that way only, can such facts, if they exist, be brought into this case. At page 667 of Maxwell on Code Pleading, the author gives a form of a petition to foreclose a chattel mortgage, in which appear the following averments only: First, the indebtedness and its description, showing its amount and when it becomes due; second, the execution of the mortgage conveying the property described therein as security for the payment of the debt; third, the recording of the mortgage; fourth, the fact that the indebtedness was not paid when due, nor afterwards; fifth, the amount still due upon the debt; sixth, prayer for foreclosure. Of course, no foreclosure could be had except in case of a default in the condition of the mortgage; and certainly a default is alleged when it is stated that the indebtedness secured by the mortgage is not paid, and it further appears that it has matured. Every one of the averments set forth in the form mentioned is fully stated in the petition in this case. See, also, Jones, Chat. Mortg. § 699, and cases cited; Woodside v. Adams, 40 N. J. Law, 417; Burton v. Tannehill, 6 Blackf. 470; 1 Jones, Mortg. §§ 69, 75.

But it is said that the foregoing tends to show that the defendant has been guilty of a tortious conversion of plaintiff's property, and in such case the measure of damages is the value of the property converted, and, inasmuch as the petition is lacking in allegations as to the value thereof, it cannot be upheld as a petition in an action for conversion. Let us admit, for the purpose of this case, the correctness of this contention. The petition itself furnishes the answer, and a complete answer, to the objection. Not only are facts alleged which show a tortious conversion of plaintiff's property right in the sheep, by means of a wrongful sale thereof at the request and instigation of defendant, but it is further alleged that the defendant fraudulently, and for the purpose of hindering, delaying, and defrauding the creditors of the mortgagors, and especially the plaintiff, collected and retained the proceeds of that sale, to wit, the sum of \$20,000. There can be no doubt that the interest of plaintiff in the property sold was the balance due him upon the indebtedness secured by his mortgage. It is further alleged that after defendant received these proceeds plaintiff demanded of him the said balance and was refused. Under these facts I can come to no other conclusion than that they show a condition of affairs in which it appears that the defendant has money of the plaintiff which, in equity and good conscience, he ought to pay over to plaintiff. 2 Greenl. Ev. § 117. The law is well settled that where one has tortiously taken another's

property and sold it, or, being lawfully possessed of it, has wrongfully sold it, the owner may recover the proceeds of the sale. *Id.* § 120; *Jones v. Hoar*, 5 Pick. 285. In *Ashe's Exrs v. Livingston's Exrs*, 2 Bay, 80, the facts were as follows: In 1778 Berwick executed a mortgage upon realty to Ashe. Owing to the confusion of the war at that day it was not recorded. It was found in 1791 among a lot of old papers by the mortgagee's executor; the mortgagee having died in the mean time, as, also, had Berwick, the mortgagor. In 1787, Livingston's executor obtained a judgment against Berwick's estate, and in 1788 Rivers, a creditor, also obtained a judgment against said estate. Execution was issued under the junior judgment and the property mortgaged to Ashe sold. The proceeds were paid by the sheriff to Livingston's executor, as his judgment was superior to that under which the execution was issued, and he paid the funds out in discharge of the debts of the estate. Up to this time neither Livingston's executor, nor Rivers, nor the sheriff, had any notice or knowledge of the mortgage. Upon the discovery of the mortgage in 1791, Ashe's executors brought suit against Livingston's executor for the proceeds of the sale, as for so much paid by mistake to their use. The action was upheld against Livingston's estate by the unanimous opinion of the court of appeals; the court holding that the mortgage, though unrecorded, was valid as against the judgments, and that plaintiff could maintain an action for money had and received, notwithstanding the fact that he could, had he so elected, have followed the property and subjected it to his mortgage. There was no question of bad faith in the case, and the case goes very much further than we do in the case before us. Of course, under our statute, an unrecorded mortgage would be void as to subsequent purchasers or mortgagees in good faith and without notice; but in the case at bar there is no question as to the validity of the mortgage. At common law the owner could recover in an action for money had and received; but under the Code, requiring the petition to set forth the facts constituting the cause of action in plain and concise language, it is very doubtful if, in such case as this, the common-law declaration for money had and received would be sufficient. In speaking of the "common counts," where incorporated in pleadings under the Code, it is said, at page 178 of *Swan on Code Pleading*: "Thus, if the plaintiff alleges that the defendant is indebted to the plaintiff for money had and received for the plaintiff's use, the plaintiff would be permitted under the Code to prove that A. remitted money to the defendant to pay to the plaintiff, and that the defendant promised to pay it to him; but under such a petition the plaintiff would not be permitted to prove, as at common law under such a count in assumpsit, that the defendant had tortiously taken the

plaintiff's goods and sold them, or that money had been extorted from the plaintiff by the defendant under duress and protest, etc. for this would be an entire departure from the facts stated in the petition, and could only be sanctioned by giving to the allegations of the petition the fictitious legal effect which belongs to a common count, under the abolished rules of pleading at common law." *Pom. Rem. & Rem. Rights*, § 544, is to the same effect. As stated in the former opinion, "it fairly appears that the defendant is guilty of a wrongful conversion of plaintiff's property; that by means and as a result of such conversion defendant obtained and has retained a sum of money largely in excess of plaintiff's debt; that the measure of plaintiff's recovery is the amount of his debt secured by the mortgage, and this amount the defendant ought in equity and good conscience pay over to plaintiff." The facts leading to this conclusion having been alleged, it is entirely immaterial what the form of the action is; all forms of action having been abolished by our statute.

The foregoing effectually disposes of the important matters urged upon the argument but there is one other matter to which I wish briefly to refer. In the former opinion of the majority of the court, the petition was set forth in full, as a statement of facts, and appended to the opinion. In the body of the opinion there was a brief paraphrase of the petition. There was no sort of pretense that the opinion set forth the language of the petition, but only a brief statement, in the language of the writer, of the substantial facts set forth at great length in the petition. In referring to the act of sale, and the defendant's connection with it, it was stated in the opinion that the defendant "requested, instigated, and procured" the mortgagors to sell and dispose of the sheep, etc. The word "procured" was evidently used for the purpose of expressing the idea that through the instigation of the defendant the sale had been accomplished, and could have been understood in no other way. In the petition for rehearing, in briefs of counsel, and at the argument, a great deal was said about the use of the word "procured." And with reference thereto it was said: "To procure means to bring about, to effect, to cause. One who procures is one who acts, and not one who suggests. Upon what theory can this court add to the language used by the plaintiff? Is it to frame a petition for him? Is this court not content with breathing life into this petition by way of 'reasonable intendment,' to go so far as to build a foundation for its theory by adding to the record too?" etc. This is strong language, but I am frank to admit that, if the facts justify it, it is none too strong. If it is not justified by the facts, then it is safe to say that it is at least in exceeding bad taste. One or two illustrations drawn from recognized masters of style will demonstrate whether there was any substan-

tial ground for the objection, or whether it owes its origin to a spirit of mere hair-splitting hypercriticism. At page 36, bk. 4, BL Comm., the author, who certainly understood the use of the English language, uses with approval Sir Matthew Hale's definition of an accessory before the fact, as "one who, being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime." And, in the text just preceding this definition, he states that a servant who "instigates" a stranger to kill his master is an accessory before the fact. There can be no doubt, then, that it may properly be said of one at whose "instigation" a crime was committed, that he "procured" the commission thereof. At section 604, 1 Bish. Cr. Law, the author uses this language: "Persuasion is one form of attempt. It is therefore indictable to persuade or hire a person to commit a crime, especially of the heavier sort, though he declines to do it, or undertakes it and fails. Yet, if this person actually does what he is persuaded or hired to do, the effort of the procurer ceases to be called an attempt, because it has become a success." Can we doubt that here the word "procurer" is used to mean the same thing as "persuader?" And certainly the word "persuader" is not so strong a word as the word "instigate." In the case of Long v. State, 23 Neb., at page 45, 36 N. W. 310, the court say: "It is insisted that the language of the charge, in which the words 'requested, advised, and incited' were used, is not synonymous with the words 'aid, abet, or procure,' as used in the statute." The court held the objection without foundation. These illustrations are, I think, sufficient to show that counsel were at least mistaken.

Looking at the allegations of this petition as I do, it is clear to my mind and judgment that it sets forth an actionable wrong on the part of the defendant, for which he should answer, and it would be a travesty upon justice to say that plaintiff should go out of court without redress, or without even calling upon the defendant to respond to these allegations. If, however, the real facts are not as alleged, according to the construction hereinbefore given to the language of the petition, but are in accord with the contention of counsel for defendant, as is intimated by them, then, and in such case, no substantial injury or wrong is done the defendant, because he has only to answer the petition, setting forth the real state of the case as a defense to this action, and if, upon trial, it should appear that no wrong was done the plaintiff by the defendant, of course he will not be permitted to recover; while, on the other hand, if it should appear that wrong has been done him at the instigation of the defendant, he should have redress, and in this way real, substantial justice would be measured out to the parties, as is the bounden duty and only legitimate object of the courts. The judgment of the court below

should be reversed, and the cause remanded to that court with instructions to permit defendant in error to answer plaintiff's petition, and for further proceedings in accordance with this and the former opinion rendered herein. Judgment reversed.

GROESBECK, C. J., concurs.

CONAWAY, J., (dissenting.) Upon the first hearing of this cause in this court I felt compelled to dissent from the decision of my brethren upon the bench, and stated in brief some reasons for such dissent. I hoped that on further consideration we might be able to harmonize our views. In this hope I have been disappointed; and it now becomes necessary that I develop my views as completely as time and opportunity permit. Differing radically from my associates, it will be necessary that I discuss their views freely. At the same time, I shall certainly do so with much deference and respect, as they are the views of the majority of the court, and settle the law of the case. The charging part of the petition in this case appears in full in the opinion of the court on the first hearing. 33 Pac. 31, 32. It is quite apparent from an inspection of the petition, and will be abundantly apparent from a review of the authorities cited by the learned counsel for plaintiff in error, that the primary theory upon which they brought this action is that the lien of the mortgage of plaintiff in error follows and attaches to the proceeds of the sale of the mortgaged chattels in defendant's hands, and that this action is in the nature of a suit in equity for the enforcement of a lien or trust. Thus, counsel say in their first brief: "The case for the plaintiff presents a very simple proposition. The parties were not favored with an opinion upon the question by the court below, and it is therefore difficult to do more in this brief than to present a most general statement of the position of the plaintiff. Two propositions are involved: (1) That the plaintiff's mortgage was and continued to be a lien upon the property up to the time of sale prior and paramount to the lien of the defendant; (2) upon the sale of the property these liens attached in the same order of priority to the proceeds." Upon this question counsel have not yet succeeded in getting a judicial opinion. It would seem that the court does not sustain the second of the above propositions, as the petition is sustained as stating a cause of action for the conversion of plaintiff's property, without mentioning this proposition of plaintiff, made in defining his position and explaining his cause of action. In a later brief counsel for plaintiff in error say: "It is of no consequence to the plaintiff, and ought not to be to the defendant, and, therefore, not to the court, which is concerned only with justice, whether the plaintiff's remedy is for a conversion of the property, or

for a conversion of the proceeds,—for money had and received, or for an accounting under a constructive trust.” As to this it must be said that it makes a very material difference, in the facts necessary to be alleged and proven, whether the cause of action is the conversion of plaintiff's property, or the conversion of a fund charged with a lien or trust, or money had and received to plaintiff's use on a fictitious contract, or money in defendant's possession which he ought in equity and good conscience to pay over to plaintiff. It is not necessary to plaintiff's cause of action, as in the nature of a suit in equity for the enforcement of a lien or trust against the proceeds of mortgaged chattels in favor of the mortgagee, that plaintiff should allege or prove that he had title to or right of possession of the mortgaged chattels at the time of the alleged sale, and he has not so alleged. A mortgage, in equity, conveys no title and confers no right of possession to the mortgagee. Allegations of title and right of possession would be inconsistent with the plaintiff's cause of action, as defined in his original brief and intended to be stated in his petition. But such allegations are necessary in the statement of a cause of action for the conversion of property, and which the court says is the cause of action actually stated in the petition; and the court supplies them by implication. It is not necessary to plaintiff's cause of action, as for the enforcement of a lien or trust, that he should state or prove the condition of the mortgage in question, or a breach of that condition; and he has not so stated. Such allegations would have made his equities all the stronger, and it is to be presumed he would have made them if they are true. He cannot be accused of falsehood if they are false. It is necessary to a cause of action for the conversion of mortgaged chattels to state the condition of the mortgage and a breach of that condition, when these facts are relied on as conferring title and right of possession; and the court has supplied such allegations by implication. It is not material to plaintiff's cause of action, as for the enforcement of a lien or trust against the proceeds of the alleged sale of the mortgaged chattels, that plaintiff should allege or prove that the sale itself was wrongful or fraudulent, or made without his knowledge or consent, and he has not so alleged. Such allegations would have made his equities all the stronger, and it is to be presumed he would have made them if they are true. He cannot be accused of falsehood if they are false. But such allegations are quite material to a cause of action for the conversion of the property, and the court supplies these by implication. It is not material to plaintiff's cause of action for the enforcement of a lien or trust that he should allege or prove that the request for or instigation of the sale of the mortgaged chattels was wrongful or fraudulent. Such allegation would have

made his equities all the stronger under the petition, and it is to be presumed he would have made it if it is true. He cannot be accused of falsehood if it is false. Such allegation is material to his cause of action as for a conversion of the property, and the court supplies it by implication. In stating his cause of action as for a conversion of a fund charged with a lien or trust, plaintiff alleges that defendant fraudulently collected and retains the proceeds of the alleged sale of the mortgaged chattels, and alleges a demand for and a refusal to pay plaintiff's claim. If defendant is liable for a conversion of the property, it makes no difference in his liability whether he received any of the proceeds of the sale of it or not. It has also been urged that defendant, under the allegations of this petition, may be liable neither for the conversion of a fund charged with a lien or trust nor for a conversion of the mortgaged property, but really liable for money had and received to plaintiff's use, or for money in his possession which in equity and good conscience he ought to pay to plaintiff.

In this conflict of views, I approach the task of endeavoring to determine for myself which is the better view with much diffidence; and this diffidence is intensified by an oppressive consciousness of the impracticability of discussing the numerous important questions involved in a single opinion of reasonable length. If I could consider the petition sufficient in any point of view, I might confine my discussion to that particular view, as the court has done. But, regarding the petition insufficient in any view of it, it is necessary to discuss them all. In Wisconsin the courts will not do this. On general demurrer they first determine what cause of action the petition is designed to state, and then whether it states facts sufficient to constitute such cause of action. If it do not, the demurrer will be sustained. *Supervisors v. Decker*, 30 Wis. 624; *Pierce v. Cary*, 37 Wis. 232. The general demurrer, under our Code, is for the reason that the petition does not state facts sufficient to constitute a cause of action. It would seem that, if the petition state facts sufficient to constitute any cause of action, it is not subject to demurrer on this ground, and that, if it states facts sufficient to constitute a cause of action, it must be presumed that it was designed to state that particular cause of action. It is probably as well to consider first the primary proposition of counsel for plaintiff in error, that the mortgage liens follow the proceeds of the sale of the mortgaged chattels. How far short counsel come of establishing this proposition as a general rule of law for mortgaged chattels sold and transferred by mortgagors in possession will be apparent from a short statement of the nature of the cases cited as establishing the rule. *Gibson v. Warden*, 14 Wall. 244, is a case of property lawfully con-

Case of deed of trust of realty to secure payment of a sum of money in three installments. When default was made in payment of the first installment, the mortgaged realty was sold in execution of power of sale in the trust deed. Held, that the trustee should not, after paying the first installment, pay the surplus left to the mortgagor, but should hold it for the payment of the other two installments. *Att v. Bright*, 31 N. J. Eq. 86, is a case where mortgaged realty was converted into money by condemnation proceedings, the money taking the place of the property. *Embel v. Stolte*, 59 Ind. 446, same as last. *Ell v. Green*, 90 Ind. 75, is a case of a mortgage by an heir of his inheritance. The land was sold by the administrator to pay the debts of the decedent. Held, that surplus proceeds in the hands of the administrator should not be paid to the heir in full, but should be charged with the lien of the mortgage. It will be observed that these are all cases of the lawful conversion of property into money by lawful authority, to the exclusion and destruction of the mortgage lien on the property. The money was lawfully substituted for the property. In the case *Ashe's Ex'rs v. Livingston's Ex'rs*, 2 Bay, it was held that a judgment lien was inferior to the lien of a prior unrecorded mortgage of realty, according to the principles announced in the case of *Frank v. Hicks*, (decided at the present term,) 35 Pac. 475. Evidently the registration laws of South Carolina did not protect judgment liens on real estate against unregistered mortgages or secret sales. No such decision could ever have been made in case of a chattel mortgage, which was void at common law unless accompanied by delivery of the goods to the mortgagee, until the registration laws were passed avoiding the necessity of delivery. *Down v. Stewart*, 1 Md. Ch. 87, was a case where mortgaged chattels had been sold out of the state by the mortgagor, and the proceeds deposited by him in a bank in his own name. Held, that the mortgage lien would be enforced against the identical money received for the mortgaged chattels, but not against other money deposited by the mortgagor in the same bank. Other cases cited are still more widely different from the case decided by the petition. It is not a general principle of the law that a mortgagee may enforce his lien against the proceeds of a sale of mortgaged chattels by the mortgagor in possession, when such proceeds are in the hands of third persons. It is not necessary that a creditor in accepting payment by his debtor, that a vendor in accepting the purchase price of property sold by him, should inquire and ascertain where and how the debtor or vendee acquired the money paid, on pain of being held liable as a converter,

rule, and plaintiff has not brought himself within any recognized exception.

So far I have been considering the action as for the enforcement of a lien or trust,—an action in its nature purely equitable. If the court had found it necessary to consider this phase of the case, and to construe the alleged chattel mortgage in so doing, it would have been compelled to hold to the doctrine of equity, as distinguished from the law, and to announce, with all judicial solemnity and authority, that the title to the mortgaged chattels is in the mortgagor. But the court considers the petition as stating a cause of action in the nature of the common-law action of trover for the conversion of property, or for trespass, or money had and received to plaintiff's use, or something of the nature of a common-law action, as distinguished from a suit in equity, and holds, with equal judicial solemnity and authority, that the title to the mortgaged chattels is in the mortgagee. And in so holding the court is sustained by abundant authority. It is true that some courts have recently shown a disposition to do away with this technical doctrine of the common law, as distinguished from equity, and to hold that a chattel mortgage in law is just what it has long been in equity, and what it practically is in business, a security by way of lien, and not a conveyance of title, the beneficial title remaining in the mortgagor. When the courts reach this advanced position, to which they are evidently tending, there will be an end to the action for the conversion of mortgaged chattels. The law of chattel mortgages is now undergoing a process of development, progress, and reform similar to what has already been effected in the law of mortgages of real estate. That the courts, under the reformed procedure of the Codes, would free themselves from much of the inconsistency in the principles of law and equity, as distinguished from each other, was evidently expected by able commentators. Jones, in his work on Chattel Mortgages, adheres quite strictly to the legal view. But he says, at section 12: "In many states all distinction between law and equity has been abolished by statute, so that equitable principles are applied in proceedings which are in form actions at law." It evidently had not occurred to this author that a court, in construing a chattel mortgage in an action in the nature of a suit in equity, would hold the title to be in the mortgagor, and that the same court, in an action in the nature of an action at law between the same parties, would hold the same chattel mortgage to vest the title in the mortgagee. Herman goes much further in the direction of reform than does Jones. Some courts have already freed themselves from this particular inconsistency by adopting the equity doctrine of chattel mort-

hardware first had that a mortgage of real estate, in equity, was but a lien, every authority was against him. But his decision was recognized from that time forward as correct. But the work of reforming the common law is now more legislative and less judicial than formerly; and I will consider this case, as the court does, from the common-law standpoint. The Wisconsin courts require a pleader to reveal the cause of action which he brings suit on, and will consider no other on demurrer. I do not go to that extent, though there is much reason in the rule. It would seem not to be too much to expect of a plaintiff, when he commences an action, that he should know what his cause of action is, and that his attorney should inform the opposite party and the court what it is by the pleading. But, let it be admitted that it is proper, or rather permissible, for a plaintiff to allege in his petition a mass of facts, some tending to establish one cause of action and some another, or a number of others, and leave it for the court to determine for him which is his proper cause of action, if he has any. When his case has reached a court of last resort, and is sent back to the trial court for further proceedings, it is certainly time that the question of what the cause of action is should be determined. This point has now been reached, and, as I understand the position of the court, it has found that the petition states facts which constitute two causes of action. They arise, however, from transactions connected with the same subject of action; and that there are two causes of action is important only because allegations and proof sufficient to sustain one of them may not be sufficient to sustain the other. Lest I be not strictly accurate in stating the position of the court, I will do so in its own language. The court says: "Not only are facts alleged which show a tortious conversion of plaintiff's property right in the sheep, by means of a wrongful sale thereof at the request and instigation of defendant, but it is further alleged that the defendant fraudulently, and for the purpose of hindering, delaying, and defrauding the creditors of the mortgagors, and especially the plaintiff, collected and retained the proceeds of that sale, to wit, the sum of \$20,000. There can be no doubt that the interest of the plaintiff in the property sold was the balance due him upon the indebtedness secured by his mortgage. It is further alleged that after defendant received these proceeds plaintiff demanded of him the balance and was refused. Under these facts I can come to no other conclusion than that they show a condition of affairs in which it appears that the defendant has money of the plaintiff which, in equity and good conscience, he ought to pay over to plaintiff."

session, or may not be for money and good. This cause of action is exp. This cause of sale of the destroying equitable a lien, and mortgagee. Neither title is exp. legations of supplied to of the sub. of Jones or gage is th of persons it as secu the perfor. The condi upon the pe No partic a chattel appear. ber 6, 188 gage of th the sheep two notes other pay leged tha something unpaid. tion of t delivery. It is also to wit, to specified perform become v breach of cause it is fully paid cur? Cen of the la seems to doubt ab conclusio fault in occurred sheep; a ed that u least a s coupled v thereof, wrongful conversio I concur gage an i in the m was whs gors, by ber 6, 18 mortgage defendan

what was "theretofore unsold." It is not "all of said sheep," simply, but "all of said sheep theretofore unsold." Not only does the petition fail to allege that any property of plaintiff was sold, but it expressly shows that no property of the plaintiff was sold. It may be said that the reference intended by the pleader in using the words "theretofore unsold" was to a prior alleged sale, by consent of the mortgagee, of a portion of the sheep originally mortgaged. This is evidently true. The petition was evidently drawn upon the equitable theory that a mortgage is not a sale, but is a lien, and conveys no title or right of possession. And the petition can be construed as stating, or attempting to state, a cause of action in conversion only by construing it entirely apart from the evident design of the pleader; and when so construed the allegations destroy each other. The mortgage must be considered as a sale, and not a sale, at the same time and for the same purpose,—the purpose of sustaining the petition. If the mortgage was not a sale, but merely a lien, plaintiff had no property to be converted. If the mortgage was a sale, whatever was sold by it was not included in a subsequent sale of property "theretofore unsold." This single consideration I must regard as conclusive against the theory of conversion; conclusive against the fiction of money had and received by defendant to plaintiff's use; conclusive against the possession of defendant of money which in equity and good conscience he ought to pay to plaintiff. The only possible cause of action not concluded is the impairment of plaintiff's security by the destruction of the mortgaged property, or a portion of it, its removal beyond the operation of the mortgage, or the selling in parcels, rendering it more difficult for plaintiff to follow with his mortgage lien. No such showing is made or attempted.

This is all that I think necessary to say upon the question of the sufficiency of this petition. But I dissent, additionally, from the views of the court upon two important branches of the law,—the law of pleading and the law of chattel mortgages. These are both in an unsettled and formative state, and what the court says now may have an important effect in shaping the law for the future. The petition is logically and skillfully drawn to meet the requirements of plaintiff's primary theory of the case,—that defendant was holding a fund charged with a lien or trust. It appears to be an exceedingly ingenious attempt to make out a cause of action from meager facts upon a theory of the law which the court does not discuss. In any other point of view, the petition must appear as the work of a blundering tyro in the law,—not from bad pleading, but from applying the pleading to a purpose foreign to the design of the pleader. As to possession, so far as appears from the petition, plaintiff may have taken possession of the sheep in question immediately upon the execution of

his mortgage, or at any time afterwards, and may have possession yet. The court cites a case to the effect that a sale of personal property implies delivery. However true this may be under other circumstances, it is absolutely erroneous as to sales of mortgaged chattels by either mortgagor or mortgagee. Either or both may sell their respective interests without regard to possession. If plaintiff has had possession, and his possession has not been interfered with, his property has not been wrongfully converted. I believe I have not seen a more insidious fallacy advanced under the reformed system of Code Procedure than the idea that a petition may show a cause of action without revealing what that cause of action is, or that a court should proceed to the trial of a cause without knowing what cause of action the plaintiff will endeavor to establish,—whether his cause of action is in tort or contract, legal or equitable; in this case, whether he will endeavor to establish his right to damages for a conversion of his property, or for the impairment of a security, or his right to an accounting under a constructive trust. The evil of such a course is forcibly illustrated in this case. In consequence of the jumbling of legal and equitable ideas and language, a mortgage of chattels is held to be a sale of a property which may be the subject of conversion, and at the same time it is held that this same property remained unsold. This method of pleading is essentially vicious. It does not state any cause of action, complete. It attempts to make a nondescript cause of action from parts of several causes. In implication upon implication to sustain this petition, I think the court goes beyond all precedent. Pomeroy, it seems to me, states the rule of liberal construction in favor of pleadings as strongly as any. The word "intendment," as used by him in the passage cited by the court, is not synonymous with "supposition." It may be supposed, from a fact alleged, that another fact exists, and such supposition may be reasonable or probable. But inference by intendment is something more than guesswork. What is to be inferred by reasonable intendment from an allegation is something intended by it; something that must be true if the allegation is true; something implied in the allegation. Pomeroy's use of the word "intendment" appears from his criticism of the New York case of *Scofield v. Whitelegge*, 49 N. Y. 259. Pom. Rem. & Rem. Rights, note at page 596. The complaint alleged that defendant had become possessed of, and wrongfully detained from the plaintiff, a piano of the value of \$400. There was an answer which denied the possession of any property belonging to the plaintiff, denied the wrongful taking, and denied the plaintiff's ownership. The complaint was dismissed at the trial on the ground that it stated no cause of action, because it did not show that plaintiff had either a general or special property in the

chattel, or the right of possession. Pomeroy's criticism is, in substance, that the wrongful detention alleged implies a property and a right of possession in plaintiff, because the detention could not otherwise be wrongful,—a case of necessary intentment or implication. In *Marie v. Garrison*, 83 N. Y. 15, an allegation of a refusal to exchange certain stocks was held to imply a tender of the stocks to be given in exchange for them, because without such tender no exchange could have been effected. In *Saulsbury v. Alexander*, 50 Mo. 142, the petition alleged that the defendant sued plaintiff for work done and cash lent, "the particulars of which appear from the following account," giving the account, and concluding with a statement of the balance due, and prayer for judgment. Defendant answered, setting up that the work had been negligently done, and that he had already paid more than its value. Plaintiff had judgment, and defendant moved in arrest of judgment on the ground that no cause of action was alleged. This motion was overruled. The court says: "When we say that a judgment should be arrested if the petition fails to show a cause of action, we speak of substantial and not of formal omissions. The latter are supplied by intentment, and will be presumed, after verdict, to have been proved." These cases are among those that go furthest in the direction of a liberal construction in favor of pleadings. I will now give a few tending in the opposite direction. *Garner v. McCullough*, 48 Mo. 318, was an action for an invasion of plaintiff's possession or right of possession. The petition alleged that the plaintiff, in virtue of a contract with one Evans, was entitled to the exclusive possession of certain premises, and that, after the execution of the Evans contract, the defendant, with knowledge of the plaintiff's right, purchased the premises and forcibly took possession of them, and excluded the plaintiff. The defendant answered, and put in issue the facts alleged. Who Evans was, his connection with the land, and the nature of plaintiff's contract with him, were not set up. At the trial, on motion of defendant, plaintiff's evidence was excluded on the ground that the facts alleged, if proved, would not warrant a recovery. The supreme court affirmed the judgment. *State v. White*, 88 Ind. 587, was an action against a sheriff for failing to levy an execution, the petition alleging that he negligently permitted the execution defendant fraudulently to take his goods and chattels out of the state of Indiana, and beyond the reach of said execution. This was held fatally defective on demurrer, as not stating that the goods and chattels were ever in the sheriff's bailiwick. In *Wright v. McCormick*, 67 N. C. 27, the supreme court of North Carolina uses the following language: "It is a rule of construction, of which no pleader has a right to complain, that uncertainties and ambiguities in his pleadings shall be taken

in the sense most unfavorable to him; for he has at all times the power, and it is his duty, to make them plain. And as, if the uncertainty occurs by accident or oversight, he can cure it by amendment when it is pointed out, a failure to amend shows that the uncertainty is of purpose, and designed to mislead his adversary; and no party can be allowed to profit by such an artifice."

I will not attempt to harmonize the cases on pleading. Some courts hold that the common-law rule that the allegations of a pleading are to be strictly construed against the pleader, and taken in the sense most unfavorable to him, is abrogated by the provision of the Code that pleadings shall be liberally construed, with a view to substantial justice between the parties. Other courts enforce the common-law rule, and find it not inconsistent with the liberal construction required by the Codes. I will not attempt to decide which view is the correct one. The general language used by some of the courts in adopting one rule, to the exclusion of the other, or in holding them both in force and not in conflict, is of little practical assistance in the solution of questions of pleading. Courts differ widely as to what a liberal construction requires, as applied to the language of a pleading. I am willing to go as far as the farthest, as I understand the cases, in the way of liberal construction, and, from this standpoint, I repeat that I think the court has gone beyond all precedent in supplying important and material allegations by intentment or implication in order to sustain the petition in this case. Such allegations should not be supplied because they are probable. They should be found intended by or implied in the allegations made. They should be, not only probably true, but necessarily true, taking the allegations to be construed as true. Where two inconsistent inferences may reasonably be made from the allegations of a pleading, we cannot say that either one is intended by or implied in it. Neither one can be taken as true. Our Code provides that the allegations of a pleading shall be liberally construed, with a view to substantial justice between the parties. I do not object to the most liberal construction of this rule by any of the authors so liberally quoted by the court, but the general language of the commentators leads to about the same diversity of opinion in its application to particular cases as does the general rule of the statute. It is only by a consideration of the facts of particular cases to which the rule has been applied that we can arrive at the real views of the different courts as to the application of the rule. The Code provides that the petition must contain a statement of the facts which constitute the cause of action, in ordinary and concise language, and makes it ground of demurrer that the petition does not state facts sufficient to constitute a cause of action. If the petition in the case at bar stated as a

fact that the plaintiff was entitled to the possession of the property in question when he commenced his action, evidentiary facts tending to show the truth of this allegation might be proved without being alleged; but the right of possession is not alleged in ordinary and concise language, or in any language. And it is not implied in any allegation that is made. The court implies it from the further implication that the condition of the mortgage has been broken; and this implication of condition broken is founded upon the further implication that the condition of the mortgage is that certain notes, given to secure the payment of the indebtedness which the mortgage was given to further secure, should be paid at maturity. And the implied right of possession rests upon the yet further implication or assumption that the terms of the mortgage are such as to vest in the mortgagee the right of possession on breach of the condition. This last is mere assumption or supposition. A mortgage of personal property, just as formal as that described by Jones in the quotation in the opinion of the court, is that provided for by our statute containing a power of sale. This power of sale may be vested in the "mortgagee or any other person." Rev. St. Wyo. § 80. The right of possession may not vest in the mortgagee by virtue of the mortgage at any time or under any circumstances. The right, on default and forfeiture, to seize, advertise, and sell the mortgaged property may be vested in "any other person." The assumption that the term of the mortgage extended to no later date than the maturity of the note having the longest time to run is a gratuitous assumption. There is better ground in the petition for the contrary assumption. It is alleged that the mortgage was executed and filed for record on the 6th day of October, 1884, and was duly recorded, and that it was in full force and effect at the filing of the petition on the 19th day of December, 1889. A chattel mortgage ceases to be valid as to creditors of the mortgagor two months after the expiration of the term for which it is given unless the record be renewed by affidavit. There is no allegation of such renewal. This is a material and substantial fact in plaintiff's cause of action, and, it is to be presumed, would have been alleged, if true. The natural presumption would seem to be that the term of the mortgage extended at least to October 19, 1889. This is a case in which two conflicting assumptions may be made from the same allegation. In such case neither can be properly called an intendment or implication of such allegation. The mortgage vests the legal title in the mortgagee. His right of possession depends upon the terms of the mortgage. Plaintiff does not reveal the terms of his mortgage in his petition. He does not claim the right of possession. I see no reason why it should be forced upon him. The assumption that

the term of plaintiff's mortgage could not be longer than till the maturity of the later note is supposed to be strengthened by Maxwell's form for the foreclosure of chattel mortgages. The form given is for an action on note and mortgage. It gives a copy of the note to secure which the mortgage was given, but no copy of the condition of the mortgage. In forms given by the same author for actions on covenant, the covenants are required to be copied; and in several forms for the foreclosure of mortgages of real estate the condition of the mortgage is copied. The omission in the present instance is evidently a mistake. But the mortgage in the case at bar is not alleged to have been given to secure the payment of the notes. In foreclosing chattel mortgages by petition in court, no allegation or proof of right of possession in the mortgagee is necessary. In the action for the conversion of personal property, such allegation and proof are necessary. Since both court and counsel rely on Maxwell's forms as authority, I will give his form for the action for conversion of chattels. It is in the following words: "First. The plaintiff alleges that on the — day of —, the plaintiff was the owner and in possession [if not in possession, entitled to the immediate possession] of the following described goods and chattels, [describe them,] of the value of \$—. Second. On the day aforesaid the defendant obtained possession of said goods and chattels, and wrongfully and unlawfully converted the same to his own use, to the damage of plaintiff in the sum of \$—. [Add prayer.]" The citation of Maxwell's forms, as sustaining the petition as for conversion, is not a fortunate citation.

The court says that, under the circumstances, "a wrongful sale of the sheep was a tortious conversion as against the plaintiff." I must say that among all the numerous cases cited by counsel and court I do not find one that goes to the extent of holding that a sale of mortgaged chattels by the mortgagor in possession is, of itself, a conversion as against the mortgagee. To be a conversion, all the commentators on chattel mortgages state that the sale must be in exclusion, defiance, or denial of the rights of the mortgagee. The mere fact of sale by the mortgagor does not import such exclusion, defiance, or denial. What I now propose to show is that no case cited holds that it does. A very few cases contain unguarded expressions, purely dicta, which, taken alone, might be so understood; but, taken in connection with the facts to which they were applied, they do not indicate such a view of the law. The case of *Coles v. Clark*, 3 Cush. 399, was a sale of mortgaged jewelry at auction, and delivery by auctioneer, followed by a demand upon the vendor, and his refusal to account for the jewelry; leaving no question as to the denial of plaintiff's right. The case of *Ashmead v. Kellogg*, 23 Conn. 70,

was an action against the mortgagor of a schooner, who had sold the "entire interest of said vessel" for \$14,000, which he retained to his own use. And the vessel was sold, as the court says, "as unincumbered." Besides, the only purpose for which a schooner would be valuable or would be sold or purchased would be for use in navigation, which would of itself indicate in the vendor a denial of, or intention to defeat and exclude, the mortgagee's lien. The case of *Sprights v. Hawley*, 39 N. Y. 441, was mortgaged jewelry sent from Syracuse to New York city and sold there. The case of *Bank v. Meyer*, (Ark.) 20 S. W. 406, is expressly stated by the court to have been a sale in exclusion or defiance of the mortgagee's right. One reason for this is apparent from the fact that it was a sale of cotton to a dealer; in effect, the cotton was placed upon the market. *Brown v. Campbell Co.*, 44 Kan. 237, 24 Pac. 492, was a case of mortgaged chattels sent to another county and sold. *White v. Phelps*, 12 N. H. 382, was a sale of a mortgaged horse, and demand made for the horse of a second purchaser, and refusal to produce or account for the horse. *Henderson v. Foy*, (Ala.) 11 South. 441, was mortgaged cotton placed in a warehouse and there sold by the mortgagor,—evidently a placing of the cotton on the market in defiance of the mortgagee's right. *Millar v. Allen*, 10 R. I. 49, is a case decided upon a mortgage which was held by the court to give the mortgagee the right of possession on demand. Demand was made. The court held, very properly, that it was no excuse that the mortgagor had placed it out of his power to deliver the property on demand by remortgaging it and giving possession to the second mortgagee. These are the principal cases cited as showing that a sale such as is alleged in the case at bar constitutes a conversion. It will be observed that in every case something appears in addition to the mere fact of sale to indicate the exclusion, defiance, or denial of the mortgagee's right. In no case does it rest upon the mere fact of sale. And when the courts or commentators mean that a sale is made of mortgaged property as unincumbered, or in exclusion, defiance, or denial of a mortgagee's interest, they say so. They do not leave it to be inferred. There is greater reason for a pleader to do so in stating his cause of action. In the case at bar, it is the gist of the action as for a conversion. It would materially strengthen the plaintiff's cause in any view, and it is to be presumed if such were the fact he would have stated it. He cannot be accused of falsehood if the sale was actually made in the recorder's office, upon an examination of the mortgage record by all parties concerned or taking part in the sale or purchase, with the mortgage record open before them, read and understood by all, and fully and correctly explained by the mortgagors. But this was unnecessary. The record notice was equivalent to this, in

the absence of any fraudulent acts or representations preventing an examination of the record. I cannot concur with the court in ignoring the constructive notice of the record imported by the allegation that the mortgage was in full force and effect. It was certainly sufficient to charge all persons participating in the sale and purchase with knowledge of the mortgage and its contents, and to strengthen the presumption of good faith which attaches to all business transactions, and to negative all suspicion of fraud. Fraud is odious, and is not to be presumed. The sale of this property is not alleged to have been fraudulent. No act of the mortgagors is alleged to have been fraudulent. The courts and text writers, when they speak of a sale of mortgaged chattels, without adding as unincumbered, or in exclusion, defiance, or denial of the right of the mortgagee, or something equivalent, speak of such sale as subject to the mortgage, of course. They do not presume fraud, but the contrary. Jones adheres strictly to the common-law, as distinguished from the equity, view of chattel mortgages. He says, at section 454: "Before forfeiture the mortgagor may sell the mortgaged property,—subject, of course, to the payment of the mortgage debt. The purchaser takes all the interest the mortgagor had. Such purchaser may again, before default, sell and deliver the property with the like effect, and the remedy of the mortgagee upon the maturity of the debt is to follow the property, and recover of the last purchaser." It is hardly necessary to remark that this remedy would not be affected by the character of the sale, whether in attempted exclusion of the rights of the mortgagee or not, unless the property were moved, separated, destroyed, or in some manner injured. Jones proceeds: "Although the mortgage empowers the mortgagee to take possession of the mortgaged property at any time, in case he deems himself unsafe, the mortgagor has full authority to sell the property so long as there has been no default, and no demand of possession under the safety clause. Until such time a sale by the mortgagor does not amount to a conversion on his part, nor does the purchase amount to a conversion on the part of the purchaser." So courts and commentators generally, in speaking of a sale of mortgaged chattels, speak of it as a sale subject to the mortgage, of course. When they mean more than this, they express such meaning. If the petition in the case at bar means more, it should express such meaning. Jones says, at section 461: "The mere fact that mortgaged property was sold by a junior mortgagee for its full value, in the exercise of his legal right to foreclose his mortgage and sell his interest in the property, is not sufficient to make such sale hostile to the prior rights of the mortgagee; especially, if it appear that the property was not sold in parcels, and was not scattered or dis-

sipated. Such a rule is not inconsistent with the right of the prior mortgagee to enforce his lien, although it may indicate that the purchaser intends to contest it." In the case at bar the court holds the defendant accountable for the sale effected by the mortgagors of the property theretofore unsold, when he would not have been accountable if he had himself seized and sold the entire property for full value. "*Fraus est odiosa et non praesumenda.*"

I feel that I have indulged in a discussion of the law of pleading and of chattel mortgages in points bearing but remotely upon the decision of this case, and not necessary to the decision. The law upon these subjects is in an unsettled and formative state. The opinion of the court has a tendency to settle the law in this state. I could not consent, by silence upon these important points, to appear to concur in views of the law in which I do not concur. This action, as an action for an accounting under a constructive trust, must fail; the proposition upon which it is founded, that in case of a sale of mortgaged chattels by the mortgagor the lien follows the proceeds into the hands of third persons to whom they have been paid by the mortgagors, not being correct as a general proposition, and the case made by the petition not being exceptional. The several other causes of action, which this petition is supposed to have concealed about it, are all legal in their nature, as distinguished from equitable. They are all founded upon the idea that plaintiff, by virtue of his mortgage from Lawrence & McGibbon, acquired as by purchase a property interest in certain sheep, and that his property interest in the sheep was afterwards resold by Lawrence & McGibbon at the request and instigation of the defendant. This is expressly negatived by the petition itself, which only alleges a sale of what was theretofore unsold. This settles the question of a conversion of plaintiff's property. This settles the question of the fiction of money had and received by defendant to plaintiff's use. This settles the question of money in defendant's possession which, in equity and good conscience, he ought to pay over to plaintiff, unless for an impairment of plaintiff's security. To sustain any of these causes of action, we must not only supply essential allegations by construction,—we must not only disregard the express language of the petition,—but we must positively presume the commission of a fraud and a felony. There remains to consider only a possible cause of action for the impairment of plaintiff's security, and no impairment is in any manner alleged or shown. The court says of the petition that it sets forth an actionable wrong on the part of the defendant for which he should answer, and that it would be a travesty upon justice to say that plaintiff should go out of court without redress, or without even calling upon defendant to answer these allegations. With

all deference, I must say that it seems clear that the allegations of the petition show no actionable wrong, and that they do not call for an answer. As to the matter of going out of court, it is better for the plaintiff to go out of court now than after trial. I am of the opinion that the judgment of the district court should be affirmed.

DUNHAM et al. v. HALLOWAY.

(Supreme Court of Oklahoma. March 3, 1894.)

DEPOSITION—SUFFICIENCY OF CERTIFICATE.

Where an officer taking depositions fails to show in his certificate that the same were taken at the place named in the notice, and where it further appears that the adverse party was not present when such depositions were taken, *held*, that the trial court erred in overruling a motion to suppress such depositions.

(Syllabus by the Court.)

Appeal from district court, Oklahoma county; before Justice John G. Clark.

Action in attachment by James H. Dunham and others against J. R. Holloway. There was judgment for plaintiffs, and defendant appeals. Reversed.

The other facts fully appear in the following statement by DALE, C. J.:

October 1, 1891, James H. Dunham, William G. Buckley, Charles Webb, and William E. Webb instituted suit in Oklahoma county against J. R. Holloway to recover judgment in the sum of \$5,004.08. On the same day the plaintiffs sued out an attachment upon the goods of defendant, and levied same upon his stock of merchandise located in Oklahoma City; the grounds set forth for such attachment being that defendant was about to sell, convey, and otherwise dispose of his property subject to execution, with the fraudulent intent to cheat, hinder, and delay his creditors, and that he was a nonresident of the territory of Oklahoma. Defendant entered a general denial as to the indebtedness, and in a separate answer denied the grounds of attachment. June 18, 1892, the cause came on for trial before a jury, and the jury found for the plaintiff in the sum of \$5,434.61, and also sustained the attachment proceedings. The defendant below filed his motion for new trial, which being overruled, he brings the cause here for reversal.

The assignments of error filed on the motion for a new trial may be summarized as follows: In refusing to grant defendant a hearing on his motion to discharge the attachment. In ordering a trial of the question of the validity of the attachment to a jury, in conjunction with the trial as to the merits of the complaint. In overruling defendant's motion to suppress depositions, and in refusing to allow certain cross-interrogatories in depositions to be read to the jury, and in excluding testimony on behalf of defendant, and in giving and refusing instructions to the jury. In not setting aside

an excessive judgment. The verdict of the jury on the attachment issue is not supported by sufficient evidence, and is contrary to law. The special findings of the jury are not sustained by the evidence, and are contrary to law.

Amos Green & Son and C. A. Leland, for appellant. J. W. Johnson and Rogers & Howard, for appellees.

DALE, C. J., (after stating the facts.) It was not error for the trial court to overrule appellant's motion to discharge the attachment. The law under which the attachment was sued out is adopted from the Indiana Code; and the courts, in construing that statute, uniformly hold that proceedings in attachment are merely auxiliary to the main action, and that both the principal and attachment proceedings must be tried together. *Foster v. Dryfus*, 16 Ind. 158; *Bradley v. Bank*, 20 Ind. 528; *Fork Co. v. Lukens*, 38 Ind. 438. And it follows that no error was committed by directing the cause to be tried to a jury, because either party was entitled to a jury to try the question of indebtedness; and, both the main and the attachment proceedings being heard together, it follows that the two issues so joined must go to the jury, where either party has demanded such jury for the trial of the cause.

Prior to the commencement of the trial the defendant below filed a motion to suppress the depositions of certain witnesses for the plaintiff, and to the ruling of the court upon such motion an exception was properly saved. The depositions referred to were those of J. H. Bradley, James H. Dunham, John T. Dutcher, Henry Walker, and Edwin A. Davis. The deposition of the first-named witness was not taken at the same time as were those of the other witnesses. In so far as the objection to the deposition of Bradley is concerned, we are of the opinion that it will not lie, such deposition being taken in substantial compliance with the statutes. But we think the motion to suppress the depositions of Dunham, Dutcher, Walker, and Davis should have been sustained, upon the first ground stated in such motion, to wit, "that the certificate of the notary does not show the place where the said depositions were taken." That portion of the certificate which bears upon the question under consideration reads as follows: "That said depositions were, and each of them was, carefully read to the deponent giving such testimony, before he subscribed to the same, and afterwards subscribed by said witnesses separately in my presence; that the defendant, J. R. Halloway, did not appear; and that the taking of said depositions commenced on Wednesday, the 30th day of December, A. D. 1891, and was finished on the same day, and before 5 o'clock p. m." Following, in the usual man-

ner, is the name of the officer, seal, etc. Section 13, art. 14, Code Civ. Proc., in force at the date of taking the depositions referred to, provides as follows: "The officer shall annex a certificate to the deposition, stating the following facts, [omitting the first three subdivisions:] Fourth. The time and place of taking the deposition, and the hours between which the same was taken; and the officer shall sign and attest the certificate and seal the same, if he have a seal of office."

The statute requiring the officer to show in his certificate the place where the deposition was taken is mandatory, and the reason therefor is so apparent that it hardly needs discussion. This requirement is obviously for the purpose of giving the adverse party an opportunity to be present, if he wishes, when the deposition is taken, and the certificate of the officer taking such deposition should show that the terms of the notice are complied with. If the adverse party had been present, a showing that the deposition was taken at the place designated in the notice would not, perhaps, be necessary, for his being present would waive any irregularity in either the notice to take deposition or the certificate attached thereto. But, where the adverse party does not appear, he waives nothing required in the statute, and he has the right to presume that the deposition will be taken in strict conformity with the statutes, and, in the absence of a certificate showing such fact, may move to suppress the deposition, and such motion should be sustained.

An examination of the record discloses the fact that there is no evidence whatever showing any indebtedness upon the part of Halloway to the plaintiffs below, except such as appeared in the depositions of Dunham, Dutcher, Walker, and Davis, and, as we have shown, the motion to suppress such depositions should have been sustained; and, the defendant below having denied the indebtedness, the claim of plaintiffs must be maintained by competent evidence. The judgment of the lower court must be reversed, and the cause remanded for a trial de novo. It has been suggested that such reversal would not carry with it a new trial upon the attachment proceedings; but, the attachment being merely auxiliary to the main issue, it follows that, where no judgment is obtained upon the principal question, the attachment must also fail. *State v. Miller*, 63 Ind. 475.

While other questions are raised by the bill of exceptions and assignment of errors, inasmuch as the ones discussed reverse the case, we do not deem it necessary to consider them.

BURFORD, SCOTT, and BIERER, JJ., concurring. McATEE, J., not sitting.

EWING v. TURNER, Territorial Treasurer.
(Supreme Court of Oklahoma. March 3, 1894.)

MANDAMUS—To TRY TITLE TO PUBLIC OFFICE.

1. Mandamus will not lie to try the title to a public office.

2. It may be stated as a general rule, in an action in mandamus, that, where a relator shows a prima facie title to a public office, he is entitled to the aid of mandamus to obtain possession of the books, records, insignia, paraphernalia, and official belongings of such office; and in granting the writ the court will not go behind such showing, and try the title thereto.

3. When an incumbent of a public office is removed by the governor, acting under statutory authority giving him such power, and a successor is thereupon appointed and commissioned and duly qualified as required by law, the court, in determining who is entitled to the books, records, insignia, paraphernalia, and official belongings of such office, will not go behind the last commission of the governor, and try the title to such office.

4. The relator is not entitled to the aid of mandamus to obtain possession of funds in the hands of the territorial treasurer, when it appears that such relator has been removed by the governor, and a subsequent commission has been lawfully issued for the same office to another, for the reason that in seeking to avoid the later commission the relator necessarily puts in issue the title to the office, which cannot be tried by mandamus; and in the face of the later commission, the relator being unable to show a prima facie title to such office, the writ must be denied.

Dale, C. J., and Burford, J., dissenting as to the reasons assigned, but concurring as to conclusions reached.

(Syllabus by the Court.)

Original action in mandamus by Amos E. Ewing, treasurer, against M. L. Turner, territorial treasurer. Writ denied.

The other facts fully appear in the following statement by SCOTT, J.:

This is an original action in mandamus, brought in the supreme court by Amos A. Ewing, as treasurer of the board of regents of the Agricultural and Mechanical College of the territory of Oklahoma, against M. L. Turner, as territorial treasurer of Oklahoma territory: The petition prays for an alternative writ of mandamus, which was granted by Chief Justice DALE on the 26th day of January, returnable to the full bench on the 31st day of January, 1894. All the facts are stated in the petition and affidavit, and the return to the alternative writ. The petition reads:

"Your relator respectfully represents to the court:

"(1) That he is a citizen of the United States and a resident of the territory of Oklahoma, and was, on and prior to the 26th day of January, 1893, and then was, and now is, in all things qualified to hold the office of a member of the board of regents of the Oklahoma Agricultural and Mechanical College, as well, also, as treasurer of said board.

"(2) That on or about the 26th day of January, 1893, he was duly appointed by the Hon. A. J. Seay, who was at that time the governor of the territory of Oklahoma, as regent of the Agricultural and Mechanical College

of the territory of Oklahoma, situated at the town of Stillwater, in Payne Co., O. T.

"(3) That afterwards, to wit, in the month of January, 1893, his said appointment was duly and legally confirmed by the council of said territory at its regular session, and a commission, in due course of time, issued to him as such regent of said college, a copy of which commission is hereto attached, marked 'Exhibit A,' and made a part hereof; and your relator duly accepted said appointment, and qualified as required by law, by taking and subscribing to the oath of office required of officers in said territory.

"(4) That afterwards, to wit, on the 21st day of March, 1893, at a regular session of said board of regents of said college, he was duly and legally elected by said board as treasurer of the board of regents of said Agricultural and Mechanical College; and thereupon, after entering into such bond as was by said board required of him, and after said bond, as such treasurer, had been duly and legally accepted and approved by said board of regents, as well as the governor of the territory of Oklahoma, he thereupon entered into said office of treasurer of said board, and continued, and still continues, to occupy said office as treasurer of the board of regents of said college; and he is now, and at all times since has been, the duly elected and qualified and acting treasurer of the said board of regents.

"(5) That as such treasurer, and by virtue of his said office of treasurer of said board, he is the custodian of all money, books, blanks, and other paraphernalia belonging to the office of treasurer of said board of regents, and as such treasurer of said board he is the custodian and entitled to all money belonging to said college, and is the general disbursing officer of said board of regents, and all debts and expenses of said college, including the salaries of teachers, officers, and employees, as well as the current expenses of said college, are paid, and can only be paid, through him as such treasurer, upon the order of said board legally authorized by them; and as such treasurer he is entitled to the possession of all money belonging to said office, as well as all funds and money belonging to said college.

"(6) That in the month of January, 1893, one Samuel Murphy was appointed treasurer of the territory of Oklahoma, and in his capacity as treasurer, and as such treasurer of Oklahoma, he received from the treasurer of the government of the United States, for the use and benefit of, and as the funds belonging to, said college, to be used in defraying the general expenses of said college, through the treasurer of the said Agricultural and Mechanical College, the sum of \$19,000.00.

"(7) That on or about the 17th day of January, 1894, the said Murphy resigned his said office of treasurer of the territory of Oklahoma, and on the same day the Hon. William C. Renfrow, as governor of said territory,

appointed the respondent herein, the Hon. M. L. Turner, as treasurer of the said territory of Oklahoma, and he thereupon entered on his duties of treasurer of said territory; and he (the said M. L. Turner) is the duly appointed, qualified, and acting treasurer of said territory of Oklahoma.

"(8) That, about the time the said Murphy resigned the office of treasurer of said territory, he turned over and delivered to the said Turner, (respondent herein,) as his successor in office, the said \$19,000.00 which belongs to said college; and the said Turner has at this time, as treasurer of said territory, in his possession, said money belonging to said college, to wit, the sum of \$19,000.00, which he wrongfully and unlawfully retains from your relator as treasurer aforesaid.

"(9) That on or about the 27th day of December, 1893, the said board of regents of said college, at a regular meeting of said board, in open session thereof, and in accordance to the rules and regulations of said board, by resolution legally passed and adopted, ordered and directed the treasurer of said territory to deliver and turn over to the treasurer of said board of regents, and for the use and benefit of said college, to be used in defraying the usual legitimate expenses of said college, the said sum of \$19,000.00, which sum of \$19,000.00 belonged to said college, and to the possession of which said money your relator, as treasurer of said college, was and is duly and legally entitled, a copy of which said order and resolution is hereto attached, marked 'Exhibit B,' and made a part hereof.

"(10) That on or about the 28th day of December, 1893, your relator, as treasurer of said board of regents, and in pursuance of the order of said board of regents, presented said order to the said Murphy, as treasurer of said territory, and requested and demanded of him, the then and there treasurer of said territory, the said sum of \$19,000.00; but the said Murphy, disregarding his duties as treasurer of Oklahoma, as well as the interests of said college, refused and neglected to deliver and turn over said money to your relator, and has at all times since refused and neglected so to do.

"(11) That on the 25th day of January, 1894, your relator, as such treasurer of said board of regents, presented said order to the said Turner, and requested and demanded of him, as the treasurer of said territory, the said sum of \$19,000.00 belonging to said college, and as the treasurer of said board of regents demanded said money for the use and benefit, and to be used in defraying the legitimate expenses, of said college; the said money being demanded by your relator of the said Turner for the purpose of using the same in carrying on the business of said college, and to defray the legitimate and legal necessary expenses of said college in paying the teachers, officers, and other employes of said college, as well

as the current contingent expenses thereof. But your petitioner alleges that, the said Turner disregarding his duties as treasurer of the territory of Oklahoma, and disregarding the rights of your relator as treasurer of said college, as well as the rights and interest of said college, and the rights and demands of the patrons of said college and the people of the territory of Oklahoma, he (the said Turner, respondent herein) wrongfully and unlawfully refused, and still refuses and neglects, to deliver and turn over said money to your relator, but unlawfully continues to hold the same in his own possession, and to withhold said fund from the legitimate and proper use to and for which it was intended and appropriated by law, all of which is contrary to law, and in violation of the rights of your relator and the said college, as well as the people of the territory of Oklahoma.

"(12) And your relator further represents that by reason of the said refusal of the said Turner to deliver and turn over said money to your relator, which said money is now in his possession, the teachers and officers and other employes in said college will be deprived, and are now deprived, of the compensation which is now due, and will become due, to them for their services, and the said college will be closed and suspended for want of funds to carry on the same, although a fund amply sufficient to properly sustain and carry on said college has been provided by law, and is now in the hands of said Turner, as treasurer of said territory, and which funds he (the said Turner) wrongfully and unlawfully withholds and retains.

"(13) Your relator further represents that by section three of an act of congress approved August 30, 1890, it is especially provided that 'if, by any action or contingency, said funds be diminished, lost, or misapplied, the same shall be replaced by the territory or state to which it belongs, and until the same is replaced no subsequent appropriation shall be apportioned or paid to such state or territory.' And your relator further represents that by the laws of the United States it is provided that all moneys remaining in the hands of the treasurer of the territory procured from the treasury of the United States for the use and benefit of said college, and which remain unexpended by said college on the 1st day of July of each year, is required to be returned to the treasurer of the United States as unexpended funds. And your relator further represents that if said Turner continues to withhold said funds from said college, and refuses to deliver and turn over the same to your relator as treasurer of said board, to be applied to the payment of the legitimate expenses of said college, as provided by law, the same will be lost to the said college and territory and misapplied, and the territory of Oklahoma will, by the act of congress aforesaid, be required to replace and repay the same to the treasurer of the United States, to the great dam-

they, nor either of them, would be speedy or adequate remedy at law.

4) And your relator further states that all said wrongful and unlawful acts of respondent he is entirely without remedy w, unless it be afforded by the interposition of this court; and he therefore prays a writ of mandamus may issue against said M. L. Turner as treasurer of the Territory of Oklahoma, and that the said M. Turner, as such treasurer, be commanded deliver said money, to wit, the sum of \$100.00, to your relator as the treasurer of the Agricultural and Mechanical College of the Territory of Oklahoma, and that in the same time he be enjoined and restrained from making any other use or appropriation of said funds, with such other further relief as justice and equity may require."

the alternative writ, respondent filed following return: "For return to the native writ awarded in this case, the respondent admits that he is the treasurer of the Territory of Oklahoma, and was at the time the demand of the relator, set out in the alternative writ, was made upon him; that such treasurer he has in his possession the sum of \$19,000.00, which, by act of Congress, he is required to pay over, on demand, to the treasurer of the board of regents of the Agricultural and Mechanical College of Oklahoma; that he is ready and willing to pay said money over on demand to the lawful treasurer of said board of regents, but he is unable to determine who is the lawful treasurer of said board; that it is admitted that the relator is a citizen of the United States and of the Territory of Oklahoma; that he was, as alleged in the native writ in this case, regularly appointed a member of the board of regents of the Agricultural and Mechanical College of the Territory of Oklahoma on the 26th day of January, 1893; that he afterwards accepted said appointment, and duly qualified under it, and afterwards duly and properly elected treasurer of said board, and accepted and qualified as such. The respondent denies that relator is now, or was at the commencement of this proceeding, either a member of said board or its treasurer, and admits the fact to be that the said relator, together with all the other members of the board of regents of the Agricultural and Mechanical College of the Territory of Oklahoma, on the 31st day of July, 1893, was removed from said board by the Hon. C. Renfrow, governor of the Territory of Oklahoma, and the vacancies thus created were regularly filled by said W. C. Renfrow, governor, on the 4th day of August, 1893, by the appointment of John R. Clark, F. Carruthers, Henry E. Glazier, J. C. Caldwell, and J. W. Howard as regents of said

regents of said college by the governor of the Territory of Oklahoma on the 4th day of August, 1893. That a copy of the commission of the said F. Carruthers is hereto attached, marked 'Exhibit A,' and made a part of this return. That afterwards, to wit, on the 5th day of August, 1893, said board of regents met and duly organized by electing John R. Clark president and secretary, and F. Carruthers as treasurer. A copy of the minutes of the said meeting is hereto attached, marked 'Exhibit B' and made a part of this return. That afterwards said F. Carruthers duly qualified as treasurer of said board by making and presenting the bond as required by the said board, which bond was duly approved. That since that date said F. Carruthers has been, and now is, claiming to be the duly qualified and acting treasurer of the board of regents of the Oklahoma Agricultural and Mechanical College. That said F. Carruthers, as treasurer of said board of regents, before the commencement of this proceeding demanded of the respondent the money in his hands belonging to said college under the act of Congress as aforesaid. That the respondent cannot, therefore, with safety to himself nor to said college, for the use of which he holds said money, pay said money on the demand of either of said claimants, but is ready to turn it over to such person as this honorable court, in a proper proceeding therefor, shall determine is the proper custodian of said fund. That respondent denies that the relator was at the commencement of this proceeding, and is now, the treasurer of the board of regents, and was and is disbursing agent of said college, through whom the salaries of teachers and the officers of said college are now paid."

Exhibit A, attached to said return, reads as follows: "William C. Renfrow, Governor of the Territory of Oklahoma, to All Who shall See these Presents, Greeting: Know ye, that reposing special trust and confidence in the ability and integrity of F. Carruthers, I have appointed and do hereby commission him regent of Oklahoma Agricultural and Mechanical College, and do authorize and empower him to execute and fulfill the duties of that office according to law, and to have and to hold the said office, with all the powers, privileges, and emoluments thereunto appertaining unto him, the said F. Carruthers, until the adjournment of the next session of the legislative council of the Territory of Oklahoma. In witness whereof I have caused these letters to be made patent, and the great seal of the territory to be hereunto affixed. Given under my hand at the city of Guthrie, the 4th day of August in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States of America the one hun-

dred and eighteenth. By the Governor. William C. Renfrow, Governor. [Seal.] Thomas J. Lowe, Secretary of the Territory."

Exhibit B, attached to said return, reads as follows: "Guthrie, Oklahoma, August 5th, 1892. John R. Clark, F. Carruthers, Henry E. Glazier, J. W. Howard, and J. C. Caldwell, having been appointed regents of the Oklahoma Agricultural and Mechanical College, held an informal meeting on this day at the governor's office. Each of said parties named subscribed the following oath, to wit: 'Territory of Oklahoma, Logan County—ss.: I, —, of lawful age, being first duly sworn, do state that I will support the constitution of the United States and the organic act of the territory of Oklahoma, and will faithfully perform my duties as a member of the board of regents of the Oklahoma Agricultural and Mechanical College, so help me God,'—before the Hon. William C. Renfrow, governor, and filed said oath with governor. The board then proceeded to organize by electing John R. Clark, of Stillwater, president and secretary of the board of regents of the Oklahoma Agricultural and Mechanical College, and F. Carruthers, of Norman, was duly elected treasurer of said board. By motion, the bond of the treasurer was fixed at the sum of sixty thousand dollars. By motion, board adjourned to meet at college building at Stillwater, on August 8th, 1892. J. R. Clark, Secretary and Treasurer."

The case was submitted by brief and argument. Peremptory writ denied.

J. C. Roberts, for plaintiff. C. A. Galbraith, Atty. Gen., and Green & Strang, for defendant.

SCOTT, J., (after stating the facts.) The questions for determination came up on the issues as shown by the statement of the case. Can the controversy between the parties be settled without a trial of the title to the office of treasurer of the board of regents of the Agricultural and Mechanical College? If the title to this office will necessarily become involved in the determination of this controversy, the court, in the very beginning, will encounter a rule of law so well established in our jurisprudence as to admit of no controversy. It is so well settled that mandamus will not lie to try the title to an office that the subject needs no discussion here or elsewhere. If the title is not involved, and the aid of the writ of mandamus were sought merely to obtain possession of the effects, moneys, and official belongings of the office, a different question would be presented. Counsel for the relator contends very earnestly that an inquiry into the title to the office mentioned is unnecessary to determine to whom the money in the hands of the respondent should be delivered for the public use for which it was appropriated. It is further contended by relator's counsel that the courts

will sometimes inquire incidentally into the title of an office, to the extent necessary to determine who should have possession of the effects and belongings of the office, and in support of this theory he cites numerous cases, the leading one being *People v. Head*, 2 Ill. 325, in which the learned chief justice uses this language: "Whatever our decision may be, it cannot affect, in the least, the contest now going on in the legal tribunals. We can only determine whether the relator is entitled to the records, etc., pertaining to the office. It is true this involves, incidentally, the inquiry as to who is entitled to enjoy the office for the time being; but we by no means settle the question whether the relator was legally elected or not." See, also, *High*, Extr. Rem. p. 61; *People v. Kilduff*, 15 Ill. 492; *Crowell v. Lambert*, 10 Minn. 369, (Gil. 295); *State v. Sherwood*, 15 Minn. 221, (Gil. 172); *State v. Layton*, 28 N. J. Law, 244; *Burr v. Norton*, 25 Conn. 103; *Felts v. Mayor, etc.*, 2 Head, 650; *King v. Owen*, 5 Mod. 314; *Rex v. Clapham*, 1 Wils. 305; *King v. Ingram*, 1 W. Bl. 50; *State v. McKinney*, 5 Nev. 194; *Bonner v. State*, 7 Ga. 473; *Railway-Frog Co. v. Haven*, 101 Mass. 398; *State v. Goll*, 32 N. J. Law, 285; *St. Luke's Church v. Slack*, 7 Cush. 226; *Rex v. Wildman*, 2 Strange, 879; *Anon.*, 1 Barnard, 402; *Walter v. Belding*, 24 Vt. 638; *Kimball v. Lamprey*, 19 N. H. 215; *King v. Payn*, 1 Nev. & P. 524; *Allen v. Robinson*, 17 Minn. 113, (Gil. 90); *People v. Stevens*, 5 Hill, 616; *People v. Olds*, 3 Cal. 167; *State v. Pitot*, 21 La. Ann. 336; and *Hussey v. Hamilton*, 5 Kan. 462. In the citation of these authorities the relator again fails to make the distinction in cases of this kind. While the title is incidentally involved in some of the cases cited, yet their clear import is the declaration of another rule of law, which has become *stare decisis et non quieta monere*. The rule established by this long line of authorities may be found declared in *High on Extraordinary Legal Remedies*, (pages 62, 63,) as follows: "The branch of the jurisdiction under discussion is of ancient origin, and was exercised by the king's bench at an early day. Wherever the term of an officer has expired, he may be compelled by mandamus to turn over to his successor all records and books pertaining to his office to which the public are entitled to access; and the writ even may be granted for this purpose in aid of the person declared duly elected to the office, and holding the certificate of election, and duly sworn, although proceedings are pending to test the legality of his election, since the court, by granting the writ, does not finally determine upon the legality of the election. And while it is true that *quo warranto* is the only method of determining disputed questions of title to public offices, yet a mere groundless assumption of an election on the part of the respondent, and a pretended exercise of the functions of the office *de facto*, will not de-

ter the court from granting the mandamus. As regards the evidence of his title, which the relator must show who seeks the aid of mandamus to recover possession of official records and insignia, it is held that, having received a certificate of election, and qualified in the manner provided by law, he is prima facie entitled to their possession, and may enforce his rights by the aid of the writ; and upon the application for mandamus the court will not go behind the certificate of election to try the relator's actual title. It is therefore wholly immaterial whether the relator is eligible to the office in question, or whether he is duly elected thereto, since to try such issues would be to determine the title upon proceedings in mandamus, which the courts will never do."

As to the writ of mandamus, then, we have two settled rules as to public offices and the effects and belongings thereof,—the one that mandamus will not lie to try the title to a public office, and the other that it will lie to compel a predecessor to deliver to his successor the books, papers, records, moneys, insignia, and paraphernalia thereof when the relator shows an absolute prima facie title. No court or lawyer of to-day would, for a moment, controvert those two well-settled rules of modern jurisprudence. Does the case of the relator fall within either of these rules? He must concede that the title cannot be determined in this action. Then, as a matter of course, if he claims relief under the other rule, he must show in himself at least a prima facie title; and this none the less, notwithstanding an acceptance of the doctrine, as spoken by the learned chief justice in the case of *People v. Head*, supra, that the title may be incidentally inquired into in determining who should have possession of the books, records, etc., of a public office. While it may be true that the courts will sometimes inquire incidentally into the title to the office in determining who is entitled to the official belongings thereof, yet no case can be cited where the court so held, unless the relator, at the same time, proved in himself at least a prima facie title thereto.

It may then be asked what it takes to constitute this evidence of title. The numerous authorities above cited will abundantly answer the question. It may be stated, as a general rule, that when the relator shows a certificate of election to an office, regular upon its face, or any lawful evidence of title later and superior to any other claimant, and that he has qualified as required by law, this may be deemed a prima facie title thereto. What does the record in this case disclose? It discloses that the relator became a member of the board of regents by virtue of an appointment by A. J. Seay, on the 23d day of January, 1893, at that time governor of Oklahoma territory; that on the 31st day of July, 1893, the successor of A. J. Seay, W. C. Renfrow, removed the relator, and appointed as his successor, on August 4, 1893, one F. Car-

ruthers, and issued to said Carruthers a commission for the same office, under the seal of the territory, executed in a manner as solemn as any official paper could be issued by the executive authority of any state or territory; that said Carruthers had qualified in form of law, and was, too, claiming the funds in the hands of the respondent, Turner, under and by virtue of his office; that the respondent is holding the funds of the college in his possession solely on account of the rival claimants to this office contending therefor. Even if nothing more could be claimed for the commission issued to Carruthers, it has the effect to cloud the title of the relator, and render it impossible for him to show a prima facie right to the enjoyment of the office or to the possession of the effects thereof.

It is further contended by the relator that Gov. Renfrow had exercised power in his removal without authority of law, and that incidentally this question can be inquired into by the court to determine if the commission issued to Carruthers is void, and, if so, a void commission could in no manner affect the title of said relator. This will not do, for the court in mandamus will not go behind the certificate or commission. When the relator seeks to go behind the commission of Carruthers, and have it declared void, necessarily he puts in issue the title to the office. From this there is no escape. In the nature of things it must be so, and upon this rock he must founder, and here his case must fail. The question as to the right of Carruthers to the effects and official belongings of the office in question by the aid of the writ of mandamus is not before us, and a discussion of that question is unnecessary. It follows that the peremptory writ must be denied. It is so ordered.

DALE, C. J., and BURFORD, J., dissenting.

BANK OF KINGFISHER v. SMITH et al.
(Supreme Court of Oklahoma. March 3, 1894.)

APPEAL—BILL OF EXCEPTIONS.

1. It is an invariable rule that, where a bill of exceptions is filed after the close of the term at which judgment was rendered, it must show affirmatively, on its face, that it was presented within the time allowed.

2. It may be stated, as a general rule, that, while parol evidence is competent, it is not of itself, unaided by any other notes, minute, or memorial, sufficient to authorize a nunc pro tunc order; it may be competent, and yet insufficient.

(Syllabus by the Court.)

Appeal from district court, Kingfisher county; before Justice Burford.

Action on a promissory note by the Bank of Kingfisher against Prior P. Smith and others. There was judgment for plaintiff, and defendants appeal. Appeal dismissed.

The facts appear in the following statement by SCOTT, J.:

This is an action upon a promissory note given by Prior P. Smith, E. J. Kelley, B. D. Brockett, W. J. Bonnett, and J. P. Irwin, for the sum of \$1,500, to the Bank of Kingfisher, dated, Kingfisher, Oklahoma territory, October 27, 1890, with interest at the rate of 12 per cent. per annum from date until paid. Plaintiff filed its complaint in the district court of the second judicial district in and for Kingfisher county on the 10th day of March, 1891, praying for judgment against defendants for the amount of the principal of said note, and interest thereon. The defendants deny their liability upon the note, alleging fraud and want of consideration. The issues being thus joined on the 12th day of November, 1891, both parties announced ready for trial. A jury was impaneled and sworn to try the issues. The court declared that the preponderance of the proof, under the pleadings, rested upon the defendants. The defendants thereupon introduced their evidence, to which the plaintiff demurred, charging that the same was insufficient to constitute a defense, and could not, under any rule of law, defeat the plaintiff from recovering on the note. The court sustained this demurrer, and ordered the jury to bring in a verdict for the plaintiff. The defendants excepted to such instructions, for the reason that they were, as alleged, contrary to law, and not sustained by the evidence. The jury returned their verdict for the plaintiff, according to the instructions of the court. Judgment was rendered thereon, and a motion for a new trial was filed on the 21st day of November, 1891, and on the 22d day of November, 1891, the court overruled said motion, and the defendants then asked 30 days in which to present their bill of exceptions, which was granted.

On the 24th day of May, 1892, the defendants, by their attorney, William McCartney, filed the following affidavit: "W. A. McCartney, being first duly sworn on oath, says: That he is one of the attorneys for the defendants, and was during the trial of the above-entitled defense; that said cause was tried at the October, 1891, term of the district court of the second judicial district, sitting in and for the county of Kingfisher, territory of Oklahoma; that the Hon. A. J. Seay was presiding judge of said court during said term, and presided at the trial of the above-entitled cause; that on the 17th day of November, 1891, after trial of said cause before said judge and regularly impaneled jury, a judgment was rendered in favor of said plaintiff and against said defendants, whereupon said defendants filed their motion for a new trial, which motion was overruled by the court on the 21st day of November, 1891; that on the same day, to wit, on the 21st day of November, 1891, said defendants asked of the court 30 days wherein to present to the court their bill of exceptions in said cause, which time was by the court granted; that thereafter, and within the time granted

by the court for said purpose, to wit, on the 21st day of December, 1891, said defendants presented to the court a proper bill of exceptions in writing, which bill of exceptions is hereto attached and made a part hereof; that afterward, to wit on the — day of —, 1892, the said A. J. Seay resigned his position as judge of the second judicial district of the territory of Oklahoma without having signed and settled said bill of exceptions, and for some time thereafter said office of judge of said district remained vacant; that thereafter, to wit, on the 22d day of March, 1892, the Hon. J. H. Burford was appointed to fill the position made vacant by the resignation of the said Hon. A. J. Seay; that the said Hon. J. H. Burford is now duly appointed, qualified, and presiding judge of the second judicial district of the territory of Oklahoma. And now, therefore, for the reasons heretofore set out, said defendants on this 23d day of May, 1892, most respectfully present to your honor (Judge Burford) their proper bill of exceptions in said cause, and most respectfully petition your honor to sign and settle said bill of exceptions herewith presented, in order that said defendants may perfect their appeal to the supreme court of the said territory."

On the 16th day of January, 1893, said McCartney submitted an additional affidavit, which reads: "W. A. McCartney, of lawful age, being first duly sworn, deposes and says that he was one of the attorneys for the defendants in the above-entitled cause, in the trial of said cause in said court; that the Hon. A. J. Seay was the judge of said court at the time of the trial of said cause, and presided at said trial, and was the judge of said court until some days after the 21st day of December, 1891; that said affiant, on the 21st day of December, 1891, presented to said A. J. Seay, judge of said court, a bill of exceptions, with a blank certificate thereto attached, for said judge to sign; that some time after, the exact date of which is not known to this affiant, the said Hon. A. J. Seay resigned the office of said judgeship without having signed said bill of exceptions; that at the time said bill of exceptions was presented to the said judge as aforesaid, it was left with him for his signature or correction."

Thereupon Judge Burford, the successor to Judge Seay, made the following order, basing his findings therein solely upon the affidavits just quoted: "On this 16th day of January, 1893, a motion in the above-entitled cause was presented to me in chambers, and both parties being present by counsel, and having heard the argument of counsel, and being fully advised, said motion to strike out certain words and dates in the certificate of the judge to the bill of exceptions is overruled. But inasmuch as it has been made to appear to me that there was, at the time said bill of exceptions was presented to me, a petition, duly verified, attached thereto, wherein it is

shown that said bill of exceptions was presented to the Hon. A. J. Seay, judge of said court, (and who presided at the trial of said cause,) on the 21st day of December, 1891, and that he failed to sign the same before leaving the bench and resigning said office, and there being no proof controverting said petition, said facts should have been specially found in said certificate. It is therefore hereby ordered that, in order to correct said certificate and make the facts appear as there shown by proof, that said certificate shall read as follows, to wit: And now the defendants tender this, their bill of exceptions, on this 23d day of May, 1892, and it having been made to satisfactorily appear by the proof before me that said bill of exceptions was tendered to my predecessor, Hon. A. J. Seay, judge of said court, for his approval and signature, on the 21st day of December, 1891, the same is now signed, sealed, and made a part of the record, which is done this 10th day of October, 1893. And it is further ordered that the clerk of said court file and record these proceedings, and that the said certificate be attached and made a part of said bill of exceptions; and it is further ordered that the motion to correct record filed herein, the affidavit in support thereof, service of notice, and this order be filed and made a part of the record in said cause without a bill of exceptions,—to all of which the plaintiff, by its counsel, W. W. Noffsinger, objected to each and every step in said proceedings, and he is given five days in which to prepare, file, and tender his bill of exceptions herein."

The appellee insists that the supreme court has never acquired jurisdiction in the case, for the reason that the appeal was not properly taken. The additional facts are stated in the opinion.

W. A. McCartney and M. J. Kane, for appellants. Noffsinger & Nagle, for appellee.

SCOTT, J. On the 21st day of November, 1891, when the court below overruled the motion for a new trial, the defendants were allowed thirty days in which to present and file their bill of exceptions. We have no further record evidence of this action from that time until the 24th day of May, 1892, when W. A. McCartney, attorney for the defendants, submitted to the successor of the trial judge a petition and affidavit alleging that the bill of exceptions was presented to the said trial judge within the time allowed for the filing thereof, and praying that said bill of exceptions be signed and settled by such successor, that an appeal from the court below might be perfected. The next record we find is an additional affidavit by defendants' attorney, submitted on the 16th day of January, 1893, in which the same facts are, in substance, set forth, with a greater degree of certainty. Upon the facts thus set forth

on the 16th day of January, 1893, Judge Burford signed and settled the bill, and the appeal was thereupon taken, and the record filed in this court.

It is not contended by appellants that there is any record or documentary evidence upon which to base the parol evidence submitted by them, upon which this appeal is sought to be allowed. Sole reliance is placed upon the parol evidence. Is it, alone, sufficient to show the fact that the bill was presented to the trial judge within the time allowed, or that it was presented for signature and settlement at all? If the trial judge had made a note or minute upon the bill that it had ever been presented, then, unquestionably, parol evidence would be competent to show that it was presented within the time allowed. Such is not the case. Record evidence is not only wanting to show that it was presented in time, but even wanting to show that it was in fact presented at all. Section 4653, St. 1890, provides: "That when the record does not otherwise show the decision or grounds of objection thereto, the party objecting, must within such time as may be allowed, present to the judge a proper bill of exceptions, which, if true, he shall promptly sign and cause it to be filed in the cause, if not true, the judge shall correct, sign, and cause it to be filed without delay. When so filed it shall be a part of the record, and delay of the judge in signing and filing the same, shall not deprive the party objecting of the benefit thereof. The date of the presentation shall be stated in the bill of exceptions and the entry shall show the time granted if beyond the term for presenting the same." At common law the bill of exceptions was required to be completed, signed, and filed during the term, but by statute in the states generally, and in this territory, the time may be extended by an order of the court. Where the bill is filed after the term, the record entry must affirmatively show that the time beyond the term was given. It is an invariable rule that, where the bill is filed after the close of the term, it must show affirmatively on its face that it was presented within the time allowed. See Elliott, App. Proc. § 802. Subsequent to the decision, and before the time of signing and settling the bill of exceptions, the judge who tried the cause went out of office by resignation, and the judge who allowed the bill duly became his successor; and, as before stated, it is a disputed matter upon the face of the record itself, and undetermined by its recitals, whether or not the bill of exceptions was duly presented within the time allowed by the court. Had this matter been definitely settled by the record itself beyond cavil, the doctrine of absolute verity might apply.

It may be stated as an established rule that, while parol evidence is admissible to aid in determining whether an amendment to a bill of exceptions is proper, an amendment can-

not be made upon parol evidence alone, and the courts are more cautious and careful in ordering amendments of bills of exceptions than they are in ordering other parts of the record. Treating of this general subject, Mr. Elliott, at section 213, says: "We have concluded, upon an examination of our own and other cases, that the true rule is that, while parol evidence is competent, it is not of itself, unaided by any other note, minute, or memorial, sufficient to authorize a nunc pro tunc order. It may be competent, and yet insufficient. It would certainly violate the rule laid down in a long line of cases to hold that parol evidence is all that is required." See, also, *Hamilton v. Burch*, 28 Ind. 233; *Seig v. Long*, 72 Ind. 18; *Kirby v. Bowland*, 69 Ind. 290. In view of the rule thus unquestionably established in the state, from which our procedure was adopted, it seems that this consideration alone is fatal to appellants, and renders unnecessary the discussion of less salient questions. We, therefore, in consonance with these views, direct a dismissal of the appeal, and affirmation of the judgment rendered below. It is so ordered. All the justices concurring.

COCKRILL v. DAVIE et al.

(Supreme Court of Montana. Feb. 19, 1894.)

SURETIES ON BOND — LIABILITIES — PRINCIPAL'S FAILURE TO SIGN — EFFECT — JUDGMENT — MODIFICATION ON APPEAL.

1. Where the liability of the principal in a bond is fixed by contract or by operation of law, his failure to sign the bond does not affect the liability of his sureties thereon.

2. A building contractor's agreement to "furnish all materials and do all labor" is not satisfied unless the materials and labor are paid for.

3. To enforce the liability of a surety on a bond which the principal, whose liability was fixed by another contract, failed to sign, the obligee need not show an express understanding by the surety that the bond should be delivered and have effect without the principal's signature.

4. On appeal by one of two sureties on bond from a judgment thereon against him alone, where it appears that the action was wrongly dismissed as to the other surety, the appellate court will modify the judgment so as to provide that it shall not affect the latter's liability to plaintiff or appellant, that the dismissal shall be set aside, and that the case may be reopened to determine such other surety's liability on the bond.

Appeal from district court, Cascade county; C. H. Benton, Judge.

Action by W. M. Cockrill against E. R. Davie, John Renner, and J. W. Cornelius. From a judgment against defendant Renner alone, he appeals. Modified.

A. J. Shores and Thomas E. Brady, for appellant. Leslie & Downing and P. H. Leslie, for respondent.

HARWOOD, J. It appears that plaintiff entered into a contract, evidenced by writing, with defendant Davie, whereby the lat-

ter agreed, for a certain consideration, to "provide and furnish all material, and do all labor, necessary to the erection and completion of a two-story frame dwelling house for plaintiff, according to certain plans and specifications, made part of the contract. To guaranty the fulfillment of that contract, a bond was executed by defendants Renner and Cornelius, and delivered to plaintiff, in the sum of \$2,500, referring to said contract, and conditioned that "if the said Davie shall well and truly furnish said material, and construct said house, as per said contract, and in all things fully do and perform his part of said contract, constructing said house within the time specified, according to said plans, and changes in the designs as said Cockrill may demand of him, then the above obligation is to be void; otherwise, to remain in full force and virtue." The building appears to have been constructed by Davie, and plaintiff paid him a considerable portion of the contract price therefor; but Davie failed to pay for certain labor and materials which he procured and used in the construction thereof, by reason of which default certain liens were applied and enforced against said property, the which Cockrill was obliged to pay in order to save his property from sale under judgment of foreclosure to satisfy such liens. Whereupon Cockrill undertook, by this action, to recover from defendants the amount he was thus compelled to pay by reason of Davie's failure to carry out said contract to furnish the material and labor for the construction of said house. Defendants Renner and Cornelius appeared and, their demurrer to the complaint having been overruled, answered, putting in issue material allegations of the complaint and alleging as a defense that they signed the bond upon the express understanding and arrangement between all the parties concerned that it should not be delivered or have effect without the signature of the defendant Davie. The trial resulted in judgment against Renner alone for \$1,011.54, and he prosecutes this appeal therefrom, as well as from an order overruling his motion for new trial.

Appellant insists that the bond in question is wholly void because Davie, named therein as principal, did not sign it along with the sureties. But, after much consideration of this subject and the authorities, we cannot sustain that view. The same obligation was fixed upon Davie by another contract, and Renner and Cornelius undertook and promised, in writing, to answer for the default of Davie in respect to his engagements by virtue of that contract, which the sureties described in their bond. This bond was a collateral ingraftment upon that contract, whereby those sureties took upon themselves the burden of answering for any default which Davie might make in respect to his obligation thereunder. As to such obligations, where the liability of the principal is fixed by contract or by operation of law, the

in them. There is no reason of principle in law, or substantial right involved, which would lead to such a ruling; and the same, we think, without doubt, would be against contemplation, understanding, and purpose of the contracting parties, because the sureties in such a case neither gain nor lose a substantial right by reason of the principal signing or omitting to sign such undertaking, which he procured on his behalf. On the other hand, under a different species of bond, where the principal was bound only in virtue of his executing the bond, a different ruling would be applicable on such a case. We think sufficient has been said on this point in *Wibaux v. Live-Stock Co.*, 13 Mont. 154, 22 Pac. 492; *Hoskins v. White*, 13 Mont. —, 32 Pac. 163; *Woodman v. Calkins*, 13 Mont. —, 34 Pac. 187.

Appellant further contends that, because there was no provision in the building contract specially requiring Davie to pay for the labor and material put into the construction of the building, his obligation was fulfilled in furnishing the same, and was not broken by his failure to pay therefor, and leaving the building and also the lot on which it was erected subject to sale to satisfy demands for materials and labor. This interpretation of the contract, we think, is untenable. Parties are deemed to contract in view of the facts relating to the subject of the contract. Davie fell short of furnishing the material for the structure, as contemplated by his contract, when he merely obtained and used labor and material in the structure, leaving upon himself the burden of paying therefor. That is not furnishing the material and labor according to the terms of the contract, any more than one would fulfill a contract to convey a piece of land to another by making a good deed sufficient deed therefor in form, while the title to the land in no manner passed by such deed. *Colburn v. Railroad Co.*, 13 Mont. —, 34 Pac. 1017. It is contended that plaintiff would have withheld payment of the installments for such building until receipted bills for labor and material used therein were tendered to him. We find no force in this position, when considered in the light of the facts and the terms of the contract. According to the contract, plaintiff was required to pay certain installments as the erection of the building progressed; and, as to the first installment of upwards of \$800, it is provided that it shall be paid "when said house is completed entire, and accepted by the party of the first part, and receipted bills for all material and labor in the construction of said house shall be furnished to said party of the first part by said second party." It appears that plaintiff did withhold payment of the last installment, and applied the same on the judgment for enforcement of his lien.

deposited on behalf of both defendants Renner and Cornelius, but granted a motion to dismiss the case as to defendant Cornelius, leaving the case to proceed against Renner. As we understand from the record and briefs of counsel, this ruling was made because plaintiff was unable to prove that Cornelius signed the bond with the understanding that it should be delivered and have effect without the signature of Davie, the principal named therein. In our opinion, it was not necessary to show an express understanding to that effect, outside of the bond. Substantially all that proposition implies is that Cornelius admits he signs the bond, intending to be bound according to its terms, if the principal Davie was likewise bound along with him. Sufficient answer to that proposition is that, under the law and the facts, Davie is bound as principal to discharge those very same obligations which the sureties, through the bond, guaranteed he would discharge; otherwise, the sureties would not be bound for his default. For, if the principal was not bound to do the thing in question there could be no default on his part, and hence no liability on the part of the surety; because the surety is only bound to answer for the default of the principal named in the bond in respect to those things which the principal was bound by the contract to perform. The contract is described in the bond sufficiently to identify it, and we must go to that contract to find what Davie, the principal, was obligated to do, as well as to find what the sureties guaranteed he would do. Can anyone, therefore, doubt that Davie was bound as principal, along with the sureties, to discharge the obligation before they could be asked to recompense for his default? Davie was sued in this action along with the sureties; and, if served, can anyone doubt judgment would go against him, as well as the sureties, for the same damage? His liability and his default must first be shown, before judgment can go against his surety.

Both parties on this appeal insist that the court erred in dismissing Cornelius, and giving judgment alone against Renner. When the case was dismissed as to Cornelius, Renner moved again for dismissal as to himself, because it clearly appeared that he refused to sign the bond unless accompanied in that obligation by Cornelius; and when Cornelius was dismissed, as defendant in the suit, because the court held there was not sufficient showing to bind him, that gave peculiar force to the showing that Renner refused to engage in said obligation unless joined therein by Cornelius. But, while respondent's counsel claim that the court erred in dismissing Cornelius, they say they are satisfied with the judgment as it stands against Renner, and insist that appellant cannot complain of it, because the obligation sued on,—that is,

the bond,—is a joint and several obligation. Respondent's counsel may be right in their position that, under the law and the terms of the obligation sued on, they have a right to proceed against one surety alone. But in this case they have proceeded against both sureties, and it has been adjudicated and determined in this action that the co-surety with appellant is not liable. If this determination is erroneous, as both appellant and respondent insist, and as this investigation leads us to conclude, then appellant has serious reason for complaint. The liability of his co-surety to share the burden of loss by reason of Davie's default, has been removed by this adjudication; and, while such determination stands, appellant would be unable to compel contribution from his co-surety, which would not be the case if one surety had been proceeded against severally. On this point, alone, we think the court erred. Therefore, while the judgment of the trial court entered in favor of plaintiff against Renner may properly be affirmed, it should be so modified as to provide that nothing therein, or in any proceeding of the trial court in said action, shall be construed to determine either the rights of plaintiff against defendant Cornelius, or the rights of defendant Renner against said Cornelius as his co-surety on the bond sued on; that the order of nonsuit or dismissal, entered in favor of Cornelius, be reversed and set aside, and that the case may be opened for further proceedings, at the instance of either plaintiff or Renner, against defendant Cornelius, to ascertain and determine his liability therein. The order of this court will be entered accordingly. Judgment modified and affirmed.

PEMBERTON, C. J., concurs.

IN RE RICKER'S ESTATE.

(Supreme Court of Montana. May 15, 1893.)

RESULTING TRUSTS—WHEN ARISE—EXECUTORS—COMPENSATION—SETTLEMENTS—COMPROMISE OF CLAIMS.

1. Where a trustee uses trust funds to the extent of half the price of land purchased for himself, but afterwards accounts for the fund so used, with compound interest, the land is not impressed with a resulting trust in favor of the cestui que trust.

2. Where circumstances require the continuance of administration over a number of years, the executor should be allowed each year, on the annual account, the statutory commission on moneys of the estate actually disbursed during the preceding year.

3. An executor should not be charged with an amount rebated from a claim due the estate by way of compromise, where he made diligent search for property of the debtor from which to make the claim, and the debtor was apparently insolvent.

4. The mere fact that title to land stood in the debtor's name, the conveyance of which recited a consideration greater than the claim due such estate, would not operate to make the executor chargeable for such rebate.

5. Though a trustee retains trust funds in

his hands directed by the court to be loaned to banks, the cestui que trust cannot complain where he pays a larger amount of interest than the banks would have done.

6. An objection that an executor was, at certain periods of his administration, allowed larger commission than authorized by statute, cannot be raised for the first time on appeal.

Appeal from district court, Lewis and Clarke county; Horace R. Buck, Judge.

In the matter of the estate of Joshua C. Ricker, deceased. Proceeding by Martha P. Ricker, on behalf of Jesse C. Ricker, to require W. A. Chessman, executor of the will of Joshua C. Ricker, deceased, to render an accounting. From a decree charging him with certain amounts, the executor appeals. Reversed.

D. S. Wade and Massena Bullard, for appellant. B. P. Carpenter and A. C. Botkin, for respondent.

HARWOOD, J. This proceeding was instituted in the probate department of the district court of Lewis and Clarke county by Martha P. Ricker, petitioner on behalf of Jesse C. Ricker, a minor heir and legatee of Joshua C. Ricker, deceased, to require an account, under the provisions of the probate practice act, (sections 254-270,) from W. A. Chessman, executor of said estate, touching his administration and disbursement of the property thereof. It appears from the record that Joshua C. Ricker died on the 1st of June, 1875, a resident of Lewis and Clarke county, Mont., leaving a widow, Martha P., and four minor children, and an estate, consisting of money deposited in certain banks, to the amount of about \$18,000, which, together with other assets, consisting of certain personal effects, and demands owing the estate, and an undivided partnership interest with M. A. Price in two ranches and certain cattle, etc., altogether amounted to the appraised value of \$34,467.55, excluding the homestead. The management and disposition of this estate was directed by the last will and testament of decedent, whereof William A. Chessman was appointed executor. By said will the testator devised to his wife, Martha P., the homestead and household furniture situate in the city of Helena, Mont., valued at \$3,235, and directed the executor to pay, out of the funds of said estate, to said widow, for the support of herself and the support and education of said minor children, the sum of \$200 monthly for the period of five years, and thereafter the sum of \$250 monthly; providing, however, that as each of said minor children reached the age of majority, and received a share of said estate, respectively, as provided in the will, then such monthly allowance should be diminished to the extent of such child's proportion thereof. The will further directed the executor, at such time, and for such prices, as he deemed for the best interest of the estate, to sell and convert into money all the effects of said estate; and that all such funds not oth-

that the interest accruing on such securities, save such part thereof as might be necessary to carry out the provisions of the will, from time to time, invested in like manner. It appears from the first annual report by the executor, returned to the probate court the close of the first year of said administration, that the available funds of said estate then on hand, after paying said month-allowance for the widow and minor children, other current expenses, and certain debts of the estate and of said partnership estate, was \$15,174.26; and thereafter, from year to year, the funds of said estate, with additional receipts from sales of property, collections of debts due the estate, and accumulations by way of interest on the funds on hand, ranged from the sum last stated upward to \$19,818.43, which was the largest sum on hand at the close of any fiscal year during the administration, after meeting demands thereon by way of annuities, debts, and expenses of the estate, and of the partnership estate aforesaid, as shown by the annual reports returned and approved by the court. When the partnership affairs were wound out, in 1883, and the estate received therefrom \$4,350, the funds of the estate reached said sum of \$19,818.43, as shown by the eighth annual report, returned that year, and approved by the probate court. The next annual report, returned in 1884, shows a balance of \$18,425 on hand. Out of this sum, in addition to other demands, there was paid to the eldest child, March 5, 1885, the sum of \$4,534, on her arriving at the age of majority. The annual report for the year 85, after such payment, shows a balance of \$11,980. Thereafter the annual reports show that the funds of said estate declined in amount, from year to year, by disbursement of annuities, current expenses, and the payment of two additional legacies to the second and third of said minor children, respectively, as they arrived at adult age, until 1891, when, as the report for that year shows, the funds of said estate were practically exhausted. The funds of said estate were not invested in government securities, directed by the testator in the will. The circumstances which are claimed to have justified the court in ordering a departure from the provision of the will in that respect, disclosed by the record, appear to be as follows: That the investment of the funds in United States government securities at the time in question would have required the payment of about \$3,000 premium. That said premium would, of course, have reduced the funds of the estate by that amount; and that, with such reduction of the fund, the annual income from investment of the remainder in government securities would, according to the testimony, have been at the rate of 5 per cent. interest during the first

year of premium, the rate of interest derived from said investment would have been, on the whole, about 3½ per cent. That the income thus obtainable, as was plain, would fall far short of sufficient to meet the required annuities and other demands upon the funds of said estate. That from these conditions, apparent at the beginning of the administration, as well as at all times thereafter, it was manifest that to carry out the provisions of the will requiring such funds to be placed in government securities, and only the interest derived therefrom used, as was evidently contemplated by the testator, and at the same time carry out the other provisions of the will as to the maintenance of the family, was impossible, because the amount required for the maintenance of the family alone was \$2,400 per year, in monthly installments, for the first 5 years, and thereafter \$3,000 per year, in monthly installments, for 4½ years, until the eldest child became of age, which would require, during the first 9½ years of the administration, the payment of \$25,500 for maintenance of the widow and children; and, if this had been the only demand on the funds of said estate, it was manifestly impossible to put the estate funds, available at any time, into government securities, and leave the same in such investment, and make those payments. That, if the funds of the estate had been invested in government securities, it would have been necessary for the executor to sell and convert into money, from time to time, sufficient thereof to raise funds, in addition to the income, to pay the annuities and other demands on said estate. That therefore it appeared impossible for the executor, or any person charged with the execution of said will, to carry out the provisions thereof, and that to attempt such procedure would have been inexpedient, in view of the necessities of the family.

In view of these conditions, as appears from the record, soon after the return of the appraisement and inventory, and on July 21, 1875, an application was presented to the probate court having jurisdiction of said estate, setting forth that the funds thereof, as shown by the inventory and appraisement, amounting to about \$18,000, were on deposit in the First National Bank, People's National Bank, and L. H. Hershfield & Bro.'s Bank, of the city of Helena, respectively, where the decedent had deposited the same in his lifetime, drawing interest at the rate of 12 per cent. per annum, and asking the court to make an order "directing said money to remain in said banks, respectively, on interest, during the term of the administration of said estate, or, at the option of said executor, during said term;" whereupon the court, after consideration of said application, made an order "that the request of said petitioner be grant-

ed; that the deposits, on time, of such moneys of said estate, drawing interest for the estate in such banks, be, and is hereby, approved." Thereafter the administration of the executor proceeded from year to year during the course of 16 years, with annual accounts returned into court, verified by the affidavit of the executor, showing, in detail, receipts and disbursements in respect to said estate. Such accounts appear to have been considered and approved by the probate court, as provided in the probate practice act, (sections 260-270;) but in this proceeding those accounts were all open to any question which the petitioner desired to raise against them, (Prob. Pr. Act, § 269.) Under this privilege a large number of specifications were formulated, and filed in this proceeding, contesting the correctness and good faith of said accounts. The evidence shows, however, that there was no attempt to sustain these charges by proof, with but one exception, and that was in respect to an item of \$400 credited in one of the executor's annual accounts for money claimed to have been paid out, on behalf of the estate, to a person employed at the partnership ranch of testator and said M. A. Price, as housekeeper. In this single attack upon the integrity of the executor's accounts, the court below found against the accusation; and the evidence, as reported in the record, appears to be overwhelmingly in favor of the executor; so that, as a result of opening to the assaults of petitioner the 16 annual accounts returned, from time to time, by the executor, and approved by the probate court, such accounts appear to stand unimpeached in every item. These accounts are in the record before us, and, after approval by the court, are, by statute, made evidence of their showing, subject, however, to be impeached on being opened to contest. Prob. Pr. Act, § 269. But, after passing through such contest without any disparagement, such accountings must, with more force, be considered as evidence of the showing therein made. Therefore, the results of the management of said estate by the executor, herein set down, are taken from said accounts, wherefrom it appears that during said period the executor accounted for \$56,360.96 derived from said estate, including accumulations by way of interest on the funds on hand, from time to time. Out of this it is claimed by the executor, and not disputed, that he paid to the widow and minor children, and to the three children first arriving at the age of majority, annuities and legacies amounting to \$45,288.51, and that liabilities of the estate, as shown by the annual reports and accounts, approved by the probate court, consumed the rest of the funds of said estate. The increase of said estate, during administration, shown in this result, was largely by way of interest on the funds on hand from year to year. From this source the increase appears to have amounted to, between fourteen and fifteen

thousand dollars. The interest is returned in gross sums in the annual accounts, but the rate, according to the testimony of a witness called as an expert accountant to investigate said annual accounts, amounts to 7.9 per cent. per annum, compound, upon the funds on hand from year to year, on the average, for the whole period of administration. These results are not controverted by the petitioner, except as to the one item of \$400, above mentioned, wherein the executor's account was sustained on the proof. Notwithstanding these results, the court found and adjudged, in this proceeding, that, in addition to the amount so accounted for, the executor ought equitably to account to the heirs of said estate for the further sum of \$51,000 and upwards (\$51,684.73) on the 1st of June, 1891, and also for an undivided one-half interest in a certain tract of land in the city of Helena, the value of which is not specifically shown, but, from the testimony in the record, appears to be of large value. From this judgment, and the order of the court overruling the executor's motion for new trial, this appeal is prosecuted.

In the review of the case here it is not proposed to enter upon an inquiry as to the legality of said order of the probate court of July 25, 1875, authorizing the executor to keep said funds in banks, at interest, instead of converting the same into government securities, nor as to what additional responsibility for the safety of such funds not so invested the executor and his bondsmen may have assumed by reason of such departure from the will, because neither party has drawn into consideration any such questions, as affecting the determination of this proceeding. Said order of the court allowing such departure from the letter of the will is only pertinent to this proceeding as part of the history of said administration. The executor would not be heard to question the legality of that order, or allowed now to depart therefrom, to the detriment of said estate, nor has he sought any such position: and the petitioner, for obvious reasons, does not desire an accounting to proceed on the basis of the result which would have been obtained by investing in government securities, instead of accepting and retaining, along with the other heirs and legatees, the larger rate of interest acquired and paid over by the course pursued. Nor is it pretended that any loss whatever happened to the principal fund by reason of departure from the will. We observe, however, that the court below took occasion to animadvert upon that proceeding in strong terms of condemnation of the executor for procuring such order from the court, and appears to regard it, in some measure, as ground for finding that the executor ought to be removed. Thus, the action of the executor in that regard has been brought in question as bearing upon his good faith in making application for such order. Whatever additional responsibility

for the safety of said fund may have been assumed by the executor in that matter, and whatever questions as to the legality of such departure from the direction of the will in that particular might be raised, if pertinent, we think the circumstances under which that course was adopted—the fact that it was decided upon to avoid foreseen sacrifice of thousands of dollars out of the limited funds of said estate, and, according to undisputed testimony, after consultation and approval by the widow, the only legatee then of mature age, and upon advice of able counsel, affirming the legality thereof, and sanctioned by the order of the probate court, with the final return of interest to the beneficiaries in double the amount which could have been obtained from an investment as directed by the will—repel all attempted condemnation of the motive which prompted the executor to that course.

We therefore pass to the questions demanding determination in this case, which have been found entirely sufficient for our most patient and painstaking consideration. In proceeding with the consideration of these questions, and the law and authorities applicable, it must be borne in mind that in the case at bar the trustee has admittedly, at all times since he became executor, in respect to this estate, punctually, and as required by the conditions of the will, accounted for all the principal fund of the estate which came into his hands, together with interest on such funds, from year to year, as the same remained in his keeping, at rates which, according to the testimony, equaled, on the whole, 7 9-10 per cent. compound. These results are admitted. The trial court, in treating the propositions involved in this case, "granted that, as a result, more profit and gain inured to the widow and children than the testator contemplated when he made the will." So, counsel for petitioner, in treating this appeal in their brief, say: "As a matter of fact, the appellant, in his reports returned to the probate court, has charged himself with compound interest with semiannual rests, whereas the directions of the court below to the referee, which were respected in the computation, called for annual rests only." It is therefore apparent that there is no contention that this executor has failed to account for all the property and funds committed to his charge, together with interest on the funds at the rates mentioned. But it is contended that he should be required to pay a higher rate of interest than he has returned, on such part of the estate funds as were, from time to time, in his hands, not deposited in bank at interest, as provided by said order of court. That demand is the only basis of claim made against the executor in this proceeding, and thereon rests said judgment for the recovery of money, as well as the decree impressing a trust in

favor of the heirs in certain lands of the executor, as aforesaid.

1. With this premise, it is first to be inquired whether the law warrants the court in declaring a trust interest in lands of the executor in favor of the heirs upon the proposition that at a certain time he paid, in the purchase thereof, moneys in his hands belonging to the estate. It is found in this case that at a certain time in 1882 the executor, in the course of his private transactions, bargained to purchase from Child & Young a tract of land in the city of Helena, Mont., for the agreed price of \$10,000, paying, at the time of the bargain, the sum of \$2,000, and obliging himself in the transaction to pay, at a certain date the following year, the balance, of \$8,000, whereupon a deed was to be delivered by the vendors, conveying said land to the purchaser; that in the final consummation of such purchase, in 1883, the executor made use of \$5,000 of said estate funds. This is disputed, and the finding is excepted to as not sustained by proof; but we pass over this dispute, and consider the fact as found, together with the other facts existing in the case. It also appears without dispute, as above shown, that the executor has long since, and without any delinquency, accounted, as fast as the terms of the will directed, to the legatees for said \$5,000 which is claimed to have been paid in the purchase of said land, with interest thereon at the rate of 7 9-10 per cent. compound. Thus, the heirs have long since received and used said sum, with the interest returned thereon. And so, granting that said sum of money has been traced into the purchase of said land, it has also been traced out of and beyond said land, into the hands of the legatees, in the execution of the trust. Still, it is insisted that the heirs of said estate are entitled to a half interest in said land. This involves a peculiar situation. It plainly requires the trustee to carry an interest in the land, for the benefit of the heirs, for years after they have admittedly been paid, not only all the principal of the trust fund, which is claimed to have been paid into the purchase of said land, but interest thereon. This would seem to be allowing one to reap where he had not sown, and left the seed to the harvest. At least, it would be allowing the cestui que trust to have and use the trust funds, with interest thereon at the rate paid, for his maintenance, and at the same time require the trustee to carry an estate in the land in question for the benefit of the heir, without any of his funds remaining in said land. It has already been pointed out that the only ground of demand against the executor is that he ought to pay additional interest on such of the funds of the estate as were not kept deposited, at interest, in the banks, as will be more fully explained hereafter. By computing compound interest on such funds at a higher rate than

the executor returned, a claim arises against him for a certain sum over and above the amount he has accounted for.

Now, counsel for petitioner insist that, when this sum arising from such compound interest equals the amount paid in the purchase of a certain tract of land by appellant during said administration, the heir has a right to take the land, at the purchase price, in lieu of an equal amount of the claim for interest against the executor. This is the position taken by counsel for petitioner in responding to the appeal by the executor, and also in the appeal by petitioner, (which is consolidated with this,) wherein petitioner's counsel urge their exception to the ruling of the court in refusing to decree a trust in favor of the heirs as to the whole tract of land above mentioned, and refusing, also, to declare a like trust interest, in favor of the heirs, in certain other tracts of land held by the executor. But the court impressed a trust upon lands of the executor only in the one case above mentioned, where it was found that in 1883 the executor had used, in the purchase of said piece of land, estate funds equal to one-half the purchase price, but which sum the executor had afterwards accounted for, with interest as aforesaid, without delinquency, in compliance with the terms of the will. He must, therefore, not only have accounted for said \$5,000 which is claimed to have been paid in the purchase of said tract of land, but for a large amount of interest thereon, as it is not disputed that he returned 7 9-10 per cent. annually, until such funds were entirely paid over to the heirs. To impress upon lands of the trustee a trust in favor of the beneficiary, under these circumstances, would be allowing him, not only the advantage of compound interest at rates determined on by the court, but would permit him to collect such interest by selecting lands out of the trustee's estate, purchased during the continuance of the trust, at the purchase price paid therefor years before. It would not only give the heirs the advantage of compounding interest against the trustee for having temporarily used trust funds, in order to draw away from him the profit of such use, but would also give them the further advantage of increasing that exaction by whatever rate the property so selected might vouchsafe, whether it be thirty, sixty, a hundred, or a thousand fold. Counsel for the petitioner undertake to sustain the decree of the court declaring said trust in the lands of the executor, and their contention is that the court ought to have gone further, and decreed to the heirs additional trust interests in the lands of the executor, by invoking the doctrine of equity that the trustee shall not be permitted to make any profit by the use of trust funds. While this is a salutary rule of equity, and must be upheld, it does not warrant the court in transferring to the heirs lands of the execu-

tor, or interests therein, under the facts existing in the case at bar. We think this is abundantly shown from the foregoing examination. But that doctrine has been asserted with such confidence, as sufficient to support the decree of the court declaring the trust, that we will briefly examine the case from that particular point of view.

The question, then, is, if a trustee use trust funds to the extent of half the purchase price of a tract of land, but afterwards, in the execution of the trust, accounts for the fund so used, with compound interest at the rate of 7.9 per cent., has the trustee profited by this transaction to the extent of half the value of such tract of land? Suppose a man purchases a tract of land at the price of \$10,000, and, not having funds at hand to pay the whole price at the time stipulated, he calls upon another having money on hand, who supplies the purchaser with \$5,000, and the transaction thus stands for a time, until such \$5,000 is called for, when the purchaser promptly returns the same, with compound interest at the rate of 7.9 per cent. per annum. Now, suppose, some years after such payment, the party giving such accommodation, pointing to said tract of land, then of the value of \$50,000, and relating the circumstances just narrated, insists that such purchaser is beholden to him to the extent of half said tract of land at its present value, together with half of the issues and profits from said land since its purchase,—in other words, that the vendor had actually profited by such accommodation to the extent of one-half the value of said land, and half the issues and profits thereof since purchase, although the purchaser had long since repaid the loan with interest. This would, we think, strike practical men as an extraordinary proposition. But we have drawn in to this illustration material facts, which harmonize with those existing in the case at bar, except that in the illustration it was a voluntary accommodation, and in the present case trust funds were used; but we are simply inquiring, now, as to the measure of profit flowing from one to the other by such use of funds. Then, if the profit of such accommodation was to be taken away from the purchaser and transferred to the other, applying the theory proceeded upon in this case, it would require the transfer of a half interest in the land, and half the issues and profits since the purchase, less \$5,000, dropped from the account of issues and profits, to offset the \$5,000 which the purchaser had returned to the lender, making no account, however, of the interest which the purchaser paid for the use of said loan; and, on this theory of accounting for profits, the one whose \$5,000 was thus temporarily used would find that he had first received back his \$5,000 on demand, with compound interest, and thereafter, although the purchaser had carried the investment in the land as

his own burden alone until it is of great value, half of the land, worth \$25,000, and also half of the issues and profits, less \$5,000, had been handed over, merely to take away the alleged profit of the temporary use of said \$5,000. The only difference between the illustration and the accounting pursued in the case at bar is that in the illustration it was a voluntary accommodation, and, also, in the account with appellant the \$5,000 dropped to offset a half interest in the land, accrued by way of compound interest, computed at higher rates than the executor had returned, prior to the date of the purchase of said Child & Young tract of land. This does not materially change the application of the illustration. But, aside from the other untenable conditions already observed, the fact just mentioned—that the money upon which this trust is proposed to be declared is not, in reality, for part of the trust money found in said land from the time of purchase, but is a demand for interest accruing on moneys which were never even in said land—would seem, in view of the authorities, to be sufficient to defeat all claim to a resulting or constructive trust in favor of the heirs in the present case. In order to sustain such a trust on the ground that the land was purchased with trust funds which were otherwise to be accounted for, the trust interest in the land must be founded on trust money paid in the purchase thereof, and other demands cannot be offset for an interest in the land. *Ducle v. Ford*, 158 U. S. 587, 11 Sup. Ct. 417, and cases cited; *Muller v. Buyck*, 12 Mont. 354, 30 Pac. 390. There is some question made in the authorities whether a trust ought to be declared in such a case, where only a moiety of the purchase price was paid by trust funds, or whether a lien only should be fastened upon the land to secure reimbursement of the trust fund. Mr. Story seems to approve the latter course as the more equitable and reasonable procedure. 2 Story, Eq. Jur. §§ 1211, 1277g. See, also, *Perry, Trusts*, § 128; *Munro v. Collins*, 95 Mo. 33, 7 S. W. 461. If it appeared in this instance that the trust money had carried the burden of half the investment in said land from the time of purchase until the trust was declared, it might then be necessary to decide between the distinctions just mentioned. But such is not the case here. The claim or money upon which the trust in the land is declared in favor of the heirs in this case arises for compound interest at a higher rate than the trustee returned. And, when the date of the purchase from Child & Young is reached, in casting the interest account, \$5,000 of the claim thus accruing for interest prior to that date is dropped to offset the amount constituting half the purchase price. On the other hand, if it is proposed to claim an interest in said land for interest on the fund which was put into the land, the difficulties of the problem are still further augmented. By

that theory compound interest would be required from the trustee for the use of the money put into the land, and the cestui would be allowed, on this very demand for compound interest, (which is supposed to constitute the profit derived from the use of the trust money,) to go back and take the land also, with its issues and profits from the time of purchase, in payment of the interest. This would be recompensing the cestui for the use of his trust money—First, by way of compound interest; and, secondly, by way of transferring to him the land, and the rents, issues, and profits of the land, besides compound interest.

Counsel for respondent urge, to support the judgment, that “the beneficiaries are permitted to make their election as to whether they will take the actual profits, or interest in lieu thereof.” It plainly appears that the court below allowed them to elect, and take both ways. We have no doubt that with a closer investigation of these conditions, and more mature consideration of the authorities, the learned judge of the court below would have denied the claims put forth that a resulting trust could arise in favor of the heirs under the conditions shown in this case; for it cannot be sustained by the application of appropriate principles of equity, or by reason or precedent.

2. As to the executor's commission; and the question to be determined herein is whether or not an executor or administrator, where the conditions require the continuance of the administration over a period of years, can lawfully be allowed, at the close of each year, on the annual account, the commission provided by statute for the executor or administrator on moneys of the estate actually disbursed during the preceding year, by way of compensation for the care and management of the estate. That the executor in this case, in rendering his annual account at the close of each year, charged the estate with the commission allowed by law on funds of the estate actually disbursed during the preceding year, is not disputed; and this was approved, from time to time, by the probate court. In the present accounting the court below caused these commissions to be taken away from the executor, and, not only so, but required him to pay interest on the amount of commission from the date of each allowance. The interest amounts to considerably more than all the commissions, and altogether, through that ruling, the executor is adjudged indebted to the estate in the sum of \$5,806.86. To support this ruling of the court below the case of *In re Dewar's Estate*, 10 Mont. 426, 25 Pac. 1026, is cited. That case is far from supporting the ruling here under consideration. It seems remarkable that the court below, having before it such a clear and painstaking elucidation of the subject of commissions, and the construction of the statute providing therefor, as found in that case, should have so

shaped a ruling as we find it in the case at bar in this particular. In this case the executor, at the close of the year, charged commission for disbursements of the past year. He was thus charging for services passed and finally completed. In the Dewar Case it is said: "It is the law that, appellant's claim for fees being unsettled, unallowed, and inchoate, and the creature of the statute, it fell with the law creating it." Here, in the case at bar, the commissions taken away from the executor were settled and allowed and approved by the court for past services, whereas in the Dewar Case the administrator sought to charge commissions at the commencement, under the law as then existing, for all the period of the administration, ignoring all changes in the law, by act of the legislature, during said period. In the Dewar Case the court further observed: "Appellant does not separate his services as to these two periods, and claim compensation upon services rendered in the three and a half months period under the old law, and upon those rendered in the nineteen-months period under the amendment. If he did so, and claimed a higher percentage upon services fully performed and passed during the three and a half months period, the argument of vested right would address itself to us with some force. *People v. Pyper*, (Utah,) 21 Pac. 722." It appears that, in the course of the executor's administration in the present case, the legislature reduced the rate of commissions, and the executor's commission was conformed to the change, as shown by indorsement on the fourth annual report of the executor by Hedges, J. Thereby the learned judge applied the construction of the law as approved several years later, in the case of *Dewar's Estate*, *supra*. The ruling of the district court in this particular cannot be sustained.

3. What rate of interest should be required from the executor on funds to the credit of the estate, not deposited in bank at interest, in view of the facts involved in this case? And, further, as to the question of compounding interest in accounting with trustees. As we proceed in the consideration of these questions, we shall also digress sufficiently to consider an exception on behalf of petitioner to the ruling of the court in refusing to charge the executor the full amount of a certain debt, and interest, owing said estate, where the executor had accepted, by way of compromise, and reported to the court, a less amount in settlement. It appears that, of the funds of said estate on hand at the death of the testator, some \$6,000 was on deposit in the People's National Bank, then a banking institution in the city of Helena; that in 1878 said deposit amounted to \$6,500; that said bank became insolvent, and went into the hands of a receiver, about July or August of that year, and, on winding up its affairs, claimants against said bank received only 55 per cent. of their demands; that,

about February or March prior to said failure, the executor, having come into possession of information concerning said bank which led him to doubt the safety of the estate funds therein, sought to draw such funds out, but the officers in charge of said bank refused to cash the certificate of deposit, claiming that it was a time deposit, and the certificate was not demandable until its maturity, at a later date; that the executor, however, insisted on drawing out such funds, and being at the time personally indebted to said bank for loans obtained therefrom in the sum of about \$6,500, for which the bank held his individual note, the executor, in order to get the funds of the estate out of said bank for the reason aforesaid, offset said certificate of deposit for the credit of the amount thereof on his note of individual indebtedness to said bank, and assumed the indebtedness of said bank to the estate for the amount of said certificate of deposit, namely, \$6,500. This transaction substituted the executor, as debtor to said estate in the sum of \$6,500, in place of his indebtedness to said bank for money theretofore borrowed and used in his affairs. From this time on, during said administration, it appears there were moneys to the credit of said estate not deposited at interest in bank as provided by the order of court, but interest was returned thereon, as above shown. The executor testified that he returned interest every year on all moneys to the credit of the estate not deposited in bank at interest at rates as high as the banks paid on deposits, and at no time less than 8 per cent. even after the banks reduced the rates below 8 per cent. This testimony is not inconsistent with the other facts shown, for, from the testimony of the bankers called in the hearing, it appears that the rate of interest paid by the banks on time deposits was reduced below 8 per cent. about the year 1883, and so continued thenceforward. This may account for the fact that, on the whole, the interest returned on the estate funds falls a fraction below 8 per cent. The rate of interest paid by the banks during said administration appears to have varied from 12 per cent., on a descending scale, to 6 per cent. The rate of 12 per cent. prevailed for only a brief period after said estate came into the hands of the executor, when it was reduced to 10 per cent., which rate was allowed until about the year 1880, when 8 per cent. was fixed upon, and prevailed until 1883; in 1883 and 1884, 7 per cent. was allowed, and thereafter 6 per cent.

In addition to the substitution of the executor as debtor to the estate in place of the People's National Bank for said \$6,500, he charged himself with \$1,500 in favor of the estate, under the following circumstances: It appears a debt was owing the estate in the sum of \$1,950, by Guthrie & Norris, bearing interest at 2 per cent. per month, and another debt owing by the same Guthrie, in

the sum of \$3,000, bearing interest at 1½ per cent. per month, through transactions had between the decedent and said debtors; that, after the estate came into the charge of the executor, said debtors were unable to make payment, and their property affairs were not in such condition that payment could be enforced. The executor says in his testimony that, under the circumstances, he thought it best to "nurse the matter along," and try to get payments from time to time, which it appears he did, and succeeded, in the course of time, in getting payments of principal and interest, altogether amounting to \$5,225.98, on said \$3,000 note, and payments of principal and interest on the \$1,950 note, amounting to \$3,137.12. It appears the debtors, for a time, conducted a butcher's business, and considerable of said collection was obtained by the executor taking supplies from them for his household, and also for Mrs. Ricker and her family, and crediting the amount due for such supplies on said notes. But, as the time approached when the eldest child arrived at the age of majority, and required her distributive share of the estate, as provided in the will, there was more than \$1,500 of principal and interest, together, due on said debts, and, in the mean time, Norris, as the evidence shows, had failed altogether financially. This balance the executor agreed to compromise with Guthrie—the only one of the debtors from whom there was any prospect of obtaining payment—at \$1,500 if he would then raise and pay that amount, so that the executor could ascertain what amount of such collection could be counted on for such distribution. Guthrie testified in this hearing that he endeavored to raise said sum agreed upon as a compromise of said debt, but could not; that he then arranged with the executor to assume said sum as paid, and credit the estate therewith, promising to pay said sum shortly thereafter; that the executor made such credit accordingly, and thereby put to the credit of said estate \$1,500, which he had not actually collected, and of which, according to the evidence, the executor never received more than \$700 from said debtors, yet the executor accounted for said \$1,500 as collected, with interest thereon, along with the other funds, as heretofore shown. The petitioner, in his appeal, insists, notwithstanding these facts, that the executor should be charged with the amount he rebated from said claim by way of compromise. This demand is based upon the showing, from the public records of Lewis and Clarke county, that in March, 1880, there was conveyed to said Guthrie and John H. Ming, jointly, for a consideration of \$2,400, stated in the deed, "the S. ½ of the S. ½ of the N. W. ¼ of sec. 29, Tp. 10 N., R. 3 W., less four acres;" that the title to said property so remained until April, 1883, when, it appears from the record, Guthrie executed a mortgage of his interest to said Ming to secure the sum of \$6,000; and that in December, 1883, as shown by such

record, Guthrie divested himself of the legal title to one-half interest in said land, by absolute conveyance, for a stated consideration of \$5,500.

From this showing of the record, the petitioner contends that it appears said claim could have been enforced in full from Guthrie by seizure of said land, and therefore the executor should be charged the full amount of said claim, and interest, for failing to make such seizure. The executor testifies that, during all the time said indebtedness of Guthrie & Norris was owing to the estate, said debtors were insolvent, according to the information gained by the executor on diligent inquiry; that he did not bring suit against them for the reason that he thought it more prudent to proceed as aforesaid in trying to collect said debts; that, in his view, to attempt to enforce payment by suit might have driven the debtors into such a condition that they could pay nothing, while, by the course the executor pursued, he was obtaining some payments. The executor also answered, in his testimony, that he could not say positively whether he searched the records to find whether the debtors had real estate, or interests therein, subject to attachment. The testimony of Mr. Hershfield, a banker, is also to the effect that, during all the time in question, claims against said debtors were not considered good; that their paper was not negotiable, and they were not regarded as financially responsible. We think the court, under the circumstances shown, justly refused to charge the executor any more than he had returned on account of said demands against Guthrie & Norris. The mere fact that the legal title to a piece of land comes into the name of an individual is not conclusive evidence that such property is subject to execution against such individual. *Vaughn v. Schmalsie*, 10 Mont. 186, 25 Pac. 102. Nor is the record of such transaction, in relation to a piece of real estate, evidence that the amount set down in the conveyances represents the value thereof. Such proof alone, without showing the real value of the land, scarcely rises to any showing inconsistent with the testimony of the other witnesses, to the effect that said debts were not enforceable because of the insolvency of the debtors. Guthrie says in his testimony that he does not think a judgment could have been enforced against him, and he appears to have been the most responsible, as well as the most active, of the two debtors, in trying to pay said debts. It is our opinion that the court below not only was justified in refusing to charge the executor with any more than he had returned on account of said claims against Guthrie & Norris, but the court should have also refused to require the executor to pay further interest on said \$1,500, inasmuch as it was clearly shown that, in giving credit therefor before the actual collection of that amount, the executor involved himself in a personal loss of \$800, besides

having returned interest on said \$1,500 from the time it was so credited to the estate, as above shown.

Regarding the rate of interest which ought to be imposed on the executor, the court below so ordered the accounting that he should be required to pay compound interest on all funds to the credit of the estate, not deposited at interest in bank, at the rates of 18, 15, and 12 per cent. per annum compound, during stated periods of the administration. The sum so accruing by those rates was compounded by annual rests to carry the interest over as principal. The rates required are, according to the evidence, near the maximum rates shown to have been obtainable on loans by banks during the periods stated, there being no restriction by law on the rate of interest which might be agreed upon between borrower and lender. The legal rate provided by statute, enforceable on demands, in the absence of an agreed rate, during the same period, was, and still is, 10 per cent. per annum. The statute in force since 1872 on this subject reads as follows: "Creditors shall be allowed to collect and receive interest when there is no agreement as to the rate thereof, at the rate of ten per cent. per annum for all moneys after they become due, on any bond, bill, promissory note, or any other instrument of writing, and on any judgment rendered before any court or magistrate authorized to enter up the same, within the territory, from the day of entering up such judgment, until satisfaction of the same be made; likewise on money lent, or money due on the settling of accounts, from the day of such settlement of accounts, between the parties, and ascertaining the balance due; on money received to the use of another, and retained without the owner's knowledge, and on money withheld by an unreasonable and vexatious delay." Comp. St. div. 5, § 1237. We have been unable to find authority to support the proposition that a court has jurisdiction to impose arbitrary rates of interest, above the statutory rate, in an equitable accounting with a trustee, although courts of equity frequently require a lower rate in such accountings as an equitable rate. In England there appears to have been a rule of equity requiring what is called an "equitable" rate of interest in accounting with trustees, and this rate is uniformly lower than the legal rate. The legal rate there being 5 per cent., equity usually required 4 per cent. In such accountings, under the name of "equitable interest in mitigation of legal rates." Fonbl. Eq. 443, note. Mr. Spence, the standard English authority on Equity Jurisprudence, says: "Where it appears that the trustee or executor has improperly or unnecessarily kept balances or any considerable portion of trust moneys in his hands, he will be charged with interest on what he has so retained, generally at four per cent., but, under special circumstances, at five per cent." 2 Spence, Eq. Jur. 920. From a passage in

the opinion delivered by Lord Chancellor Brougham in 1834, in *Docker v. Somes*, 2 Mylne & K. 666, it appears conclusively that English courts of chancery did not feel at liberty to impose arbitrary rates of interest upon trustees in such accountings, exceeding the legal rate. As to the rule in the United States, Mr. Perry, in his examination of the subject, says: "In the United States there is no law by which different rates of interest can be applied to different degrees of negligence or misconduct, and the only question here is whether simple or compound interest shall be imposed." Further along, in summing up his examination, he says: "The rate established by law as the legal rate, in the absence of special arrangements," governs courts of equity in accounting with trustees in this country. 2 Perry, Trusts, § 468. Mr. Story expresses the same view, saying: "And the trustee, by mixing trust money with his own, at his banker's or otherwise, will become responsible for the replacing of the money, and lawful interest during the intervening period. * * * So, too, when the trustee makes an improper investment of trust funds, he becomes responsible for the same, with interest." 2 Story, Eq. Jur. § 1277e. The same conclusion is reached by Mr. Page in his recent research on Executors and Administrators, found in 7 Am. & Eng. Enc. Law, pp. 426-429, with copious citations. In *Schleffelin v. Stewart*, 1 Johns. Ch. 620, although one of the severest cases in this country in its exaction from the trustee, there appears to have been no thought of imposing rates higher than the legal rate of 7 per cent. See, also, *Clarkson v. De Peyster*, 1 Hopk. Ch. 426. In California we find it held that the legal rate of interest should not be exceeded in such accountings. *Estate of Clark*, 53 Cal. 355; *Merrifield v. Longmire*, 66 Cal. 180, 4 Pac. 1176; *In re Eschrich*, 85 Cal. 98, 24 Pac. 634. There is a passage in *Cruce v. Cruce*, 81 Mo. 676, relied on by respondent to sanction the requirement of interest above the rates fixed by statute; and, while it may be so construed, we do not think such was intended to be held, for in that case only the legal rate of 10 per cent. was allowed, and under the passage relied on is cited *Frost v. Winston*, 32 Mo. 489, where it appears the rate charged was that prescribed by law. In the examination of a great many cases on this subject, and especially all of those cited by respondent, we fail to find any authority contradicting the text of Mr. Perry,—that the legal rate is not exceeded unless a lawful contract provides for a higher rate.

We now pass to a brief examination of the question of compounding interest in accounting with trustees. Near the close of the last century the remedy of compounding interest in such cases appears to have come into vogue in the courts of equity of England and the United States, as a convenient and potent remedy to draw from delinquent trustees the actual or presumed profits derived from

regard. In 1805 we find Lord Eldon, in examination of the question of compound interest in such accountings, (*Raphael v. hm*, 11 Ves. 92,) so much in doubt as to proper practice that he postponed the consideration to give time to make special dry on the subject, observing that it was matter of great importance. And for his determination, it appears, he went, not to reports or treatises, but caused inquiry, to be made of the masters in chancery as to their understanding of the correct practice. See, on an examination of this subject, from historical, as well as legal, point of view, Lord Chancellor Brougham in *Docker v. es*, supra; by Chancellor Kent in *Schleffelin v. Stewart*, supra; by Chancellor Sanborn in *Clarkson v. De Peyster*, supra; by Justice Grier in *Barney v. Saunders*, 167 U.S. 443; *Perry, Trusts*, and cases cited in section 468; *Cruce v. Cruce*, supra; the opinion by Mr. Page, of the Pennsylvania Commission on Executors and Administrators, 7 Pa. & Eng. Enc. Law, 425 et seq.; and the elaborate note to *Walls v. Walker*, 99 Am. 296. There is no doubt that the doctrine has been applied along down through the present century, where circumstances appeared to warrant, as shown by an examination of the cases; but as to the special conditions to which it ought to be applied, and as to the rate of compound interest considered equitable, there seems to be much diversity of opinion. Sometimes the rule has been exerted with extreme rigor against a trustee guilty of fraud in respect to the trust itself, whereby he sought to enrich himself therefrom, as was done by Lord Chancellor Brougham, in 1798, in *Raphael v. Boehm*, supra. Of this case, Lord Chancellor Brougham says (see *Docker v. Somes*, supra) it was the strongest instance of compounding interest against a trustee in England; but it was a case where "a gross breach of trust had been committed, for the large sum of 30 pounds was expressly directed to be paid out from accumulation, and, the executor having thought proper to employ it in his private trade, the court ordered him to be charged with interest at five per cent. from the time of the executor's death, with half-yearly rests, and interest for the intermediate times. All the judges who have mentioned this decree have considered it severe." He adds that in this "most remarkable case," which, indeed, is always cited to be approved, if not disapproved, the compound interest was given with a view to the culpability of the trustee's conduct, and not as any estimate of the profits he had made therefrom." As has been mentioned, the case *Schleffelin v. Stewart*, supra, before Chancellor Kent in 1815, is considered one that applied the rule with great severity. There-

any benefit or advantage to the estate;" and the chancellor approved the report of the master charging the executor the legal rate of 7 per cent. interest, with annual rests for compounding the same. One of the cases relied on by Chancellor Kent in support of that judgment was *Raphael v. Boehm*, supra, but, of course, without knowledge of the estimate in which it was held by the English bench, as appeared by later comments; and the case of *Schleffelin v. Stewart*, notwithstanding the great weight of authority it carried by reason of the acknowledged learning and judicial ability of the chancellor who delivered the opinion, in its turn seems to have been shaken by subsequent adjudications in New York, at least as to the rigor with which it applied the rule of compounding interest. *Clarkson v. De Peyster*, supra; *De Peyster v. Clarkson*, 2 Wend. 78. Mr. Perry states, as his deduction from the authorities, that: "It is difficult to lay down any general rule that is equitable, and applicable to all cases, as to the interest trustees shall pay upon trust funds in their hands. In England, if trustees suffer money to remain in their own hands, or in the hands of third persons, or in bank, for an unreasonable time, in addition to their liability for its loss during such delay, they will be charged with interest at the rate of four per cent.; but if the trustees are grossly negligent or corrupt, or improperly call in the money from a proper investment and suffer it to lie idle, or if they use it in trade or speculation, or invest it in improper places, the court will charge them with interest at the rate of five per cent.; and in certain special cases of misconduct the court will order annual or semi-annual rests, for the purpose of charging them with compound interest. In the United States there is no law by which different rates of interest can be applied to different degrees of negligence or misconduct; and the only question here is whether simple or compound interest shall be imposed. The general rules, so far as they can be drawn from all the cases, are as follows: (1) If a trustee retains balances in his hands which he ought to have invested, or delays, for an unreasonable time, to invest, or if he mingles the money with his own, or uses it in his private business, or deposits it in bank in his own name or in the name of the firm of which he was a member, or neglects to settle his account for a long time, or to distribute or pay over the money when he ought to do so, he will be liable to pay simple interest at the rate established by law as the legal rate in the absence of special agreements. This rule is subject to the qualification that trustees cannot make any advantage to themselves out of the trust fund; and, if they make more than legal interest, they

shall pay more, as, if they make usurious loans, they shall be charged with all their gains from the use of the money. If the trustee cannot show what amount of interest he has received, he shall be charged with legal interest from the time when the regular investment ought to have been made. There may be an exception to the rule that a deposit of the trust money in bank in the name of the trustee, or a mixing of the trust fund with his own, will impose a liability of legal interest. There must be some element of a breach of trust in the transaction, or a breach of duty." 1 Perry, Trusts, § 468.

There are cases of comparatively recent date, however, in which compound interest has been held proper by the supreme court of one state, and refused by that of another, where the cases appear to be surrounded by quite similar circumstances. This will be seen by a comparison of *Clark's Estate*, *Merrifield's Estate*, and *In re Eschrich*, supra, with the case of *Cruce v. Cruce*, supra, where, apparently under very similar facts, the California court allowed 7 per cent., compounded by annual rests, while the supreme court of Missouri allowed only simple interest at the legal rate of 10 per cent. But in the treatment of the latter case, after referring to the fact that "the rule of exacting interest from delinquent trustees has nowhere been enforced more rigorously" than in Missouri, it was said that if the interest had been compounded by annual rests "at the low rate of six per cent." it would have been allowed to pass; "but, as every case must be determined according to the facts and circumstances peculiar to it, I am satisfied," says the author of that opinion, "that it would be inequitable to order interest compounded at the high rate of ten per cent. per annum against the respondent. My reasons for this conclusion are as follows: First, the account extends through fifteen years. The result of the computation, like all such arithmetical results, would be surprising and excessive. It would, in my judgment, exceed what could be expected from any prudent and careful administration of the estate under ordinary circumstances. I think it would be a marvelous achievement for any trustee of ordinary skill and prudence to keep a fund of five or six thousand dollars so constantly and securely invested for a period of fifteen years as to produce the net result of compound interest at ten per cent. per annum. In the ordinary course of events, there would necessarily be intervals of irregular length between investments, not to say anything of possible loss and depreciation of security. The ability of investing the interest annually, as soon as collected, may well be doubted when we consider its moderate volume, and the frequency with which it would have to be put out. The exaction of compound interest at such a high rate, for so long a period of time,

would, in my judgment, be a departure from the leading principle which requires the chancellor to approximate, as near as possible, the actual or presumed gains and profits of the fund." *Cruce v. Cruce*, supra.

The theory upon which the court exacted such extraordinary rates of compound interest from the executor in the case at bar was that, according to the testimony of the bankers, money could have been loaned, at the time in question, at such rates. Nowhere in the record is there shown any proof as to the net result of loaning money during a given period, even by such experienced financiers as bankers, after deducting expenses and losses, in order to ascertain the net profits which could be derived from the use of money by way of interest. Without any such inquiry, the rates of 18, 15, and 12 per cent. were designated by the court for stated periods of the administration, and the referee was directed to compute at those rates, during such periods, compounding by annual rests. Would it not be somewhat analogous if, in a given case, it was found a bailee of another's carriage horse had kept and used it for the period of, say, five years, and, in order to charge the bailee with the profit of such use, the court should take proof of the price for a livery animal, of like quality, for one day, and without further inquiry as to expense of feeding or care, or as to the time such animal would ordinarily lie idle, the court should order the case to a referee to cast the aggregate for the whole period at the price stated for a day, and enter judgment accordingly? If liverymen could so reckon profit, their prosperity would no doubt be far different than practical experience demonstrates. So, if loans of money always promptly returned at maturity with the stipulated interest, and the gross rate was never diminished by loss or delay through deterioration of securities, death, disaster, or fraud, or by the expense of constant attention to such affairs, the employment of professional services, of litigation, and so forth, even then it would not be possible, in practice, to make the gain compound along the line of the highest rates attainable, because, in practice, it would not be possible to reloan the money and the accumulated interest the instant it was due. If the debtor, through stubborn neglect or misfortune, is delinquent in payment, the law must be resorted to, and for such delay it will not require from the delinquent debtor compound interest; so that in demanding return of compound interest, at the loaning rate, in such instances, (which are not infrequent in experience,) the law would demand on the one hand, of the trustee, what it would not allow him to collect on the other. The problem of compound interest, when set in motion, moves on for its allotted period with the certainty of time and mathematics. All other conditions are assumed. It considers no delay, no failure, no expense;

he reloaded the instant of its payment. A problem contemplates constant accretion at a composite process, but no diminution; omits no farthing, nor allows any to escape when gathered, not even so much as the pence of postage, or the wear of shoe leather, to make a demand. The thriftiest management and most fortunate consummation in practice cannot hope to reach the object gathered by the problem in the long run, unless odds are given, in fixing the rate to be compounded, to offset the expenses, delays, and failures met with in practical experience. But with allowance for such contingencies, in fixing such rate, no doubt common experience will admit that it is actual to gain compound interest; and it has been—no doubt, justly—held equitable accounting with trustees, where they have their hands money for accumulation, or which was made to accumulate, or has been added for the trustee's profit, to require compound interest. But the rate must be fixed with due consideration, or the result will be wound out of all proportion to what could have been accomplished in the field of practical affairs. We are suggesting here nothing new, for these conditions have undoubtedly been considered, if not mentioned in detail, in courts of equity, as shown in the fact that they have, in general, gauged their requirements accordingly. But sometimes, as might have been expected in the application of an abstract mathematical rule, the exactations of which to practical results is not easily detected, some hardship may have been worked.

There is evidence in the record to the effect that, from time to time during the period in question, banking institutions contracted to pay, for the use of funds left with them for a stated time, a certain rate of interest per annum. That is the only evidence in the record which approaches a safe criterion from which there might have been found the measure of net profits, or, in other words, the net earnings which could be counted on for the use of money by way of interest. While this testimony did not make that form of inquiry exactly, it is evidence of what money could have earned, if used in such institutions; they insuring the safety thereof, so far as their own responsibility went, and bearing the expense and risk incident to its use. The tendency of this evidence, more than any other in the record, is to show what such financial institutions could afford to pay for the use of money, and insure its safety, and bear the expense and loss incurred in handling. Who is more likely to get greater profit from the use of money, under fairly safe and conservative conditions of handling, than bankers? There are other financiers or business men who can do better, is it not likely bankers

for, when the rate in the banks went below 8 per cent., the evidence is that he kept on returning, at that rate, on moneys to the credit of the estate not in bank. If we look to the precedents in the books, we find, too, that the returns of this executor, made without delinquency or any suspicion of fraud, rise above the exactions from trustees, by way of compound interest, in cases where their accounts were delinquent and conduct culpable. Shall a judgment of greater severity be pronounced in this case than in such? It appears from numerous precedents from all sections of the country that this case would, in those courts, be dismissed, because the executor has voluntarily and promptly made returns of income double what could have been obtained by the course contemplated by the testator's will, and more than the banks would have allowed during considerable portion of the time, and more than the courts have found equitable to exact in accountings with trustees whose conduct was found grossly detrimental to the interests of the estate. This must be admitted. And, even granting the worst that has been asserted against the executor in the case at bar,—the temporary use of certain of the trust funds in private affairs, which is made the occasion for exacting compound interest in several cases, as we have seen,—still it appears, and is not disputed, that this executor has seen to it that the estate in no way suffered detriment therefrom, and gained considerably thereby. If a man's foot slip, or if he stumbles, and then, regathering himself, walks uprightly, and delivers his burden in advance of all others, without one whit missing, shall he be turned upon, and scourged with a severity exceeding that laid upon one who refuses to proceed with the discharge of his duty altogether? It may be answered that, if one who waivers is allowed to go without punishment, others will walk unsteadily. This answer does not meet the situation. If he was found delinquent, it would be time to consider his punishment, but if, not finding him delinquent in any respect, more is exacted than for entire neglect, absolute default would be encouraged by such unjust judgment.

But, laying aside all figures of speech, as not much to be indulged in judicial investigations, and viewing all phases of this case in the plainest fashion, it appears that, if heavier judgment is laid on such a case as this, the court will thereby designate the plane of its exactions much higher than any court has attempted to maintain, so far as we have been able to discover. With the carefullest investigation of the law and facts, our deliberate judgment is drawn to a negative conclusion on every vital point in this case. There is no hardship in this, for the executor must have managed the affairs of

the estate with solicitude for the welfare of the heirs, and that his management has been largely fruitful of benefits to them is frankly admitted. Such results as are shown in this case do not come from indifference or neglect. In rendering the extraordinary judgment in this case, we think the learned judge of the court below must, without the deliberation usually manifested, have adopted views urged by the forceful eloquence of petitioner's counsel; but things only assumed, in whatsoever eloquent phrase, or forms only painted, however real they seem at first impression, cannot support the judgment of a court. An order will therefore be entered, reversing the judgment in this proceeding, and remanding the case, with directions to enter judgment in the court below dismissing this proceeding, at the cost of petitioner.

PEMBERTON, C. J., and DE WITT, J., concur.

On Rehearing.

(March 12, 1894.)

PER CURIAM. Since the determination of this appeal, motion for rehearing has been presented, and given careful consideration, besides allowing counsel the unusual privilege of argument to more fully expound the grounds on which motion for rehearing is demanded. Nevertheless, there has been no exposition of points wherein the court overlooked or erroneously applied any pertinent or controlling authorities or material facts in the original determination. On the contrary, this retrospection of the case, in the light of motion for rehearing, tends to confirm the views of the court heretofore expressed, as fully in accord with the authorities and facts, and that a just and proper determination was reached. The same will therefore be allowed to stand as originally announced.

This motion for rehearing, however, raises a new point in the case,—which hitherto was neither presented in brief nor argument on the appeal; nor does it appear that consideration thereof was had in the trial court,—namely, that in certain years the probate court of Lewis and Clarke county, then having jurisdiction of said estate, allowed the executor a higher rate of commission by 1 per cent. than the statute then provided; in other words, it is asserted that, at certain times when 5 per cent. commission was allowed the executor, the statute prescribed only 4 per cent. It is obvious, this being a court of review, and not of original inquiry in these matters, it should not enter upon an investigation, or make any order, touching this question, for the reason already mentioned,—that no inquiry or determination on that feature of the case appears to have been made in the trial court. Therefore, there is no order or determination of the trial court to review. The trial court denied the executor all commissions on grounds which did not touch the question of his having been

allowed by the probate court a rate exceeding that provided by statute. That particular question seems not to have been adjudicated. But whatever inquiry or order concerning the readjustment of said commission on the ground alleged may be pertinent should, in the first instance, be proceeded with in the trial court. The motion for rehearing will therefore be denied.

OSBORN v. KETCHUM et ux.

(Supreme Court of Oregon. Feb. 26, 1894.)

PLEADING—ACTION TO REFORM A DEED—PETITION—EVIDENCE—SUFFICIENCY.

1. A complaint in an action to reform a deed is sufficient, in the absence of a demurrer, where it alleges that, to make the deed conform to the intent of the parties, the description should be amended, though it fails to allege that it was the intent of the grantee to purchase, and of the grantor to convey, the land thus described, or that the mistake was mutual, or that there was any contract between the parties to the deed.

2. In an action to reform a deed which described the land by metes and bounds, it appeared that the initial point of the description was a permanent monument; that a county road mentioned in one of the calls of the deed was also a permanent monument, but was inconsistent with the line described as the north boundary of the tract conveyed; and that, on a survey being made according to the puts and calls in the deed, a narrow strip of land was left lying between the tract conveyed and such county road. There was evidence that the grantor pointed out the place where he thought the west line would intersect such road, and that he suggested a building spot, and assisted the grantee in building a dwelling on such strip. *Held*, that a decree reforming the deed so as to include such strip was supported by the evidence.

Appeal from circuit court, Benton county; J. C. Fullerton, Judge.

Action by Louisa P. Osborn against M. B. Ketchum and Amanda Ketchum to reform a deed. From a judgment for plaintiff, defendants appeal. Affirmed.

The other facts fully appear in the following statement by Moore, J.:

This is a suit to reform a deed. The facts show: That the defendant M. B. Ketchum was the owner in fee of that portion of the west half of the donation land claim of John Phillips and wife, in Benton county, Or., lying south of a county road that runs north, 75 degrees west, from the east boundary of said tract, the southeast corner of which is 22 chains and 65 links south of the center of said county road. That he and the defendant Amanda Ketchum, his wife, on August 13, 1888, in consideration of \$500, duly granted and conveyed to one F. Critcherson the following described premises, to wit: Beginning at the southeast corner of the west half of the original donation land claim of John Phillips and Rhoda Phillips, his wife from the U. S. government, it being claim No. (60) sixty, notification No. 6,250, in Benton county, Oregon; running thence westerly along the south line of said claim eighty (80)

rods; thence northerly eighty (80) rods; thence easterly with the meanderings of the road eighty (80) rods; thence southerly eighty-one rods, to the place of beginning. The intention of this conveyance is to convey forty (40) acres of land out of the southeast corner of the west half of said claim, in as near square shape as can be had." That in the spring of 1890 the defendant M. B. Ketchum had the said premises surveyed by beginning at the southeast corner of said tract, and following the courses and distances given in his deed to Critcherson, and there was found, lying between the said survey and the center of the county road, a tract 2 chains and 40 links wide at the east end, that gradually grew wider as the distance increased towards the west. That said Ketchum and wife, intending to convey that portion of said tract lying north of and between said survey and said county road, on July 9, 1890, for the expressed consideration of \$100, by a quitclaim deed conveyed the same to their son-in-law, Frederick Root, but designated the beginning at a point 81 rods north of the southeast corner of the Rhoda Phillips donation land claim. That said Frederick Root and wife, on August 16, 1890, for the expressed consideration of \$200, by a quitclaim deed conveyed the said tract to the defendant Amanda Ketchum, describing the said premises as in the deed to said Root. The plaintiff alleges that the premises intended to be conveyed by Ketchum to Critcherson were, through mistake, incorrectly described, and that, in order to make said deed conform to the actual intention of the parties, it is necessary that the said description should be amended so as to read as follows, to wit: "Beginning at the southeast corner of the west half of the original donation land claim of John Phillips and Rhoda Phillips, his wife, from the United States government, it being claim No. sixty, (60,) notification No. six thousand two hundred and forty-nine, (6,249,) in Benton county, Oregon; running thence westerly along the south line of said claim sixteen (16) chains and thirteen (13) links; thence northerly twenty-six (26) chains and ninety-seven (97) links to the Yaquina road; thence easterly with the meanderings of the road sixteen (16) chains and seventy (70) links to the division line of said claim; thence southerly along said division line of said claim twenty-two (22) chains and sixty-five (65) links, to the place of beginning. The intention of this conveyance is to convey forty (40) acres of land out of the southeast corner of the west half of said claim, extending northerly to the Yaquina road, in as nearly square shape as can be had." That immediately after the execution and delivery of the deed from Ketchum to Critcherson the latter went upon and established the boundaries of said land in accordance with the amended description. That Ketchum was present, and afterwards assisted said Critcherson in the erection of buildings and other valuable improvements on the premises so

intended to be conveyed, but outside of the limits included by measurement from the initial point, according to the erroneous description. That said Critcherson is the son of, and acted for, the plaintiff, who furnished the money to make the purchase of said premises, and for the improvements placed thereon, and that on September 14, 1899, she had said premises conveyed to her by the description contained in the deed to her son, and went into possession of the premises intended to be conveyed with the knowledge and consent of the defendant M. B. Ketchum. That she removed from the state in July, 1890, and thereafter the defendants took possession of that portion of the premises lying between the county road and the 40-acre tract described in the Ketchum deed and the house thereon, and claim to have some right thereto adverse to the plaintiff. Wherefore she prays for a decree correcting the description of said premises, for judgment for the rental value thereof while in the possession of the defendants, and for her costs and disbursements. The defendant Amanda Ketchum, for her separate answer, after denying the allegations of the complaint, alleges the conveyance of said premises to her by said Root and wife; that she is an innocent purchaser for a valuable consideration, without notice or knowledge of any claim or equity of the plaintiff. The defendant M. B. Ketchum, for his separate answer, after denying the allegations of the complaint, alleges that since July 9, 1890, he had no interest in, or claim to, any of the disputed premises. The replies deny the allegations of new matter in the separate answers, and the cause, being at issue, was referred to take and report the evidence to the court, which having been done, the court found that the equities were with the plaintiff, and decreed a reformation of said deed, rendered a judgment for \$114 for the rental value of said premises, and for the costs and disbursements, against the defendants, from which they appeal.

S. T. Jeffreys, for appellants. W. G. Cleland, for respondent.

MOORE, J., (after stating the facts.) The plaintiff fails to allege that it was Critcherson's intention to purchase, or Ketchum's to sell and convey, the real property mentioned in the amended description, or that there was any contract entered into between the said parties, or that the mistake, if any, in the execution of the deed, was mutual; and the defendants contend that, on account of this failure to so allege, the complaint does not state facts sufficient to constitute a cause of suit. It is true that, in a suit to reform a deed for mutual mistake, the complaint should distinctly set forth the original agreement and understanding of the parties, point out with clearness and precision wherein there was a mistake, and show that it did not arise from gross negligence of the plain-

tiff. *Lewis v. Lewis*, 5 Or. 169. In the case at bar it is alleged that, to make the deed conform to the actual intention of the parties, the description should be amended so as to read as described in the complaint. The record shows that a general demurrer to the complaint was interposed, which, by consent, was overruled, and the defendants filed their answers. In *Hyland v. Hyland*, 19 Or. 51, 23 Pac. 811, it was held, a similar complaint being under consideration, that it was not a case of a defective cause of suit, but of a defective statement of it; that, if the case had been presented in this court upon demurrer to the pleading, the demurrer would probably have been sustained; and that, having answered, every reasonable inference should be in favor of the complaint that could be drawn therefrom. If it had been the intention of Critcherson to purchase the real property mentioned in the amended description, and the intention of Ketchum to grant and convey another tract, then the minds of the parties never met or agreed upon the terms of the contract, and hence the mistake, if any, could not have been mutual. But here, while conceding that the description in the deed is different from that now sought to be established, the plaintiff distinctly alleges that it was the actual intention of both parties to purchase and convey the property by the description as amended. Hence it follows that, in the absence of a demurrer to the complaint, these necessary allegations are reasonably inferred. Section 855 of Hill's Code furnishes the following rule for construing the descriptive parts of a conveyance when the construction is doubtful, and there are no other sufficient circumstances to determine it: "(2) When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount." The southeast corner of the west half of the donation land claim of John Phillips and wife in Benton county, Or., is shown by the record to be a permanent and visible monument, forming the initial point of the premises intended to be conveyed. The county road mentioned in one of the calls of the deed is also a permanent and visible monument, but is inconsistent with the line described as the north boundary of the tract conveyed. If there were no other sufficient circumstances to determine the tract intended to be conveyed, under the statutory rule of construction, the premises would be held to include the land described as follows: "Beginning at the initial point, and running thence westerly along the south line of said claim 80 rods; thence northerly 80 rods, more or less, to the center of the road; thence easterly with the meanderings of the road 80 rods or more, to the east line of the west half of said claim; and thence southerly 81 rods, more or less, to the place of beginning." The permanent and visible monument at the

southeast corner, and the said road on the north of the tract, would thus become paramount to the lines, angles, and even the surface, if it were not for the limitation that: "the intention of this conveyance is to convey forty (40) acres of land out of the southeast corner of the west half of said claim, in as near square shape as can be had." The intention of the parties is to be ascertained by considering all the provisions of the deed, and it is the duty of the court to give effect to such intention, if practicable. 2 Devl. Deeds, § 838. Under the rules of construction above given, qualified by said limitation, the amended description must necessarily express the intention of the parties.

F. Critcherson testified that the premises had not been surveyed when he made the contract of purchase with M. B. Ketchum: that a fence containing 79 panels extended from the southeast corner along the east boundary to the county road, which they estimated at one rod to the panel, and added two rods to make the line extend to the center of the road; that he and Ketchum estimated the west boundary would intersect the county road at a gate near some willows; and that the site for the dwelling house was selected by him at Ketchum's suggestion, in order to procure a supply of water and to be sheltered from the wind. John McGee testified that Ketchum told him they counted the panels of the fence on the east boundary to determine its length, and that he showed the witness a straw stack, where he said he thought the west line would intersect the county road. W. H. Dilly testified that Ketchum told him how they obtained the length of the east boundary, and that they added two rods to extend it to the center of the road. A. B. Alexander testified that he hauled the lumber for the dwelling house erected upon the disputed tract, and that Ketchum told him where to unload; that Ketchum also told him how the lines would run, and said the west boundary would probably be near a straw stack he showed the witness. M. B. Ketchum did not deny that he told McGee, Dilly, and Alexander how the lines would run, or that the west boundary would intersect the county road near said straw stack, but testified that he did not remember of having told them where the lines would probably run; that he might have told the witnesses that the line extended to the road near the straw stack. The evidence also shows that Ketchum assisted Critcherson in building the dwelling house, and saw the improvements as they were being made; but he testifies that they were placed there by him, and it was agreed that, if Critcherson did not purchase the disputed tract, a right of way across it to Critcherson's land should be granted for one dollar. The deed describes the east boundary as being 81 rods, which corroborates the testimony of the witnesses that it

was ascertained by counting the panels of said fence, and adding two rods to extend it to the center of the road. The evidence shows that a straw stack stood near a cluster of willows, and that the survey, according to the amended description, is within about two rods of said straw stack. Without quoting more of the testimony, we think it shows, beyond a reasonable doubt, that the parties intended to convey by said deed the premises mentioned in the amended description. The record also shows that the defendant Amanda Ketchum accepted a quitclaim deed, in which it was sought to convey to her the disputed tract, and she contends that she is an innocent purchaser for a valuable consideration, without knowledge or notice of plaintiff's claim thereto. This deed to her fixes the initial point 81 rods north of the southeast corner of Rhoda Phillips' donation land claim. The government patent grants the north half of said claim to Rhoda Ann Phillips; and, as the premises in question are situated in the west half thereof, the initial point in the deed to Amanda Ketchum appears, from the description given in the patent, to be more than a half mile distant from the northeast corner of the tract described in the deed to Critcherson, and hence does not embrace any of the land in controversy, and, even if her deed had been one of general warranty, it could not support her contention. The decree must therefore be affirmed.

COUGILL v. FARMERS' & MERCHANTS' INS. CO.

(Supreme Court of Oregon. Feb. 26, 1894.)

ACTION ON JUDGMENT—PETITION—SUFFICIENCY.

In an action on a judgment, the petition stated that plaintiff recovered it in the superior court of Washington; that it had never been paid, and was still in force; that on defendant's motion such court vacated the judgment; that thereafter the supreme court reversed such order, and gave plaintiff judgment for costs in the supreme court. It was not alleged that there was any remittitur to the superior court. *Held*, that the petition did not state a cause of action.

Appeal from circuit court, Linn county; George H. Burnett, Judge.

Action by Mary Cougill against the Farmers' & Merchants' Insurance Company on a foreign judgment. From a judgment for plaintiff, defendant appeals. Reversed.

C. E. Wolverton, for appellant. H. H. Hewitt, for respondent.

BEAN, J. This is an appeal from a judgment of the circuit court for Linn county in favor of the plaintiff, rendered in an action on a judgment of a sister state. The only question argued or presented on this appeal, and which has been here raised for the first time in the case, is as to the sufficiency of the complaint. It alleges, in substance, that

on the 11th day of December, 1890, in an action then pending in the superior court of Jefferson county, Wash., the plaintiff herein recovered a judgment against the defendant for the sum of \$1,451.80, together with her costs and disbursements, taxed at \$36.85; that no part thereof has ever been paid, and that the same remains in force and effect, not satisfied, reversed, or otherwise vacated; that on June 27, 1891, the said court, on motion of the defendant, vacated, annulled, and set aside such judgment, and that thereafter such proceedings were had that a writ of certiorari issued from the supreme court of said state to the judge of the superior court, commanding him to certify up to the supreme court the record of the proceedings in said cause; that subsequently such proceedings were had in the supreme court as that on the 9th day of February, 1892, a judgment was duly rendered against the defendant, and in favor of the plaintiff, in which it was adjudged that the order of the superior court vacating the judgment be set aside and held for naught, and that plaintiff recover her costs in the supreme court, taxed at \$63.50.

It is admitted by counsel for defendant that the facts set forth in the complaint would have constituted a cause of action, if they had been confined to the existence of the judgment, and that it remained in full force and effect. But his contention is that the plaintiff having averred that such judgment had been set aside and vacated by the court in which it was rendered, and that the cause had been taken to the supreme court by the plaintiff on a writ of certiorari, it must be presumed, in the absence of any allegation to the contrary, that the cause is still in the supreme court, and that inasmuch as that court did not affirm the judgment so vacated, or render a judgment in plaintiff's favor, but simply reversed the order of the lower court, (*State v. Sachs*, 3 Wash. St. 691, 29 Pac. 446,) it therefore does not appear that there is any judgment upon which this action can be maintained. Under the system of procedure in the state of Washington, as we understand it, the supreme court has original jurisdiction to issue a writ of certiorari, in a common-law sense; and at common law this writ was issued to remove a record from an inferior into a superior court, to be there examined and affirmed or reversed according to law, and, when so removed, it remained in the superior court until remitted by order of that court, though the writ be quashed. *Jaques v. Cesar*, 2 Saund. 100, and note. Until such remittitur be made, the judgment is not again in the court from which it was certified, and such court has no jurisdiction of the cause. *Welsh v. Brown*, 42 N. J. Law, 323; *State v. Adams*, (N. J. Sup.) 24 Atl. 482. So that, when the record of the superior court of Jefferson county was removed by certiorari to the supreme court, it there re-

maigned until remanded; and, there being no judgment in the superior court, because of its having been vacated by that court, and the cause never having been remanded, it necessarily follows that the complaint does not show a judgment in favor of plaintiff, upon which this action can be maintained.

It was argued by plaintiff's counsel that the complaint states two causes of action: One upon a judgment of the superior court, and the other on a judgment of the supreme court for costs; and having alleged that the judgment of the superior court still remains in full force and effect, and has not been reversed or annulled, it states a cause of action on that judgment; and the question as to whether a remittitur from the supreme court has ever issued is solely a question of proof. This would probably be true if the complaint had not also averred that the judgment had been vacated and set aside by the court in which it was rendered; and hence it shows on its face that there is no judgment of that court, unless the effect of the action of the supreme court in reversing the order setting it aside is to revive the judgment without a remittitur, which we do not understand to be the law.

Again, it is claimed that only the order purporting to vacate the judgment, and not the entire cause, was taken to the supreme court on the certiorari proceedings, and therefore the judgment remained unaffected by such proceedings. But, under a writ of certiorari, it was necessary to certify up the whole record, and it appears from the complaint that, while the proceedings were instituted for the purpose of testing only a single question, the entire record was removed to the supreme court, and consequently the proceedings in the court below were suspended until the cause was again regularly remitted to that court. *Hunt v. Lambertville*, 46 N. J. Law, 59.

It follows, therefore, that the complaint does not state facts sufficient to constitute a cause of action; and the judgment of the court below must be reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

LORD, C. J., being interested in the result, took no part in this decision.

STATE v. HANSEN.

(Supreme Court of Oregon. Feb. 19, 1894.)

MURDER—FIRST DEGREE—INSANITY AS A DEFENSE—INTOXICATION.

1. On the defense of insanity superinduced by alcoholism, the sheriff's testimony, that on the day after the homicide accused had no symptoms of delirium tremens, is admissible, in the trial court's discretion, even if the sheriff be not so intimate an acquaintance as to make his opinion, with reason given, competent, under Hill's Code, § 706.

2. Accused having, before consulting coun-

sel, formally confessed that he struck his wife the fatal blow after she had quarreled with and thrown a rock at him, and a witness having sworn that accused told him that he struck the blow without provocation, on a sudden impulse, which he could not explain, there was no error in admitting testimony that such statement was made after accused had consulted with his counsel.

3. Proof that deceased kept her money in a certain drawer, whose key she carried in her pocket; that the key was found in the drawer; that accused, her husband, just before her death, had no money, and when arrested, the day after, had \$52.25; that there remained in the drawer \$5 in money and \$1,200 in negotiable paper,—is admissible to corroborate accused's confession that after her death he took the key from her pocket and opened the drawer, and also to show his connection with and motive for the crime.

4. A charge that the defense of insanity must be made out beyond a reasonable doubt, "and, if you have any doubt as to whether the prisoner * * * was sane or insane, the state is entitled to the benefit of such doubt," is not erroneous for omitting the word "reasonable," in connection with proper general charges on the doctrine of reasonable doubt.

5. Hill's Code, § 1358, permitting the jury, in cases involving actual "motive, purpose, or intent," to consider the fact that the accused was intoxicated at the time,—the defense being an insane impulse induced by intoxication,—the court properly waived question of "motive and purpose," and directed the jury to consider the intent.

6. A charge that "if deliberation, premeditation, malice, or cool blood existed, and the killing is the result of them," intoxication is no defense, is not error, as making either element enough to establish murder in the first degree.

7. There being no contention that the killing was effected in the commission of a felony, a charge, following the statute, to the effect that the first degree required some other evidence of malice than the mere killing, unless so effected, was not error.

8. There was evidence that when accused went home, the day before his wife's death, he said he had not a nickel; that the keys of the bureau in which she kept her valuables were probably in the pocket of her dress, which pocket was found turned inside out; that accused, after striking her down, took the keys from her pocket, and opened some of the bureau drawers, before he told any one of her death; that accused, when arrested, next day, had \$52.25 on him. Held sufficient evidence of deliberation and premeditation.

9. Under Hill's Code, § 1358, requiring insanity, as a defense, to be proved beyond a reasonable doubt, the jury's finding on that question cannot be disturbed.

Appeal from circuit court, Clatsop county; T. A. McBride, Judge.

John Hansen, convicted of murder in the first degree, appeals. Affirmed.

O. W. Fulton, for appellant. Geo. E. Chamberlain, Atty. Gen., W. N. Barrett, Dist. Atty., and F. D. Winton, for the State.

MOORE, J. The defendant was indicted, tried, and convicted of the crime of murder in the first degree, by striking and killing his wife, Caroline Hansen, in Clatsop county; and, a motion for a new trial having been overruled by the court, the defendant was sentenced to be hanged. From this judgment he appeals, and assigns as error the admission of certain evidence, and the giving

and refusal of certain instructions. We shall consider the assignments in the order in which his counsel presents them:

1. He contends that the court erred in admitting in evidence the testimony of H. A. Smith, sheriff of said county. The defense interposed was insanity superinduced by the excessive use of alcoholic liquors, to support which evidence was introduced tending to show that for about 11 years prior to the alleged homicide the defendant had been in the habit of becoming intoxicated whenever he could obtain liquor; that, upon returning to his home after a drunken spree, he was restless, and could not sleep, or work continuously at anything, but changed from one thing to another, and that these nervous symptoms continued for about 8 or 10 days after each of his periodical sprees; that when he had been drinking for some time he talked to himself, as if he imagined there was a little man in his boat to aid him in picking up his net; that at times, when under the influence of liquor, he laughed, danced, and cried alternately; that during these sprees, or while getting sober, he was moved to tears by the mention of his wife's name in his presence; that deceased was killed on Wednesday, July 26, 1893, and that for some time prior to the preceding Sunday the defendant had been in Astoria, had purchased while there two gallons of whisky, and was so much under its influence on that Sunday that he remained in his boat alone, without any apparent purpose, and talked to himself; that on the evening of that day his wife had him brought home, where he remained until Tuesday night, when he went out fishing on the Columbia river; that on the following morning he visited a neighboring fisherman, to whom he complained of being sick, and took three drinks of whisky, and partook of some bread and coffee, but, when offered beefsteak, he said he could not eat it; that after partaking of these refreshments he went home, and retired to rest; that about 5 o'clock that evening he informed a person working near his house that some one had killed his wife. Upon the defendant's symptoms, thus described, hypothetical questions were asked medical experts, whose answers thereto tended to show that, at the time of the alleged homicide, defendant was insane. To rebut this evidence, the state, over the objection of defendant's counsel, was permitted to show by the testimony of H. A. Smith, the said sheriff who took the defendant into his custody the day after the tragedy, that in his opinion the defendant was perfectly sane on the day he was arrested. The objection to this evidence was made upon the ground that it did not appear that the witness was an intimate acquaintance of the defendant. The bill of exceptions shows that the witness had known the defendant for five or six years; that he saw him every month or so, when he came to town; and that said witness made the following an-

swers to questions propounded to him: "Q. Were you intimately acquainted with him? A. I was, for about two years. Not very intimately, but at the time I belonged to the Fishermen's Union. Q. He was in your office quite frequently during those two years? A. Yes, sir. Q. Were you up to his place visiting? A. Not until this time. Q. How frequently during these two years did you see him? A. I didn't pay any attention. It might be a month or so, or a couple of weeks. Q. Do you know him well? A. I know him pretty well." Upon these answers to the foregoing questions, the court permitted him to express an opinion upon the mental condition of the defendant. He also testified that he took the defendant to jail about 8 o'clock in the evening, and saw him about three times during the night after his arrest, and that he did not notice any tremor of his muscles. Section 706, Hill's Code, provides that evidence may be given on the trial of the following facts: "(10) * * * The opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given." It is not every acquaintance that is competent to give an opinion in such cases, but it must be one who has close social relations with the person whose mental condition is the subject of inquiry. There are, however, degrees of intimacy; and it is within the discretion of the trial court to say when the witness has shown himself competent and qualified to express an opinion upon the subject, and this discretion, when exercised, will not be reviewed, except in case of abuse. *People v. Pico*, 62 Cal. 52; *People v. Levy*, (Cal.) 12 Pac. 794; *State v. Murray*, 11 Or. 413, 5 Pac. 55. But even if reviewable, and found to have been exercised erroneously, the defendant could not have been injured by this evidence, for the reason that it was confined to the defendant's symptoms, and that the sheriff's opinion was predicated upon his mental condition on the day after the alleged homicide. The fact that he did not have the symptoms of a person suffering from an attack of delirium tremens, and was not then, in the opinion of the officer, insane, did not prove that at the time the act was committed he was not laboring under an insane delusion. The most that can be claimed for it is that it might strengthen the inference that if the defendant did not have those symptoms, and was not, in the opinion of the witness, insane, the day after the commission of the act, that therefore he was sane when it was committed. It is within the discretion of the trial court to admit evidence upon the question of the sanity of the person accused, at the time of committing an offense, and of his acts, conduct, and habits at a subsequent time, which would fairly justify any inference of insanity relating back to the time of the alleged offense. *Com. v. Coe*, 115 Mass. 481; *Com. v. Pomeroy*, 117 Mass. 143.

2. The state, upon the cross-examination of Victor Hansen, defendant's son, showed by him that the first time he saw his father after he was placed in jail was on Saturday forenoon, and, over objection, was permitted to show that defendant's counsel was with him at the jail, and had a conversation with his father. The record shows that on Saturday morning, just before the defendant was visited by his counsel, he made the following confession: "On Wednesday, July 26th, last, I was duly sober all day. I left Burnside's scow about 6:30, and went home, and met my wife coming from Svenson's. When I got in the house, I laid down on the sofa. She said, 'If you don't go to work, I will kill you.' I said, 'I have been out fishing all night, and I now want to rest.' I then went up stairs, to bed. I slept then until the steamer Miller whistled. In the afternoon, about 3:15, I then got up, and went down stairs to urinate, and my wife was then sitting in front of the house. After I got through urinating, I went up stairs again, and laid down in the bed until about 3:45. I went down stairs again, and my wife told me to help her pick berries. I said, 'I have little time, but I will help you anyhow; but I want to give the chickens water first.' My wife was then in the raspberry patch, alongside of the chicken house, picking berries. I then helped her pick berries. While we were picking berries, she said, 'If you don't leave the place, I will kill you.' I said, 'I don't want to leave.' She then picked up a rock, and threwed it at me. I had a stick and an ax standing by the chicken house, with the intention of driving it out in the pasture to tie the calf on. The stick was about 3 feet long, with a knot close to the end. I struck her with that stick, and the knotty part hit her on the head. I was standing behind her, a little to the left, and she was stooping down a little, picking berries. She never said nothing after she fell in the place where she was found. I stayed there with her until she was dead. I then went back to the house, and stayed there about 2 minutes, and then went back again to where my wife laid, and looked at her, and then went away again. It was about 4:45. I then went to the tide land, and notified John Nylund, and told him the same as I testified to at the coroner's inquest. After I came back from the tide land, before Nylund got to the house, I chopped part of the stick I killed my wife with, and put it in the wood box, and that evening burned it up in the stove. John Hansen. Signed in the presence of H. A. Smith, F. I. Dunbar. Done on Saturday morning, July 29th, 1893." The following statement was made by the defendant, and added to the confession, but was not signed by him: "After she was dead, and lying where she was found, I took the keys out of my wife's right-hand pocket of her dress; and I went in the house, and opened the lower drawer of the bureau, to look for some papers, and

found a bottle of Kimmel. There was about one good swallow in the bottle, and I drank that, and then took out the keys and put them in the upper drawer, but I never opened it. I was duly sober, and in good humor." The confession was introduced in evidence by the state, which also called Peter Svenson, who testified that defendant, while in jail, and after he had seen his counsel, in speaking of the alleged homicide, admitted "that he did it," and said: "There was a club lying there that was to change the calf in the pasture, and he took up that club to change the calf; and all of a sudden he had an impulse, and took the club, and hit his wife over the head. He said he had no care for it whatever, and he didn't know at that minute what he done it for; but he said he done it, and he didn't hardly know how it happened, himself, at the time." The latter confession materially differed from the former, and tended to support the theory of the defense. In offering it in evidence on the part of the prosecution, the witness was permitted to testify that it was made by the defendant after consultation with his counsel. This, it is contended, was error. No evidence was offered of what was said at any time between the defendant and his counsel. How, then, was he prejudiced by proof of the fact that his counsel visited and conferred with him? He had a right to employ and consult counsel, in order to prepare for his defense. The bill of exceptions does not show that counsel for the state alluded to or commented upon this fact in the argument, or that defendant took exceptions to any argument tending to lead the jury to infer that the theory of the defense was formulated at the time defendant and his counsel had this conference. The question to which the testimony objected to was a response was asked in the cross-examination of the defendant's witness upon a collateral matter, and in such case it is largely within the discretion of the trial court to say to what extent the inquiry shall be extended. 1 Greenl. Ev. § 449.

3. The defendant's counsel contends that the court erred in admitting testimony as to the nature and value of the estate of deceased. The testimony objected to tended to prove that deceased kept her money in the bureau drawer, the key to which she was in the habit of carrying in her pocket; that when the body was discovered the key was not there, but was found in the bureau drawer; that defendant, just prior to the alleged homicide, had no money; and that when the sheriff arrested him, there was found upon his person \$52.25. It also appears that the state was permitted to show by Victor Hansen, administrator of his mother's estate, over the objection of defendant's counsel, that after his mother's death he found in said bureau drawer \$5 in money and certificates of deposit and notes to the amount of \$1,200. This evidence was ad-

motive for its perpetration. *Hendricksen v. People*, 10 N. Y. 13.

4. The defendant's counsel contends that the court erred in giving the sixth instruction, to which he excepted, and which is as follows: "Among the defenses suggested in this case is insanity. The defense of insanity, or mental incapacity to form an intent or to deliberate, is a defense that the defendant as a perfect legal and moral right to avail himself of, if he can establish it; and it is our duty, under your oaths, to give to the evidence on this branch of the case the same careful consideration that is required of you as to the other portions of this case. The law presumes every man to be sane until he establishes in the mind of the jury, beyond a reasonable doubt, the fact of his insanity. In other words, the burden is upon the party claiming insanity as a defense to make out that defense beyond a reasonable doubt. And if you have any doubt as to whether the prisoner, at the time of the commission of the alleged homicide, (if he did commit it,) was sane or insane, the state is entitled to the benefit of such doubt, and you should reject such defense." The court, in its general charge, correctly defined a "reasonable doubt," and in the foregoing instruction informed the jury that: "The law presumes every man to be sane until he establishes in the mind of the jury, beyond a reasonable doubt, the fact of his insanity. In other words, the burden is upon the party claiming insanity as a defense to make out that defense beyond a reasonable doubt." Then the court says: "Now, if you have any doubt," etc. What meaning could a person of common understanding gather from the word "any," used in that connection, other than that it referred to such a doubt as he had twice previously alluded to in the same paragraph? The word "such" might have been a better selection; but, however that may be, to hold that the jury were instructed that if they entertained any doubt, however slight or trivial, they must give the state the benefit thereof, would be to render the preceding part of the charge perfectly senseless. But assume that the word "reasonable" was inadvertently omitted after the word "any." Was the alleged error corrected by other instructions? "Although," says Mr. Rice, "an instruction, considered by itself, is too general, yet if it is properly limited by others given on the other side, so that it is not probable it could have misled the jury, judgment will not be reversed on account of such instruction." 3 Rice, Ev. § 140. The seventh and tenth instructions given by the court are as follows: (7) "It is not every crotchet or mere crankiness, or eccentricity of mind, never well established, that will excuse the commission of an act otherwise criminal. If the party, notwithstanding some mental dis-

ture and quality, and has left the power of deliberation and premeditation, and the power to do or refrain from doing the act charged as a crime, such mental disease will not avail as a defense. In other words, while the law will not punish a man for an act which is the result of, or produced by, mental disease, it will punish him for an unlawful act not the result of, or produced or influenced by, mental disease, even though some mental unsoundness is shown to have existed. Voluntary drunkenness is no excuse for a crime, and our statute provides that no act shall be any less criminal by reason of the fact that the party committing it was in a state of voluntary intoxication. You can, therefore, only consider intoxication in determining whether or not the defendant was in such a state of mind as to be capable of having an intent to kill, and in determining whether there was premeditation, deliberation, malice, or cool blood. There shall be some other evidence of malice than the mere proof of the killing, to constitute murder in the first degree, unless the killing was effected in the commission or attempt to commit a felony; and deliberation and premeditation, when necessary to constitute murder in the first degree, shall be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood, and not hastily, upon the occasion. But if deliberation, premeditation, malice, or cool blood existed, and the killing was the result of them, the fact (if it be a fact) that he was intoxicated, or under the influence of liquor, when he committed the alleged homicide, (if you find that he did commit it,) is no defense. That is to say, if he was too much intoxicated or too insane to deliberate or premeditate, you cannot convict him of murder in the first degree; if he was too much intoxicated to have an intent to kill, you cannot convict him of murder in the second degree; and if, from all the testimony in the case, you have a reasonable doubt on these subjects, you should give him the benefit of such doubt. But beyond this you cannot go, remembering all the time that the law presumes every man sane and sober until the contrary state is shown to exist." (10) "This is a criminal case, and, before you can convict the defendant, you must be satisfied beyond a reasonable doubt of every fact necessary to constitute the crime charged in this indictment. That is to say, if you have a reasonable doubt as to any fact that would be necessary to constitute murder in the first degree, you could not convict him of murder in the first degree. If you have a reasonable doubt as to the deliberation, premeditation, malice, or purpose, you could not convict him. If you have a reasonable doubt as to the malice and purpose, you could not convict him of murder in the second degree. He has

the right to the benefit of a reasonable doubt at all stages of the case. But by 'reasonable doubt' is not meant every possible doubt that may arise in a man's mind, because there is nothing but what is open to some possible doubt. It has been defined as a doubt that leaves your mind in that condition that you cannot say you have an abiding conviction, to a moral certainty, of the truth of the charge, and therefore of the guilt of the defendant. It must be a doubt arising naturally out of the facts of the case. It is not a mere imaginary doubt, conjured up from your sympathies or from your prejudices, or to escape the consequences of a verdict; but it must be a substantial doubt,—such a doubt as would cause you to pause and hesitate upon the most important affairs of your life. If you have such a doubt, you should give the defendant the benefit of it. If you have a doubt whether he killed the deceased or not, or whether the blow was the cause of the killing, or if you are satisfied the killing was unlawful, but if you have a doubt as to what degree it is, you should acquit him of the degree concerning which you have a reasonable doubt. You should give the defendant the benefit of all reasonable doubts, and there is no technical way of judging it, other than using your ordinary, plain, common sense and judgment. You are to take this testimony, and judge it as a whole, weighing all the facts in the case." In *State v. Johnson*, 74 Am. Dec. 321, an instruction had been given that failed to contain the element of premeditation, in defining the crime of murder in the first degree. The bill of exceptions in that case did not include the other instructions, and it nowhere appeared that this element had been correctly defined, yet the court, in commenting upon the probability of the correct interpretation of the element of premeditation being contained in the other instructions, say: "If it so appeared from the record, we might be justified in holding, taking the instructions together, that there was no prejudice to the prisoner's cause from its omission in the third instruction." "It is not contended," says *SeEVERS, C. J.*, "that every proposition should be accompanied with or qualified by the doctrine of reasonable doubts. It is sufficient if the court says that every fact necessary to convict must be established to their satisfaction beyond a reasonable doubt." *State v. Maloy*, 44 Iowa, 104. If, then, the omission of the word "reasonable" made the instruction too general, it was properly limited by others.

The remaining question is directed to the inquiry, is it probable that the jury was misled by the omission? Whenever the instructions, considered as a whole, are substantially correct, and could not have misled the jury to the prejudice of the defendant, the judgment will not be reversed because some instruction, considered alone, may be subject to criticism. *People v. Cleveland*, 49 Cal. 578; *Story v. State*, 90 Ind. 413. It must be pre-

sumed that each member of the jury possessed at least ordinary common sense, and was capable of understanding the whole charge in its connected relations and in its application to the facts of the case. *People v. Bagnell*, 31 Cal. 409. The instructions given by the court fully state the law as applicable to the facts of the case at bar, and the judgment ought not to be reversed except for some palpable error which would afford a dangerous precedent. *Stout v. State*, 90 Ind. 1. Courts owe a duty to persons accused of the commission of crime, to see that they have a speedy, fair, and impartial trial in the mode prescribed by law; and, while this is true, they also owe a duty to society, to suppress crime, and punish those who have been legally convicted thereof. In the discharge of this duty, we are not unmindful of the importance of avoiding the adoption of any rule which might become dangerous as a precedent; but we fail to see that any dangerous precedent would be established by adopting the rule that instructions should, in criminal as well as in civil cases, be considered in their entirety, and that a single instruction which might be subject to the criticism of being too general, when not misleading, furnishes no just reason for reversing a judgment, when properly limited by other instructions that correctly state the law.

5. Defendant's counsel contends that the court erred in refusing to give the following instructions requested by the defendant: (3) "I charge you further, in regard to the question of the defendant's intoxication at the time of the killing of deceased, (if you find that he killed her,) it is provided by the statutes of this state that 'whenever actual existence of any particular motive, purpose or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the defendant was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act.' Now, in order to constitute the crime charged, there must have been purpose and intent on the part of the defendant to commit it, and therefore, if you find that, at the time of killing deceased, (if you find defendant did it,) defendant was intoxicated to such an extent—or laboring under temporary insanity, by reason of previous intoxication or excessive use of alcoholic liquors, to such a degree—that he was incapable of forming a purpose or intent, you cannot find him guilty of murder in the first degree." (4) "The fact (if you should so find it) that defendant killed the deceased, even though you should find that he did it willfully and maliciously, is not sufficient, alone, to convict him of murder in the first degree. In addition to these elements, there must be proof of deliberation and premeditation. And, in order to prove premeditation and deliberation, there must be some evidence of a de-

sign,—of premeditation and deliberation,—such as would be evidenced by lying in wait, by the administering of poison, or some kindred act showing a previous consideration of the act, and that the act was done deliberately, formed and matured in cool blood, not hastily upon the occasion; otherwise, you cannot find the defendant guilty of murder in the first degree.” The questions presented by these requests are embodied in the seventh instruction given by the court. That portion of section 1358 of Hill’s Code applicable to the question of intoxication as a defense is as follows: “Whenever the actual existence of any particular motive, purpose or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the defendant was intoxicated at the time in determining the purpose, motive or intent with which he committed the act.” It will be observed that the instruction given by the court omitted the words “purpose and motive,” and limited the inquiry to the defendant’s state of mind, as to whether, from the effect of intoxication, he was capable of having an intent to kill. His motive for the act may have been to acquire personal gain, or to gratify his anger or revenge; and yet, if he were too intoxicated to premeditate and deliberate upon an intent to kill, he could not have been convicted of murder in the first degree, as the court charged the jury. The intent with which he committed the act, and not the motive or purpose, is the test of his criminal liability, in determining the degree of his guilt; and hence, under the evidence in the case, the omission of these words could not have been prejudicial to his rights, under the instruction given by the court. Had self-defense been the issue, as indicated in the first confession, then the motive and purpose of the act might have been material questions; but this theory was abandoned, and the defense of an insane, irresistible impulse was substituted therefor, in which motive and purpose, under the evidence in the case, did not form an element.

Another objection to the seventh instruction, as presented by the requests, is urged to that part of it which says: “But if deliberation, premeditation, malice, or cool blood existed, and the killing is the result of them, the fact, if it be a fact, that he was intoxicated or under the influence of liquor when he committed the alleged homicide, (if you find that he did commit it,) is no defense.” From this it is contended that the court told the jury, in effect, that, if malice existed, then intoxication could not be considered; that the use of the word “or” after the word “malice” made either element, viz. deliberation, malice, or cool blood, sufficient to constitute murder in the first degree; and that intoxication would not reduce the grade. This contention might be tenable if the court had used the word “either” in referring to the several elements, but it will

be observed that the word there used is “them,” and hence it follows that all these elements were necessary to overcome the fact of intoxication, if it existed; and certainly the instruction was as liberal as the defendant could reasonably expect.

The fourth request is also embodied in the seventh instruction, but it is contended that since there was no claim at the trial, nor charge in the indictment, that the killing was effected in the commission of any felony, it was error to include in the instruction the words, “unless the killing was effected in the commission or attempt to commit a felony.” The court, in this part of the instruction, quoted the language of the statute; and, there having been no charge or claim that the killing was effected in the commission or attempt to commit a felony, the jury must have realized that they were instructed that the proof of premeditation and deliberation, in addition to the mere fact of killing, was required.

6. Defendant’s counsel also contends that the court erred in failing to give the following instructions requested by the defendant: (7) “The deliberate use of a deadly weapon by the defendant, and the fact that he killed the deceased with it, without further proof of deliberation and premeditation, is not sufficient to constitute murder in the first degree. Therefore, if you should find that the defendant purposely and maliciously killed the deceased by the deliberate use of a deadly weapon, but that there is no other proof of deliberation and premeditation than the fact of the killing, and the deliberate use of such weapon in killing her, or if you entertain a reasonable doubt in this respect, you cannot find him guilty of murder in the first degree, but of murder in the second degree only.” (10) “I further charge you that, in order to find the defendant guilty of murder in the first degree, you must be satisfied beyond a reasonable doubt that he was in such a condition of mind as to be able to deliberate and premeditate; and you must be satisfied beyond a reasonable doubt, by evidence in addition to the mere fact of the killing of the deceased and the deliberate use of a deadly weapon, that in so doing he did it of deliberate and premeditated malice; otherwise you cannot find him guilty of murder in the first degree.” In the seventh instruction, supra, the court charged the jury that there must be other evidence of malice than the mere proof of killing, to constitute murder in the first degree, and fully covered these requests.

7. It is further contended that the court erred in failing to give the following instruction requested by the defendant: (9) “I instruct you that in this case there is not sufficient proof of premeditation and deliberation, and therefore you cannot, in any event, find defendant guilty of a higher crime than murder in the second degree,”—and that there was no evidence of malice, in addition

to the mere fact of killing, to support the charge of murder in the first degree. The testimony shows that when the defendant returned from Astoria, on Sunday evening preceding his wife's death, he stated that he did not have a nickel; that he was at home at the time she was killed; that deceased kept her money and valuable papers in a bureau, the keys to which, probably, were in the pocket of the dress she had on when she was killed; that the pocket in this dress was partly turned inside out when the body was first seen by others; that the defendant took the keys from her pocket after striking her with the club, and opened some of the drawers of this bureau before he notified any one of her death; that the person who first went to the house after her death found the keys in the bureau; that this person, who was a witness at the trial, had left his money with the deceased, and when he saw the keys in the bureau he told the defendant that his money was lost; that the defendant said to him, "You never lost a nickel. Your money is there all right;" that this witness and the defendant then went to the drawer, and looked for the witness' money, but did not find it; that the witness went away, leaving the defendant in the room where the bureau was, and in a few minutes returned, and found his money among some clothing in the bureau; that the defendant was present when the witness found the money; and that when the defendant was put in jail, on Thursday evening, the sheriff found \$52.25 on his person. This evidence was in addition to the proof of killing, and it was a question of fact for the jury to say by its verdict whether from these circumstances an inference that the defendant had deliberated and premeditated upon the commission of the act before he struck the fatal blow could reasonably be drawn, and hence there was no error in refusing to give the instruction requested.

Defendant's counsel contends, further, that the first confession, made to the sheriff, in which he stated that his wife, to whom he had been married 30 years, and with whom he never had any difficulty; that she, who had always treated him with affection, should, without any provocation, throw a stone at him, is absurd; and the further statement therein that he was duly sober and in good humor when he killed her conclusively shows that when he made this confession he was insane, and that the subsequent confession, made after he had recovered from the effects of the liquor, further confirms this conclusion; that the evidence of his habits, symptoms, and mental condition when recovering from a protracted drunken debauch, and the testimony of the medical experts, show beyond a reasonable doubt that at the time the defendant struck the fatal blow he had not sufficient control of his mental faculties to premeditate and deliberate upon the atrocity of the act, and therefore was incapable of form-

ing an intent to kill. Section 1358, Hill's Code, provides that: "When the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt." This statute requires the accused, when insanity is pleaded as a defense, to establish the fact beyond a reasonable doubt. It is not in the province of courts to question the policy of the law, or to say that the rule established in such cases is inhuman, or that the state should, in any contingency, be required to establish the fact of sanity, like any other fact, beyond a reasonable doubt. From the facts and circumstances of the case, the jury were at liberty, and it was their duty, to say by their verdict whether the design to kill was formed and matured in cool blood, and not hastily, upon the occasion, and having so found, under proper instructions from the court, covering all the issues of the case, the judgment must be affirmed.

WALKER v. DISTRICT COURT OF PINAL COUNTY et al.

(Supreme Court of Arizona. Jan. 30, 1894.)

WRIT OF PROHIBITION—APPEAL.

A writ of prohibition will not issue to the district court, forbidding the entertainment of an appeal from the probate court, on the ground that no appeal bond which would give it jurisdiction had been filed, as there is adequate remedy by appeal or error.

Application for a writ of prohibition. Petition by Juana Walker, through her guardian, Rosetta Jones, for a writ of prohibition against the district court, Pinal county, and Hon. Owen T. Rouse, judge of such court. Writ denied.

Fitch & Campbell and Bethune & McCabe, for petitioner. W. H. Barnes, Kibbey & Israel, and Wm. R. Stone, for respondent.

BAKER, O. J. In this matter there was an appeal taken from the probate court of Pinal county to said district court from a judgment finding the petitioner to be an heir at law of one John D. Walker, deceased. It is claimed that a sufficient bond on appeal was not filed, and therefore said district court acquired no jurisdiction to hear and determine such appeal. The petitioner appeared, and moved said district court to dismiss the appeal for want of jurisdiction, and upon such petition being denied, and the appeal being about to be heard, she prays us to issue a writ of prohibition against said court, to prevent the hearing of the appeal for the reason of want of jurisdiction. The question of a want of jurisdiction in the supreme court to issue such a writ by virtue of its original jurisdiction was extensively argued at the hearing, but, inasmuch as the determination of that question is not necessary to the conclusion which we have reached,

we do not express any opinion upon that subject. If the power exists in this court to issue the writ, the petitioner, we are convinced, has an adequate remedy by appeal or error from the action of the district court; and it is everywhere agreed that in such case the writ will not issue. Any other course, ordinarily, would bring all civil cases where jurisdictional questions are involved to this court by the writ, instead of appeal or error; a course not authorized by our practice. *People v. District Court*, (Colo. Sup.) 19 Pac. 541. There may be—we do not say there are—cases where the remedy by appeal or error might not be considered adequate, and the writ would issue; but even then we think that the question whether the remedy by appeal or error is adequate should be left, along with the question of jurisdiction, to be decided upon the application. 2 Spel. Extr. Relief, par. 1732. We are content to say the remedy by appeal or error, in this instance, is amply sufficient. The mere fact that to be put to trial and then to the appeal necessitates an expense and some delay is no answer to the conclusion. All litigation is, unhappily, attended with the same results. The writ is denied.

SLOAN and HAWKINS, JJ., concur.
ROUSE, J., not sitting.

BASHFORD-BURMISTER CO. v. AGUA FRIA COPPER CO.

(Supreme Court of Arizona. Jan. 24, 1894.)

JUDGMENT—DEFAULT—GOODS SOLD AND DELIVERED.

1. The fact that the court is in session does not invalidate the clerk's entry of default.

2. An answer filed after default, or motion to open a default, must show an excuse consistent with due diligence.

3. A mercantile business for sale of goods, mining supplies, etc., is an "industrial business," incorporable under Rev. St. U. S. § 1889, by territorial statute.

4. Nonpresentation of an account for goods sold and delivered is not a meritorious defense to an action for their price.

Appeal from district court, Yavapai county; before Justice John J. Hawkins.

Action by the Bashford-Burmister Company against the Agua Fria Copper Company on account for goods sold and delivered. Default entered, and motion to open denied. Defendant appeals. Affirmed.

J. F. Wilson, for appellant. Herndon & Norris, for appellee.

BAKER, O. J. Plaintiff below instituted suit upon a stated account, to recover a balance of \$421.10. The time for answering having expired, the clerk entered the default of the appellant, who, of course, was the defendant. Subsequently to such entry of default, the appellant filed its answer, consisting of an exception to the complaint, a

motion to make more definite, and a general denial. Upon motion, this answer was stricken from the files, or, which is virtually the same thing, set aside, for the reason that it was filed after the time had expired for answering, and a default had been entered. This action of the court is assigned as error. The appellant did not offer any excuse whatever why it had not filed the answer within the time allowed by law. It assumed, as a matter of course, that the court would set aside the entry of default made by the clerk, and suffer it to answer without first showing any diligence upon its part. The fact that the court was in session did not deprive the clerk of the power to enter the defendant's default. It was not a judgment. The court afterwards entered that. To set aside or strike the answer from the files, under these circumstances, was not error. The appellant subsequently, to wit, July 11, 1893 moved the court to open the default and permit the answer to be filed. This motion was denied, and this action of the court is assigned as error. But, again, the appellant failed to offer any excuse or reason why it had neglected to answer in the first instance. Apparently, it did not propose to excuse its delay at all; as if this was an inquiry with which the court had nothing to do. But the court did offer to permit the appellant to appear and defend, if it would file an affidavit of merits. Treating this motion itself as an affidavit of merits, (there being no other paper which it is possible to so designate,) it claims that inasmuch as the suit is upon a mercantile account, and as the appellee is a mercantile corporation organized under the laws of this territory, it can have no valid existence, because the act of the territorial legislature authorizing the formation of corporations for mercantile purposes is in conflict with section 1889, Rev. St. U. S., which is as follows: "The legislative assemblies of the several territories shall not grant private charters or special privileges, but, may, by general incorporation acts, permit persons to associate themselves together as bodies corporate, for mining, manufacturing, and other industrial pursuits; and for conducting the business of insurance, banks of discount, and deposit, (but not of issue,) loan, trust and guarantee associations, and for the construction and operation of railroads, wagonroads, irrigating ditches, and the colonisation of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association."

It is hardly possible that one will be suffered to obtain the goods of another, doing business as a corporation, and, retaining the goods, defeat a recovery by alleging the illegality of the act under which the corporation was formed. We do not care to countenance such a result. But it is evident that the territorial act is not in conflict with said section 1889, Rev. St. U. S. The term "in-

dustrial pursuit," for which the legislature may authorize corporations to be formed, is a very broad expression. For instance, it was decided by Judge Deady in *Wells, Fargo & Co. v. Northern Pac. R. Co.*, 23 Fed. 469, that the express business was "an industrial pursuit," within the meaning of that term. Just why the sale of goods, mining supplies, etc., should be less "industrial" than the express business would, in our opinion, be difficult to maintain. Besides, congress, in enacting section 1889, was endeavoring to prevent the granting of monopolies and special privileges, rather than specifying all the purposes for which corporations might be formed. And then, too, the mercantile business is certainly industrial; it is embraced in the words "industrial pursuits," according to their popular or ordinary usage. These views will be found in *Mercantile Co. v. Hulme*, 7 Mont. 566, 19 Pac. 213; *Wells, Fargo & Co. v. Northern Pac. R. Co.*, 23 Fed. 469. The objection that the account was not presented to appellant for payment before suit is without merit. If, then, we consider this motion as an affidavit of merits, the matter therein set up constitutes no defense. We see no error in the record; and as the court properly denied this motion, and proceeded to judgment upon proofs, the judgment is affirmed.

SLOAN and ROUSE, JJ., concur.

MEYER v. CULVER.

(Supreme Court of Arizona. Jan. 10, 1894.)

JUSTICE OF THE PEACE — FAILURE TO ELECT SUCCESSOR—HOLDING OVER—VACANCY.

Under Rev. St. par. 1393, declaring the term of office of a justice of the peace to be two years, and till his successor is elected and qualified, and paragraph 484, providing that all county and precinct officers shall hold office till their successors are elected and qualified, a justice of the peace, who is a precinct officer, in a precinct entitled to two justices, holds over where only one candidate receives more votes, and another the same number as he, and there is no vacancy to which an appointment can be made.

Appeal from district court, Pima county; Richard E. Sloan, Judge.

Action by Charles H. Meyer against William H. Culver. Judgment for defendant. Plaintiff appeals. Affirmed.

S. M. Franklin, for appellant. Heney & Ford, for appellee.

ROUSE, J. This suit was instituted by appellant against appellee to try the title to the office of justice of the peace, under the provisions of title 62 of the Revised Statutes of 1887. Precinct No. 1, Pima county, is entitled to two justices of the peace. Justices of the peace, in this territory, are elected for a term of two years. At the general election in 1890, M. R. Slater and the ap-

pellee were elected justices of the peace for said precinct No. 1, and on the 1st of January thereafter received their commissions according to law, and duly qualified and entered into the possession of said offices. At the general election in 1892, they were candidates for re-election, and at the same time W. F. Scott, C. A. Elliott, and the appellant were candidates for said offices. The votes cast for said offices were divided among the five candidates as follows: Scott, 368 votes; Culver, 303 votes; Meyer, 303 votes; Slater, 255 votes; Elliott, 224 votes. The board of canvassers declared that Scott was elected, and they further declared that, by reason of the tie between Meyer and Culver, neither of them was elected. The board of supervisors, at the meeting in January, 1893, duly commissioned Scott, and, acting on the theory that only one justice of the peace had been elected, and there was a vacancy, appointed and commissioned the appellant to fill said vacancy. After Scott received his commission and qualified, he received the books and papers pertaining to the office of justice of the peace from Slater, and entered upon the discharge of the duties of said office. After Meyer was appointed and commissioned by the board of supervisors, he demanded the books and papers of the office of justice of the peace from appellee, but Culver refused to give them up, and continued in the discharge of the duties of said office. Appellant then commenced this action, and in his complaint alleged, substantially, the foregoing facts. Appellee demurred to the complaint for the reason that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the judgment of the court sustaining the demurrer is the only question presented to us by this appeal.

The precinct mentioned was entitled to two justices of the peace. In this territory the term of office of a justice of the peace is two years, and until his successor is elected and qualified. Rev. St. par. 1393. It is also provided that "all county and precinct officers shall hold office until their successors are elected and qualified." Id. par. 484. A justice of the peace is a precinct officer. The appellee, William H. Culver, and Slater, having been elected justices of the peace for said precinct No. 1 at the general election in 1890, and having been commissioned as such in January, 1891, their terms of office were for a period of two years, and until their successors were elected and qualified. Each, therefore, would hold his office until January, 1893, and until his successor was elected and qualified. At the general election in 1892, of the five candidates for the office of justice of the peace for said precinct, Scott was the only one that was elected. He received more votes than any other candidate, and therefore was entitled to one of said two offices. It only remains for us to determine who is entitled to the other office. To fill

the two offices by election. It was necessary that two persons should receive more votes than any other candidate. Therefore, before Culver or Slater would lose his office, two persons would have to receive more votes than any other. As to Slater, such was the result. Scott, Meyer, and Culver received more votes than he. As to him, a successor was elected. But, as to Culver, no two persons received more votes than he. The tie between him and Meyer prevented an election of his successor, and he will hold over under his former commission. Paragraphs 484 and 1393 were not repealed by Act No. 47 of the Laws of 1891. That act amended paragraph 467, but in no way affects the two paragraphs last mentioned. The appointment of appellant by the board of supervisors was void, for the reason that there was no vacancy. The demurrer to the complaint was properly sustained, and the judgment of the district court is affirmed.

BAKER, C. J., and HAWKINS, J., concur.
SLOAN, J., not sitting.

CITY BLOCK DIRECTORY CO. v. APP
et al.

(Court of Appeals of Colorado. Feb. 12, 1894.)

RELIEF FROM JUDGMENT—EXCUSABLE NEGLECT.

Neglect arising from reliance placed by a party upon assurances given him by the opposing counsel is "excusable," within the meaning of Code Civ. Proc. § 75, relieving a party from a judgment or order taken against him through "excusable neglect."

Appeal from district court, Arapahoe county.

Action by App & Stott against the City Block Directory Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Buford & Griffith, for appellant. E. E. Schlosser and H. W. Spangler, for appellees.

THOMSON, J. App & Stott brought suit against one Robert Stride, who made default, and judgment went against him. A writ of garnishment was issued upon the judgment, and served upon the City Block Directory Company, against which judgment was entered for want of an answer. The company moved the court to vacate the judgment, and the motion was denied. The company appealed. The ground of the motion was that the company was misled into the default by the plaintiffs' counsel. Affidavits were filed in support of the motion, and counter affidavits against it. It appears that, on the day of the service of the garnishment, Elisha Procter, the secretary of the company, prepared and verified an answer denying any indebtedness to Stride. In his affidavit he states that soon after its preparation he showed the answer to E. E. Schlosser, the attorney of plaintiffs, who represented to him that it was unnecessary to file it. as it

showed that the company owed Stride nothing, and that accordingly, relying upon Schlosser's representation of the want of necessity for filing the answer, he did not do so. E. J. Miller, W. J. Winters, and H. W. Hilton each made affidavit to a conversation between Miller and Schlosser, in which Miller asked Schlosser how he happened to get a judgment against the company, to which he replied that he had fixed up a trap, and the company fell into it. The original answer, verified as stated by Procter, was also introduced. Schlosser, in opposition to the motion, made affidavit giving a somewhat different version of the conversations with Procter and Miller, but upon the question whether the company was misled by him, to its prejudice, the affidavit is not very satisfactory. It is provided by section 75 of the Code of Civil Procedure that the court may, on such terms as may be just, and upon payment of costs, relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through mistake, inadvertence, surprise, or excusable neglect. Neglect which arises from reliance placed by a party upon assurances given him by the opposing counsel is excusable, within the meaning of the law; and we think the showing made in this instance required the court, in furtherance of justice, to set aside the judgment, permit the answer to be filed, and proceed to a hearing of the case upon its merits. The judgment is accordingly reversed. Reversed.

GALLUP v. LICHTER et al.

(Court of Appeals of Colorado. Feb. 12, 1894.)

ACTION ON REPLEVIN BOND — SUFFICIENCY OF COMPLAINT—RES JUDICATA—DISMISSAL OF SUIT—EFFECT.

1. A judgment on demurrer that a complaint does not state a cause of action is not a bar to another suit between the same parties on the same cause of action.

2. A complaint does not state a cause of action on a replevin bond where it alleges that plaintiff owns the cause of action which accrued on the judgment for defendant in replevin, but does not allege that the bond was assigned to plaintiff.

3. Under Code 1887, § 166, subd. 4, providing for a nonsuit where, before final submission, plaintiff abandons the suit, where a demurrer for failure to state a cause of action is sustained, and the case is dismissed on application of plaintiff, he has a right to re-bring suit.

Error to district court, Arapahoe county.

Action by Charlotte R. Gallup against John Lichter and others on a replevin bond. Judgment for defendants. Plaintiff brings error. Reversed.

L. C. Rockwell, for plaintiff in error. Brown, Putnam & Preston, for defendants in error.

BISSELL, P. J. Unless we greatly misread the record, the court rendered judgment

for the defendants on the hypothesis that the issue had been previously disposed of in another suit between the same parties. This conclusion was undoubtedly erroneous, and necessitates a reversal of the judgment.

In 1883, Raymond Kaltenbach brought replevin suit in the superior court against one Von Richthofen and his wife to recover the possession of an orchestration. He gave the statutory bond, which was signed by three of the present defendants as sureties. That suit proceeded to judgment, and the defendants were adjudged entitled to the return of the instrument, or its value. Afterwards the present appellant, Charlotte R. Gallup, brought suit in the superior court against Kaltenbach and his sureties to recover the value, and damages for the detention. The defendants demurred to the complaint, and the demurrer was sustained; but the entry reserved leave to the plaintiff to amend her complaint, as she might be advised, within a time named. Before the expiration of this limit the plaintiff came into court, and asked that the cause be dismissed at her cost, which was accordingly done. This was on the 16th of February, 1885. In August, 1888, the present suit was brought, and the complaint contained all the formal and necessary averments to state a good cause of action on the bond against these defendants. The allegations were apt to show the liability of the obligor, and the assignment and transfer of the instrument to the present plaintiff. The defendants answered, set up a tender of the instrument and a refusal to receive it, and likewise pleaded the former recovery in bar of the present action. The plaintiff replied. There were various amendments to the plea of a former recovery and to the replication, but they resulted in presenting very sharply the issue as to the conclusiveness of the former judgment. We shall not concern ourselves with the issue as to the tender, because we are well satisfied that the case turned on the other question. We leave that issue to be tried hereafter. It is not difficult to ascertain the law by which the rights of these parties must be determined, and it will prove but little more troublesome to apply it to the case. The plea of *res adjudicata* is almost as familiar to the profession as the general issue, although occasionally there is some difficulty in its application. Its limits need not be ascertained, nor are we compelled to enter the disputed field embracing that class of cases wherein it must be determined whether the point was actually at issue, or whether it might, with reasonable diligence, have been brought forward and settled in the former suit. The only proposition with which we are concerned is that which relates to the rendition of a judgment upon demurrer, under the circumstances shown by the record offered in support of the plea. It was formerly questioned whether a judgment on demurrer would operate as a bar to another suit be-

tween the same parties on the same cause of action. This question has been set at rest, and it may now be deemed established that a judgment rendered upon any pleadings setting forth the facts is as conclusive concerning them as would be the verdict of a jury; for, while one is a finding by a tribunal concerning the truth of the matters in issue, the other is a solemn admission by the record which determines the merits of the case. It is essential to the application of this rule that it be evident from the record that the merits of the case were heard and disposed of on the first trial. If, for any reason, the first complaint failed to state a cause of action, a judgment on demurrer would not be a bar. As strongly put by Mr. Justice Clifford in the case cited from 91 U. S.: "Support to those propositions is found everywhere; but it is equally well settled that if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration, which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action." These principles are very well established by the authorities, and there is in modern times an almost uniform course of similar judgments upon these questions. *Gould v. Railroad Co.*, 91 U. S. 526; *Terry v. Hammonds*, 47 Cal. 32; *Aurora City v. West*, 7 Wall. 82; *Keater v. Hock*, 16 Iowa 23; *Birch v. Funk*, 2 Metc. (Ky.) 544.

The only proposition remaining to be examined to sustain the conclusion arrived at by the court respects the contention that the complaint in the original suit brought by Charlotte R. Gallup failed to state a cause of action. Of this there can be no question. In most respects, the two complaints are entirely concurrent. The chief difference relates to the averment of title to the bond, which is the gravamen of the suit. In the original action, she simply averred that she was the owner of the cause of action which had accrued to Mrs. Von Richthofen by reason of Kaltenbach's failure to maintain his replevin suit. But it was nowhere alleged that the bond on which this present suit was instituted had been assigned or transferred to her, so that she was entitled to sue the sureties bound by it. Whether it was or was not true that Charlotte had become so possessed by transfer of a right of action on that judgment that she might sue the original plaintiff in it need not be determined. At all events, the complaint filed did not state a cause of action on the undertaking executed in the original replevin suit. The present complaint does. This very substantial and essential difference destroys the force of the plea of a former adjudication, and permits the present action to be maintained.

We think there is another equally conclu-

sive reason which operates to destroy the bar. There has been much discussion in the profession as to the circumstances under which a plaintiff may dismiss his suit, and thereby reserve to himself the right to recommence his action. The present appeal does not permit us to construe all the divisions of chapter 10 of the Code of 1887, so that the whole subject may be set at rest. We expressly limit what we say to the construction of the fourth subdivision of section 166,¹ so that there can be no possibility of a misconstruction. We think the present case is entirely covered by that subdivision, and what the court did on the 16th day of February amounted to a dismissal of the suit on trial, after an abandonment by the plaintiff which in any event would preserve the right to re-bring suit. The judgment which the court entered on the 10th of February, sustaining the demurrer, was a conditional judgment, which preserved to the plaintiff the right to amend her declaration as she might deem proper. Under such circumstances, the judgment can in no sense be deemed final until the lapse of the time allowed by the court in which the defective pleading may be amended. Whenever, within such time, the plaintiff comes in, and on the application of that individual, and before the rendition of the final judgment, the court enters an order dismissing the case, the judgment of dismissal must be taken to be within the power conferred by the fourth subdivision of the section, and the judgment will be taken to be one of dismissal, and not so far final on the merits as to be pleadable in bar to the complaint filed in the subsequent suit. On either hypothesis, the plea of a former recovery was not sustained by the production of the record in the other suit. The judgment will be reversed, and the case remanded for further proceedings in conformity with this opinion. Reversed.

DOLAN et al. v. PARADICE.

(Court of Appeals of Colorado. Feb. 12, 1894.)

APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE—HARMLESS ERROR.

A judgment will not be disturbed where there is evidence to support the verdict.

On Rehearing.

Where plaintiff proved delivery in an action for the price of goods, and denied the giving of 90 days' credit, which defendant alleged and introduced evidence to prove, it was harmless error to admit evidence of plaintiff's general custom to collect his bills at the first of the ensuing month, since his denial, coupled with the legal presumption of a sale for cash on delivery, entitled the jury to find that no credit was given.

¹ Sec. 166. An action may be dismissed or a judgment of non-suit entered, in the following cases: * * * Fourth—By the court, when upon trial, and before the final submission of the case, the plaintiff abandons it.

Error to district court, Arapahoe county.

Action by Frank H. Paradice against Dolan Bros. & Smith on account. Judgment for plaintiff. Defendants bring error. Affirmed.

John P. Brockway, for plaintiffs in error.
J. B. Wiltsea, for defendant in error.

BISSELL, P. J. The dealings between Paradice and Dolan Bros. & Smith in 1890 resulted in an account amounting to about \$1,600, which the firm owed when this action was commenced. Paradice was a wholesale dealer in plumbers' supplies, and the co-partnership carried on their business in the city of Denver. A bill was presented to the firm early in January, 1891, for nearly \$2,000, and they paid some \$300 on it, reducing the indebtedness to the amount claimed. Paradice sued out a writ of attachment, and filed the statutory affidavit, in which the grounds stated were two,—fraud in the contraction of the debt, and that the goods should have been paid for on the 1st of January. When the case came to trial, and on the conclusion of the plaintiff's testimony, the court held the allegation of fraud unproved, and submitted the other matter to the jury. There was a very large amount of testimony introduced as to the date the debt matured, for it was conceded on both sides, if the goods were sold on time, a right of action had not accrued to the plaintiff, but that, if they were sold on terms that called for payment on the first of the ensuing month, the plaintiff rightfully brought his suit, and his ancillary writ could be maintained. In support of his contention the plaintiff offered proof which tended to show that the goods sold during one month were payable about the first of the ensuing month, and that this had been the course of dealing between the parties. To overcome this proof, one of the Dolans and Smith, who were members of the firm, testified there was a specific agreement by which it was provided that all goods should be taken as sold on 60 days' credit. What they attempted to prove was a definite agreement for a specific credit. The case was tried to a jury, and the plaintiff had a verdict, on which judgment was rendered, and from which the firm appealed.

The appellants contend that there was no proof of an arrangement between the two houses, with respect to the dealings, which either specifically made the bills payable in the ensuing month, or from which any such arrangement could be deduced. Of course, counsel concede (as they must) that if there was a uniform course of dealing between the parties, and there were definite rules of trade settled by the vendor which would bind the purchaser to pay at a definite date, and those rules and arrangements were brought home to the knowledge of the vendee, they would become obligatory, and be taken as part and parcel of the transaction. But it is insisted that there is no evidence, which war-

rants this conclusion. It must be admitted that the proof in this respect is not so clear or so satisfactory as to leave the matter free from doubt; but we discover nothing in the record which would justify us in setting aside the verdict of the jury. In contravention of this proof, which lacks the robust and substantial force apparent in some cases, the defendants testified directly to a distinct, positive agreement between them and the vendor for a 60-day credit. They were wholly unable, however, to satisfy the jury as to the truth of their contention. We cannot say, in the face of a verdict rendered against such testimony, that our impressions derived from the reading of the record should take the place of a positive conclusion arrived at by a body which was confronted with the witnesses. Counsel likewise insist with great vigor that the court erred in permitting proof to be introduced concerning the custom which prevailed in the business as carried on by the plaintiff, and that much of the testimony given by his clerks infringed upon the rule concerning the introduction of hearsay testimony. A careful examination of the record fails to convince us that the court committed serious error in this particular. It is possible that some little evidence crept in which a strict enforcement of the rule would have excluded; but we cannot see that the defendants were so seriously prejudiced thereby as to entitle them to set aside the judgment. There was evidence given which adequately supports the verdict, and the judgment should not be disturbed. It will accordingly be affirmed. Affirmed.

On Rehearing.

BISSELL, P. J. The petition for rehearing in this case will be denied. It is seldom necessary or expedient on such applications to express the reasons which lead the court to adhere to its former determination. In this particular case the opinion seems to be assailed on a basis somewhat similar to that on which the attack was laid in the case of *Murphy v. Hobbs*, 8 Colo. 130, 11 Pac. 55. The matter is of such frequent recurrence that the court feels quite justified in suggesting the usual course which it pursues in the disposition of causes. We are quite well aware that it is often a ground of complaint with counsel that the courts fail to consider and determine various matters which have been urged upon their attention in the oral and printed arguments. This probably comes from a failure to appreciate the immense addition to the ordinary labors of the court which this course would entail. Wherever a case is affirmed, unless it involves some controverted question of law, a general suggestion of the position which the court takes with respect to the matter is all that is consistent with a successful and rapid discharge of business. It would be manifestly impossible to dispose of all the theories of attorneys in such a way that, at

the end of the opinion, the judge could honestly write, "Quod erat demonstrandum." It is conceded in the present case that some evidence was admitted, concerning the custom of the dealer Paradise, which ought to have been excluded. The admission of this evidence, which in a very remote sense may be said to bear upon one of the substantive facts of the case, to wit, the terms of the sale, does not compel us to reverse a judgment which rests on the verdict of a jury rendered upon conflicting testimony. The right to begin the suit was undoubtedly dependent on the maturity of the debt. As a general proposition, goods which are sold are to be paid for in cash on delivery, in the absence of a specific agreement concerning the terms of sale. This is always implied if nothing is said. All that Paradise needed to do in order to recover in this case, and show his right to bring suit, was to prove the delivery of the goods. To avoid the liability which sprung from the sale, and gave an immediate right of action, the defendants were bound to establish an agreement for credit. This might have been done in either one or two ways, to wit, by proof of a general course of dealing, or by evidence of an exact contract providing for the delayed payment. In the present case the defendants chose the latter alternative, alleged an agreement for a 90-day credit, and went to the jury on that proposition. This agreement was totally denied by Paradise, and undoubtedly he sought to emphasize his denial by proving what his usual course of trading was. The denial, coupled with the legal presumption following the sale, entitled the jury, if they did not believe the defendants' story, to find that there was no sale on credit. It is difficult to see how this issue was materially aided or affected by proof that the dealer's general custom was to collect his bills at the commencement of the ensuing month. Even though that were true, it in no manner tended to disprove the defendants' contention of a specific agreement for a definite credit. We conclude that the introduction of that testimony, even if the ruling be concededly erroneous, does not entitle us, under these circumstances, to reverse the case. The former opinion will be adhered to, and the judgment will stand affirmed. Affirmed.

WILCOXON v. CITY OF SAN LUIS OBISPO. (No. 19,178.)

(Supreme Court of California. March 1, 1894.)
WIDENING STREET—ASSESSMENT—COST OF GRADING.

Under Act March 6, 1889, authorizing a city council to widen a street and acquire land therefor, the expense of the work or improvement to be assessed on the district benefited, the assessment cannot include the cost of grading and graveling.

In bank. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Wilcoxon against the city of San Luis Obispo, in the nature of a suit to quiet title. Judgment for plaintiff. Defendant appeals. Affirmed.

William Shipsey, for appellant. Wilcoxon & Bouldin, for respondent.

HARRISON, J. In December, 1890, the city of San Luis Obispo instituted proceedings under the act of March 6, 1889, (St. 1889, p. 70,) for the widening of about 300 feet of Chorro street, and designated the exterior boundaries of the district of lands to be affected or benefited thereby. In its resolution of intention, it declared that "the public interest and convenience require that Chorro street, of said city, between Monterey street and Higuera street, be widened as hereinafter specified," and, after describing the land to be taken therefor, continued: "And the work to be done and the improvements to be made shall consist of removing from said land the buildings and other structures and obstructions now thereon, and filling in with earth so as to bring the land taken (not including the creek) to the present grade of Chorro street, and gravel the same." After proper publication of its resolution, commissioners were appointed to assess the benefits and damages to be produced by the improvement, and in due time made a written report thereof to the city council, in which they estimated that the aggregate amount of the value of the land to be taken, and damage to improvements and property affected, and the cost of work and improvements, and the expenses, would be \$11,082.52, and assessed that amount upon the lands within the aforesaid district. One item of this aggregate amount is designated in their report to be: "Cost of contemplated work and improvement specified in resolution of intention, \$1,722.52." Subsequent to the confirmation of this report, a certified copy thereof was placed in the hands of the street superintendent, who by virtue thereof sold a lot belonging to the plaintiff herein to satisfy the assessment thereon. This action, in the nature of a suit to quiet title, was brought by the plaintiff for the purpose of having it adjudged that by the aforesaid proceedings no lien was created upon his land, and that the sale of the superintendent was void. Judgment was rendered in favor of the plaintiff, and the defendant has appealed.

Section 1 of the act of March 6, 1889, gives authority to the city council of any municipality "to order the opening, extending, widening, straightening up in whole or in part of any street, square, lane, alley, court or place within the bounds of such city and to condemn and acquire any and all land and property necessary or convenient for that purpose." The only "work to be done or improvement to be made," under the provisions of this act, is that for which power is conferred by this section; and, before the mu-

nicipality can acquire jurisdiction to exercise this power, it is required to pass a resolution of its intention to do so, "describing the work or improvement." Hence, the only work or improvement which the municipality has any jurisdiction to order is limited, in the first place, to that which is designated in section 1 of the act, and next to that which it has described in its resolution of intention. The resolution of intention, in the present case, is for the "widening" of a portion of Chorro street. The "widening" of a street, which is authorized by this act, does not include the additional work of making the street suitable for travel and general use. The expense of such work is to be undertaken after the street has been widened, and, by section 869 of the municipal government act, (St. 1883, p. 272,) is to be borne by the adjacent property. To widen a street is merely to enlarge its width, and the term "widen" cannot, under any construction of language, be extended to include grading and graveling. "To grade a street" is to reduce it, either by filling or excavation, to a fit or established degree of ascent or descent; and "to gravel a street" is to cover the surface of a street already existing with some durable substance. Neither of these kinds of improvement or work is embraced in section 1 of the act aforesaid, and consequently the power to make an assessment for the expense incurred thereby has not been conferred upon the city council. A consideration of the entire act shows that the assessment which is authorized to be made upon the district defined in the resolution of intention is to be limited to the cost of the lands and improvements to be taken or damaged, and the expenses that the commissioners are by the act authorized to incur in effecting the widening of the street. In *Reed v. City of Toledo*, 18 Ohio, 161, the court held that, under the authority conferred upon a city council for opening a street and assessing the damages caused thereby upon a district, it was not authorized to include the expense of improving the street, saying: "By the term 'opening,' we do not understand the improvement of a street or highway by grading, culverting, etc. The term is generally—we think always—clearly distinguishable from such kind of improvement. The term 'opening' refers to the throwing open to the public what before was appropriated to individual use, and the removing of such obstructions as exist on the surface of the earth, rather than any artificial improvement of the surface." See, also, *Dill. Mun. Corp.* § 608. The widening of a street is only an additional opening of it, throwing a larger space open to public use than previously existed. We are of the opinion, therefore, that it was not within the power of the municipal authorities to include in the assessment the cost of grading and graveling the lands taken for the widening of the street, and that for that reason the assessment was il-

legal, and created no lien upon the land of the plaintiff. The judgment and order are affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.; DE HAVEN, J.; GAROUTTE, J.; PATERSON, J.

BEATTY, C. J. I concur in the judgment, not only upon the ground stated, but because I am of the opinion that the act of 1889 is unconstitutional.

BURR v. NAVARRO MILL CO. (No. 15, 576.)

(Supreme Court of California. Feb. 13, 1894.)

APPEAL—DELAY IN FILING DISMISSAL.

An appeal not filed within the time prescribed by court rules will be dismissed, no good cause for the delay being shown, though no notice of the motion to dismiss was served on appellant's assignee in insolvency, he having, however, knowledge of the notice served on appellant's attorneys.

In bank. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Maggie E. Burr against the Navarro Mill Company. Judgment for plaintiff. Defendant appeals. Appeal dismissed.

Young & Powers, for appellant. A. Morgenthal, for respondent.

PER CURIAM. Respondent moved to dismiss the appeal upon the ground that it was not filed within the time prescribed by the rules of the court. It is apparent from the certificate of the clerk of the lower court that such is the fact, and the appeal must be dismissed, unless good cause for the delay appears.

The action is one for personal injuries, and a judgment was entered upon the verdict of the jury for the sum of \$1,000 in favor of plaintiff. Subsequently defendant appealed the case to this court, and gave a bond with two sureties, staying execution upon the judgment. After the appeal was perfected and the stay bond given, the defendant was adjudged an insolvent debtor, an assignee was appointed, and an order made by the court staying all proceedings against the insolvent. Thereafter, upon application of respondent, the order was modified to the extent of allowing the present action to be prosecuted to final judgment, for the purpose of fixing the liability of the sureties upon the aforesaid bond. The attorneys representing the defendant in the trial of the case and on the appeal thereof were regularly served with notice of the motion to dismiss now under consideration, but counsel for the assignee was not served with the notice, and now comes before the court asking for a continuance of the hearing, and also, in effect, objecting to the consideration of the matter because of a failure to serve notice

upon him. The continuance was denied at the time, and his presence in court at the hearing was indicative of the fact that he had actual notice of the proceeding, and neither he nor the defendant's attorneys of record in the case make any showing upon the merits of the motion. It is ordered that the appeal be dismissed.

CONNER v. SOUTHERN CALIFORNIA MOTOR ROAD CO. (No. 19,260.)

(Supreme Court of California. Feb. 28, 1894.)

REVIEW ON APPEAL—CASE ON MOTION FOR NEW TRIAL—TIME OF SETTLEMENT.

If the proposed statement of the case on motion for new trial, together with the amendments proposed by the adverse party, are not within ten days after the service of the amendments, presented to the judge or clerk for settlement, as required by Code Civ. Proc. § 659, subd. 3, the statement must be disregarded on appeal from an order denying the new trial, the time for settlement not having been extended, and there being no explanation of the delay.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; J. C. Campbell, Judge.

Action by H. Conner against the Southern California Motor Road Company. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Rolfe & Freeman and Chas. N. Fox, for appellant. Harris & Gregg, for respondent.

HAYNES, C. Appeal from judgment, and an order denying defendant's motion for a new trial. It is conceded by appellant that the appeal from the judgment cannot be considered, because taken too late; and respondent contends that the appeal from the order denying a new trial cannot be considered upon its merits, because the statement was not settled within the time required by subdivision 3, § 659, Code Civ. Proc. Appellant's counsel did not notice the question in their opening brief, and, as no reply has been filed, we are without the benefit of any suggestions from them.

The statement contains the following: "It is agreed that the statement on motion for a new trial herein was served August 17, 1891, and that the proposed amendments thereto were served in April, 1892; and that neither the proposed statement nor amendments thereto were ever presented to the judge prior to this date, and that they have never been filed with the clerk of this court. Plaintiff objects to a settlement of the proposed statement on the grounds that the moving party in this case has not complied with subdivision 3, § 659, of the Code of Civil Procedure, in that he did not, within ten days after the service of the amendments, present the same to the judge who tried the case for settlement, nor to the clerk of the court for the judge, and failed and refused

The objection to the settlement of the statement was overruled, and plaintiff pted, and the statement was thereupon ed.

e delay of seven months in presenting statement and amendments to the judge settlement is wholly unexplained. The ement having been objected to on the nd that it was too late, "it became the of appellant to incorporate in the bill ement] the matter, if any, going to ex- his apparent delay; otherwise, the ex- ons, though settled, cannot be considered."

Higgins v. Mahoney, 50 Cal. 444. Regambo v. Mining Co., 57 Cal. 503, it said: "If a statute actually fixes the within which an act must be done, it emptory. The act cannot be done at other time, unless during the existence ie prescribed time it has been extended in order made for that purpose under ority of law." This language was used elation to the time within which a bill ceptions might be taken under the stat- and is therefore applicable here. To that the statement may be settled when steps were taken until after the explra- of the ten days, the time for doing so having been extended, and respondent cting thereto, would be a judicial abro- of the statute. See, also, Wills v. a Kong, 70 Cal. 548, 11 Pac. 780. The ment must therefore be disregarded. judgment and order appealed from ld be affirmed.

e concur: VANCLIEF, C.; BELOHER,

ER CURIAM. For the reasons given in foregoing opinion, the judgment and r appealed from are affirmed.

NTYRE v. SOUTHERN CALIFORNIA MOTOR ROAD CO. (No. 19,267.)

reme Court of California. Feb. 23, 1894.)

partment 1. Appeal from superior court, Bernardino county; J. C. Campbell, Judge. tion by Allan McIntyre against the South-California Motor Road Company. From a ment for plaintiff, and an order denying a on for a new trial, defendant appeals. med.

lfe & Freeman and Chas. N. Fox, for ap- nt. Harris & Gregg, for respondent.

ER CURIAM. In this case the appeal the judgment was taken too late, and same objection is made by respondent to a ideration of the appeal from the order de- g a new trial as was made in Conner v. r Road Co., (No. 19,209, this day decided,) ac. 990. All the facts touching the settle- of the statements on motion for a new are the same in each case, and, upon the ority of that case, the judgment and or- appealed from are affirmed.

PLEADING — WAIVER OF FORM — APPEARANCE — TRUSTEES — ACCOUNTING — INTEREST — ALLOW- ANCE — COMPENSATION.

1. A petition entitled "In the Matter of the Estate of T., Deceased," asking for an ac- counting by the trustees under the will of de- ceased, filed after the probate jurisdiction of the court is exhausted by final distribution, and discharge of the executors, will be treated as a bill in equity; the court having equity as well as probate jurisdiction, and no objection having been made to the form of the petition.

2. The fact that a court has not jurisdic- tion of a party is waived by appearance with- out objection.

3. Where a trustee mingles the trust funds with his own, and uses them in his business, which pays a net profit of 11 per cent. per annum, there is no error in charging him 10 per cent. compound interest.

4. An item of \$250 for retainer fee is prop- erly disallowed a trustee on accounting, he not having shown it a proper disbursement.

5. Though a will provides for compensa- tion for trustees, it is properly disallowed, where they have been negligent in the dis- charge of their duties.

6. A decree on accounting by a trustee should not provide that he be charged with 10 per cent. compound interest so long as he remains a trustee, as it is to be presumed that in the future he will faithfully discharge his duties.

Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Petition, entitled "In the Matter of the Es- tate of Jonathan Thompson, Deceased," for accounting by the trustees under the will of deceased. From the decree, Isaac Goldtree, one of the trustees, appeals. Modified.

Wilcoxon & Bouldin and J. M. Wilcoxon, for appellant. Myrick & Deering and L. Lamy, for respondent.

PATERSON, J. This is an appeal by Isaac Goldtree, one of the trustees of the estate of Jonathan Thompson, deceased, under the will, from a decree settling an account. Thompson died in the county of San Luis Obispo on December 5, 1875, leaving a will, in which, after making certain specific be- quests, he directed the residue of his estate to be distributed to three trustees, to hold and invest the same, and deliver the income thereof to four sets of beneficiaries during their lifetimes, and thereafter to deliver the estate to the children of the first-named bene- ficiaries. The will was duly admitted to pro- bate, and on March 16, 1877, the estate was distributed to the trustees, and the executors were discharged. On December 22, 1884, one of the trustees named in the will was re- moved from his office as trustee, and the ap- pellant, Goldtree, was appointed a trustee to fill the vacancy. Ever since said last-named date, Goldtree and John Thompson have been sole trustees of the estate; Grierson, one of the trustees named in the will, having re- signed on the 22d day of December, 1884.

The estate consisted of a large amount of real estate lying in different counties, \$11,453.84 in money, and \$11,015.22 in promissory notes, cattle, horses, wagons, machinery, etc. It was arranged between Thompson and Goldtree that the latter should hold all the money collected or belonging to the trust, and manage the lots in the towns of San Luis Obispo and San Jose, and that Thompson should take charge of all other portions of the trust estate. On the day of his appointment, Goldtree received the \$11,453.84 cash belonging to the estate, and deposited the same to the credit of the general account of Goldtree Bros., a partnership of which he was a member, and thereafter said money was mingled with the funds of the partnership. In the years 1885 to 1886, inclusive, he received, on notes belonging to the estate, the sum of \$2,639.60, which the court found, "together with the \$11,453.84, making a total of \$14,093.44, constituted a part of the corpus of the trust estate." This amount was reduced by payments made pursuant to orders of the court aggregating \$1,742.90, leaving, the court finds, "corpus, for which Isaac Goldtree was chargeable on October 2, 1892, the sum of \$12,350.74." All of the moneys received by Goldtree were deposited in the name of his firm, and mingled with the funds thereof. No separate account was ever kept of the moneys received by him as trustee. The general account was drawn upon and used for the purposes of the business of their partnership, as well as for the trust estate, by checks signed "Goldtree Bros." The profits of the general business of Goldtree Bros. netted them, on the average, for the years 1885 to 1892, inclusive, about 11 per cent. per annum. The firm was engaged in various enterprises, including speculation in land, buying grain, the lending of money, and the carrying on of a banking business. In 1890, Goldtree left the state, with his family, for Europe, and at all times since said date has remained out of the state. During this time he has left the management of the trust to the bookkeeper of his firm, and to his attorney. During the years 1884 to 1892, inclusive, various portions of the estate had been in litigation, and the appellant has paid out, as necessary and proper disbursements, including attorney's fees, something over \$13,000, and, including payments to beneficiaries, something over \$14,000. The beneficiaries, becoming dissatisfied with the action of the trustees, filed a petition asking that the latter be required to account, and that they be removed from office. Thereupon, appellant filed an account showing receipts by him of trust funds, to certain items of which an objection was made; and after a hearing the court disallowed items aggregating \$1,070.73, charged appellant with the corpus of the estate received by him, together with interest thereon, at the rate of 10 per cent. per annum, compounded annually, and credited him with the allowed disbursements. Compensation

was denied to the trustees, and appellant was directed to pay 10 per cent. per annum on the trust money belonging to the trust, and in his possession, as long as he remained trustee; the court, in its findings, however, saying "that said Isaac Goldtree be given the privilege of resigning said trust." The petition asking for the account and removal of the trustees is entitled "In the Matter of the Estate of Jonathan Thompson, deceased," and, in accordance with its prayer there was issued from the probate division of the superior court a citation to the trustees, requiring them, at a certain time to appear and render an account.

It is contended by the appellant that the superior court, sitting in probate in the estate of Thompson, deceased, had no jurisdiction of the matter of the settlement of the account of the trustees, and, technically speaking, this is true. The will of Thompson had been probated, and the estate distributed and delivered up to the distributees. The executors had been discharged in the probate court 15 years before this petition was filed. Goldtree's powers came through an order of the superior court in equity, but while it is true that the probate and equity jurisdictions of the superior court are separate and distinct, that the former furnishes a method of administering the affairs of a decedent, and when final distribution has been had its jurisdiction is exhausted, and it is peculiarly for a court of equity to appoint and control trustees in the management of trust estates, yet under our system the same tribunal exercises equity and probate jurisdiction. The appellant made no objection to the form of the petition. The court had jurisdiction of the subject-matter, and the objection is raised for the first time in this court that the court did not have jurisdiction of the person, which, of course, was waived by the appearance of the defendant without objection. The petition under these circumstances, may be regarded as a bill in equity addressed to the equitable powers of the superior court, and the form of its title is immaterial. It is not true that there were no issues, or that a burden was placed upon the appellant which would not have been upon him in a court of equity. The petitioners alleged mismanagement and failure to account or report. Pursuant to the order contained in the citation, appellant did appear and file an account of his dealings with the trust estate, and thereafter specific objections were made to certain items. The same matters were in issue that would have been in issue if the complaint had been filed in equity, and the burden of proof was no greater in the one case than it would have been in the other.

The court did not err in its statement of the account, or in charging Goldtree with interest at the rate of 10 per cent. per annum. The funds with which the moneys of the estate were mingled earned about 11 per cent.

upon those funds, or ought to have included them so as to yield interest, he shall, in each case, be chargeable with the payment of interest. In some cases courts of equity even direct annual or other rests to be made, the effect of which will be to give to the cestui que trust the benefit of compound interest. But such an interposition requires extraordinary circumstances to justify it. Thus, for example, if a trustee, in manifestation of his trust, has applied the trust funds to his own benefit and profit in trade, the courts of equity will apply the rule of annual or semiannual rests, if it will be for the benefit of the cestui que trust. The true rule in equity, in such cases, is to require that all the gain shall go to the cestui que trust." 2 Story, Eq. Jur. (13th ed.) § 1277; 1 Perry, Trusts, (4th Ed.) § 471. We are unable to see that the court erred in allowing the item of \$250 retainer. The appellant evidently thought it was an unnecessary expenditure. The burden of proof was on the appellant to show that it was a proper disbursement, and the same may be said of the other items mentioned in finding

either did the court err in refusing to allow the trustees commissions. Compensation is allowed, in cases of this kind, only to faithful stewards, for their care, trouble, and responsibility in the management of an estate; and it matters not that the will itself provided for compensation, which is conditioned upon a faithful performance of the trust. There are many reported cases in which the courts have refused to allow commissions where the negligence exercised by trustees was not so great as that shown in the case at bar. Dufford's Ex'r v. Smith, 11 J. Eq. 216, 18 Atl. 1052; Norris' Appeal, Pa. St. 128.

We think it clear, however, that the court did in charging the appellant with interest at the rate of 10 per cent. per annum, compounded annually, so long as he may remain trustee. The court had the right to decree him of commissions, and to impose on him interest compounded annually up to the time of the settlement of the accounts, did not have the right to impose a penalty for his future conduct of the affairs of the estate. It must be presumed that in the future the appellant will faithfully discharge the duties of his office. The cause is remanded to the court below with directions to make a final conclusion of law No. 10 from its decision, and to modify its decree by striking out the ninth paragraph the words, "so long as he shall remain in office;" and, as so modified, the decree will stand affirmed.

We concur: GAROUTTE, J.; HARRIS, J.

v.35P.no.10—63

MUNICIPAL CORPORATIONS — RIGHT TO CONSTRUCT WHARF — RAILROAD RIGHT OF WAY OVER PUBLIC LANDS — PERMIT — FORFEITURE — RIGHT OF STATE.

1. Under the municipal government act, (section 862,) which authorizes a city to construct and operate wharves on any land bordering on any navigable bay within its corporate limits, or contiguous thereto, a city has no absolute right to construct a wharf at any point on its water front which it may select, irrespective of the rights of others.

2. Under Civ. Code, § 478, which requires the surveyor general, on the selection of a railroad right of way over public lands, to "issue to the corporation a permit to use the same unless on petition presented to the court a review is had and such use prohibited," the permit continues until such use is prohibited.

3. Where a railroad company has selected a right of way over public lands, and the surveyor general has issued a permit to use them, a delay in the construction of the railroad will not, of itself, work a forfeiture of the permit.

4. Where the surveyor general issues a permit to use a part of a city water front for a railroad right of way, the city cannot enjoin the construction of a wharf thereon by the railroad company without proof that a municipal right has been invaded, and cannot allege a trespass to public lands by the railroad, or a forfeiture of a corporate privilege by delay, since the state, only, can complain of such trespass, or enforce such forfeiture.

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Bill by the city of San Pedro to enjoin the Southern Pacific Railroad Company and others from constructing a wharf in Wilmington bay. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed.

John D. Bicknell and Bicknell & Trask, for appellants. Cheney & Cronin, for respondent.

HARRISON, J. In March, 1887, the Southern Pacific Railroad Company made selection of a right of way over certain public lands of the state for the location and construction thereon of tracks and other works necessary in the extension of its Wilmington branch, and on the 7th of April, 1887, the surveyor general, under the provisions of section 478, Civ. Code, issued to it a permit to use the same. The lands over which the right of way was so selected are located in Wilmington bay, within the corporate limits of the plaintiff, and a portion thereof are tide lands,—that is, lands between the lines of high and low water,—while another portion is continually covered by the waters of the bay. In December, 1891, by virtue of the permit thus granted by the surveyor general, the defendants commenced to drive piles from the extremity of the wharf theretofore constructed by the railroad company, and had driven them for the length of about 660 feet, when the plaintiff brought the present

action to enjoin and restrain them from further prosecuting their work. The grounds upon which the plaintiff bases its right to the relief sought are that the lands upon which the defendants were driving the piles are within its corporate limits, and form a portion of its water front; that it has certain statutory and riparian rights over said land and water front, and that, in the exercise of these rights, it was about to construct a wharf and landing place at the point where the defendants were driving the piles; that the driving of the piles and building a wharf at that point by the defendants will prevent it from erecting a wharf or landing place there; and that the acts of the defendants are without any right or authority. The court made findings in support of the averments in the complaint, and rendered judgment in favor of the plaintiff. From this judgment, and an order denying a new trial, the defendants have appealed.

The court finds "that the defendants were proceeding to drive said piles in a continuous row, close to the line of mean low-water mark, and almost parallel to the channel of Wilmington bay; that for a distance of about 200 feet the said piles were driven below mean low-water mark; and that said piles were driven below low tide at that portion of the premises described in plaintiff's complaint as adjoining the southerly end of the wharf of the Southern Pacific Railroad Company." It does not appear that the state has ever parted with its title to these lands, either those between the lines of high and low tide, or those which are at all times covered with water; and, unless the plaintiff has some right in the lands which the acts of the defendants will tend to impair, it is not entitled to the relief sought. The plaintiff cannot enjoin the defendants from prosecuting their work of driving piles within the terms of the surveyor general's permit, unless such work is an invasion of some right of the plaintiff, and the burden of establishing that fact rests upon it. If it should be assumed that the acts of the defendants are a trespass upon the rights of the state, the state alone has the right to complain; and, in the absence of any complaint on its part, the defendants are not to be questioned about the nature of these acts of trespass. *People v. Davidson*, 30 Cal. 379. Hence, it is unnecessary to determine whether the legislature could by special act disincorporate the town of Wilmington. St. 1887, pp. 108, 109.

The plaintiff is a municipal corporation of the sixth class, and was organized as such February 27, 1888, subsequent to the date of the permit given to the defendants by the surveyor general. As such municipal corporation, it is only one of the agencies of the state to aid it in the discharge of its political duties; and, although the lands upon which the defendants were driving the piles are within the corporate limits of the plaintiff, the plaintiff has not, for that reason, any pro-

prietary interest in these lands, nor is it the owner of the soil, or clothed with any riparian rights. Its right to construct a wharf rests upon the provision of section 862, subd. 11, of the municipal government act, (St. 1891, p. 234,) by which it has authority "to construct, maintain and operate on any lands bordering on any navigable bay within the corporate limits of such city, or contiguous thereto, wharves, piers," etc. The authority given in this section does not, however, clothe the plaintiff with an absolute right to construct a wharf at any point on its water front which it may select, irrespective of the rights of others; but it is intended to confer upon it the same authority to do the acts therein enumerated which a natural person would possess, and to give to its acts a sanction which they would not otherwise have. A municipal corporation can exercise only such powers as are conferred upon it by the legislature, and in the absence of the authority above conferred the plaintiff would not be authorized, under any circumstances, to erect or maintain a wharf; but the authority thus given does not authorize it to prevent the erection of a wharf by another person, who has a right therefor, or who does not infringe upon any of the plaintiff's rights.

The court also found that there had been an abandonment and nonuser of the portion of the lands within the limits of the permit beyond the existing wharf, and that by reason thereof these lands were excluded from the permit. The record does not contain any evidence showing an "abandonment" of the rights conferred by the permit, and we have been cited to no statute or rule of law by which a failure on the part of the railroad corporation to construct its wharf immediately upon receiving the permit would work a forfeiture of its rights. Section 478, Civ. Code, under which the permit is granted, does not limit the time within which the work shall be commenced; and the clause therein by which the surveyor general is directed to "issue to the corporation a permit to use the same, unless, on petition properly presented to the court a review is had, and such use prohibited," implies the continuance of the permit until such use is prohibited in the manner therein prescribed. As the permit is only a license for a right of way over the public lands of the state, and does not confer any proprietorship in the lands themselves, the state would have the right to revoke the license at any time, and would be justified in doing so if it should appear that there was unnecessary delay on the part of the corporation in availing itself of the privilege; but, unless the state makes the objection, the privilege cannot be declared forfeited at the instance of any other person. Upon the organization of a railroad corporation, it makes a selection of the route over which it intends to construct its road; and, in making such selection, ordinary prudence would dictate that it should include the en-

tire route over which its road would ultimately be constructed. Necessarily, some time must elapse before the road can be completed, and circumstances may arise during the process of its construction which will render a delay or suspension of work not only prudent, but even necessary. Such delay or suspension will not of itself work a forfeiture of any privilege which the state may have granted, unless the statute under which it was granted expressly so provides, as has been done in the case of street railroads, (Civ. Code, § 502,) and it is a well-recognized rule that, when only the right to the forfeiture of a corporate privilege or of a franchise exists, it can be invoked only at the instance of the state. See *Western R. Co.'s Appeal*, 104 Pa. St. 399. The judgment and order denying a new trial are reversed.

We concur: PATERSON, J.; GARGUTTE, J.

BROWN v. KLING. (No. 19,279.)

(Supreme Court of California. Feb. 9, 1894.)

CONTRACTS — VALIDITY — RESTRAINT OF TRADE — TIME OF LIMITATION — INJUNCTION.

1. Civ. Code, § 1673, provides that a contract in restraint of trade, otherwise than provided in the next two sections, "is to that extent void;" and section 1674 provides that the seller of "the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified territory, so long as the buyer or any person deriving title to the good will from him carries on the business." *Held*, that a provision, on sale of a good will, that the seller shall not engage in the business for three years in a certain city, is not void, but the contract will be limited to such time, not exceeding three years, as the buyer or his assignee carries on the business.

2. The breach of a valid contract in restraint of trade may be enjoined, though nominal damages, only, can be proved.

Commissioners' decision. Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by A. P. Brown to enjoin Theo. Kling from breach of contract, and for damages. From a judgment for defendant on demurrer, plaintiff appeals. Reversed.

Victor Montgomery, for appellant. E. E. Keech, for respondent.

TEMPLE, C. In this case a demurrer was interposed to the complaint on the ground of insufficient statement of facts. It was sustained, and plaintiff declined to amend. Judgment was thereupon entered, and plaintiff appeals.

The complaint, in substance, states that theretofore defendant and one Challis carried on a retail butcher business in Santa Ana and the city of Orange, which cities are about $3\frac{1}{2}$ miles apart. They had shops in these cities, and ran wagons distributing and selling meat in the vicinity. April 18, 1892, plaintiff purchased their shops, implements,

wagons, fixtures, and stock for \$4,650 paid to them, and at the same time bought the good will of the business, for which he paid the further consideration of \$600, and defendant and Challis at the same time, in consideration of such purchase, each for himself agreed with the plaintiff that he would not at any time thereafter, and within the period of three years from said 18th day of April, 1892, engage, directly or indirectly, or concern himself in carrying on or conducting a butcher business in said city of Santa Ana, or within a radius of five miles from said city. Plaintiff has ever since continued to conduct said business at the towns of Santa Ana and Orange. On the 19th day of September, 1892, defendant set up a retail butcher business in the city of Santa Ana, which he has since continued to conduct at that place, to the damage of plaintiff in the sum of \$500, for which sum he asks for judgment, and that defendant be enjoined.

The principal point made on the demurrer is that the agreement sued on is void because in restraint of trade, and not in accordance with section 1674, Civ. Code, which only authorizes one selling the good will of his business to agree to refrain from doing business "so long as the buyer or any person deriving title to the good will from him carries on a like business therein." Here the purchaser is, as a matter of fact, still carrying on the business purchased, but it is not so limited in the contract. In form, defendant agreed not to carry on the business for three years; non constat that plaintiff or his assignee may do business there for three years; therefore, defendant bound himself for a period which may extend beyond the period for which he was authorized to bind himself to refrain; therefore, the contract is wholly illegal and void. Section 1673, Civ. Code, reads as follows: "Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void." Section 1674 is as follows: "One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein." The contracts which are here declared void are not declared unlawful. Certain contracts not made in a certain mode are declared void by the statute of frauds, but they are not therefore illegal. This contract is not against public policy. At common law, such a contract would have been valid. A contract restraining one from following a lawful trade or calling at all is invalid because it discourages trade and commerce, and prevents the party from earning a living; but the right to agree to refrain from his calling, within reasonable limits as to space, may have the contrary effect. It encourages trade, for it

gives value to a custom or business built up by making it vendible. One would have an inducement, therefore, to serve the public honestly and efficiently, for he is not only profiting by the business, but the custom attracted by so doing is valuable, even after he is ready to retire from business; and, besides, the rule enables him to find a purchaser who will also have an interest in so serving the public. The period of the restraint is not unreasonable. While it has been said that a restraint of this character, independently of any statute upon the subject, is binding even if the party in whose interests the restraint was imposed has retired from business and has no assignee, still in such case only nominal damages could be recovered. The statute does not provide that such contracts, though not in accordance with the Code, shall be wholly void. It says they shall be "to that extent void." It may be said (and perhaps that is the correct construction) that the restraint which is other than that prescribed shall be void. But it is a familiar rule of law that, where there is a statute upon a certain subject, it enters into, and becomes a part of, such contract upon such subject, if the contract can be so construed. The contracting parties are presumed to have had the law in view. Sometimes the terms of the contract will rebut this presumption, but in the present case they do not. One rule at common law applicable to this matter was that the restraint shall be no greater than is necessary to protect the purchaser. This rule would limit the restraint to the time during which the purchaser or his assignee is in business, for beyond that time there is nothing to protect. As, at common law, the restraint as to time was not objectionable, this question did not arise. The question as to space was a very different affair. The court could not hold such a contract valid for a reasonable extent of country, and void as to the excess. To what part of the specified country would the court confine the business? If the described space were the state of California, to what city or town within the state should the operation of the contract be confined? To confine it to any part would be to make a new contract. The courts have generally done this, however, when the circumstances permitted. Upon this point, *Baines v. Geary*, 35 Ch. Div. 154, is very instructive. The plaintiff was engaged in the business of selling milk, and the defendant engaged as an employe as milk carrier, and agreed that "he will not during such service, or after being discharged or quitting such service, serve, or cause to be served, with milk or any other dairy produce, for his own benefit or that of any other person or persons, * * * any customers served or belonging at any time to the said Clement Baines, his successors or assigns." Action for injunction. Judge North said: "It is quite clear that a covenant in restraint of trade is good if it does not go further than is necessary to give reasonable

protection to the person who imposes it. There is nothing illegal in such a covenant, but it is considered unreasonable if it imposes a larger restraint than is necessary for the protection of the covenant. The courts have, however, seen their way to treat such a covenant as divisible, and to enforce to the extent to which it is reasonable, the declining to enforce such part of it as is unreasonable. There are many reported cases in which covenants in restraint of trade have been held to be divisible as regards space. * * * No case, however, was cited to me in which a covenant of this kind has been held to be divisible in regard to time and I postponed my judgment that I might see if any such case had been reported, and I have found the case of *Nicholls v. Stretton*, 10 Q. B. 346. In that case, the defendant, on being articulated for five years to the plaintiff, who was a solicitor, covenanted that he would not, during the five years, 'nor at any time after the expiration of the term,' etc., do business 'for any person who had already been, or who should, from time to time thereafter, become or be, the client,' etc. * * * Mr. Cowling then contended that the contract was at least good so far as it concerned the clients who carried on business with the plaintiff at the time of making the indenture, or during the continuance of the articles, and the breaches are confined to these. 'It is true,' he said, 'that when any contract, whether under seal or not, is in part illegal, the whole contract fails. But that is different from the present case, where the contract is not to do anything illegal, but only to abstain from certain acts, some of which a party cannot bind himself not to do, but may still legally abstain from doing. In such case, the law will enforce such restrictions as the party can bind himself to.' Mr. Bramwell replied, and the court took time to consider their judgment. Lord Denman, C. J., delivered the judgment of the court, thus: 'This case must be decided in favor of plaintiff,' etc. * * * I must therefore grant an injunction, but limited to restraining the defendant from serving or interfering with any persons who were customers of plaintiff, Baines, at any time during defendant's employment by him." The contract was enforced to the extent to which it was deemed reasonable, and was held void as to excess. In *Moore, etc., Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 6 South. 41, defendants sold their business to plaintiffs, and agreed not to handle any more plow stocks or plow blades. There was no restriction as to time or place. It was objected to as unreasonable because unlimited. The court said, however, in substance, that a contract was to be construed with reference to the circumstances of the parties and the object sought to be attained by the contract; that, in fact, the firm was dealing only within a limited territory, and the evident purpose was to protect the plaintiff in his business.

I think this case an advance upon former precedents upon the subject. But, whatever difficulty there may be in limiting such a contract as to space, there is none whatever in doing so as to time. In fact, it is practically unlimited in the nature of things. The obligation when the purchaser is not engaged in the business within the limited territory is mostly ideal, as only nominal damages could be recovered for a breach, and equity, under such circumstances, would not interfere to prevent a breach. The sole purpose here was to protect the plaintiff in the enjoyment of what he had purchased, and the contract was presumably made in view of the law. All the parties sought to attain was within the limits of the law. We neither add to nor take from the contract by supposing that the parties contemplated that it should be so limited. This principle seems to be recognized in *Langan v. Langan*, 91 Cal. 654, 27 Pac. 1092. I think, therefore, the contract was valid. I think the complaint sufficiently states a breach of the contract. Even if only nominal damages could be proven, plaintiff would be entitled to his adjunction, partly, perhaps, upon the very ground of the difficulty in proving damage. I advise that the judgment be reversed, and the court directed to overrule the demurrer.

We concur: SEARLS, C; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, and the court below directed to overrule the demurrer.

WILHELM et al. v. SILVESTER. (No. 18, 085.)

Supreme Court of California. Feb. 20, 1894.)

MINES—LOCATIONS—INTERSECTING VEINS.

Rev. St. U. S. § 2322, giving locators of quartz claims exclusive possession of all the surface within their location lines, and the entire depth of all veins whose apex is within the surface lines extended vertically, is not repealed by § 2336, providing that, where two or more veins cross each other, the prior location shall have all ore within the space of intersection, but the latter shall have right of way or working through said space, since the latter section may well apply to ledge locations made before May 10, 1872, and to possible intersections on the dip; and the former still stand to preserve to the prior locator, under federal laws, the ownership of a vein crossing his on the strike, whose apex is within his surface lines. De Haven, J., dissenting.

In bank. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by T. H. Wilhelm and others against Henry Silvester on agreed facts. Judgment for defendant. Plaintiffs appeal. Affirmed.

Kitts & Bowman, for appellants. A. Burrows, for respondent.

defendant's grantor, in December, 1879, discovered a gold-bearing quartz vein, which he called the "New Idea Lode," and made a valid location thereof, including surface ground 1,500 feet long and 600 feet wide. The New Idea lode runs nearly north and south through the center of said surface ground; and the land on which the location was made was at the time public, unclaimed, and unoccupied public land of the United States. It is admitted that said location was a valid one, and that since then defendant and his grantor have complied with all the laws and customs necessary to continue the validity of said location. About a year afterwards, to wit, on December 4, 1880, the plaintiffs discovered a gold-bearing lode which commenced east and outside of the said New Idea claim, and thence ran westerly across said New Idea claim at nearly right angles, and intersected said New Idea lode; and they attempted to locate a claim 1,500 feet long and 600 feet wide across the said prior location of the defendant, and did the formal acts which are required by mining laws and customs in making valid locations, and have since done the necessary work, etc., to maintain said location. The said asserted location of plaintiffs is called the "South Scotia Lode and Claim;" and they contend that by said subsequent attempted location they have acquired the title to, and right of possession of, the said South Scotia lode, where it lies within the surface ground of said defendant's New Idea claim. Defendant claims that the plaintiffs, by said attempted subsequent location, acquired no right whatever to any portion of the said South Scotia lode, which lies within the boundaries of defendant's location. The plaintiffs brought this action to enforce their right to the South Scotia lode within the limits of the said prior location of defendant. The court found in favor of defendant, and the plaintiffs appeal from the judgment.

We think that the decision of the superior court was right, and that the judgment should be affirmed. Section 2322 of the Revised Statutes of the United States, which is a re-enactment, in this respect, of the act of May 10, 1872, provides that the locators of quartz claims, where no adverse claim existed on the 10th of May, 1872, so long as they comply with the laws of the United States and local customs, "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically." This language is clear and explicit, and, in designating the property rights of locators, is in no wise ambiguous or uncertain. It expressly, and in language which needs no construc-

tion, grants to such locators every ledge or lode, the top or apex of which lies within the surface lines of the location; that is, such part of the ledge as lies within such lines. And there is no limitation or exception of any such ledge on account of the direction in which it may run. It may be parallel with the originally discovered ledge, or may approach it at right angles, or at an obtuse angle, or at an acute angle, it may intersect it or not, and still it will be clearly within the language of the said section.

It is contended, however, by appellants, that this positive language of said section 2322 is overcome or repealed, or in some way rendered nugatory, by the provisions of section 2336 of said Revised Statutes. That section is as follows: "Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right-of-way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection." It will be observed, however, that this latter section does not undertake to give to any person the right to make a valid location of a quartz ledge across either the surface ground or the lode of a prior locator. It merely assumes that there may be instances where there may be certain kinds of intersections of lodes where both the prior and the latter locators may have some rights; and if there can be a reasonable and apparent construction of section 2336, by which it will not be in conflict at all with section 2322, then such construction should govern. Now, there are cases where the owners of ledges which intersect may each have rights entirely distinct from, and which do not conflict at all with, the clear and positive language of section 2322. Passing the consideration of the possibility of a subsequent locator acquiring rights, as against the prior locator, by adverse user, it must be remembered that the Revised Statutes were not intended to impair the rights of quartz miners, in cases where the locations were made before May 10, 1872. Rev. St. § 2344. Prior to the time when congress undertook to legislate upon the subject of the location of quartz mines, such location was regulated entirely by local rules and customs; and, while those rules and customs had a general similarity throughout mining regions, there were still some districts in which they differed quite materially from the general customs. For instance, in some localities quartz claims were held by square location,—the owner not being allowed to go beyond his side lines to follow his lead under ground,—and in other localities there were what are known as "ledge locations;" that is, where the ledge alone was located, without any surface

ground. Now, then, the provisions of section 2336 can readily be construed as intending to protect the rights of such old ledge locations. But, in the second place, there are two kinds of intersections of quartz ledges. They sometimes intersect, and sometimes unite, in their horizontal extension, or, as the miners call it, their "strike." But they may also intersect or unite on their dip; that is, they may intersect laterally in their downward course. Now, when they intersect laterally, as last above stated, the owner of each ledge has rights at the point of intersection entirely consistent with all of the provisions of section 2322. In such a case the owner of a claim on land adjoining that of a prior locator would have a right to follow his ledge as it dipped laterally underneath the surface ground of his neighbor, and, if his ledge intersected the ledge of the prior locator, he would have the right of way through it under the statute, the older locator merely having the quartz at the exact point of intersection; but his right to thus follow his vein underground would be an entirely different thing from the right asserted in the case at bar by appellants,—to enter upon the surface of defendant's prior location, and locate a claim, the top or apex of which was within the surface location of defendant's ground. And to such an intersection the provision of section 2336 can be readily applied, in perfect consistency with the provisions of section 2322. Moreover, there is strong reason for thinking that such an intersection was the very one in the mind of congress when it passed section 2336; for in that section, and speaking of the same subject, it says that: "Where two or more veins unite, the oldest or prior location shall take the vein below the point of union." And, if the other kind of intersection was in the minds of the legislators at that time, they would not have used the word "below;" for "below" would not apply at all to a union on the strike of two veins, such as the appellants' rights depend on in the case at bar. These views make the two sections under review entirely harmonious, and the fundamental rule of construction is to reconcile apparently contradictory provisions of the statute, where it can be reasonably done. And, if we look at the apparent intention of congress, there would seem to be no possible reason for giving to the first locator all the veins within his surface lines, except those that happen to run in a particular way. Under appellants' contention, if the course of a vein was such that it intersected with the original vein of the prior locator a few feet before it reached the end line, it would not belong to such original locator; but, if the point of intersection was a few feet beyond his end line, then he would own it. There would be no good reason for supposing that congress intended such a result, when not using any language to express such intention. Moreover, how was it possible for

appellants to locate any part of a quartz ledge on the surface of respondent's claim? It is the universal rule that a valid mining location can be made only upon unappropriated public land; that is, at least, as against the prior appropriator. It was even held by the supreme court of the United States in *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. 1110, that a mining location made partly upon a former valid location was void throughout its entire length, as against a third party. That is no doubt a somewhat extreme doctrine, but it is certainly clear that such a location is invalid as against the prior appropriator himself; and as, in the case at bar, the appellants' whole claim rests upon a location made within and on top of the former valid location of the respondent, it is impossible to see how there is any basis at all for their asserted rights. And it must be remembered that section 2336 refers to a case where "priority of title" governs, and of course it can have no application to a party who has no title.

We are aware that the supreme court of Colorado, in *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. 669, reached a different conclusion on this question; but, while we have the highest respect for the decisions of that court, we are not able to concur with its conclusion on the point under discussion. The opinion in that case went upon the theory that the two sections of the Revised Statutes above referred to are utterly inconsistent, and the court say: "We see no way out of the dilemma, except by the application of the arbitrary rule of construction suggested by the court in the case of *Hall v. Smelting Co.*, [Morr. Min. Rights, (3d Ed.) 282, Fed. Cas. No. 5931.]—that, as between conflicting statutes, the latest in date will prevail, and, as between conflicting sections of the same statute, the last in order of arrangement will control." But that rule of construction is to be invoked only as a last resort, and where the conflict is so sharp and complete as to leave no possible room for giving both effect; and, as appears from the views above expressed, in our opinion, there is no such conflict between the two sections named. Both, in our opinion, can easily stand together, and we see no difficulty in reconciling them. The construction contended for by appellants would leave the rights of prior locators in the greatest confusion. Their property interests in their claims would be undefined, and the result would be ruinous litigation, and perhaps personal conflicts. But to give section 2322 its clear and undoubted meaning is to accurately fix the rights of prior locators as we think congress clearly intended them to be fixed.

After the foregoing opinion had been written, our attention was called to the case of *Mining Co. v. Leach*, (decided by the supreme court of Arizona,) 33 Pac. 418, in which that court reached the same conclusion as that heretofore stated. In the opinion of the court,

delivered by Kibbey, J., there is an elaborate discussion of the subject, leading to the result that section 2336 does not conflict with, nor does it in any way repeal, any part of section 2322; that the former section had reference to mining rights existing prior to its passage; and that "congress had in mind, at the time of the enactment of the law of 1872, that, as mining rights then stood, A's lode might legally cross B's lode on the strike."

The judgment is affirmed.

We concur: HARRISON, J.; FITZGERALD, J.; GAROUTTE, J.; PATERSON, J.

I dissent: DE HAVEN, J.

BEATTY, C. J. I concur in the judgment, and in the conclusion of the court as to the proper construction of sections 2322 and 2336 of the Revised Statutes. I think, however, that too much is conceded, both in the opinion of the court and in the argument of counsel for respondent in assuming that the provisions of section 2336 cannot be applied to locations made since the passage of the mining law of 1872, on veins which intersect upon their strike, without bringing it in conflict with the plain terms of section 2322. This wholly unwarranted assumption has been the source of all the trouble and difficulty which the land office and some of the state courts have encountered in their attempts to construe provisions of a statute which are in perfect harmony, but which have been erroneously supposed to be inconsistent. The sum of the argument in favor of the construction thus imposed upon the statute—which is, in effect, a nullification of the express terms of section 2322, and a relegation of mining rights to the same condition of uncertainty and confusion in which they were before the act of congress was passed—has been that section 2336 must be allowed some operation and effect; that its only possible application is to veins which cross on their strike, because parallel veins never do intersect on their dip; and that, if it is to be applied to veins which cross on their strike, the necessary inference is that congress intended that the discoverer of a cross vein should have the right to lay his surface location across the surface location of the intersected vein. But in truth this conclusion is a perfect non sequitur. There is no proposition in geometry plainer or more easily demonstrable than this: that surface locations on cross veins may be so made as not to conflict, while at the same time the portions of the veins included in or covered by the respective locations will intersect in depth,—in some cases within the surface lines of one or the other location extended downward vertically, and in other cases altogether without the surface lines of both locations. This results from the fact that veins generally, if not universally, descend into the earth,

not vertically, but at a greater or less inclination or dip. This being so, and the law allowing the locator to follow his vein on its dip outside of his side lines projected downward vertically, and within the vertical lines of an adjoining or neighboring claim, it may easily happen that the parts of two intersecting veins included within entirely distinct surface locations will intersect in depth either outside of both claims, or within one or the other, according to the angle of the dip and the relation of the surface claims to the point where the apices or croppings of the veins intersect. Suppose, by way of illustration, a north and south vein, dipping to the west, intersected by an east and west vein dipping to the north at the same angle. Assuming these veins to be perfectly regular in strike and dip, their intersection will be along a diagonal line descending into the earth from the point of intersection at the croppings, (which, for brevity, I will call "Point A,") and extending in its horizontal projection to the northwest. Now, suppose a location on the north and south vein, commencing three hundred feet or more north of point A, and extending to the north along the vein. It is evident that a full surface claim, 1,500 feet in length, and extending 300 feet on each side of the croppings, may be located on the east and west vein without at all conflicting with the supposed location on the north and south vein; and it is equally evident that such location may be made to include point A, or altogether east of it or west of it. If made wholly to the east, it will not include any part of the intersection at the surface or below the surface. If made to extend but a short distance west of point A, it will include some of the intersection, but the diagonal of the line of intersection will carry it beyond the vertical plane of the west end line before the dip of the vein carries it beyond the south line of the other location. If made somewhat further to the west, the intersection will fall more or less within the surface lines of the north and south location, and will make a case for the application of section 2336. If made still further to the west, the line of intersection of the portions of the respective veins covered by the two locations will be wholly outside of the surface lines of either location, and still another case for the application of section 2336 will arise. Here, then, are two cases for the application of section 2336, without bringing it in conflict with section 2322; and the mere possibility that such cases might sometime arise under distinct locations, each entitled to all the rights conferred by the plain terms of section 2322, was a sufficient reason for incorporating in the law the provisions of section 2336. Of course, the hypothesis of two perfectly regular veins dipping at the same angle, and crossing at right angles, is one which will never be realized. But the very fact that veins, instead of being regular and uniform

in strike and dip, are in every way irregular and eccentric, increases the possibility of intersections of cross veins under ground, outside of the lines of surface locations, and, so far from diminishing the force of the illustration used, only proves how infinitely it might be varied. If these views are correct, it follows that the only reason ever suggested for construing section 2322 against the plain import of its terms is based upon a geometrical absurdity; and the practice of miners in making, and of the land office in permitting, cross locations on the surface, is without any justification in the mining law.

TALMADGE v. ARROWHEAD RESERVOIR CO. (No. 19,303.)

(Supreme Court of California. Feb. 20, 1894.)

POWERS—SUBSTITUTION—SUBMISSION TO ARBITRATION.

A reservoir company's power of attorney to bargain, contract, agree for, purchase lands, etc., in the donee's judgment required for the company's business, "with full power of substitution or revocation," will not sustain his agreement to arbitrate the price of a tract he desires to buy for the company so as to bind the company by an award of a majority of the arbitrators, not concurred in by those whom he appointed.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by F. L. Talmadge against the Arrowhead Reservoir Company on an award of arbitrators. Judgment for defendant. Plaintiff appeals. Affirmed.

H. C. Rolfe and F. B. Daley, for appellant. Willis, Cole & Craig, for respondent.

BELCHER, C. It is alleged in the complaint in this case that in April, 1892, the plaintiff and defendant entered into a written agreement, which is set out in full, and the material parts of which are as follows: "Whereas, the Arrowhead Reservoir Company, a corporation organized and existing under the laws of the state of Kentucky, and doing business in the county of San Bernardino, state of California, is desirous of purchasing from F. L. Talmadge" the east half of a certain sixteenth section of land in San Bernardino county; and "whereas, said parties cannot agree among themselves as to the exact amount to be paid and received for said premises: Now, therefore, we, the undersigned, * * * do hereby submit said controversy to the arbitrament of" five men, two chosen by each of the parties named, and one to be chosen by the said four, "and we do mutually covenant, promise, and agree to and with each other that the award to be made by said arbitrators, or a majority of them, shall in all things by us, and each of us, be well and faithfully kept and observed."

and that said arbitrators shall fix the amount or value of said premises, * * * which said amount said Arrowhead Reservoir Company promises and agrees to pay to said F. L. Talmadge within thirty days after said arbitrators have delivered to said company their decision therein; and the said Frank L. Talmadge promises and agrees, upon receiving the amount so fixed by said arbitrators of said property, that he will then and there give to said Arrowhead Reservoir Company a duly-executed grant deed, conveying to said company the legal title to the property hereinbefore described. And that the value fixed upon said property by said arbitrators shall be final between the parties hereto, and that neither party hereto shall appeal to or resort to any court from the decision of said arbitrators. And that said award be made in writing under the hands of said arbitrators, or a majority of them, and ready to be delivered to said parties in difference, or such of them as shall desire the same, on or before the 1st day of June, 1892. * * * And it is hereby stipulated and agreed that this submission to arbitration shall be entered as an order of the superior court in and for the county of San Bernardino, state of California." The agreement is signed: "The Arrowhead Reservoir Co., by Adolph Wood, Vice President and General Manager. F. L. Talmadge."

It is further alleged that the four so-called arbitrators, chosen by the parties, chose a fifth, and that on May 12, 1892, all of said five men met to consider the matter submitted to them, and both plaintiff and defendant appeared before them, and produced and submitted evidence as to the value of the premises, and were fully heard; that thereafter, on May 13, 1892, a majority of them fixed the value of the said premises at \$18,000, and made their decision in writing, a copy of which is set out; that the decision was on the day of its date delivered to the plaintiff and defendant, and thereafter, on June 8, 1892, the plaintiff offered and tendered to the defendant a duly-executed grant deed, conveying to defendant the legal title to said property upon payment to him of the sum of \$18,000, and again, a week later, made the same offer and tender, and demanded of defendant the said sum, but defendant then refused, and still refuses, to receive the said deed, or any deed of the said premises, or to pay to plaintiff the said sum; and that plaintiff is still ready and willing to deliver said deed, and to transfer and convey the legal title to said property to the defendant upon payment to him of the said sum of \$18,000. Wherefore, he demands judgment against the defendant for the sum of \$18,000, with interest and costs.

The answer denies most of the averments of the complaint, and, among other things, that defendant ever entered into any agreement with the plaintiff in reference to the purchase of the described land, or any other

land, or ever entered into the agreement set forth in the complaint, or ever agreed or stipulated in writing to purchase said property, or any part of it, or ever agreed to submit the price of it to arbitration or otherwise.

At the trial the plaintiff offered in evidence a state patent to himself for the land described in the complaint, and a power of attorney to Adolph Wood, executed May 27, 1891, by the president and secretary of the defendant company, in pursuance of a resolution of its board of directors, and also the two other papers above referred to as set out in the complaint. By the power of attorney the company made, constituted, and appointed Wood "its true and lawful attorney for it, and in its name, place, and stead, and for its use and benefit, in said state of California, to bargain, contract, agree for, purchase lands, tenements, hereditaments, which in his judgment may be required or necessary for the company's business, and to receive and take such property, and all deeds and assurances therefor; and in case land is purchased by said company, and the entire purchase money is not paid therefor in cash, to mortgage such lands for the balance of purchase money upon such terms and conditions, and under such covenants, as he shall think fit, and to deliver and execute such instruments in writing as may be necessary or proper in the premises, * * * giving and granting unto its said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents, as said corporation might or could do if personally present by its board of directors and corporate officers, with full power of substitution and revocation, hereby ratifying and confirming all that said attorney or his substitutes shall lawfully do or cause to be done by virtue of these presents." The defendant objected to all the offered evidence upon the ground that it was irrelevant and immaterial, and to the power of attorney upon the ground that it did not confer any power to make the submission, and also to the power of attorney and the agreement and award set out upon the further ground that the complaint did not state a cause of action, for the reason that it did not show any case for submission to arbitration, or any compliance with the statute in regard to arbitrations, or that any contract had ever been made between plaintiff and defendant for the purchase of any land, or upon which any civil action could have been brought or maintained by either party. The court sustained the objection that the complaint did not state a cause of action, and rendered judgment for the defendant, from which the plaintiff appeals.

It is not, in our opinion, necessary to consider the question as to whether the complaint stated a cause of action or not, or as to whether the agreement, if authorized, con-

stituted a statutory or common-law submission to arbitration, (*Church v. Seltz*, 74 Cal. 287, 15 Pac. 839;) for if, as claimed by respondent, the power of attorney did not authorize Wood to submit to third parties the matter of fixing the price to be paid for the land, then there was no completed contract which was binding upon or enforceable against either party. It is well settled that no action will lie to enforce the performance of a contract, or to recover damages for its breach, unless it be complete and certain; and the rule applies as well to price as to subject-matter and parties. *Association v. Phillips*, 56 Cal. 539; *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179. It is also a general rule of law that an agent cannot delegate his authority to another, unless he is specially authorized so to do. *Mechem*, Ag. §§ 184-186; *Ang. & A. Corp.* § 277. Wood did not sign the agreement as the attorney in fact of the corporation, but as vice president and general manager, and it does not appear that he held either of those positions, nor, if he did, what were his powers as such. Waiving that objection, however, and still it only appears that he was authorized "to bargain, contract, agree for, purchase lands, tenements, hereditaments, which, in his judgment, may be required or necessary for the company's business," "with full power of substitution and revocation."

It is contended for appellant that the power of substitution conferred authority to submit to the so-called arbitrators the matter of appraising the land and conclusively fixing its price, and that, when the appraisement was made and delivered to the parties, the contract was complete. This contention cannot, in our opinion, be sustained. Wood was authorized only to substitute another to take his place and perform his duties as attorney or agent for the principal, not to substitute the judgment of another for his judgment while he was still acting as agent, and himself performing the duties pertaining to his position; but, even if he had the right to substitute another to make the appraisement and fix the price, still he certainly had no right to agree that his principal should be bound by an appraisement not made by his substitute, but by other persons. Here it appears that the appraisement was made and concurred in by only three of the so-called arbitrators, namely, the two chosen by appellant, and the fifth chosen by the other four. Under these circumstances, it is clear that no price for the land was ever agreed upon by the contracting parties, and no enforceable contract was ever made. It follows that the judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, O.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

CITY OF LOS ANGELES v. COHN et al
(No. 19,210.)

(Supreme Court of California. Feb. 21, 1894.)

ESTOPPEL OF CITY—OCCUPATION OF STREET.

Where one erects a valuable building projecting into a street, after the agent of the city instructed by it, with the concurrence of the lot owner, to investigate and report to the council the city's rights in the land, reports that it has no rights, and such report is received and filed among the records of the city, it is estopped to claim the land.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the city of Los Angeles against Kaspere Cohn and others. Judgment for defendants. Plaintiff appeals. Affirmed.

O. McFarland, for appellant. Houghton, Silent & Campbell and Stephen M. White, for respondents.

GAROUTTE, J. Plaintiff bring this action to recover the possession of a small tract of land which lies at the intersection of Spring and Main streets, in the city of Los Angeles, and which is covered by a portion of the building known as "Temple Block." It is claimed by the city that this land is a part of a public street. At the conclusion of the trial the court made its findings of fact, to the effect that defendants were the owners of the land at the time the action was commenced, and that they and their grantors and predecessors had been in the active and exclusive occupation and possession of the property for more than 40 years. Upon these findings, judgment went for the defendants, and this appeal is prosecuted from that judgment, and from the order denying a motion for a new trial.

Owing to the views we entertain upon another branch of the case, we do not find it necessary to discuss in detail the sufficiency of the evidence to support the finding of the trial court as to the character of the possession, and the period of time of the possession, of these defendants, and their grantors and predecessors, over this tract of land. Upon examination of the evidence, we think it established to a certainty that this possession had been continuous and exclusive for almost 50 years. This is something unusual in litigation of the present character, and is a feature of the case to which we would attach considerable importance, if the consideration of the element of possession were necessary to support the title of defendants to the land. An uninterrupted possession of 40 or 50 years is full of meaning, even against a municipal corporation, and in some states such conduct upon the part of the city would conclusively indicate an abandonment by it of all right to the land as a public highway. In 1871, Temple began the erection of a block of buildings upon a certain parcel of land, which included, upon the north end thereof,

the strip in dispute. The contemplated structure was to be three stories in height, of great value, and extended over this tract of land. The foundations being laid, it was reported to the city council by the street commissioner that Temple, the owner, was encroaching upon the public street with his building, and, upon an order of the council, the matter was referred to the city attorney for investigation. Subsequently, as shown by the minutes of the proceedings of the council, the city attorney made a lengthy report to that body, wherein, in detail, he reviewed the merits of the claims of both parties, and in conclusion held that Temple was the owner of the land, and was justified in erecting the building as he had begun it. This report was ordered received and placed on file, and a full synopsis thereof was entered upon the minutes of the board. Thereupon the building was at once erected to completion, and nothing further was ever done by the city in the premises until the present action was brought, 20 years later. Stephen C. Foster, who had been a former alcalde of the pueblo, and later a mayor of the city, and a witness in whom, it appears, all parties reposed confidence, testified that, at the time the city attorney was investigating the rights of the city to this land, he heard Temple, the owner of the building, tell the attorney that he wanted to do what was right; "he wanted the matter fixed at once;" and the witness also stated that his impression was that Temple said he would leave it to Howard, (city attorney,) and act upon his opinion as to where the north line should be placed.

Various questions pertaining to title and dedication arise in the case, and those questions have been fully argued by counsel. We shall not discuss them, but rest our decision upon the history of this piece of realty, as disclosed by the facts we have quoted from the record. If it be conceded that the legal title to this land has always been in the city, that fact alone avails the plaintiff nothing, for an assertion of its claims upon that ground has been barred by the statute of limitations for many years. A dedication of the property as a public highway, resulting from the filing of a certain map among the public records of the county in the year 1849, forms the basis of plaintiff's cause of action; and, conceding the filing of this map to have had all the force and effect claimed for it, and that dedication ipso facto resulted therefrom, yet we think plaintiff's conduct has been such that, whatever merit its claim may have possessed years ago, there is no merit in it now. While municipal corporations do not own their public streets, and while the laches of municipal officers cannot defeat the rights of the public in those streets, yet individuals have some rights which, in the exercise of common justice, the municipality must respect. Its conduct towards a citizen, pertaining to the boundary

line of one of its highways, may be such that it would be a violation of every principle of right and morals to allow it to recede from the stand taken or the agreement made. The foregoing principle is well illustrated, and strongly put, by Dillon in his work upon Municipal Corporations, (section 875,) wherein it is said: "It will, perhaps, be found that necessities sometimes arise, of such a character that justice requires that an equitable estoppel shall be asserted, even against the public; but, if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle; but there is no danger in recognizing the principle of an estoppel in pais, as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere process of time, but upon all the circumstances of the case, to hold the public estopped or not, as right and justice may require." The author cites many cases to support the text, and upon examination of these citations we find the principle recognized and approved, especially by the decisions of the Illinois court. In the later case of *Simplot v. Railway Co.*, 16 Fed. 360, the text from Dillon is quoted with approval, and Judge Shiras says: "In the latter cases [referring to cases like the present one] the courts may apply the doctrine or principle of an estoppel, and by means thereof, where justice and right demand it, prevent wrong and injury from being done to private rights." This doctrine is also directly declared in the recent case of *Crocker v. Collins*, 37 S. C. 327, 15 S. E. 951; and while it is not for us to say whether or not the facts of that case were sufficient to justify an application of the principle of estoppel in pais as against the public, yet the law is there well declared, as follows: "We think, therefore, that mere adverse possession, for the statutory period, of a street or alley in a town which is a public highway, cannot confer a title; but, where such possession is accompanied with other circumstances which would render it inequitable that the public should assert its rights to regain possession, then, upon the principle of estoppel, a party may be protected against the assertion of right by the public, in order to prevent manifest wrong and injustice. For example, when a party, under an honest conviction of right, has taken possession of a portion of one of the streets or alleys of the town, and expended his money in erecting buildings thereon, without interference on the part of the public, these, or perhaps other, circumstances connected with adverse possession for the statutory period, may afford good ground for estoppel."

To our knowledge, there is nothing to be

found in the decision of the court opposed to the doctrine laid down in the text we have quoted from Dillon's work on Municipal Corporations, while in the case of *Fresno v. Fresno, etc., Irrigation Co.*, 98 Cal. 182, 32 Pac. 943, the principle was stated, and incidentally approved. The question being a new one in this state, and a most important one, we will content ourselves with an application of it to the facts of the present case, and not attempt to promulgate any general rule by which every case invoking this doctrine may be weighed and measured. If we concede the existence of the principle of estoppel in pais against the public in certain exceptional cases, then this case is rightly decided, for this is an exceptional case. If this character of estoppel may be pleaded where justice and right require it, then it may be successfully pleaded in this case, for justice to these defendants demands it. There are limits beyond which even a city, in representing the rights of the public, may not go, and we think the city, in the present action, has gone beyond those limits. If the city had expressly agreed by its officers, with defendants' grantors, even in parol, that a certain line should constitute the boundary line between the street and the grantor's property, and upon the faith of such agreement the grantors had erected a block of buildings flush with the line of the street, as agreed upon by all parties, it would be a hard law that would allow the city to repudiate that agreement, and destroy the grantor's property. No court should countenance such a thing, and an estoppel in pais will rise up in the pathway of a city, to bar it and its principal, the people, from the commission of such a grievous wrong; and, to give the acts of this city a very limited meaning, we think its conduct in the present case at least equivalent to an oral agreement as to the location of the true boundary line of the street.

It is unnecessary to again detail the facts. Before the building was erected, with a knowledge and concurrence of the owner, the city instructed its agent to investigate and report to the council its rights in the land. The agent did investigate, and reported that the city had no claim or title. This report was received, placed on file, and entered, in substance, upon the minutes of the proceedings of the council. Nothing more was ever done by the city until this action was brought,—a period of 20 years later. Upon the reception of the report, and its filing among the records of the city, defendants' grantors at once proceeded to the erection of a large and valuable building, and there it stands at the present day. A judgment for plaintiff would result in a destruction of this property. These facts are potent in themselves, and in our researches we have found no case which may so well be termed an "exceptional case." We have found no case which, with better

reason, should form a "law unto itself." It is a case where an estoppel in pais is properly pleaded. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

SOLARI v. SNOW. (No. 19,225.)

(Supreme Court of California. Feb. 24, 1934.)

IMPEACHMENT OF WITNESS—COMPLAINT IN ANOTHER CASE—DEED—NOTICE.

1. A complaint not verified or signed by plaintiff, and whose contents are not shown to have been known by him, is not admissible against him, in another action, to contradict his testimony.

2. Where defendant took a deed signed by G., not only individually, but as attorney in fact of plaintiff, he was charged with notice of plaintiff's interest.

Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by Globatti Solari against S. P. Snow. Judgment for plaintiff. Defendant appeals. Affirmed.

E. B. Hall and B. F. Thomas, for appellant. Richards & Carrier, for respondent.

FITZGERALD, J. Action to quiet plaintiff's title to the land described in the complaint, against the claims of defendant, and for the recovery of the possession thereof, also to cancel a tax deed issued to defendant therefor, as a cloud on plaintiff's title, and for rents and profits, and damages for withholding. Plaintiff had judgment, and defendant appeals from the judgment and the order denying his motion for a new trial. The evidence shows that plaintiff was the owner of the property described in the complaint, at the date of its purchase by the defendant. This being so, it is only necessary to consider but two of the questions discussed by counsel in their briefs, as their decision necessarily disposes of the others raised by the record on this appeal. These questions are: (1) Did Domingo Grondoma, who joined—individually and as attorney in fact of plaintiff—with his wife and son in the execution of the deed to defendant of the premises in controversy, sustain, or claim to sustain, at and prior to the execution thereof, the relation of attorney in fact to plaintiff? (2) If so, did defendant purchase said property with notice, either actual or constructive, of such relation, and of plaintiff's ownership thereof? On these questions, the court, in its decision, found adversely to appellant; and as the findings thereon, as well as the other findings attacked by the specifications, are fully justified by the evidence, they will not, under the well-established rule of this court, be disturbed, unless the rulings of the court

have been committed by the court during trial of the cause, but the only one necessary to be noticed—the others being immaterial or unimportant—is the one relating to the admission, against defendant's objection, of an unverified complaint signed by attorney alone, the contents of which were not shown to have been known to the plaintiff therein, filed September 1, 1887, in the action brought in the superior court into Barbara county, notice of which was thereafter duly recorded and filed, wherein said Domingo Grondoma was plaintiff, his son, Jose H., and Encarnacion, the father of the said Domingo, were defendants. The action, which was dismissed on the day of the execution of the deed to defendant, was brought to set aside and vacate, on the ground of fraud, two deeds to the property in question,—one a deed of gift executed by Domingo to his son Jose H., conveying to him the whole of said property; the other, also a deed of gift, from Jose H. to his mother, Encarnacion, conveying to her part thereof. The complaint in that action contained the allegation, among others, that Domingo Grondoma was "at all the times hereinafter mentioned the duly appointed, qualified, and acting administrator and trustee of the estate of Giobatti Solari, who is civilly dead, and the real property hereinafter described belongs to said estate." The property referred to and hereinafter described is the property involved in this action.

This complaint was offered and admitted in evidence, against defendant's objection, for two purposes: First, as an admission by Domingo Grondoma of the relation which he claimed to sustain to plaintiff, thereby contradicting his testimony at the trial on that point; and, secondly, to charge defendant with notice of the contents thereof. The complaint was clearly inadmissible as evidence for either purpose, for the reason that it was unverified, and not signed by the plaintiff therein, and not shown that he had any knowledge of its contents. But affirmatively appears from the record that defendant could not have been injured by its admission, as the evidence, independent of the complaint, was overwhelming in support of the finding that defendant purchased the property with full knowledge of plaintiff's ownership, and of Domingo Grondoma's alleged relation, as his attorney in fact, in connection therewith. The deed to defendant of the property in question was signed by the said Domingo as the attorney in fact for plaintiff. This was, of itself, sufficient to give the defendant with notice of the character and extent of plaintiff's interest in the property, and of Grondoma's real or pretended relation to him, at and prior to the purchase of the property by the defendant,

LAND, J.

AMES et ux. v. CITY OF SAN DIEGO. (No. 19,291.)

(Supreme Court of California. Feb. 24, 1894.)

MUNICIPAL CORPORATIONS — ADVERSE POSSESSION AGAINST—EFFECT OF FINDINGS.

1. Land obtained from the United States by a city, as successor of a former pueblo, may, if not dedicated for some public use, be lost by the adverse possession of another.

2. A finding that the land in controversy was conveyed to defendant city, as successor of a pueblo, "in trust for municipal purposes," taken in connection with a previous finding that plaintiffs have been in adverse possession since 1846, occupying it as a place of residence during that period, is not to be construed as declaring that the land was dedicated to public use as a street or park, or for a public building, or that it was conveyed to defendant for such a purpose, so as to show a conflict between the findings.

Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Catalina S. Ames and husband against the city of San Diego. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

William H. Fuller, for appellants. William Darby, for respondent.

DE HAVEN, J. The plaintiffs are husband and wife, and this action was brought for the purpose of determining an adverse claim made by the defendant to certain land which the complaint alleges is owned by the plaintiff Catalina S. Ames. The answer alleges that the defendant is the owner of the land in controversy, and this was the only issue made by the pleadings. The action was tried by the court without a jury, and judgment was rendered in favor of plaintiffs. The defendant appeals from the judgment and from an order denying its motion for a new trial. It is claimed by the defendant that the findings do not support the judgment, and also that the finding in respect to the plaintiffs' adverse possession is not justified by the evidence. The court did not find in direct terms that the plaintiff Catalina S. Ames is the owner of the land in dispute, but it found the following among other facts: "(2) That, ever since the year 1846, the said plaintiffs and their grantors have been continuously in possession of the lands and premises hereinafter described, claiming the same adversely to defendant, and that the same have been during the whole of said time inclosed with a substantial fence; and that there has been erected, and is now standing on said lands, a two-story adobe dwelling house and a frame dwelling house, and that said adobe dwelling house has been occupied by said plaintiffs and their grantors

as a dwelling continuously from the said year 1846." "(4) That on the 10th day of April, 1874, the title of said defendant as successor to the Mexican pueblo of San Diego was confirmed, and that on said day a patent was issued to defendant by the United States of America for the land and premises hereinafter described, with other lands, as the pueblo lands of said defendant, and in trust for municipal purposes."

The foregoing finding numbered 2, although somewhat informal, was evidently intended as a finding to the effect that the plaintiffs had, before the commencement of this action, acquired title to the premises in controversy by adverse possession, and that such is its proper construction is not denied by counsel for defendant; but it is urged that the latter finding, numbered 4, is in conflict with the former, and shows that plaintiffs did not and could not have acquired such title as against defendant. The finding last above quoted, and upon which the defendant relies, shows clearly that the defendant city obtained from the United States title to the land in controversy as the successor of the former pueblo of San Diego; and it is well settled in this state that land thus acquired cannot be sold under an execution issued upon a money judgment against the city succeeding to the rights of the pueblo. *Hart v. Burnett*, 15 Cal. 530; *San Francisco v. Canavan*, 42 Cal. 541; *Townsend v. Greeley*, 5 Wall. 328. The reason for this rule is that such lands are not held as the absolute property of the city, but in trust for its inhabitants. The nature of the title of a pueblo to the lands within its limits, and the trust upon which it was held by the pueblo, are very clearly stated by Baldwin, J., in delivering the opinion of the court in *Hart v. Burnett*, 15 Cal., at page 568. He said: "We have carefully examined their references to laws and text-books, and it seems to us that, taken together, they show that under the old Spanish system the lands assigned to towns, whether by general law or special act, were in the sense of endowments to be held in trust for the purposes and objects specified in the laws or in the particular grant; or, as expressed by Perez, *en clase en de dote o privilegio de poblacion*, (in class of endowment or town privilege,) but not in absolute ownership, with full right of disposition. The lands so assigned were for the general object of building up and sustaining the town and its population, and were to be applied to that object in the manner which might be directed by the laws or by royal orders. The government, or its authorized agents, were therefore to designate the portions of such lands which were to be used for particular purposes, as those which were to be given to individuals in solares and suertes, those which were to remain common for the use of all alike,—as the pastures, woods, public squares, watering places, etc.,—and those from which the municipal officers were to derive reve-

nues for their support and the expenses of the municipal government. The lands so assigned to these special objects could not all be used or disposed of in the same manner. Thus, the building lots were to be given to the settlers for their individual and exclusive benefits, but the commons were for the common use of all, and could not, in general, be reduced to individual ownership, except by common consent or the exercise of the right of eminent domain."

The defendant city, as successor of the former pueblo, took its lands upon the same trust upon which they were held by the pueblo, and succeeded to the same right of alienation; and, while the land held upon such a trust is not subject to sale upon an execution issued upon a judgment against the trustee, it does not by any means follow that title to such portion of the pueblo lands as has not been dedicated to some specific public use cannot be acquired by adverse possession. Of course, it is well settled that land held by a city in trust for the general public upon a dedication to the public for use as a street, park, or for a public building, cannot be alienated by the city, and the title of the public thereto cannot be lost by a possession adverse to the city. *Hoadley v. San Francisco*, 50 Cal. 265; *People v. Pope*, 53 Cal. 437; *County of Yolo v. Barney*, 79 Cal. 375, 21 Pac. 833; *Board v. Martin*, 92 Cal. 209, 28 Pac. 790. But in case of lands the legal title to which is vested in the city, and which may be alienated by it, the rule just stated in relation to land dedicated to the public use does not apply. As to land which is the subject of alienation, we are clearly of the opinion that the title of the city thereto may be lost by the adverse possession of another for the requisite period of time; and in regard to pueblo lands of this latter character, such as house lots, we see no reason why the statute of limitations should not apply in favor of an adverse possessor, precisely the same as if such land had been acquired by the city by purchase, and for purposes of sale, or for any other use not strictly municipal.

The remaining question upon this point is whether the finding upon which the defendant relies shows that the land in controversy is held by the city for some specific public use as a park, street, common, or as a site for public buildings. The language of the finding is that the land was conveyed to the defendant, as successor of the pueblo, "in trust for municipal purposes." We do not think, in view of the specific finding to the effect that the plaintiffs have been in adverse possession of the land since 1846, occupying the same as a place of residence during all that period, that the court intended by the language above quoted to say that this land was ever dedicated to public use as a street, park, or for public building, or that the same was conveyed to the defendant in trust for either of such purposes. Findings are to be

liberally construed in support of a judgment, and, if possible, are to be reconciled so as to prevent any conflict upon material points; and, unless the conflict is clear, and the findings are incapable of being harmoniously construed, a judgment will not be reversed upon the ground of a conflict in the findings. We think the court below only meant to say, in the findings now under consideration, that the defendant acquired the title of the former pueblo of San Diego to the land in controversy and other pueblo lands, impressed with the same general trust upon which they were held by its predecessor, but did not mean that the land in controversy was held by the defendant in trust for a specific public use.

What we have said in regard to the construction of the findings disposes of the further contention of defendant that the finding in relation to the adverse possession of plaintiff is not sustained by the evidence. The stipulation relied upon by defendant to overthrow this finding of the court is as general as the finding we have just considered, and in view of the other evidence in the transcript, in which we find no intimation that the lot in controversy was ever dedicated to a public use, or that any claim of such dedication was ever made upon the part of the defendant, we would not be justified in holding it to be a stipulation by the plaintiffs that such land was so dedicated to public use and is not a house lot such as the former pueblo might have alienated, and which the defendant, as the successor to the pueblo title, was authorized to convey in private ownership. Judgment and order affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

TIBBETS v. BAKEWELL et al. (No. 19,162.)

(Supreme Court of California. Feb. 24, 1894.)

EJECTMENT—EVIDENCE—SUFFICIENCY.

In ejectment, in which the answer denied ouster and the possession and withholding by defendants, it appeared that the land in dispute is a strip six feet wide, on which a water ditch is located. The evidence showed that defendants frequently put a pressure board in the ditch, which cut off plaintiff's water, and diverted it into a flume made by them. *Held*, that the evidence established a trespass, merely, and did not justify a judgment for plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; John C. Campbell, Judge.

Action in ejectment by Luther O. Tibbets against Thomas Bakewell and others. From a judgment for defendants, plaintiff appeals. Affirmed.

L. O. Tibbets and A. B. Paris, for appellant. Frank O. Oster, for respondents.

HAYNES, C. Ejectment to recover a strip of land six feet in width. The complaint was

in the usual form. The answer denied the seisin of plaintiff, and the ouster and the possession and withholding by the defendants. It appears from the evidence that a water ditch is located upon this strip of land, and that at some point of the land in question the water was diverted by the defendants to other land belonging to them. Plaintiff, after giving evidence tending to prove title, etc., testified: "I had ordered my water in said ditch, and had been using it. When I found I had been getting no water, I went up to the box to see what the trouble was; and I found a board put in, and the water running into a flume that Thomas Bakewell and the Riverside Water Company had made. There was a pressure board put in, so that all of my water was shut off." He further testified that this occurred about every time he had "gone to irrigate" since then. He also testified that he "had been damaged" by the loss of the use of that strip of land, and by the prevention by the defendants of his running water on said land, in the sum of two hundred dollars." Plaintiff having rested, defendant moved for judgment of nonsuit, which was granted; and this appeal is from that judgment, and from an order denying a new trial.

It may be that the defendants have been guilty of a trespass, and have damaged the plaintiff by a diversion of water, or that they did something they ought not to have done, but the evidence is clearly insufficient to justify a judgment for plaintiff in an action of ejectment. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

PEOPLE ex rel. BURNETT v. MORSTADT, Justice of Peace. (No. 15,245.)

(Supreme Court of California. Feb. 24, 1894.)

BAIL TO APPEAR BEFORE EXAMINING MAGISTRATE—WHEN FORFEITED.

Where the argument of a demurrer to a complaint before a justice of the peace, charging defendant with a felony, is commenced an hour before the time set for defendant's examination, and is not concluded within the hour, the justice properly refused to have defendant called during the progress of such argument, after the time set for the examination had passed, and enter on his docket the failure of defendant to appear, and declare his bond forfeited.

Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Petition by the people of the state of California, on relation of Albert G. Burnett, for a writ of mandate to J. Morstadt, justice of the peace, to compel him to enter in his docket the failure of one Berta to appear at the

time fixed for his examination on a charge of felony, and to declare his bond forfeited. From an order granting the writ, respondent appeals. Reversed.

J. P. Rodgers, (Rutledge & Pressley, of counsel,) for appellant. A. G. Burnett, Emmet Seawell, Dist. Atty., and J. R. Leppo, Asst. Dist. Atty., for respondent.

GAROUTTE, J. This is an appeal from an order of the superior court directing the issuance of a writ of mandate to the appellant, a justice of the peace of Sonoma county, requiring him to enter in his docket the failure of one Berta to appear for examination on November 10, 1891, at 11 a. m., and also commanding said justice to declare a certain undertaking of bail, given by defendant prior to that time, forfeited. Berta was charged with the offense of embezzlement, and upon his arrest gave a bond in the sum of \$1,000, with two sureties, conditional that he would appear and answer the charge when ordered by the court. By consent of attorneys, the examination was set for November 10th, at 11 a. m. In the mean time a demurrer was filed to the complaint, upon the ground that it stated no cause of action, and the argument of this demurrer was taken up on the 10th of November, at 10 a. m. This argument continued until 11:25 a. m., when the following occurred, as appears by the evidence of the justice of the peace: "Now when it was 11:25 a. m., Mr. Leppo, [deputy district attorney,] in the midst of his argument of the demurrer, pulled out his watch and says: 'I ask now the court to send the constable in front of the courthouse, and call H. Berta three times, and, if he shall not answer, to declare his bond forfeited.' I told him I could not do anything of the kind, because, if I sustained the demurrer, we don't want him. The very question of the demurrer is whether it shall be we want Berta or not." It thus appears that the justice declined to grant the request of the district attorney, and the subsequent history of the litigation, as evidenced by the record, discloses that his argument bearing upon the legal question raised by the demurrer was not convincing, for the demurrer was sustained, and, no amended complaint being filed, Berta was not "wanted," and the proceeding terminated.

We think the judgment should be reversed and the proceeding dismissed. As to whether the filing of a demurrer to a complaint charging a defendant with felony is an authorized practice, we are not called upon at the present time to decide. Neither are we justified in reviewing the legal soundness of the court's views, as indicated by its order in sustaining the demurrer to the complaint. The condition of the defendant's bail bond was, substantially, that he would hold himself amenable to the orders of the court; and when the court took up the considera-

tion of the demurrer to the complaint, at 10 a. m., and the argument thereon was still in progress, at and after 11 a. m., the hour set for the examination, we think the further hearing of that matter by the magistrate was, in effect, a continuance of the examination until the argument of the demurrer was concluded. There is no doubt but that the magistrate had the power to continue the examination even in the absence of the defendant. Notwithstanding the examination was set for the 10th of November, if the magistrate had sustained a demurrer to the complaint on the 9th, and thereupon dismissed the proceedings, it is unquestioned that the defendant would not have been in default if he had failed to present himself before the court upon the 10th. If at 10 o'clock upon the 10th, when the demurrer was taken up for consideration, the court had, in terms, continued the examination until the disposition of the demurrer, the presence of the defendant would not have been required, nor could he have been declared in default until the demurrer was disposed of, or a further order of the court made. We think the conduct of the case, as to the hearing of the demurrer, was, in effect, a continuance of the examination until that hearing was concluded. For these reasons, it is ordered that the judgment be reversed, and the cause remanded, with direction to dismiss the proceeding.

We concur: PATERSON, J.; HARRISON, J.

BALDWIN v. TEMPLE. (No. 19,278.)
(Supreme Court of California. Feb. 24, 1894.)
ADVERSE POSSESSION—PAYMENT OF TAXES—EVIDENCE.

1. Where an assessment for a certain year covered the whole of a certain ranch, describing it by boundaries, one claiming a part thereof by adverse possession, who did not pay taxes for such year, has the burden of showing that the part claimed by him was not within the assessment.

2. The fact that the number of acres which the assessment named as being within the ranch, together with the acres in the part so claimed by adverse possession, was less than the number of acres stated in the patent, did not show that such part was not covered by the assessment.

3. The fact that one in possession without title accepts a lease from the owner of the paper title is strong evidence that he did not claim adversely to the latter.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by E. J. Baldwin against John H. Temple. From a judgment for defendant, plaintiff appeals. Reversed.

Wells, Monroe & Lee, for appellant. Brouseau & Hatch, for respondent.

McFARLAND, J. The plaintiff brought ejectment. The defendant answered, and al-

so filed a cross complaint to quiet title to the demanded premises, and plaintiff answered the cross complaint. The cause was tried by the court without a jury. The findings were in favor of defendant, and judgment was entered thereon. Plaintiff moved for a new trial, which was denied, and this appeal is from the judgment, and from the order denying a new trial.

No question is made but that the plaintiff has the legal title, unless the defendant has acquired title by adverse possession; nor is there any question but that the defendant was in the exclusive possession of the demanded premises a sufficient length of time to give him title. The question controverted, touching the adverse possession of defendant, is as to whether taxes were levied and assessed upon the demanded premises for the year 1878. Upon this point, the finding of the court is as follows: "That said property was not assessed for taxes for the year 1878." A general statement of the facts of the case is necessary to a clear understanding of the question above indicated. In 1874, F. P. F. Temple was the owner of the undivided one-half of the Rancho La Merced and the Rancho Potrero De Felipe Lugo, which adjoin each other, the Merced lying on the westerly side of the last-named ranch. The defendant is the son of F. P. F. Temple. The father, it is found, made a survey of a tract of land containing about 75 acres, lying partly in each of the said ranches, which 75-acre tract embraces the lands in controversy in this action. January, 1874, F. P. F. Temple made a parol gift of the 75-acre tract to the defendant. That part of the tract which is in controversy here is a small parcel, the quantity of which does not clearly appear, but containing probably from three to five acres, belonging to the Merced grant, and lying on the westerly side of the line separating the two grants.

It is contended by appellant that the finding above quoted is not justified by the evidence, but that, on the contrary, the evidence shows that it was included in the levy and assessment of taxes upon the Rancho Merced for the year 1878 and each subsequent year. The finding, of course, concedes that the defendant did not pay the taxes upon the lands in controversy for that year, none being assessed; so that the question is as to whether they were in fact assessed. The defendant offered no evidence tending to show whether or not taxes were assessed upon the demanded premises for that year. The plaintiff, however, gave evidence tending to prove that these premises were assessed as a part of the Rancho La Merced for each year from 1876 down to and including the year 1887. The only ground upon which respondent controverts this statement is based upon the various statements as to the number of acres contained in said rancho. This ranch was patented by the

United States to F. P. F. Temple and Juan M. Sanchez in 1872, and is there stated to contain 2,363.75 acres. On December 2, 1875, Temple, Sanchez, and Workman mortgaged this rancho, with other property, to the plaintiff, the mortgage describing it as containing the same number of acres mentioned in the patent. This mortgage was afterwards foreclosed, and in all the proceedings for foreclosure and sale the same number of acres is stated. Defendant was not a party to the foreclosure proceedings. In 1876, F. P. F. Temple failed and made an assignment to Freeman and Spence, and that year an undivided one-half of the ranch was assessed to Sanchez, and the other half to Freeman and Spence, the number of acres in the ranch being put down as 2,324. In 1877 the same number of acres appears in the assessment. In 1878 it was assessed as follows: "Geo. E. Long, assignee of F. P. F. Temple, an undivided one-half interest in 2,324 acres of the Rancho La Merced, situate in the county of Los Angeles, and bounded north by Rancho Potrero Grande, east by Potrero De Felipe Lugo, south by San Gabriel river, west by Rancho San Antonio, being 1,162 acres." "Paid." And for the same year to "Juan M. Sanchez, 1,152 acres of land, being an undivided one-fourth interest of the Rancho La Merced, county of Los Angeles, bounded north by Rancho Potrero Grande, east by Potrero De Felipe Lugo and San Gabriel river, west by Repetto." "Paid." The ranch was similarly described in the assessment for each year up to 1880. In 1880 it was described by sections and fractional sections in the different townships, the number of acres being set down to each description, and the whole stated to be 2,385 acres; and was assessed to Richard Garvey, receiver. In 1881 it was assessed to E. J. Baldwin, the plaintiff, as follows: "Also, 2,335 acres of land in Rancho La Merced, being the whole of said rancho, (except 50 acres sold by Wm. Alvord to Mrs. A. M. W. De Temple, as per deed recorded,)" etc.; following with a particular description by sections and fractional sections, with the quantity in each description. All the subsequent assessments follow the description given in the assessment of 1881. The tract, containing about 75 acres, claimed by defendant, is designated in the record as the "John Temple Homestead." No description of the homestead, as assessed for taxation, appears in the record, nor is there any evidence that the homestead was assessed by any description in 1878, while the finding is that the part in dispute was not assessed. The discrepancy in the number of acres appearing in different assessments and that stated in the patent is not material, in view of the description given of the ranch by its boundaries, no part of it being excepted until after the conveyance of the 50 acres to Mrs. Temple. Besides, there was evidence tending to prove that no part of the Merced ranch

had ever been assessed to the defendant except 12¼ acres assessed, in 1884, to John H. Temple, "as guardian of Maggie B."

In *Reynolds v. Willard*, 80 Cal. 605, 22 Pac. 262, it was held that, when the plaintiff in an action of ejectment proves a paper title, his case is made out; and, if the defendant relies upon adverse possession under the statute of limitations, he must prove either that no taxes were levied and assessed upon the land, or that he paid all taxes which were levied and assessed thereon. See, also, concurring opinion in *McGrath v. Wallace*, 85 Cal. 629, 24 Pac. 793. If that decision is followed, the burden was upon defendant of proving that the land was not assessed. He offered no evidence tending to prove that fact, nor is there any evidence in the record which in any manner conflicts with that offered by plaintiff from the records, showing the assessment of the Merced ranch for each year, and the payment of the tax assessed thereon. It is contended by respondent that the discrepancy between the quantity of land contained in the Merced ranch, as shown by the patent, and the quantity as stated in the assessment of 1878, tends to show that it was not assessed. The evidence, however, shows that the parcel of land in controversy here is the only part of the Merced ranch claimed to be owned by defendant; and this part contains but a small quantity of land, variously stated at from two to five acres, which would not at all account for the difference between the quantity stated in the patent and that stated in the assessment to the assignees of Temple. Besides, the description in the assessment to the assignee of Temple purporting to include the whole ranch, it rested upon defendant to show that that assessment did not include the four or five acres in controversy. The assessment did not refer to the fence which cut a few acres off from the remainder of the ranch, but referred to the line between the two ranches. The case is, therefore, within *McDonald v. Drew*, 97 Cal. 266, 32 Pac. 173. The land assessed, being bounded on the east by the Potrero De Felipe Lugo grant, necessarily included the land in controversy. Even if it be conceded that the whole of the Merced ranch was not assessed, there is nothing to indicate that this particular part was omitted. But the whole ranch was assessed. The quantity of land expressed in acres is mere description, and does not control the more certain description by boundaries, but must yield to boundaries where they do not agree. *Stanley v. Green*, 12 Cal. 164, 165; *De Arguello v. Greer*, 26 Cal. 632; *Tappendorff v. Downing*, 76 Cal. 170, 18 Pac. 247. There is no claim that defendant paid the taxes since 1878, or at all, upon any part of the Merced ranch by that description, but, on the contrary, it is shown that the land was assessed, and the taxes paid by others, every year down to the commencement of this action. As counsel for

respondent suggests, the payment of the taxes by the plaintiff added nothing to his title, but it excludes any presumption that it was assessed to or paid by defendant. The finding in question is not justified by the evidence.

Other questions are presented by the record which will probably be presented upon a new trial, and which will, therefore, be briefly noticed. On the 8th of February, 1881, the plaintiff called the attention of the defendant to the fact that a portion of the land he had inclosed belonged to the Merced grant. The defendant replied that he did not wish to have any trouble about it, and thereupon the plaintiff executed to the defendant a lease of the premises in question for the period of one year for the annual rental of one dollar, which lease the defendant accepted. At the expiration of this lease, the defendant refused to accept another lease, saying that he did not desire to lease his own property. It is quite true that, where the owner of land accepts a lease from another, it does not destroy his title to the land. Where, however, the lessee is in possession without title, it is a pregnant admission of the fact, and may be used as evidence tending to show that he did not claim to hold the land adversely to the party from whom he accepted the lease. Respondent, however, is right in his contention that, being in possession at the time the lease was made, his right to maintain an action without first surrendering the possession is not affected by the lease; his prior possession not having been obtained from the lessor. Whether defendant paid the rent is immaterial.

Any question arising upon the fact that defendant's possession was based upon a parcel gift is not important to be considered, inasmuch as the gift, though invalid as against the mortgagee, was nevertheless a sufficient basis for the acquisition of a right by adverse possession, so that defendant's right is unaffected by the making of the mortgage and plaintiff's title under it, if the defendant had acquired title by adverse possession. We advise that the judgment and order appealed from be reversed, and a new trial granted.

We concur: VANCLIEF, C; BELCHER, C.

DE HAVEN and FITZGERALD, JJ. For the reasons given in the foregoing opinion, it is ordered that the judgment and order appealed from be reversed, and a new trial granted.

McFARLAND, J. I concur in the judgment. The question does not arise here whether one relying on adverse possession must prove, negatively, that no taxes were levied on the land in contest. It was held that he must do so in *Reynolds v. Willard*, 80 Cal. 605, 22 Pac. 262, by a divided court: but I do not consider that one case as estab-

lishing the doctrine. If we are to stand by the decisions, why, they are the other way. In the opinion of the majority of the court in *Reynolds v. Williard*, the case of *Ross v. Evans*, 65 Cal. 439, is referred to, and treated as not necessarily determining the point, but the two later cases of *Heilbron v. Ditch Co.*, 75 Cal. 123, 17 Pac. 65, and *Oneto v. Restano*, 78 Cal. 374, 20 Pac. 743, are not in any way referred to or mentioned; yet in these two last-named cases, both in bank, the point was squarely decided the other way. In *Ross v. Evans*, while the point was, perhaps, not clearly involved, still the opinion of the department, delivered by Mr. Justice Thornton, states views inconsistent with those afterwards expressed in *Reynolds v. Williard*. However, in *Heilbron v. Ditch Co.* the point was necessarily involved, and the court held that the point of nonpayment of taxes was "sufficiently answered by the fact that it does not appear that any taxes were ever levied or assessed upon" the property there involved; and there was no dissent in the court in bank upon the point, although Mr. Justice Paterson dissented upon another point. But in *Oneto v. Restano*, supra, the court in bank, without any dissent, took occasion to express its views fully on the subject, and said: "It is argued for the plaintiff that, in order to recover upon this ground, the defendant must show that he paid all the taxes which have been assessed. It has been held, however, that, if no taxes are found to have been assessed, it need not be found that the party claiming by adverse possession has paid taxes. *Heilbron v. Ditch Co.*, 75 Cal. 117, 17 Pac. 65. In other words, the requirement as to the payment of taxes does not apply when none have been assessed to anybody. And the inference is that the burden of showing that none have been assessed is not upon the claimant by possession. That is a negative which he is not required to prove. If there has been an assessment, it is for the other party to show the fact. This is the rule which convenience requires, for it is an easy matter to show that an assessment has been levied, but a difficult one to show that none have been levied for a series of years." This case was not in any way called to the attention of the four justices who rendered the decision in the subsequent case of *Reynolds v. Williard*; and under these circumstances I adhere to the decisions, and not to the one isolated case last above mentioned.

**DOOLEY v. SEVENTEEN THOUSAND
AND FIVE HUNDRED HEAD OF
SHEEP. (No. 19,298.)**

(Supreme Court of California. Feb. 28, 1894.)

ANIMALS—TRESPASS—LIABILITY—DAMAGES—EVIDENCE.

1. Where a trespass is committed by the animals of several persons, those of one person cannot be sold to pay the damages caused by

animals of others, he not having any control over them, and not having contributed to the cause of their trespassing, and no authority for such sale being given by Act March 7, 1878, concerning trespassing of animals.

2. A finding that 7,000 sheep, marked with certain brands, trod down and depastured all of plaintiff's lands, being 9,460 acres, comprising 10 whole and 20 fractional sections, is not supported by evidence only that they were seen on five different days and on three sections of the land; there being evidence that other sheep were seen on the lands, and it not being shown that 7,000 other sheep did not trespass on the lands as alleged in the complaint.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Hiram A. Dooley against 17,500 head of sheep. Judgment for plaintiff. Gracian Solaberry appeals. Reversed.

Alvin Fay and Wilcoxon & Bouldin, for appellant. Ruffin & Ruffin, Graves & Graves, and L. Lamy, for respondent.

VANCLIEF, C. This action in rem was brought to recover \$7,500 damages, alleged to have been suffered by plaintiff in consequence of trespasses of the defendant sheep upon 9,460 acres of unclosed lands of the plaintiff, situate in the county of San Luis Obispo; and is based upon an "Act concerning trespassing of animals upon private land in certain counties," approved March 7, 1878, (St. 1878, p. 176.) It is alleged in the complaint that the defendant sheep are marked or branded as follows: 8,500 of them, J H; 3,500, J O; 3,500, A A; 3,500 P; and 3,500, Δ, — and that the owners of the defendant sheep are unknown to plaintiff. The trespasses are alleged to have been committed at divers times between December 1, 1892, and March 6, 1893.

The action was commenced March 13, 1893, and on the same day a writ of attachment was issued to the sheriff of Kern county, (which is not one of the counties to which the act applies) commanding that sheriff to attach all the sheep above described, "or so much thereof as may be sufficient to satisfy the plaintiff's demand as above mentioned," unless the owners give security, etc. A summons directed to the defendant animals was also issued, and served by posting a copy thereof on the courthouse door from March 13th until March 24th. On March 24th the sheriff of Kern county attached 3,000 of the defendant sheep, 1,500 of which were marked J O, and 1,500 marked Δ, by seizing them and placing them in the hands of a keeper. On March 29, 1893, the owner of the sheep attached appeared by attorney, and demurred to the complaint; and, the demurrer being overruled, the defendant answered, denying all the material averments of the complaint. The court found the alleged trespasses to have been committed by the following sheep: "About 2,500 sheep branded A A, and about 2,000 head of sheep branded J O, and about 2,500 sheep branded Δ, (triangle.)

by treading down and depasturing all of said lands, and the grass and herbage thereon growing. That the value of said grass and herbage so destroyed was and is 20 cents per acre for each and every acre of said land, and the plaintiff was thereby damaged by the said destruction of said grass and herbage in said sum of \$1,892." And also found that Gracian Solaberry was the owner of about 2,000 of the sheep branded J O, and about 2,500 of those branded Δ , (triangle,) including the 3,000 attached by the sheriff of Kern county. At the close of the evidence, upon motion of plaintiff, the action was dismissed as against the 3,500 sheep branded P, and the 3,500 branded J H. It was thereupon "ordered and adjudged that there is due the plaintiff, as found by the court, the sum of \$1,892 damages, and costs of suit," and "further ordered and adjudged that the defendant sheep levied on and held in attachment in this case, to wit, about 1,500 head branded J O, and about 1,500 head branded Δ , (triangle,) be sold according to law, in the usual course of sales of property under execution; that the proceeds of sale be applied to the payment of the expenses of sale and the amount due the plaintiff, with his costs and accruing interest; and, if any surplus remains after said payments, the same to be paid to Gracian Solaberry, the owner of said brands of sheep. If said sales do not produce enough to satisfy the amount due plaintiff, that then those certain sheep defendants, about 2,500 head, (owner unknown,) branded A A, be sold to pay the balance due plaintiff, and expenses of sale. If any surplus arises upon said last sale, the same shall be paid into court for the unknown owner of said sheep branded A A." From this judgment, and from an order denying his motion for a new trial, Gracian Solaberry appeals.

1. On the appeal from the judgment, it is contended by appellant that the findings of fact do not warrant the conclusions of law, nor support the judgment. It is found as a fact that the trespasses, for which damages in the sum of \$1,892 are found to have been suffered by plaintiff, were committed by 4,500 sheep, the property of appellant, Solaberry, and 2,500 sheep marked A A, of which Solaberry was not the owner, and whose owner was unknown, and of which the court had acquired no jurisdiction by attachment or distraint; yet the judgment is that the 3,000 of Solaberry's sheep which were attached be sold, and that the proceeds of such sale be applied to the payment of all the damages and costs, if sufficient to pay all. I think this was not warranted by the facts found. The act of the legislature under which this action is prosecuted, however unique in some respects, does not expressly, nor by necessary implication, authorize the taking or sale of one man's animals to pay the damages caused by trespasses of animals owned by others, over which animals he had no con-

trol. It does not appear that Solaberry had any control of the sheep marked A A, nor that in any way or degree he contributed to the cause of their trespassing upon plaintiff's land. Therefore Solaberry was only severally liable for the damages caused by his sheep, and such damages should have been distinctly found.

2. Appellant contends that the evidence is insufficient to justify the finding that the damage caused by the trespasses of 2,500 sheep branded A A, 2,000 branded J O, and 2,500 branded Δ , "was 20 cents per acre for each and every acre" of the land described in the complaint, (9,460 acres,) or the finding that plaintiff was thereby damaged in the sum of \$1,892 by the trespasses of the sheep last above mentioned. I think this point well taken. None of these sheep were seen on any part of plaintiff's lands, except on five different days, and only on three different sections of it; and no two of the bands differently branded were ever seen together on said land. Plaintiff testified that he first saw about 2,500 of the sheep branded A A on section 18, Feb. 18, 1893, and on the same day saw about 2,500 branded J O on section 12. About five days thereafter he saw about 2,500 of the triangle band on section 12; and that these were all the times he saw the sheep on his land. Swain testified that on January 22d or 23d he saw about 2,000 sheep, branded J O, on section 18, and on March 3d saw about 2,500, branded Δ , on section 34. Abbott testified that on March 3d or 4th he saw the triangle sheep on plaintiff's land, but did not know what section they were on; about the same time he saw two or three other bands of 2,000 to 2,500 each, but did not see the brands of these. The sheep he saw at different times were three miles apart. On March 3d, Morris saw about 2,000 triangle brand on the land near the line of Kern county, in care of a herder, who drove them across the line into Kern county. The evidence as to damage consisted of the testimony of the witnesses above named, who testified as experts as to the damage done to the pasturage on the whole of plaintiff's land, without regard to the animals by which the damage had been caused, except as above stated. They rode over and examined all the land, between the 1st and 10th days of March, 1893, and testified that all the grass and herbage had been eaten, and the land trodden, apparently by sheep, in consequence of which they estimated the damage at 20 cents per acre of all the land; but there was no evidence, except that above stated, that the damage was caused by appellant's sheep, or by the sheep branded A A. On the contrary, other bands of sheep had been seen on the lands by some of the same witnesses. Plaintiff's land (9,460 acres) is composed of 10 whole sections and about 20 subdivisions of other sections, all situate in townships 31 and 32, and amounts to nearly 15 sections, which, if located in a square form, would be

nearly 4 miles square; but they are not so located, and the descriptions given in the complaint show that in some directions they must extend at least 6 miles.

It is alleged in the complaint that the damage was done by five different bands of sheep, two of which were branded, respectively, J H and P; and there is nothing in the evidence tending to prove that these two bands of 3,500 each did not trespass upon plaintiff's lands at the times and in the manner alleged. The evidence that appellant's sheep and the A A sheep were seen on small portions of the land, on four or five different days, is perfectly consistent with this allegation of the complaint, and is obviously insufficient to justify the finding that appellant's sheep and the sheep branded A A damaged "each and every acre" of plaintiff's lands to the extent of 20 cents, even though each and every acre had been so damaged by sheep. I think the order and judgment should be reversed, and the cause remanded for a new trial.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

RIEHL v. CITY OF SAN JOSE et al. (No. 15,257.)

(Supreme Court of California. Feb. 28, 1894.)

CITIES—CONTRACTS—LOWEST BID.

In the absence of fraud, or any statute requiring lighting contracts to be let to the lowest responsible bidder, a taxpayer and competing bidder cannot sue to vacate the contract made on a bid higher than his own, where such bid offered services not included in his.

Department 1. Appeal from superior court, San Jose county; E. F. Fitzpatrick, Judge.

Action by Adam Riehl against the city of San Jose and the San Jose Improvement Company to vacate a contract. Judgment for defendants. Plaintiff appeals. Affirmed.

H. V. Morehouse and Hiram D. Tuttle, for appellant. W. B. Hardy and John E. Richards, for respondents.

GAROUTTE, J. This is an action brought by the plaintiff, a citizen and taxpayer of San Jose, and also the president of the San Jose Light & Power Company, against the city of San Jose, its mayor and common council, and the Electric Improvement Company, of San Jose, to set aside a contract entered into between the city, through its said mayor and common council, and the said Electric Improvement Company, of San Jose, for the lighting of the streets with arc electric lights for a period of five years from and after October 1, 1890. Judgment went for the respondent,

and this appeal is from the order denying a motion for a new trial.

After notice given, competing bidders came before the council of the city of San Jose to secure the contract of lighting the streets of the city, and such contract was subsequently awarded to the respondent the Electric Improvement Company, of San Jose. The charter of the city does not contain any provision requiring contracts of the present character to be let to the lowest bidder; but appellant insists that, even in the absence of such a provision of the law, the city has no authority, in justice to its taxpaying citizens, to arbitrarily let a contract to a party for a sum largely in excess of the amount for which an equally responsible competing bidder offers to do the same work and furnish the same character of material. It is claimed that the foregoing conditions are present in this case, and that, by the contract of which complaint is here made, the city has bound itself to pay \$11,800 more money during the five years which compose the life of the contract than the service could have been rendered for by other parties. The facts of the case do not bear out appellant's claims in this regard, for the findings, supported by evidence, disclose a wide variance between the terms of the contract entered into by the city with the San Jose Electric Improvement Company and the proposition submitted to the city by the competing company. This substantial difference is set forth in the following finding of the court: "This last bid of said light and power company did not contain or refer to the changes suggested by the majority report of the finance committee as to the rearrangement of the lights without expense to the city, nor as to the lighting of the city upon dark and stormy nights, outside of the 'moonlight schedule,' without charge, but the said bid expressly provided that the said light and power company should receive extra compensation for all lighting done outside of the 'moonlight schedule.'" The services to be rendered and the material furnished by the opposing bidders not covering the same ground, a great portion of appellant's argument necessarily falls, for it is based upon the assumption of the existence of a contrary state of facts.

It is also insisted that the contract is tainted with fraud, and that it is not the result of a fair and honest exercise of the discretion and judgment of the city council. If such be the fact, it is the duty of a court of equity to set it aside, but appellant's contention has no support in the findings, and but little in the evidence. If it has no support in the findings, we will not disturb the judgment, unless those findings are clearly opposed to the evidence. Among other matters, the court found, as a fact, that said contract was a fair and reasonable one; that there was no fraud or collusion practiced; and that the members of the common council, in all of the proceedings connected with the awarding of

the contract, acted as honest men, and exercised their honest discretion for the best interests of the city of San Jose. In these findings of fact there is ample support for the judgment, and we find nothing in the evidence to justify a successful attack on the findings of the court as to the honesty and fair dealing exercised by the council in the letting of this contract. There is nothing disclosed by the record demanding a new trial. The order appealed from is affirmed.

We concur: HARRISON, J.; PATERSON, J.

RIEHL v. CITY OF SAN JOSE et al. (No. 15,258.)

(Supreme Court of California. Feb. 28, 1894.)

Department 1. Appeal from superior court, San Jose county; E. F. Fitzpatrick, Judge.

Action by Adam Riehl against the city of San Jose and the San Jose Improvement Company to vacate a contract. Judgment for defendants. Plaintiff appeals. Affirmed.

H. V. Morehouse and Hiram D. Tuttle, for appellant. W. B. Hardy and John E. Richards, for respondents.

PER CURIAM. In many respects, this case is similar to *Riehl v. City of San Jose*, (No. 15,257, decision filed this day,) 35 Pac. 1013. Appellant's counsel admits that the findings substantially state the facts of the case, but complains of the conclusions of law drawn therefrom. We think such complaint not well founded. The material findings upon which the judgment rests are similar to those made in the aforesaid case, numbered 15,257, and in that case we held the findings sufficient to support the judgment. Upon the authority of the decision there rendered, the order here appealed from is affirmed.

BOEHM v. GIBSON. (No. 19,285.)

(Supreme Court of California. Feb. 28, 1894.)

TRIAL—ABSENCE OF PARTY'S ATTORNEY—APPEAL TAKEN FOR DELAY—DAMAGES.

1. The court waited several hours for plaintiff's attorney to conclude the trial of another case, in another department of the same court, with the understanding that the trial of the case against defendant would then proceed. At the conclusion of such trial, such attorney did not appear, but engaged in the trial of habeas corpus proceedings, which he commenced two days before, and treated a notice by defendant that the trial of his case would proceed with profane contempt. *Held*, that a trial of such case in the absence of such attorney was proper, plaintiff being present, and offered an opportunity to introduce his evidence.

2. Where, in an action to recover personal property, it appears that an appeal by plaintiff is without merit, and was taken for delay, and that defendant has been deprived of the use of such property for more than a year, the latter will be awarded \$200 damages, in addition to his costs.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by William Boehm against E. D. Gibson to recover possession of certain per-

sonal property. From a judgment for defendant, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

H. H. Appel and G. D. Blake, for appellant. James Burdett and W. E. Arthur, for respondent.

VANOLIEF, C. Action to recover the possession of specific articles of personal property, or the value thereof, alleged to have been wrongfully taken and withheld from the plaintiff by the defendant. The defendant is sheriff of Los Angeles county, and justifies the taking under a writ of attachment against one William Shoulderer. The judgment of the court was in favor of the defendant, from which, and from an order denying his motion for a new trial, the plaintiff has appealed. Appellant makes no point on the appeal from the judgment; and the only grounds upon which a new trial is asked are (1) irregularity in the proceedings of the court; and (2) accident and surprise which ordinary prudence could not have guarded against. The affidavits upon which the motion was made and opposed occupy 34 pages of the printed transcript, and, without much conflict, are to the following effect: The case was first set for trial on December 9, 1892, when defendant, with his counsel and witnesses, was in attendance and ready for trial; but, on account of other business having precedence, the trial was postponed from day to day until December 15th, when it was called for trial, defendant, with his witnesses and counsel, then being present in court and ready for trial, but neither plaintiff nor his counsel was present. After waiting about an hour, it was ascertained that plaintiff's attorney was engaged in the trial of another case in another department of the court; whereupon defendant's attorney reluctantly consented that the trial should be postponed, and, by agreement of counsel, the case was reset for trial on January 13, 1893, at 10 o'clock a. m., at which hour the defendant, with his witnesses and counsel, again appeared and was ready for trial, when the attorney for plaintiff stated to the court that he was then engaged in the trial of another case in another department (No. 5) of the same court, which trial had been commenced on January 12th, but that such trial would probably be closed by 12 o'clock m. Thereupon the court, with consent of defendant's counsel, appointed 2 o'clock p. m. as the time for the commencement of the trial, at which time the defendant was again present and ready for trial; but, plaintiff's counsel failing to appear, the court, after waiting about half an hour, dispatched a messenger to department No. 5 (in the same building) to ascertain whether plaintiff's attorney was still engaged in that department. Shortly afterwards plaintiff's attorney appeared, and said he was still engaged in department No. 5, but would probably be through by 3 o'clock p. m., when he

would immediately proceed with the trial of this case. Shortly thereafter defendant's attorney, (Mr. Burdett,) as stated in his affidavit, went to department No. 5, and there awaited the termination of the trial in which plaintiff's attorney (Mr. Appel) was engaged; and when it terminated, about 3 o'clock p. m., and department No. 5 had adjourned, Mr. Burdett requested Mr. Appel to commence the trial of this case, and was then, for the first time, told by Mr. Appel that he was about to enter upon the argument of a habeas corpus case in department No. 2, for the purpose of obtaining the discharge of one of his clients from imprisonment for contempt of court, and that he did not know how long he would be thus engaged. Thereupon Mr. Burdett returned to department No. 3, in which this case was pending, and reported to the court that the trial of the case in department No. 5, in which Mr. Appel had been engaged, had been closed, and what Mr. Appel had said about engaging in the habeas corpus proceeding, and asked the court (No. 3) to proceed with the trial of this case; but the court refused to proceed immediately, saying it would wait a few minutes longer. Mr. Burdett then went to department No. 2, where he found Mr. Appel's partner (Mr. Kinley) arguing the habeas corpus case, and Mr. Appel in his seat listening to the argument. Mr. Burdett then again requested Mr. Appel to go to department No. 3, and proceed with the trial of this case, and notified him that, unless he did so, Mr. Burdett would insist that the court proceed with the trial, to which Mr. Appel answered that "he did not care what was done; that he would not leave that case," (the habeas corpus case.) While Mr. Appel, in his affidavit, does not deny having said "he did not care what was done," he states that he "never consented to the judgment being entered, or said anything indicating that said Burdett should go on with the trial," but admits that he said to Mr. Burdett: "Don't bother me. You be d—d,"—which language is not stated in Mr. Burdett's affidavit. Immediately after this conversation in department No. 2, Mr. Burdett returned to department No. 3, and informed the judge thereof of what Mr. Appel said, and what he was doing in the habeas corpus case, and insisted that the court proceed with the trial of this case; and thereupon the court ordered the parties to proceed with the trial of this case, the plaintiff then being present in court. No doubt Mr. Appel was immediately informed of this order, as he was then in the same building, and not more than 150 feet distant from the court room in which the order was made; yet neither he nor any one for him appeared therein, or objected to the trial in his absence. Nor does it appear that plaintiff objected, though present. The court then informed plaintiff that it would hear any evidence he desired to offer, and that he was at liberty to testify in his own behalf, but he declined to testify or

to offer any evidence whatever. The evidence on the part of defendant was then introduced, but no evidence was offered by plaintiff in rebuttal. Thereupon judgment was rendered for defendant.

Counsel for appellant contends that the trial of this case was commenced in his absence, contrary to an agreement and understanding between him and counsel for defendant, assented to by the court, to the effect that the trial was not to be commenced until the close of the trial in which he was engaged in department No. 5, and further contends that the trial of the habeas corpus case in department No. 2 was a continuation of the trial in which he had been engaged in department No. 5. But the affidavits do not support either of these contentions. He had said nothing about the habeas corpus proceeding to defendant's attorney, or to the court, (department 3,) until after the close of the trial of the civil action, when he first spoke of it to Mr. Burdett, as above stated. Indeed, he had petitioned for the writ of habeas corpus after the agreement to proceed with the trial of this case as soon as the trial of the civil case should be closed, though his client had been imprisoned the day before, while his partner was trying the civil case in his absence. Surely the habeas corpus proceeding which he commenced in the afternoon of that day (January 13th) was no part of the civil case on account of which the delay of the trial of this case had been consented to at his request. Considering all the circumstances, I think the conduct of plaintiff's attorney not only manifested a want of proper respect for the court, but plainly indicated his intention to subordinate the business of the court and the rights of suitors therein to his own business and convenience. If, upon the close of the trial of his civil case, he deemed it of great importance to himself or client to enter upon the trial of the habeas corpus case, a proper respect for the court, that had been waiting for him several hours at his request, and solely for his accommodation, should have induced him to go to that court, and render his excuse, and ask for such further delay as he desired, or for a continuance; but he did nothing of the kind. Nor did he even ask opposing counsel for further time, but, according to his own affidavit, did ask him to "be d—d." There is no evidence of accident or surprise nor of irregularity in the proceedings of the court to the prejudice of appellant. *Barnes v. Barnes*, 95 Cal. 171, 30 Pac. 298; *Baumberger v. Arff*, 96 Cal. 261, 31 Pac. 53. I think the judgment and order should be affirmed.

We concur: SEARLS, C.; BELOHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed; and as the appeal was evidently taken for delay, and is without merit, and by reason thereof the re-

spondent has been deprived of the use of the property sued for for more than a year, the sum of \$200 damages is awarded to the respondent, in addition to his costs upon appeal.

WOODWARD v. McADAM et al. (No. 19,257.)

(Supreme Court of California. Feb. 23, 1894.)

MORTGAGE TO PARTNERSHIP—VALIDITY.

A mortgage of real estate to "S. B. & Co." a partnership, is not void, as given to a fictitious person, since the names of two of the partners appear in the firm name, and it will be regarded as a mortgage to the individual members named.

Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Woodward against McAdam and others to foreclose a real-estate mortgage. From a judgment for plaintiff, defendant Jackson appeals. Affirmed.

Wilcoxon & Bouldin, for appellant. Cormac & Donohue and F. A. Dorn, for respondent.

PATERSON, J. This is an action on a negotiable promissory note secured by a mortgage, given by the defendant McAdam to Shoober, Beale & Co., and by the latter assigned to this plaintiff. The court below granted a decree of foreclosure, as prayed for, and from such decree the defendant Jackson, who is a grantee for value, by deed from McAdam given subsequent to the mortgage, has appealed.

The point made is that the mortgagee is a fictitious person; that the mortgage, having been made to a partnership doing business under a fictitious name, creates, at most, only an equity, and, as against a subsequent grantee, for value, of the mortgagor, establishes no lien. There is no doubt that a partnership is not a person, either natural or artificial, and it cannot, at law, be the grantee in a deed, or hold real estate. Legal title must vest in some person, but, if the title be made to all the partners by name, they hold the legal title as tenants in common. In equity, however, a different rule prevails. There the real purpose for which the property was acquired is considered, and, under the principles of trusts, the court will regard real estate held for partnership purposes as personal property, so far as such holding may be necessary to settle the equities between a firm and creditors, or between the partners themselves. None of the latter principles is involved in this action, however. If the name of the grantee were purely fictitious, that is, if no person were named, it may be that the mortgage would be void, although there is respectable authority for holding that a mortgage may be enforced in the firm name. *Foster v. Johnson*, 39 Minn. 380, 40 N. W. 255. In the case at bar the names of two of the partners appear in the

firm name. There is an important distinction to be drawn between a description which is inherently uncertain and indeterminate, and one which is merely imperfect, and capable of different applications. "To correct the one is, in effect, to add new terms to the instrument, while to complete the other is only to ascertain and fix the application of terms already contained in it. Indeed, the most usual and perfect description of the grantee—that which gives his Christian and sur names, and the town in which he lives—may prove to be imperfect, as others bearing both those names may be living in the same town. And, if the Christian name or place of residence be omitted, the description is only rendered the more imperfect. It is less certain than it might be, and usually is, made. But a grantee is still designated, though imperfectly; and, for aught that the deed discloses, the party accepting the conveyance may be the only person answering the description given. In all these cases a resort to extraneous facts and circumstances may become necessary. In order to ascertain the individual to whom the description was intended to apply; but it is not perceived that the greater or less probability of this should, in either case, affect the validity of the deed." *Morse v. Carpenter*, 19 Vt. 616. In *Moreau v. Saffarans*, 3 Sneed, 599, it was held that real estate purchased by partners is to be regarded, in respect to the legal title, as an estate held by them as tenants in common, but subject to a trust for the benefit of the partnership until the partnership accounts are settled, and that a conveyance to "J. L. Saffarans & Co." would operate to invest John L. Saffarans, individually, with the entire legal title, but that in equity he would be treated as holding the legal title in trust for the benefit of the partnership. In *Menage v. Burke*, 43 Minn. 212, 45 N. W. 155, the court sustained a mortgage of real estate to "Farnham & Lovejoy" as legally sufficient as a mortgage to Sumner W. Farnham and James A. Lovejoy, it appearing that said persons constituted the firm of Farnham & Lovejoy. In *Foster v. Johnson*, *supra*, the court explained *Tidd v. Rines*, 26 Minn. 201, 2 N. W. 497, cited by appellant, and held that, in an action to foreclose a mortgage, it was no objection that the mortgage ran to a partnership, in its firm name. In *Holmes v. Jarrett*, 7 Helsk. 506, the court held that where the deed was made to Jarrett, Moon & Co., and it did not appear whether the firm was composed of Jarrett, Moon, and others, or Jarrett Moon and others, the title would vest in Jarrett and Moon, or in Jarrett Moon, in trust for the partnership, and that the uncertainty arising from the omission of the Christian names of the grantees could be removed by parol proof. See, also, *Brunson v. Morgan*, 76 Ala. 594. In *Winter v. Stock*, 29 Cal. 407, it was held that a conveyance of land to L. B. & Co. vests the legal

concur: GAROUTTE, J.; HARRIS, J.

DECKER v. PERRY. (No. 19,268.)
Supreme Court of California. Feb. 28, 1894.)

GATION—INCORPORATED DISTRICTS—ASSESSMENTS—DURESS.

1. A complaint against an irrigation district alleged that such proceedings had been before the board of supervisors that said district declared the district duly organized. *Held*, verment that the district was incorporated, provided by Act March 7, 1887, since it did how the jurisdiction of the board, or an on held, or that its declaration "was duly or made," or that a copy of the order been filed for record.

2. A complaint to recover money paid on a assessment must show the nature of the edings to collect it, the threat of which ituted the compulsion.

3. Where 33 days must have elapsed, after iff paid the assessment, before the three s' advertisement of sale of his land thereould have begun, (St. 1891, p. 245,) and he not allege that any sale had been already ised or otherwise threatened when he he fails to show any intention to sell it as would make his payment involuntary.

mmissioners' decision. Department 2. al from superior court, San Diego coun-George Puterbaugh, Judge.

tion by Uri Decker against Wesley Per- money had and received. Demurrer omplaint overruled, and judgment for iff. Defendant appeals. Reversed.

H. Rippey, for appellant. D. L. Mur-, for respondent.

NCILIEF, C. The defendant demurred ie complaint on the ground that it does state facts sufficient to constitute a cause ation. The demurrer was overruled, and, a failure of defendant to answer, judgt was rendered in favor of the plaintiff. appeal is from the judgment on the ment-roll, and presents the question ther or not the demurrer was properly ruled.

ie object of the action is to recover from lefendant \$5.02, alleged to have been unully assessed to plaintiff on his land by the y Irrigation District," and paid by plain- to defendant under protest, to prevent iff's land from being sold by the de- ant as collector of said district. It is red in the complaint "that, on December 891, such proceedings were had before board of supervisors of San Diego coun- state of California, that the said board upervisors declared the Otay Irrigation rict duly organized under the name and e of 'Otay Irrigation District,' and de- ed" five persons—Funk, Modie, Jordan, ace, and Merriam—elected as directors of

said board, and the defendant, Wesley Per- ry, is acting as collector of said Otay Irriga- tion District. That said board of directors have voted to themselves salaries and fees amounting to about \$2,600, and claim to have contracted indebtedness against said district for other purposes, amounting to nearly \$3,500. That on October 4, 1892, said board passed a resolution declaring that it was nec- essary, for the purpose of defraying the ex- penses of the organization of the district, including salaries of officers and employees, to raise the sum of \$9,179.62; and, by a fur- ther resolution, ordered an assessment levied on the assessable property of said district of \$9,179.62; and, by a further resolution, fixed the rate of assessment at 90 cents upon \$100 valuation of the assessable property of said district. That said board never submitted to the electors of said district, at any election, the question as to whether or not an assess- ment of \$9,179.62 should be levied, nor did said electors ever vote for any bonds, or to incur any indebtedness upon said district. That, after the levying of said assessment, the defendant, as collector of said district, received from the secretary of the board the assessment books of said district, in which were entered said assessment against the property within said district, among which was five acres of land, the property of plain- tiff, on which was assessed the sum of \$4.78; and thereafter the defendant caused to be published in a newspaper published in said district a notice stating "that said assessment was due and payable, and would become delinquent at six o'clock, p. m., on the last Monday of December, 1892, and that, un- less paid prior thereto, five per cent. would be added." That, on December 29th, (after the last Monday in December,) "the plaintiff, to prevent his above-described property from being sold by the defendant as collector of said district, paid to the defendant said as- sessment of \$4.78, together with 25 cents pen- alty, which sum was paid under protest made in writing and delivered to defendant at the time of such payment." A copy of the pro- test, with the defendant's acknowledgment of the receipt thereof, dated December 29, 1892, is attached to the complaint as an ex- hibit. The only ground of the protest is that no election had been called or had at which the question whether the assessment should be levied was, or could have been, submitted to the electors of the district.

It is contended for appellant that the pay- ment of the assessment by the plaintiff was voluntary, and not induced by duress or coercion, and, therefore, that he is not enti- tled to recover it back; and the record seems to support this view. "The illegality of the demand paid constitutes of itself no ground for relief. There must be in addition some compulsion or coercion attending its asser-

tion, which controls the conduct of the party making the payment." *Brumagim v. Tillinghast*, 18 Cal. 266; *Garrison v. Tillinghast*, *Id.* 407. The complaint shows that the assessment was paid to defendant while acting as the agent or officer (collector) of an undefined association under the name and style of "Otay Irrigation District," operating through five directors, a secretary, and collector, but the kind or nature of whose business is not stated. Respondent's counsel claims in his brief, however, that the Otay Irrigation District is a corporation organized under the act of the legislature entitled, "An act to provide for the organization and government of irrigation districts," etc., approved March 7, 1887, known as the "Wright Act" (St. 1887, p. 29), and amendments thereof; but this fact is not averred in the complaint. The bare averment that "said board of supervisors declared the Otay Irrigation District duly organized" is not an averment of the facts or acts required by said act of the legislature to confer jurisdiction on the board of supervisors, or to constitute an organization of an irrigation district under that act. Nor is it an averment that an order, resolution, or "declaration" of the board to that effect had been "duly given or made," as required by section 456 of the Code of Civil Procedure. *Judah v. Fredericks*, 57 Cal. 391. The averment that the board declared the district "duly organized" is substantially and essentially different from an averment that the board duly declared the district organized. But, even if the averment had been that the board duly declared the district organized, it would not have shown a completed organization. The law requires, as a prerequisite to a complete organization, that an election be held at which two-thirds of the votes cast shall be in favor of organizing the district; and section 3 of the act provides: "The said board of supervisors shall meet on the second Monday succeeding such election and proceed to canvass the votes cast thereat; and if upon such canvass it appear that at least two-thirds of all the votes cast are 'Irrigation District—Yes,' the said board shall, by order entered on their minutes, declare such territory duly organized as an irrigation district under the name and style theretofore designated, and shall declare the persons receiving respectively the highest number of votes for such several offices to be duly elected to such offices. Said board shall cause a copy of such order, duly certified, to be immediately filed for record in the office of the county recorder, * * * and from and after the date of such filing the organization of such district shall be complete, and the officers thereof shall be entitled to enter immediately upon the duties of their respective offices." There being no averment that the board, duly or otherwise, caused a copy of its order declaring the district organized to be filed for record, the complaint fails to show that the organiza-

tion of the district as a corporation was ever completed. Then, again, the complaint fails to show that the defendant threatened or intended to sell plaintiff's land, or any land within the alleged district. All that is alleged is that defendant published a notice "that said assessment was due and payable, and would become delinquent at six o'clock p. m. on the last Monday (26th) of Dec., 1891, and that, unless paid prior thereto, five per cent. would be added." No demand for payment, other than such as may be implied in that notice, appears to have been made. The compulsion or coercion which is sufficient to render a payment involuntary "must come from the party to whom or by whose direction the payment is made, and arise from the exercise or threatened exercise of some power possessed, or supposed to be possessed, by him over the person or property of the party making the payment." *Garrison v. Tillinghast*, 18 Cal. 407. The complaint fails to show that the defendant to whom the assessment was paid possessed any power over the person or property of the plaintiff, or any reason for supposing he possessed such power; nor is it pretended that defendant had, or was supposed to have, any power over the person of the plaintiff, it being claimed only that defendant, as collector of the Otay Irrigation District, whatever that may be, had, or was supposed to have, power to sell plaintiff's land to pay assessments levied thereon by the directors of said irrigation district. But, since the complaint fails to show that the Otay Irrigation District was ever organized as a corporation according to any law, it fails to show any reason for the alleged supposition that the officers or agents of that district had power either to levy assessments on, or to sell, plaintiff's land. It is suggested, however, by counsel for appellant that the Otay Irrigation District is shown at least to be a *de facto* corporation, but this suggestion finds no support in the complaint: there being no averment that it or its officers ever claimed to be a corporation, or acted as such, or that plaintiff ever dealt with or recognized it as a corporation. All of the alleged acts of its officers or agents may have been lawfully done by an unincorporated association having no power to enforce payment of assessments by the sale of property of its members. But conceding, for the sake of argument, that the Otay Irrigation District was duly organized according to the Wright act, yet it does not appear that such pressure for payment was put upon plaintiff as would constitute duress or coercion in the legal sense. No sale of his land had been advertised or otherwise threatened before he paid the assessment; and 33 days must have elapsed, after he paid, before a notice of sale of his land could have been published, and no sale could have been made until after three weeks' publication of such notice. See sections 24 and 25, the act as amended, St. 1891, p. 245. For aught that

appears in the complaint, there may have been no intention to sell his land.

Counsel have cited no case in this state, and I have found none, in which the money paid on an alleged tax or assessment has been recovered back when no seizure of property of the plaintiff had been made, and no sale thereof advertised or otherwise threatened. In addition to the cases above cited the following are more or less in point: *De Baker v. Carillo*, 52 Cal. 473; *Bank v. Chalfant*, Id. 170; *Bank v. Webber*, Id. 73; *Bank v. Chalfant*, 51 Cal. 369; *De Fremery v. Austin*, 53 Cal. 381; *Meek v. McClure*, 49 Cal. 623; *Guy v. Washburn*, 23 Cal. 111; *Dear v. Varnum*, 80 Cal. 87, 22 Pac. 76.

For all purposes of this appeal, it is assumed, without deciding, that the assessment may have been illegal because not authorized by vote of the electors of the district, as held in *Tregea v. Owens*, 94 Cal. 317, 29 Pac. 643, which case authoritatively construes the act of March 7, 1887, as originally passed, in relation to the power of the directors to levy assessments of the nature of that in question here, and is applicable to this case, unless that act has been changed, in respect to such powers of the directors, by the amendments thereof in 1891. I think the judgment should be reversed, and the court below directed to sustain the demurrer.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to sustain the demurrer.

BLAISDELL v. LEACH et ux. (No. 18,181.)

(Supreme Court of California. Feb. 27, 1894.)

ESTOPPEL—ACKNOWLEDGMENT BY WIFE OF FORGED SIGNATURE—NEGLIGENCE.

In foreclosure of a mortgage executed by a married man to secure a loan on land which the record showed had been conveyed to him by his wife, it appeared that her signature to the deed to her husband was forged; that she signed a lease of the land, and gave it to her husband; that he substituted for it the forged deed; and that, when the deed was presented to her by a notary for acknowledgment, she negligently admitted that the signature to it was hers. *Held*, that the wife was estopped from disputing her signature, as against plaintiff, a purchaser in good faith.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by one Blaisdell against Bailey K. Leach and Mattie A. Leach, his wife, to foreclose a mortgage. From a judgment for plaintiff, defendant Mattie A. Leach appeals. Affirmed.

J. B. Campbell and C. C. Merriam, for appellant. J. P. Strother and Mr. Webb, for respondent.

HARRISON, J. The defendant Bailey K. Leach borrowed \$1,000 from the plaintiff July 18, 1891, and, to secure the payment thereof, executed to him a mortgage upon certain lands which appeared by the record to have been conveyed to him by his wife, Mattie A. Leach. This action was brought to foreclose the mortgage, against husband and wife; the plaintiff alleging in his complaint that the wife claims some interest in the mortgaged lands, but that her claim was subject to the lien of his mortgage. Mattie A. Leach filed a separate answer, alleging that she was the sole owner of the lands, and that her husband had never had any interest therein. Upon the trial of these issues, the court found that the wife's signature to the deed under which the husband claimed title was a forgery, but that she had acknowledged its execution to the notary public, and that the conveyance had been placed on record, with the notary's certificate of her acknowledgment indorsed thereon. No question was made of the good faith of the plaintiff in loaning the money, and the court held that he was entitled to rely upon the record evidence of title, and rendered judgment for the foreclosure of the mortgage. From this judgment the defendant Mattie A. Leach has appealed.

The record discloses the following facts connected with the appellant's acknowledgment of the conveyance: It appears that on the morning of the 16th of July the appellant had signed a lease of certain property, and given it to her husband, and that in the afternoon of that day her husband handed the deed in question to the notary, with his wife's name already signed thereto, and requested him to go with him to his house and take her acknowledgment. The notary testified that, when he and the husband reached the house, he explained to Mrs. Leach the object of his visit, and "got up from my chair, and walked over to her with the deed in my hand, passed it to her, and took my seat again; and, as I suppose, she read it. I don't know. She peered over it. I don't know whether she read it or not. I got up then, and asked her if it was her signature, and she acknowledged the execution of that instrument. She said she did, and I placed my seal to it, and handed it to Mr. Leach." Mrs. Leach contradicts the notary in some details, but the findings of the court must be accepted as determinative of the facts that her signature had been placed to the instrument without her knowledge or consent, and that the facts stated in the notary's certificate are correct. Mrs. Leach does not, in her testimony, say that she then questioned the genuineness of her signature, but that the instrument did not appear to her to be the same one as that upon which she had placed it. Taking the most favorable view for the appellant, it will appear that after she had signed the lease, and given it to her husband, he substituted for it the deed

to himself, with her name affixed thereto, and that she paid but slight attention to the instrument when it was presented to her for her acknowledgment, and admitted to the notary that it was her signature.

The Civil Code, § 1091, requires that a grant of real property shall be subscribed by the grantor, in order that the title may be transferred thereby, but it is not necessary that the signature of the grantor be affixed by himself. It may be so affixed by another, if done in his presence and by his own direction. *Gardner v. Gardner*, 5 Cush. 483. And he may also adopt and ratify a signature made by another without any previous authority. *Bartlett v. Drake*, 100 Mass. 174. And the adoption of a forgery has been held to be binding upon the maker of a promissory note. *Forsyth v. Day*, 46 Me. 176; *Bank v. Crafts*, 4 Allen, 447. The owner of property cannot be divested thereof by a forged instrument, but his conduct in reference to the instrument may estop him from denying its validity. As between himself and the person who committed the forgery, such estoppel may not arise; but if, with knowledge of the forgery, he should declare to an innocent person that the signature was his own, and that he had executed the instrument, and thereby induce him to purchase the property, he could not afterwards claim the property upon the ground that the instrument was a forgery. When the instrument in question was presented to Mrs. Leach for her acknowledgment, it was competent for her to adopt the signature of her name, that had been placed there without her knowledge or authority, and by such adoption give it the same validity as if placed there by herself. She must be presumed to know her own handwriting, and her statement to the notary that she had executed the instrument to which it was affixed prevents her from questioning the correctness of that statement, as against one who, in reliance thereon, has parted with his property. The statute has designated a notary public as one of the officers to whom a grantor may make a formal acknowledgment of his execution of an instrument, for the purpose of establishing the fact of such execution and having a public record made thereof; and, when such acknowledgment is made by the grantor and certified by the notary, it is a public declaration of that fact to all persons who may in good faith act thereon, which the grantor is estopped from denying. If the notary is himself deceived, as, for instance, if another person should personate the grantor and acknowledge the signature, the title of the true owner would not be affected; but when the person named in the instrument appears in person before the officer, and makes such acknowledgment, he is estopped from afterwards denying his

declaration, as well as the fact of his signature, against any one who, without any other notice or knowledge than is conveyed by the instrument, parts with his property upon the strength thereof.

Although the court does not find that Mrs. Leach, in terms, adopted the signature to the deed, yet its finding that she was so negligent in acknowledging its execution as to estop her from disputing the plaintiff's claim is fully sustained by the evidence. By her own testimony, she did not, at the time of her acknowledgment, deny the genuineness of her signature, and, although she says that she then thought the instrument was not the one she had signed in the morning, she failed to give it such an examination as to convince her of that fact; and the testimony of the notary that he handed the instrument to her for her examination, and that she appeared to examine it, shows that she had every opportunity for determining whether or not it was her deed. Having this opportunity for repudiating or adopting the signature, her acknowledgment of its validity estops her from questioning that fact, as against the plaintiff, who in good faith has parted with his money to the one in whose favor she made the acknowledgment. If afterwards she ascertained that she had been deceived, and had acknowledged the validity of a deed which was in fact a forgery, the loss would be her own, as against an innocent party who had relied upon such acknowledgment. If she neglected to give the instrument such an examination as would inform her, either that another instrument had been substituted for the one which she had signed, or that the signature thereto was not her own, the consequences of such neglect should fall upon herself, rather than upon one who, by her own positive declaration of its genuineness, had been induced to part with his property. "When a man knows that he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told it is a mere form, and has such confidence in his solicitor as to execute the deed in ignorance, the deed so executed, although it may be voidable upon the ground of fraud, is not a void deed." *Hunter v. Walters*, 7 Ch. App. 88. See, also, *Goodell v. Bates*, 14 R. I. 65; *State v. Matthews*, 44 Kan. 596, 25 Pac. 36; *Tunison v. Chamblin*, 88 Ill. 378; *Shirts v. Overjohn*, 60 Mo. 305; *Chapman v. Rose*, 56 N. Y. 137. "Where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer." Civ. Code, § 3543. The judgment and order are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

REPLEVIN—WHEN MAINTAINED—TENANT AT WILL
WHAT CONSTITUTES — APPEAL — JUDGMENT—
VERSAL.

1. The owner of land, after recovery therefrom one in possession under a claim of an est therein, cannot replevin the crops grown harvested by defendant while in such adverse possession. Page v. Fowler, 37 Cal. 100, Cal. 412, followed.

2. G., a member of a firm, obtained a patent to land under a void contract with the firm, whereby he agreed to procure it for its benefit. At G.'s death, A., one of the surviving partners entered as the representative of the firm, raised and harvested crops on the land, against the protest of G.'s heirs and administrators who recovered the land by legal proceedings. *Held*, that A., as the representative of the firm, was not a tenant at will while in possession and raising such crops.

3. Where a judgment is correct, it will not be reversed because the court gave a wrong opinion for its rendition.

bank. Appeal from superior court, San Obispo county; V. A. Gregg, Judge. Action by Julia Groome and Nellie E. Groome against L. T. Almstead to recover possession of certain personal property. On a judgment for defendant, and from an order denying their motion for a new trial, plaintiffs appeal. Affirmed.

William Shipsey and F. A. Dorn, for applicants. Wilcoxon & Bouldin, for respondents.

PER CURIAM. Action for the recovery of certain personal property, consisting of wheat hay, of the alleged value of \$1,496, or the value thereof in case delivery cannot be had, and for \$200 damages for detention thereof. Judgment for defendant, from which, and from an order denying their motion for a new trial, plaintiffs have appealed. The plaintiff Julia Groome is the widow of Thomas B. Groome, who died intestate May 1890, seised of 160 acres of land situated in the county of San Luis Obispo, on which he resided at the time of his death. Nellie Groome is the daughter of Thomas B. and Julia Groome, and was 16 years of age when her father died, and the plaintiffs are the only heirs of Thomas B. Groome. Thomas B. Groome obtained a patent for said land in December, 1890, under the circumstances stated in the case entitled "In re Groome," (94 Cal. 69, 29 Pac. 487,) wherein it was decided by virtue of the patent he acquired and the absolute title to the land, free from trust in favor of the defendant herein (Almstead) and one Minturn, who claimed to be equitable owners of an undivided eleventh part thereof. On August 16, 1891, letters of administration on the estate of Thomas B. Groome were issued to plaintiff Julia. In the winter of 1890-91 the defendant entered upon the land, and commenced to plow the same for the purpose of

not plant any crop, and that the land was the property of the estate of Thomas B. Groome; but he disregarded her notice and protest, and proceeded to plow the land and plant the crop. Again, in May, 1891, when the crop was ripened, she forbade him to harvest the same. This he also disregarded, and harvested and removed the crop. Again, in the winter of 1891-92, defendant plowed and planted the land, and in May and June, 1892, harvested the crops, against like protests of plaintiff Julia. In the mean time, on May 29, 1891, the plaintiff Julia had petitioned the superior court to set apart the whole of the land to the plaintiffs as a homestead. This petition was opposed by the defendant herein, and denied by the court. On appeal to this court the order was reversed, and the cause remanded. In re Groome, 94 Cal. 69, 29 Pac. 487. After reception of the remittitur, on May 24, 1892, the superior court set apart the whole tract of land as a homestead for the plaintiffs. The greater portion of the crops of 1892 was harvested after the setting apart of the homestead. This action was commenced June 7, 1892, to recover the crops of both 1891 and 1892 or their value.

It is conceded in this action that the patent invested Thomas B. Groome with absolute title to the land, and that the plaintiffs are his only heirs; but as a defense to this action it is claimed that, at the times the defendant planted the crops in question he was a tenant at will of the plaintiffs, and that he became such tenant by having been in possession at the time Thomas B. Groome died, under a contract by which the latter had agreed to procure the patent for the use and benefit of a copartnership composed of defendant, Groome, and Minturn, which contract is conceded to have been illegal and utterly void, as was held in Re Groome, supra. It was found by the court that such a copartnership existed, and had the use of the land under said void contract from July, 1886, until Groome died; and that defendant, as surviving partner, represented the concern at the times when he planted and harvested the crops in question. The court also found as a fact that, "about eight months after the death of said Thomas B. Groome, a dispute arose between defendant and said Julia Groome as to the ownership of said 160 acres of land, defendant claiming the same for said partnership, and plaintiff Julia Groome denying said claim. Said dispute has continued to the time of this trial." From the foregoing facts, the court deduced, as conclusions of law, that the defendant, as representative of the dissolved copartnership, was a tenant at will at the time he planted the crops; that his tenancy could not have been terminated otherwise than by 30 days' written notice in accordance with section 789 of the Civil Code; that he was entitled to har-

vest and remove the crop, as emblements, by authority of section 819 of the Civil Code; and that plaintiffs never had any right of possession except by force of the order of May 24, 1892, setting apart the homestead,—and thereupon rendered judgment to the effect that plaintiffs take nothing by the action.

While we think the court below was clearly in error in holding that, upon the foregoing facts, the defendant was a tenant at will, and entitled to a notice terminating such tenancy, and that plaintiffs had no title to, or right to the possession of, the land upon which the crops in dispute were grown, other than by virtue of the order setting apart the homestead, still we think the facts of the case, as above stated, bring the case within the reason of the rule declared in *Page v. Fowler*, 37 Cal. 100, 39 Cal. 412, and the judgment should not be reversed by reason of the fact that the superior court gave a wrong reason for its rendition. The facts here are not exactly parallel with those in the cases just cited, still we think the principle declared in those cases govern this, and plaintiffs are only entitled to recover damages for the withholding of the land, measured by the rental value, or the value of the use and occupation, of the land during the period it was occupied by defendant. The plaintiffs have misconceived their remedy. Judgment and order affirmed.

PEOPLE v. CLEMENT. (No. 21031.)

(Supreme Court of California. Feb. 28, 1894.)

INFORMATION—DUPLICITY—AMENDMENT—MOTION IN ARREST OF JUDGMENT—WAIVER.

1. An information which charges two offenses is demurrable, and cannot be amended after the taking of defendant's plea, without a new arraignment and plea to the amended information.

2. A defendant who has demurred to an information as charging two offenses does not waive his right to move in arrest of judgment by moving for a new trial.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

O. H. Clement was convicted of an attempt to commit grand larceny. From an order in arrest of judgment, the people appeal. Affirmed.

H. C. Dillon, Dist. Atty., and Atty. Gen. Hart, for the People. W. T. Williams, for respondent.

HAYNES, C. The people appeal from an order in arrest of judgment. The information contained two counts,—the first, for the larceny of a horse, buggy, and harness, and the second count charging an embezzlement of the same property. The defendant demurred to the information upon the ground that it charged more than one offense. The demurrer was overruled, and a plea of not guilty entered. After all the evidence had

been introduced, and during the argument of the case to the jury, the district attorney, with the consent of the court, and without objection from the defendant, withdrew the count charging embezzlement, and the jury found defendant "guilty of attempt to commit grand larceny." The defendant moved for a new trial, and his motion was denied. He then moved in arrest of judgment, upon the ground stated in his demurrer, and, this motion being sustained, the people appeal.

That two distinct offenses are charged in the information has been decided by this court in at least two cases where the facts were the same as here. See *People v. De Coursey*, 61 Cal. 134, and *People v. Quivse*, 56 Cal. 396. But appellant contends that the duplicity was cured by withdrawing the count charging embezzlement, and we are cited to authorities to show that the duplicity may be cured (1) by verdict of guilty on one count and not guilty on the other; (2) by a nolle prosequi as to one count; (3) by taking a verdict on one count only; and (4) by election by the prosecuting officer as to which count he will proceed upon. These authorities, however, are under the old procedure, which permitted several counts, and where, upon the face of the indictment, each count charged a distinct offense. But under that procedure the defendant was required to plead to each count, and thus a distinct issue was made upon each, and the jury were required to find on each count as to which there was a plea of not guilty; and, while the district attorney might enter a nolle as to one or more counts, if this were done after the jury was sworn, unless the defendant consented, it was a bar to a further or new prosecution for the offense charged in such count. This, however, did not affect the issues upon other counts; but here the information was framed upon the theory that but one offense was charged, and it was upon that theory that the demurrer was overruled and a single plea of not guilty taken. As the defendant could not be required to plead to two offenses charged in the same information, it cannot be said that issue was joined as to either offense, and withdrawing one of the counts, after the plea, could not cure the defect; for, even if it be conceded that there was a plea to one offense, it could not be said that it applied to one of the offenses rather than the other. If the demurrer had been sustained, as it should have been, and the district attorney had then taken leave to amend by striking out the second count, and the plea had been taken as to the first, the defect would have been cured. The information being bad, under the statute, it could not be amended after the defendant's plea was taken, without a new arraignment and plea to the amended information.

It is further contended by appellant that, by moving for a new trial, the defendant waived his right to move in arrest of judgment.

ment. This contention cannot be sustained. At common law, it was matter of right, and might be made at any time after conviction and before sentence. 1 Bish. Cr. Proc. §§ 1283, 1284. Our Penal Code makes but one restriction. If the defendant failed to demur to the information he waived his right to move in arrest upon any of the grounds mentioned in section 1004. See Pen. Code, § 1185. Like a complaint in a civil case, which states no cause of action, a fatal defect in an indictment may be taken advantage of at any stage of the proceeding, unless the right to do so is restricted by the Penal Code. The Code, as well as the common law, permits this motion after a plea of guilty, and even authorizes the court to arrest the judgment on its own view of any of the defects specified in the Code without motion. Id. § 1186. We know of no case which sustains appellant's contention. 12 Am. & Eng. Enc. Law, p. 1471, cited by appellant, expressly states that "the motion may be made after the decision of a motion for a new trial," though the two cases cited by the author to this proposition were civil cases. The motion in arrest of judgment was properly sustained, and the order appealed from should be affirmed.

We concur: VANOLIEF, C.; TEMPLE, O.

PER OURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

SHEA et al. v. ROBINSON et al. (No. 18,232.)

(Supreme Court of California. Feb. 28, 1894.)
ATTACHMENT LIEN—PRIORITY—FALSE STATEMENT
IN AFFIDAVIT—PLEADING.

In a suit to have a subsequent attachment decreed a prior lien on attached personality, because the affidavit of the prior attachment falsely stated that the claim sued on was not secured by a lien on the personality, the complaint averred that the prior attachment was for rent, that the tenant owned the attached personality, and had it on the leased premises, and that the prior attaching creditor did "retain a lien" thereon for the payment of the rent. *Held*, that the complaint was insufficient, since it failed to aver facts from which the court could see that some particular kind of lien existed.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by James Shea and others against R. B. Robinson and others to have an attachment on personality, though subsequent in time, decreed to be a prior lien to another attachment on the same personality. Defendants demurred. From a judgment for defendants, plaintiffs appeal. Affirmed.

L. L. Cory, for appellants. E. W. Risley, for respondents.

McFARLAND, J. A demurrer to the complaint was sustained, and, plaintiffs electing not to amend, judgment was entered for de-

fendants. Plaintiffs appeal from the judgment.

It is averred in the complaint that defendant Johnson brought an action against defendant Zetz to recover money alleged to be due from the latter to the former, and in said action caused certain described personal property of Zetz to be attached; and that afterwards plaintiffs brought an action against said Zetz, and caused the same property to be attached. The purpose of the present action is to have it decreed that the attachment of plaintiffs, though subsequent in time, is a prior lien to the attachment of Johnson. There is no averment that the money sued for by Johnson was not justly due and owing to him from Zetz, or that the alleged cause of action in Johnson v. Zetz was in any way false or fraudulent; nor is there any averment that the attachment proceedings in that action were on their face in any way invalid. It is averred, however, that the statement in the affidavit of attachment that "the claim sued upon had not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property," was false; that Johnson has leased certain real property to Zetz; that his suit against Zetz was for rent due upon the lease; and that Johnson did "retain a lien" upon said personal property mentioned in the complaint, for the payment of said rent. (It seems that the personal property was owned by, and in the possession of, Zetz, and was on the leased premises.) There is no other attack in the complaint on the validity of the said attachment proceedings.

We think that the demurrer was properly sustained. In the first place, as plaintiffs do not attack the justness and validity, either in whole or in part, of Johnson's cause of action against Zetz, it is doubtful if they could avail themselves of the falsity of the affidavit as to the nonexistence of the lien, even if that falsity were sufficiently averred. We have been referred to no case in which a junior attachment has been given precedence over a prior one, where the good faith of the debt for which the first attachment issued was admitted. The general rule is that where the claim of the prior attaching creditor is for a bona fide debt, without tinge of fraud, such an objection to the attachment proceeding as that insisted on in the case at bar can be successfully made only by the defendant in the attachment suit. *Fridenberg v. Pierson*, 18 Cal. 152; *Patrick v. Montader*, 13 Cal. 435; *Harvey v. Foster*, 64 Cal. 296, 30 Pac. 849; *Scrivener v. Dietz*, 68 Cal. 1, 8 Pac. 609; *Drake, Attachm.* § 771. But if it be admitted that the falsity referred to rendered the Johnson attachment wholly void, so that a stranger could successfully assail it, still there is no sufficient averment of such falsity. The only averment on the subject is that Johnson did "retain a lien" on the said personal property. If there could

be any circumstances under which a mere general averment that a person retained a lien, without any intimation of its nature or character, could be considered as a statement of a fact, within the meaning of the law of pleading, such circumstances do not appear on the face of the complaint in the case at bar. Indeed, it is hard to imagine what kind of a lien a man could "retain" on personal property out of his possession. He might, perhaps, acquire some sort of a lien on such property; but where the purpose of a pleader is to aver the falsity of a statement that there was no lien, and to thereby overthrow an attachment, he certainly should aver some facts from which the court could see that some particular kind of lien did exist.

There are some additional averments in the complaint that said Zetz, before plaintiffs' attachment issued, confessed judgment to Johnson, upon which an execution was issued and levied upon the property in question, and also gave a bill of sale of said personal property to Johnson, without change of possession; and these averments are somewhat insisted on in the briefs. We cannot see, however, how plaintiffs were injured by the things thus averred. The amount of the judgment confessed is not stated, and there is no averment that it was for more than was justly and legally due. The bill of sale seems to have been of little consequence, and it does not appear that the value of the property was greater than the just claim of Johnson. The judgment is affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

DOMICO v. CASSASSA. (No. 15,422.)
(Supreme Court of California. Feb. 27, 1894.)
REVIEW ON APPEAL—GRANT OF NEW TRIAL—
CONFLICTING EVIDENCE.

Where the evidence bearing on oppression, fraud, or malice justifying a verdict for exemplary damages is conflicting, the court's action, in granting a new trial to defendant unless plaintiff remit all of the verdict in excess of that allowed as actual damages, is an exercise of discretion, and not reviewable.

Department 1. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Action by one Domico against one Cassassa. From an order granting a new trial to defendant, on certain conditions, plaintiff appeals. Affirmed.

A. B. Ware and Rutledge & Pressley, for appellant. Barham & Bolton, for respondent.

HARRISON, J. Action to recover damages for personal injuries sustained by the plaintiff at the hands of the defendant. The jury rendered a verdict in favor of the plaintiff for \$750. Upon a motion for a new trial by the defendant, on the ground, among others, of insufficiency of the evidence to justify the verdict, the court made an order granting the

motion, unless the plaintiff should, within 20 days, remit all of the verdict above \$200 and costs, and, if such remission be made, that a new trial be denied. The plaintiff declined to remit, and has appealed from the order.

The evidence in the record fails to show that the actual damage sustained by the plaintiff was as great as the amount of the verdict, and the jury were not authorized to give exemplary damages, unless there was some evidence of oppression, fraud, or malice. Civ. Code, § 3294. The granting or denying a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive upon this court, unless it appears that there has been an abuse of such discretion; and it is immaterial whether the evidence is insufficient to sustain all, or only a portion of, the issues on which the judgment must depend. Whether the acts of the defendant were accompanied by oppression, fraud, or malice, so as to authorize the giving of exemplary damages, was a fact to be determined by the jury from the evidence before it, and upon this point there was a substantial conflict of evidence. The order of the judge granting a new trial shows that in his opinion the evidence was insufficient to show that there had been any fraud, oppression, or malice on the part of the defendant. The cases cited by the appellant, in which this court has refused to interfere with the verdict of a jury, were cases in which the trial court had itself refused to grant a new trial, or to reduce the verdict. The same principle which precludes an interference by this court in such cases applies when the trial court has granted a new trial, either absolutely or conditionally. If there is no evidence upon an issue which is essential to the judgment, a verdict or finding upon such issue is an error of law, which may be reviewed by this court. *Mason v. Lord*, 40 N. Y. 484; *Conely v. McDonald*, 40 Mich. 150. But, if the verdict or finding is made upon a conflict of evidence, the sufficiency of the evidence therefor is a question of fact, which the trial court is authorized to review; and if, in its opinion, the verdict is against the weight of the evidence, it is its duty to set it aside. *Dickey v. Davis*, 39 Cal. 569; *Sherman v. Mitchell*, 46 Cal. 577; *Irving v. Cunningham*, 58 Cal. 306; *Curtiss v. Starr*, 83 Cal. 376, 24 Pac. 806; *Bjorman v. Ft. Bragg Redwood Co.*, 92 Cal. 500, 28 Pac. 591. Its action in so doing is the exercise of a legal discretion, but is not an error of law which can be reviewed by this court. *Breckenridge v. Crocker*, 68 Cal. 403, 9 Pac. 426; *Nally v. McDonald*, 77 Cal. 284, 19 Pac. 418; *Townsend v. Briggs*, 88 Cal. 230, 26 Pac. 106; *Crooks v. Miller*, 89 Cal. 35, 26 Pac. 615. The order is affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

Supreme Court of Wyoming. March 14, 1894.)
EQUITABLE MORTGAGES — AFTER-ACQUIRED PROPERTY.

An equitable mortgage may take effect after-acquired property.

On rehearing. Denied.

On prior report, see 35 Pac. 475.

ONAWAY, J. It is urged that the defectively executed trust deed held by the trial court and by this court to be an equitable mortgage became such only when declared so by the judgment of the trial court. We are of the opinion that such is not the case. The court did not make an equitable mortgage by its decree, but found one already existing, which it foreclosed. Much has been said as to possible fraud. There is scintilla of evidence tending to show fraud. The defectively executed trust deed has been spoken of as a promise to execute a trust deed or mortgage. It is more. It is an attempt to execute a legal trust deed, and the actual execution of an equitable mortgage. It is urged that an equitable mortgage does not take effect on after-acquired property. Why not, is not apparent. It would seem it should take effect, if at all, according to its terms, so far as these terms are lawful and valid. Rehearing denied.

ROESBECK, C. J., and BLAKE, J., con-

TOWNE et al. v. RUMSEY.

Supreme Court of Wyoming. March 14, 1894.)
HOMESTEAD—DURATION—LOSS OF FAMILY.

Rev. St. § 2780, provides that every head of a family, being the head of a family, shall be entitled to a homestead exempt from execution.

Section 2781 provides that such homestead shall only be exempt while occupied as such by the owner thereof, or his or her family.

Section 2782 provides that when any person seised of a homestead, leaving a widow or minor children, such widow or husband or minor children shall be entitled to a homestead. *Held*, that one who has acquired a homestead does not lose his right to exemption by the death of his wife, child, or if he continues to occupy the premises as he.

Rehearing denied.

On prior report, see 35 Pac. 475.

On rehearing. Denied.

On prior report, see 35 Pac. 475.

In 1883, William L. Ash, a married man, became the owner of the premises in question, and continued in the ownership thereof until November 19, 1889, when he sold the same to Rumsey, the defendant in error. Ash was a bona fide resident of Rawlins, Wyo., the town in which the premises are situated, and, together with his wife, occupied the premises as a home from 1883 until June 22, 1885, when his wife died. After her death, Ash, who had no children then living, continued to live upon the premises until after his sale of the same to Rumsey. During this time he habitually ate and slept at this place, treated it as his home, and had no other place of abode. After his wife's death, he employed a servant, and kept house for some time. Then a niece kept house for him; and thereafter other people lived in a portion of the house, under an oral agreement, occupying a part of the house, and using a portion of the furniture and household utensils belonging to Ash; paid him a small rental, and boarded him, while he at the same time occupied the remaining part of the house. The value of the house and lot did not exceed \$1,500. In May, 1887, Ash mortgaged the property for \$1,100; and November 19, 1889, he sold it to Rumsey for \$1,500, receiving the excess over the mortgage debt, Rumsey agreeing to discharge the mortgage as a part of the consideration, and paying to the mortgagee the full amount thereof, the mortgage being discharged of record. The conveyance of Ash to Rumsey was by sufficient deed, with full covenants of warranty, and was properly recorded. In May, 1888, Towne and Symons obtained a judgment against Ash in the district court for Carbon county for \$631.28, and, at the commencement of the suit of Rumsey, (the case at bar,) were proceeding to sell, and were about to sell, the premises in question upon an execution, then in the hands of the sheriff, issued on the judgment. Rumsey had no actual knowledge of the judgment until the issuance of the execution thereon in June, 1891, and purchased the property, and paid the mortgage, and made permanent improvements on the property, in actual ignorance of the judgment. The trial court held that the property was the homestead of Ash, and was exempt from sale upon execution for his debts, and that, Ash having continued to reside thereon until after the sale to Rumsey, the property had not lost its homestead character by the death of the wife, and that Rumsey took the same free from any lien by reason of the judgment against Ash, and a decree was entered perpetually enjoining the sale. The trial court further held that, even if the judgment were a lien upon the premises, Rumsey would be entitled, as against the defendants, to be subrogated to the rights of the mortgagee against the property. The

defendants' motion for a new trial, on the ground that the findings of fact were not sustained by the evidence, and that the court erred in its conclusions of law, was overruled, and they institute proceedings in error in this court.

A homestead is acquired under the provisions of section 2780 of the Revised Statutes: "Every householder, * * * being the head of a family, shall be entitled to a homestead, not exceeding in value the sum of fifteen hundred dollars, exempt from execution and attachment arising from any debt, contract or civil obligation entered into or incurred." The duration of this exemption is covered by section 2781: "Such homestead shall only be exempt, as provided in the last preceding section, while occupied as such by the owner thereof, or the person entitled thereto, or his or her family." The status of the homestead upon the death of the owner is regulated by section 2782, which reads: "When any person dies seized of a homestead, leaving a widow or husband, or minor children, such widow or husband, or minor children, shall be entitled to the homestead, but in case there is neither widow, husband nor minor children, the homestead shall be liable for the debts of the deceased." The right to alienate the homestead is limited by section 2784: "Every owner or occupant of a homestead as established herein, may voluntarily sell, mortgage or otherwise dispose of or incur the same; provided, that every such sale, mortgage, disposal or incumbrance shall be absolutely void, unless the wife of the owner or occupant of such homestead, if he have any, shall, separate and apart from her said husband, freely and voluntarily sign and acknowledge the instrument of writing, conveying, mortgaging, disposing of, or incumbering such homestead, and the officer taking such acknowledgment shall fully apprise her of her right and the effect of signing and acknowledging such instrument." The proceeds arising from the sale of a homestead not exceeding \$1,500 are exempt, and any subsequent homestead acquired by such proceeds is also exempt, and no judgment or other claim against the owner of the homestead is a lien against the same in the hands of a bona fide purchaser for a valuable consideration. Rev. St. § 2786. These statutory provisions, relating to the acquisition, duration, disposal, and alienation of a homestead, plainly point to the legislative intent that the exemption is not only for the protection of the family, but for the benefit of the debtor. The right can only be acquired by the head of a family, and the continuance of the right is dependent upon the occupancy of the homestead by the owner thereof, or the person entitled thereto, or his or her family. The continuance of the homestead exemption does not rest, under our statute, upon the occupancy of the homestead by the owner and his family jointly; but the conditions imposed by the law as an

immunity from seizure and sale under legal process of the homestead is that of occupancy by the owner or the family. In the case at bar the occupancy of Ash and his wife of the homestead premises was continuous until her death, and his occupancy was continuous up to the time of the sale to Rumsey. The evidence is undisputed that he treated his homestead as his home, and that he had no other place of abode. The leasing of a portion of the premises did not destroy any right of homestead therein that he possessed so long as he resided there, and made it his home, no matter to what circumscribed area therein he limited himself; and we do not think this contention of sufficient importance to consider. It has been held that a temporary leasing of the entire homestead is not a renunciation of the homestead right. Wap. Homest. & Ex. p. 572. However this may be, surely it cannot be doubted that a rental of any portion of the premises by the homestead claimant for the purpose of eking out an existence is not fatal to the right.

The serious question in the case is whether or not the right of homestead continued after the death of the wife to the childless widow; and upon this proposition, although the weight of authority is in favor of the continuance of the right to the surviving owner, who is no longer the head of a family, there are many well-written and well-considered opinions to the contrary. The supreme court of Arkansas, "interpreting the law according to its spirit, and following the current adjudications," held with some hesitation that when the association of persons which constitutes the family is broken up, whether by separation or the death of some of its members, the right of homestead continues in the former head of the family, provided he resides at his old home. *Stanley v. Snyder*, 43 Ark. 429. So, also, is the decision of the supreme court of Illinois under enactments similar to our statutes. *Kimbrel v. Willis*, 97 Ill. 494. While admitting that there was much force in the observation that the homestead act has respect to the family of the debtor, and is for its benefit, and that in any case where this family relation is not found to exist, the homestead exemption does not subsist, there being then no cause for the application of the law, yet the court held that—looking at another section of the act, providing that, upon the death of the original owner of the homestead, the exemption shall continue after the death for the benefit of the surviving spouse, so long as he or she continues to occupy the homestead—the original owner, the meritorious cause of the exemption, must be regarded with equal favor as the survivor of such a one after his death. The court asks this pertinent question: "If, then, the homestead exemption may continue in such surviving husband or wife so long as he or she continues to occupy the homestead, without

stead before his death, whether the homestead estate has been once vested in him, should not the homestead exemption continue for him so long as he occupies the homestead premises, although he may have ceased to be a householder having a family?" To the same effect is the opinion of the supreme court of Kentucky in *Wills v. Sale*, 17 S. W. 148. The right was held to continue, as the debtor had done nothing to release or forfeit the right, and he therefore could not be deprived of the right to the loss of his family by misfortune. We think our statute, construed, as it must be, as to render every part of it effective, bestows the homestead right to the debtor, as well as to his family; and where once this right is acquired by the head of a family, it is maintained by occupancy of the exempted homestead by either the owner or his or her family, the right continues. In other words, the homestead exemption cannot be divested by the voluntary act of the head of the family, by abandonment or direct renunciation of the right. The right extends to the surviving spouse of the owner after his or her death, and such a survivor may be a childless widow or a childless widower; and there being in that case no family, and consequently no head of a family upon whom the original right of homestead is conferred, it must be held that the right once acquired is not lost to the survivor because there is no family to protect, in need of the shelter and sanctuary of the homestead. The continuance of the right, then, is not dependent upon the continuance of family relations; and, this being so, it must be conceded that the right, once acquired by the head of a family, may continue after the family relations are dissolved. So the right exists also during the life of the owner, as head of a family at the time the right accrued, so long as he occupies the homestead, whether he has been deprived of his family by death or by other circumstances. It is unnecessary to consider the other question involved in this case,—that of subrogation. Rumsey, the purchaser of the homestead, has the rights of the mortgagee thereof. It seems that Rumsey would be subrogated to the rights of such a lienholder, having paid his money in an honest endeavor to remove all encumbrances upon the property. The amount of the lien so discharged, with interest at the legal rate, since the date of its satisfaction, would amount to more than the value of the premises at the time of the sale, as shown by the evidence. However, it is not our purpose to treat of this question further, as it follows that the homestead right of William L. Ash, the grantor of the deed in error, accrued in the premises while he was a married man, and continued to exist after the death of his wife, and that

in error. The judgment of the district court of Carbon county will be affirmed. The other justices concur.

LONDON, PARIS & AMERICAN BANK, Limited, et al. v. SMITH et al. (No. 15,363.)

(Supreme Court of California. Feb. 27, 1894.)

PARTNERSHIP — MORTGAGE BY ONE PARTNER TO SECURE FIRM DEBT—EFFECT—LIABILITY OF SURVIVING PARTNER—ACTION TO FORECLOSE MORTGAGE—PARTIES.

1. A mortgage to secure a firm debt by a partner, in the absence of a personal covenant to pay the firm debt, creates in him no personal obligation, (Civ. Code, § 2923,) but renders him liable as surety.

2. On the death of a partner who became surety for a firm indebtedness by mortgaging his land, the mortgagee may enforce the mortgage without first exhausting his remedies against the surviving partner.

3. There being no partnership assets within the state, and the surviving partner being a nonresident, he is not a necessary party to such proceeding.

Commissioners' decision. Department 2. Appeal from superior court, San Mateo county; George H. Buck, Judge.

Action by the London, Paris & American Bank, Limited, and others, against Mary C. Smith, executrix of the will of Andrew Smith, deceased, and others, to foreclose a mortgage. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Affirmed.

W. G. Witter and Edw. F. Fitzpatrick, for appellants. Stanly & Hayes, for respondents.

HAYNES, C. The complaint alleges, in substance, that on the 24th day of August, 1885, Andrew Smith applied to the London, Paris & American Bank, Limited, to extend a credit accommodation to the firm of Harrington & Smith, a copartnership which then, and until the death of Andrew Smith in January, 1892, existed and carried on business at Seattle, in the present state of Washington, and, to secure the same, executed to the plaintiff David Cahn a deed conveying to him certain lands situate in the county of San Mateo, in this state; and at the same time, and as part of said transaction, the said grantor and grantee entered into an agreement, reciting among other things, "that said conveyance is intended to secure the payment to the London, Paris and American Bank, Limited, of all sums of money which are now, or may hereafter become, due from the party of the first part, or the firm of Harrington and Smith, of Seattle, Washington Territory, with interest, and all costs and charges incurred by said party of the second part, together with interest on all said indebtedness at the rate of eight per cent. per annum. And it is agreed that so

long as the said party of the first part, or the said firm of Harrington and Smith, shall be, or continue to be, indebted to the said London, Paris and American Bank, Limited, from any cause or on any account, that the said party of the second part shall hold the title to said property as security therefor; and that in the event of the failure or refusal of the said Andrew Smith, or of the said firm of Harrington and Smith, at any time, to pay to the London, Paris and American Bank, Limited, any sum or sums of money which may be due or payable to it, an action may be brought by the said David Cahn to enforce the payment thereof by a sale of the said premises, and the application of the proceeds to the payment of such indebtedness, together with interest at the rate of eight per cent. (8%) per annum, and all costs and charges incurred in respect to such property, growing out of the preservation thereof and the enforcement of said lien, with interest, including a reasonable counsel fee." The complaint sets out several promissory notes alleged to have been made by Harrington & Smith to said bank, the earliest of which bears the date July 5, 1889, and admits certain payments thereon; and also alleges that, at various times during the year 1891, said bank loaned to Harrington & Smith various other sums, amounting in the aggregate to \$937.23; that after the appointment and qualification of the defendant Mary C. Smith as executrix, the said claims of the bank, amounting to \$70,937.23, and interest thereon, were duly presented for allowance, and were rejected, and this action was brought to subject the land to the payment of said claims under the lien created by said deed and contract, and to secure a judgment against the executrix for any deficiency, to be paid in due course of administration. Mary C. Smith is the widow, and the minor defendants the children, of Andrew Smith, deceased. To this complaint the defendants demurred, upon the ground that it did not state facts sufficient to constitute a cause of action against them, and also for defect of parties defendant, in that W. A. Harrington, the surviving partner of Harrington & Smith, was a necessary party defendant, and upon the further ground that plaintiffs had not exhausted their remedies against the copartnership, nor presented their claim to the surviving partner. Other technical grounds of demurrer were afterwards cured by amendments to the complaint, and are not urged here. The demurrer was overruled, and the defendants answered, and among other defenses alleged that the claims mentioned in the complaint had not been established as an indebtedness of the firm of Harrington & Smith in any action brought against the partnership or the surviving partner; that plaintiff should first have recourse against the partnership property, before proceeding upon the mortgage deed given by

Andrew Smith, and that it was not alleged that the copartnership was insolvent. Findings were filed, and a decree entered as prayed for in the complaint, except as to a deficiency judgment, which was waived, and defendants appeal from the judgment and an order denying their motion for a new trial. Several exceptions were taken to the admission of evidence, raising substantially the same questions which were presented by the demurrer. The only findings necessary to be noticed are to the effect that the business of the firm was conducted at Seattle, in the state of Washington, where Harrington resides; that neither Harrington nor the firm had any assets in the state of California; "and that there is due, owing, and unpaid from the late firm of Harrington & Smith to the plaintiff, the London, Paris & American Bank, Limited, the full sum of \$55,321.98, for which said mortgaged premises are bound." Appellants' argument is directed to two propositions: (1) That plaintiff is required first to exhaust the liability of the surviving partner; and (2) that the surviving partner is a necessary party to this action, even if it can be maintained without first proceeding against the surviving partner.

The first proposition presents no serious difficulty. The deed and contract constitute a mortgage, and we will so call it. This mortgage contained no personal covenant for the payment of the liabilities of the firm. The mortgagor was liable therefor as a partner, but he assumed no new personal obligation. "A mortgage does not bind the mortgagor personally to perform the act for the performance of which it is a security, unless there is an express covenant therein to that effect." Civ. Code, § 2928. By executing the mortgage, he hypothecated or pledged the land as security for the indebtedness of the firm. If he had given his personal obligation for the payment of the debts of the firm, it would be readily understood that he occupied the position of a surety for the firm. "A surety is one who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor." Civ. Code, § 2831; *Hassey v. Wilke*, 55 Cal. 528. Here the obligation of the surety is several. The mortgage created no new obligation against the firm or the surviving partner. The firm was bound by its promissory notes; the suretyship was created by a separate instrument. "Persons severally liable upon the same obligation or instrument, including parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff." Code Civ. Proc. § 383. "It is well settled in this state, as elsewhere, that mere delay of

the creditor to proceed against the principal will not discharge the surety." *Bull v. Coe*, 77 Cal. 60, 18 Pac. 808, and cases cited. It is therefore clear that the surety may not only be sued separately, but that it is not required that the creditor shall first proceed against, or exhaust his remedies against, the principal debtor, unless some special circumstance requires a departure from the general rule as to necessary parties.

The circumstances relied upon to sustain the proposition that the surviving partner is a necessary party are that the mortgage was not given to secure a promissory note or other obligation of the firm set out or described in the mortgage, or a specified sum then admitted by the mortgagor to be due, nor for a specified sum then or thereafter to be advanced or loaned by the mortgagee, but "of all sums of money which are now, or may hereafter become, due from the party of the first part, or the firm of Harrington and Smith, of Seattle, Washington Territory, with interest, and all costs and charges," etc. No part of the indebtedness described in the complaint was incurred for nearly four years after the mortgage was given, and no part of it was the individual indebtedness of Andrew Smith. If the decree herein is paid by appellants in exoneration of the land, or the land is sold under the decree, they will have the right to proceed against Harrington, the surviving partner, for reimbursement or contribution; but in an action for that purpose the surviving partner would not be bound by this decree, and it could not be used in evidence against him, to establish the amount of his indebtedness to the bank. The result, therefore, would be, not only that appellants in such action would be obliged to establish the amount of the partnership liability to the bank, but, if the amount so established should be less than they had paid to the bank, they would lose the difference; nor could they have recourse against the bank, as they are bound by the decree, while the fact might be that the true amount due the bank was less than the decree, but more than their judgment against the surviving partner. These considerations show, at least, that the surviving partner would be a proper party to the action, and this much is not disputed by respondents. But the question is whether he is a necessary or indispensable party. In *Shields v. Barrow*, 17 How. 130, the court pointed out three classes of parties to a bill in equity, viz.: "(1) Formal parties. (2) Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on the rule which requires it to decide on and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting

other persons not before the court, the latter are not indispensable parties. (3) Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such condition that its final termination may be wholly inconsistent with equity and good conscience." See, also, *Cassidy v. Shimmmin*, 122 Mass. 411.

It is clear that the surviving partner is not a necessary party in the sense that he is or would be prejudiced by the decree, since it cannot be enforced against him, and he would not be concluded by it in an action brought by appellants for contribution or reimbursement; but he comes within a class of necessary parties, not because of his interest, nor that of the plaintiffs, but where his presence as a party is necessary to the full protection of the defendants before the court. In speaking of the subject of necessary parties, Story, in his work on Equity Pleading, (at section 138,) says: "In the next place, an interest of the absent parties in the subject matter, *ex directo*, which may be injuriously affected, is not indispensable to the operation of this rule; for, if the defendants actually before the court may be subjected to undue inconvenience, or to danger of loss, or to future litigation, or to a liability under the decree, more extensive and direct than if the absent parties were before the court, that of itself will, in many cases, as we shall presently see, furnish a sufficient ground to enforce the rule of making the absent persons parties." So Chancellor Wallworth, in *Bailey v. Inglee*, 2 Paige, 279, said: "Persons are necessary parties, * * * where the defendants already before the court have such an interest in having them made parties as to authorize those defendants to object to proceeding without such parties." The complaint, however, alleges the nonresidence of the surviving partner, and that there are no assets of the partnership within this state, and respondents rely upon these averments, which are not denied, as an excuse for not making him a party. I think this brings the case within well-recognized exceptions to the general rule. "The first exception to the rule, which we shall notice, is the utter impracticability of making the new or necessary parties. This occurs, of course, when such new parties are without the jurisdiction of the court, and when, consequently, they cannot be reached by the process of the court. In such a case, to require such persons to be made parties would be equivalent to a dismissal of the suit, and amount to a denial of justice. Hence, it is a common rule of the court that, when a person who ought to be a party is out of the jurisdiction of the court, if the fact is stated in the bill and admitted by the answer, or proved (if denied) at the hearing, that of itself constitutes a sufficient ground for dis-

pensing with his being made a party, and the court will proceed to a decree without him." Story, Eq. Pl. § 78. The author in the same section applies it to a bill against a partnership, but adds the qualification "that it can be done without manifest injustice to the absent partner." See, also, *Cockburn v. Thompson*, 16 Ves. 326; *Towle v. Pierce*, 12 Metc. (Mass.) 329; *Milligan v. Milledge*, 3 Cranch, 220; *West v. Randall*, 2 Mason, 181-190, Fed. Cas. No. 17,424. But this case is more clearly within the exception than most of the cases above cited, for the reason that this action is not upon an engagement of the partnership, but to foreclose a mortgage made by Andrew Smith, one of the partners, upon real estate situated here, and which could only be foreclosed in an action brought in the county where the land is situated, and in which the surviving partner has no interest. The mortgage might have contained a condition that the indebtedness should first be ascertained by an action against the firm, or an admission of the amount by the firm, or that a liability under the mortgage should only be for such amount as should remain unpaid after exhausting the partnership liability. In the absence of some restriction of the character indicated, it would be unreasonable to require that plaintiffs should go to another state, and exhaust their remedies against the surviving partner, or even ascertain by judgment the amount of the debt due to it, before proceeding against the surety, who had imposed no such condition.

It is not necessary to review the numerous cases cited by counsel for appellants. They apply to actions upon the partnership obligation alone against the estate of a deceased partner, and not, as here, to a several obligation created against the individual property of the deceased partner, whereby he became a surety for the firm. If plaintiffs had insisted upon a deficiency judgment against the estate of Andrew Smith, to be paid in due course of administration, these authorities would apply, for, as the mortgagor did not covenant that he would pay the debt of the firm, no personal liability was created by the mortgage, and, as to any deficiency after exhausting the mortgaged property, the liability could only rest upon the legal liability of the deceased as a partner, and not as a surety. It is said in appellants' reply brief that jurisdiction of Harrington's person could have been obtained, but it is not shown how. The record discloses no fact justifying the statement. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

DIXON v. PLUNS. (No. 14,429.)

(Supreme Court of California. March 2, 1894.)

NEW TRIAL—MISCONDUCT OF JURY—CHANCE VERDICT—EVIDENCE.

Where the fact that one or more jurors were induced to assent to a verdict "by a resort to the determination of chance" may be proved by affidavits of jurors, (Code Civ. Proc. § 657, subd. 2,) and there is a finding of the trial court, supported by the evidence on a motion for a new trial because of such misconduct, that the verdict was not arrived at by a resort to chance, an order refusing to grant a new trial will not be disturbed, though one of the jurors made affidavit that it was so arrived at, and that he was induced thereby to assent to it.

In bank. Appeal from superior court, city and county of San Francisco; Eugene Garber, Judge.

Action by Kate E. Dixon against J. F. W. Pluns for personal injuries. Plaintiff had judgment, and, from an order denying his motion for a new trial, defendant appeals. Affirmed.

H. C. Firebaugh, for appellant. Nagle & Nagle, for respondent.

GAROUTTE, J. This case has previously been before the court. See 98 Cal. 384, 33 Pac. 268. At that time the appeal from the judgment was not passed upon, but the appeal from the order denying a new trial was sustained, and the cause remanded, with directions to the trial court to hear evidence upon the manner in which the jury arrived at their verdict, and thereupon to pass upon the motion for a new trial. This course was followed by the lower court, and thereafter the motion was denied, and this appeal taken from the order denying the same. The application for a new trial was based solely upon the ground that the jury had been guilty of misconduct, in this: that the verdict was arrived at by a resort to chance; and evidence, both oral and by affidavit, was presented to the trial court for its enlightenment upon that question. The court found that the verdict was not arrived at by a resort to the determination of chance, that the jury was not guilty of misconduct, and denied the motion for a new trial.

Section 657, subd. 2, Code Civ. Proc., provides, substantially, that whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such fact may be proven by the affidavits of jurors. In the present case, one Koster made affidavit that the verdict was arrived at by resorting to the determination of chance, and that he was induced to assent thereto in that manner. It is now insisted that his affidavit must be taken as true, as far as his own conduct is concerned, and that, he being so induced to assent, the verdict must be set aside. Koster's affidavit appears to consist

of two portions—First, the verdict was a chance verdict; second, he was induced to consent to it by reason of that fact. But the rock upon which his contention is shattered is located in the finding of the court that the verdict was not a chance verdict. If it was not a chance verdict, he could not have been induced to assent to it for the reason that it was such a verdict; and the second portion of his affidavit, *ex necessitate*, falls with the first. As is said in *Dixon v. Pluns*, *supra*, "Courts are not inclined to set aside verdicts for the reasons here urged;" and the evidence in this case greatly preponderates in favor of the finding of the court. Appellant's counsel rely upon the late case of *Gordon v. Trevarthan*, 34 Pac. 185, from the supreme court of the state of Montana. Upon the facts of that case, we think the trial court should not have set aside the verdict, but its action appears to have been sustained by the appellate court by invoking the well-recognized rule that the decision of the trial court upon a matter involving a substantial conflict in the evidence will not be disturbed. By affirming the action of the trial court in the present case upon a matter of conflicting evidence, we are only doing as was done by the court in *Gordon v. Trevarthan*. If that case be construed as taking broader grounds upon this question, it trespasses upon the views we entertain. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: DE HAVEN, J.; PATERSON, J.; HARRISON, J.; McFARLAND, J.; FITZGERALD, J.

In re McDOWELL'S ESTATE. (No. 18,227.)
(Supreme Court of California. March 2, 1894.)

HOMESTEAD.

A building used primarily as an hotel cannot be regarded as a homestead, though the owner and his wife reside there for the purpose of carrying on the business.

Commissioners' decision. Department 1. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

In the matter of the estate of J. E. McDowell, an insolvent debtor. From an order refusing to set apart to him an hotel as homestead, he appeals. Affirmed.

Warren & Taylor, (T. M. Osmont, of counsel,) for appellant. L. F. Coburn, for respondent.

BELCHER, C. This is an appeal by J. E. McDowell, an insolvent debtor, from an order refusing to set apart to him certain real property as a homestead. The appellant was adjudged to be an insolvent debtor on the 21st day of January, 1893, by the superior court of Siskiyou county. At that time he was the owner of the property in question,

which consisted of certain land and the building thereon in the town of Sisson. Ten days later he filed a petition asking to have the property set apart to him as a homestead. The application was opposed by some of his creditors, and, after a hearing, was denied by the court. The findings of the court were, in substance, as follows: During the year 1886, appellant was engaged in conducting an hotel and boarding house at McCloud, and in the spring of 1887, at the request of friends, he erected the said building at Sisson for the special purpose of boarding and lodging railroad men and the public generally. As first constructed, the building consisted of a bar-room, office, dining room, and eight sleeping rooms, but during the year it was enlarged somewhat. A large sign was placed upon it, designating it as the El Monte Hotel, and by that name it was advertised in the newspapers and by cards. From the time of its completion, in the spring of 1887, until June 12, 1890, appellant used the said building primarily as an hotel. For the purpose of conducting the same as an hotel, he employed chambermaids, cooks, and waiters, and his wife superintended the chamber work and dining room, and he had a general supervision and conducted a bar in the house. His wife died in August, 1889, at the city of Los Angeles, leaving a female child, who was subsequently taken to Sisson, and kept in the El Monte for about two months, and then returned to Los Angeles. On November 20, 1889, appellant made and filed for record a declaration of homestead upon the said premises, and the same was duly recorded in the office of the county recorder. On June 12, 1890, appellant leased the whole of the said premises as an hotel for the term of one year, and did not, in the lease, reserve any portion thereof for his own use. The court further found "that said hotel, ever since its construction in 1887, has been used primarily as an hotel, and not as a home of the said James E. McDowell; that the residence of said James E. McDowell therein has been for the purpose of managing and conducting the business of an hotel, and for no other purpose;" and, as conclusions of law, "that the said James E. McDowell, at the time he filed for record his aforesaid declaration of homestead, was not entitled, under the law, to file said declaration upon said real estate," and "that he is not now entitled to have the said property set apart to him as a homestead."

The only specifications found in the bill of exceptions, and the only grounds urged for a reversal of the order, are that the last two findings which we have quoted were not justified by the evidence, and that the conclusions of law were not supported by the facts found. It is objected for respondents that the findings not assailed are sufficient to uphold the order appealed from; but, waiving that point, the order cannot, in our opinion, be disturbed upon either of the grounds urged for its reversal. The evidence clearly tended

to show that the building was constructed to be used, and that from the time of its construction it was used, primarily and principally as an hotel for the accommodation of the public, and it was being so used by appellant at the time he filed his declaration of homestead. This being so, the case is plainly within the rule declared in *Laughlin v. Wright*, 63 Cal. 113. In that case it was said: "The use of the property is an important element to be considered;" and it was held that, when the property is primarily and chiefly used as an hotel for the accommodation of the public, it would be doing violence to the statute to regard it as a homestead, although the owner may reside there with his family for the purpose of carrying on the business. What was said in that case upon this subject was not obiter dictum, and the decision has never been overruled. In *Heathman v. Holmes*, 94 Cal. 296, 29 Pac. 404, the case is referred to and distinguished from the one then under consideration, but the correctness of the decision is not questioned when limited to the facts involved in it. Upon the authority of *Laughlin v. Wright*, *supra*, the order appealed from here should be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

OLEMENS v. LUCE et al. (No. 19,234.)
(Supreme Court of California. Feb. 28, 1894.)

MORTGAGES—FORECLOSURE—DEFERRED PAYMENTS OF INTEREST—SECURITY FOR ATTORNEY'S FEES—DEMAND.

1. The interest on a note was payable quarterly, and, if not so paid, was to become a part of the principal, and bear interest at a like rate till paid; and the note was secured by a mortgage which recited that principal and interest should be due, and the mortgagee might foreclose, on default of an interest payment. *Held*, that the mortgagee could foreclose on default of an interest payment, as the mortgagor had no option to allow an interest installment to become a part of the principal.

2. Demand for payment was not necessary before suit to foreclose, where the mortgagor made default of an interest payment.

3. Where the mortgage secured the payment of principal and interest only, attorney's fees, for which the note provided, could not be made a lien on foreclosure.

4. On foreclosure for default of an interest payment on the note, judgment could not include the attorney's fees without proof that the mortgagee gave notice of his option to claim the whole amount due on the note, and demanded payment.

Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Jere Clemens against M. A. Luce and Henry W. Magee to foreclose mortgages. From a judgment for plaintiff, defendants appeal. Modified.

Luce & McDonald, for appellants. J. B. Mannix, for respondent.

GAROUTTE, J. This is an action of foreclosure of two certain mortgages, the note and mortgages being executed by appellant Luce in favor of respondent Clemens. The note was payable two years after date, interest payable quarterly, and, if not so paid, then to become a part of the principal, and to bear a like rate of interest till paid. The note also contained the following provision: "And I further agree that, in the event of suit being brought against me, then there shall be added to any judgment against me rendered in said suit, as counsel fees, an additional sum of five per centum in like gold coin upon the amount of the principal and interest hereof, accrued at the time of the entry of such judgment; or, if paid before judgment, and after action commenced, then on the amount at the date of payment." The mortgages recited that if default be made in the payment of the interest, or any part thereof, according to the tenor of said note, then the whole sum of principal and interest shall become immediately due, and the mortgagee may proceed with suit of foreclosure, and sell the mortgaged premises in the manner provided by law. The mortgages also contained the following recitals: That they are given "as security for the payment to said mortgagee of the sum of \$18,000, in gold coin of the United States of America, with interest thereon according to the terms of a certain promissory note, of date September 22, 1891, in words and figures," etc.

It is insisted that a general demurrer to the complaint should have been sustained, upon the ground that nothing was due upon the note at the time the action was brought. Two of the quarterly installments of interest had not been paid when the complaint was filed, but it is charged that such payments were not due, inasmuch as the maker of the note had the privilege of allowing the installments of interest to become a part of the principal. There is no strength in appellants' position. The mortgages are attached to and made a part of the complaint, and there is not the slightest conflict between the terms of the note and the terms of the mortgage, when we consider them together. This identical question was before the court in *Brickell v. Batchelder*, 62 Cal. 623, and it was there said: "The right to dispose of the interest due and unpaid in the mode prescribed in the note was given to the plaintiff mortgagee, not to the mortgagors. A failure to so dispose might arise from the concession of the plaintiff, and not from any default of the mortgagors, except by default in paying the interest monthly. The language of the note and mortgage gave to the mortgagee the right on default to proceed to foreclosure. He might delay it or waive it, but a delay in exercising this right could not be construed as depriving him of it." The same principle is

also recognized and approved in *Maddox v. Wyman*, 92 Cal. 674, 28 Pac. 838.

The judgment upon the pleadings was properly ordered. The answer created no issue. The denial that the plaintiff was the owner and holder of the note and mortgages amounts to nothing. *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. 514; *Poorman v. Mills*, 35 Cal. 118; *Bank v. Boyd*, (Cal.) 34 Pac. 337. Neither is there a conflict between the provisions of the note and the terms of the mortgage as to when the note is to become due; and, consequently, the fact that certain provisions of one were printed and certain provisions of the other written becomes entirely immaterial. Again, no demand for payment was necessary prior to the commencement of the action, for the mortgagor was guilty of a breach of contract when he defaulted in payment of interest, and the cause of action immediately accrued. *Prescott v. Grady*, 91 Cal. 518, 27 Pac. 755, is not in point. The mortgages in this case were given as security for the payment of \$16,000 in gold coin, with interest thereon as specified in a certain note. This was the contract of the parties. It nowhere appears in either of said mortgages that they were given to secure the payment of any attorney's fee whatever. Indeed, the matter of attorney's fee is not mentioned in either instrument. As to what these mortgages were given to secure was a matter of pure contract between the parties. They could have been given to secure the principal of the note alone, or the interest alone, or both principal and interest, as was actually done, or they could have been given to secure future advances and attorney's fees in case of foreclosure. It follows that security for an attorney's fee is not provided for in either mortgage, and consequently such fee cannot be made a lien upon the land, and the judgment of the court in that regard is erroneous. We are authorized to go a step further, and hold that plaintiff, as to the foreclosure of the securities, was not entitled to any attorney's fee whatever, for there was no stipulation to that effect in the mortgage. This has always been the law in this state. *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. 514.

As the obligation for the payment of attorney's fees, although not secured by the mortgage, was included in the instrument by which the secured debt was evidenced, and provided that judgment might be entered for counsel fees in such suit, it was properly included in the same action; but the right to a judgment for such fees was the same as it would have been in an action upon a promissory note with such a clause, of which no part was secured by mortgage. In such a case it is held that, when the note is payable on demand, it is necessary to allege and prove an actual demand before there can be such a breach of the contract as will authorize a recovery of this special demand for attorney's fees. *Prescott v.*

Grady, 91 Cal. 518, 27 Pac. 755. Although by the terms of this agreement the maker renders himself liable to an action by his mere default prior to the maturity of his obligation, (*Hewitt v. Dean*, 91 Cal. 5, 27 Pac. 423,) yet if his liability for additional damage is not so established, but is merely consequent upon another liability, which depends upon the option of the holder of the instrument, and cannot exist until after that option shall have been exercised, it is only just that the holder of the obligation should inform him of this option, in order that he may avoid the additional damage by making payment of the note. The right to bring an action after his default, without any demand of payment, is limited to the purposes for which the action is to be brought, viz. the foreclosure of the mortgage, and it does not include the attorney's fees. As the note in the present case does not give to the holder the right to bring an action before its maturity, that right being created by the mortgage alone, and limited to a foreclosure of the mortgage, if the holder would claim the attorney's fees provided for in the note, he should be required to give notice of his option to claim the whole amount to be due, as much as though the action was upon the note alone. For this reason the judgment for the amount of attorney's fees was erroneous.

It is ordered that the cause be remanded, with direction to the trial court to modify the judgment by striking therefrom the amount of the attorney's fee allowed; and in all other respects it is ordered that the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

SAINSEVAIN v. LUCE et al. (No. 19,274.)
(Supreme Court of California. Feb. 28, 1894.)

ACTION ON NOTE TO "GUARDIAN"—PLEADING—
DESCRIPTIO PERSONAE—CONSTRUCTION OF MORTGAGE—ATTORNEY'S FEES.

1. Though the Code provides that a guardian must sue in the name of his ward, a payee of a note who is described as "guardian" may sue in his own name, in the absence of evidence of a ward or trust estate.

2. Where a mortgage secures in terms only the principal and interest of a note, a lien cannot be had for attorney's fees, though the note provides for them.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Paul Sainsevain against M. A. Luce, C. S. Luce, and Olive B. Montania to foreclose a mortgage. Judgment for plaintiff, and defendants appeal. Modified.

Luce & McDonald, for appellants. Sweet, Sloane & Kirby, for respondent.

TEMPLE, C. This appeal is upon the judgment roll. The suit is to foreclose a

mortgage, which is fully set out in the complaint. It recites that the mortgage is given to secure the payment of \$2,000, with interest, according to the terms of a promissory note, "in the words and figures following." The note is then set out, and is as follows: "2,000. San Diego, Cal., Aug. 19, 1890. Two years after date, without grace, for value received, I promise to pay to the order of Paul Sainsevain, guardian, the sum of two thousand dollars, with interest thereon from this date until payment, at the rate of eleven per cent. per annum, payable quarterly; and, if not so paid, then to become part of the principal of this note, and to bear like rate of interest till paid; both principal and interest to be paid in United States gold coin. And I further agree that, in the event of suit being brought against me, then there shall be added to any judgment against me rendered in said suit, as counsel fees, an additional sum of ten per centum, in like gold coin, upon the amount of the principal and interest thereof accrued at the time of the entry of such judgment; or, if paid before judgment and after action commenced, then on the amount at date of payment. [Signed] M. A. Luce." The mortgage then contains a covenant that, in case of default in payment of interest, the whole sum of principal and interest shall become due. This, with a description of the property mortgaged, constitutes the entire mortgage.

Appellant first contends that the plaintiff cannot maintain this action because the note is payable to him as guardian, and; under our Code, a guardian cannot maintain an action in his own name, but suit must be in the name of the ward. But the description of the payee as guardian, in the absence of any showing that there was a ward or a trust estate, does not show that the money did not belong to plaintiff. There is nothing in the mortgage or complaint which would justify a finding that the plaintiff is not the proper party to bring suit. If the defendant had answered averring that the note belonged to a ward of plaintiff, the description would have materially contributed to strengthen any proofs he may have had, but, standing alone, it is of no consequence.

It is next objected that the mortgage was not given to secure an attorney's fee, and that it was error to give plaintiff a lien for that. In this respect I think the decree is erroneous, and must be modified. A mortgage is but a contract for a lien, and is whatever the parties make it. This mortgage in terms only secures the payment of \$2,000, and interest, and cannot, by implication or otherwise, be construed to give a lien for the attorney's fee. *Clemens v. Luce*, (No. 19,234; filed Feb. 28, 1894,) 35 Pac. 1032.

Respondent does not claim that he is at least entitled to a personal judgment in case he is denied a lien for the attorney's fee. It is therefore not necessary to determine whether such relief might be obtained in this

suit. I think the decree should be modified by deducting therefrom the amount of the attorney's fee allowed.

We concur: VANCLIEF, C.; HAYNES, C

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the decree be modified by deducting therefrom the sum of \$200, the amount of the attorney's fee therein allowed, and, as so modified, the judgment appealed from is affirmed.

LEE v. MCCARTHY et al. (No. 19,302)
(Supreme Court of California. Feb. 28, 1894.)
MORTGAGES — FORECLOSURE — SECURITY FOR ATTORNEY'S FEES — PLEADING — DIRECT AVERMENT.

1. A lien for attorney's fees cannot be obtained in a suit to foreclose a mortgage which contains a provision that, should suit be commenced, or an attorney employed, the mortgagors agree to pay an additional sum of 10 per cent. on principal and accrued interest as attorney's fees, since the mortgage does not purport to secure such fees.

2. Attorney's fees cannot be recovered where the agreement to pay them is not directly averred in the complaint, but is merely inferable from an exhibit annexed thereto.

Department 1. Appeal from superior court. San Diego county; W. L. Pierce, Judge.

Action by Lee against McCarthy and another to foreclose a mortgage. From a judgment for plaintiff, defendants appeal. Modified.

Luce & McDonald, for appellants. A. E. Nutt, for respondent.

PER CURIAM. This case is not distinguishable in principle from *Clemens v. Luce* (No. 19,234; this day decided,) 35 Pac. 1032. The agreement providing for attorney's fees in case of suit is contained in the mortgage instead of the bond, and is as follows: "Should suit be commenced, or an attorney employed, to collect the said promissory bond, or any of said interest coupons, the mortgagors agree to pay an additional sum of ten per cent. on principal and accrued interest as attorney's fees." The mortgage does not purport to be given to secure these attorney's fees, and the agreement can have no greater force than if it were contained in the bond, or in a separate instrument. It may be added that this agreement to pay attorney's fees is not directly averred in the complaint, but is merely inferred from being contained in an exhibit annexed thereto; and it is a well-established rule in pleading that "whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint." *Burkett v. Griffith*, 90 Cal. 542, 27 Pac. 527.

The cause is remanded, with directions to the court below to modify the judgment by

striking therefrom the amount of the attorney's fees allowed; in all other respects the judgment and order appealed from to be affirmed.

CHASE v. HIGH et al. (No. 19,249.)

(Supreme Court of California. Feb. 28, 1894.)

Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Levi Chase against W. E. High and another to foreclose a mortgage. From a judgment for plaintiff, defendants appeal. Modified.

Luce & McDonald, for appellants. James E. Wadham, for respondent.

PER CURIAM. On the authority of *Clemens v. Luce*, (No. 19,234; this day decided,) 35 Pac. 1032, it is ordered that the judgment appealed from in this case be modified by deducting therefrom the amount of the attorney's fee allowed.

CASTRO et al. v. CITY AND COUNTY OF SAN FRANCISCO et al. (No. 15,029.)

(Supreme Court of California. March 2, 1894.)

DISMISSAL OF SUIT—DELAY IN PROSECUTION.

It is within the sound discretion of the lower court to dismiss an action for inexcusable delay in failing, for two years after the commencement of the action, to serve defendant with process.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by one Castro and others against the city and county of San Francisco, one Barkley, and others. From an order dismissing the action on motion of defendant Barkley, plaintiffs appeal. Affirmed.

D. L. Smoot, for appellants. John Lord Love, for respondent.

PATERSON, J. This is an action against the city and county of San Francisco and a large number of individuals to declare that the city and county of San Francisco, and those claiming under it, are trustees of the plaintiffs as to the property described in the complaint, and for an accounting of the rents, issues, and profits of the same. The appeal is from an order of the superior court dismissing the action. The ground of the motion for a dismissal was want of ordinary diligence in prosecuting the action. The affidavit of the defendant Barkley showed that the action was commenced on the 19th day of June, 1889, but that he was never served with process until the 17th day of November, 1891; that no diligence had been exercised to serve him prior to said 17th day of November; that he had for several years prior thereto continuously resided on the premises described in the schedule, and had for two years been employed as a bookkeeper for the Pacific Bridge Company, at No. 4 California street, in the city and county of

San Francisco, where he could have been found at any time during business hours. The affidavit further stated that plaintiffs' claim was a "shadowy cloud in the minds of some persons when property within the boundaries of the premises embraced in said complaint are sold or mortgaged;" and that it was not the intention of the plaintiffs to bring the cause on for trial "so long as they can get one dollar a front foot from persons who happen to want to sell or mortgage, and desire the cloud removed." The plaintiffs filed a counter affidavit, denying the statement that they did not intend to bring the cause on for trial, or that they had failed to prosecute their action with reasonable diligence; and alleging that the pendency of the action had been widely advertised in the public print, and that the delay had been caused by reason of the great number of defendants and expense of serving them with process; that a large number of defendants had been promptly served with the summons, but a motion to quash the same for clerical misprision had been granted, which caused delay; that the defense set up by the city and county and other defendants would test the merits of plaintiffs' case, and, if the former should prove successful, the benefit would fall to all of the defendants, whether served with process or not.

It is claimed by appellant that the court had no power to dismiss as to respondent Barkley, because he was served with process within three years after the complaint was filed, and section 581, subd. 7, Code Civ. Proc., as amended by the act of March 19, 1889, is cited in support of the contention; but in *Kreiss v. Hotelling*, 33 Pac. 1125, we said, speaking of that amendment: "The discretion of the court to determine whether there has been an inexcusable delay within the term of three years still remains, and each case must be determined upon its own peculiar circumstances." See, also, *Murray v. Gleeson*, 35 Pac. 88. Upon the showing made in this case, we cannot say that the court below abused its discretion in granting the motion to dismiss. The order is affirmed.

We concur: **HARRISON, J.; GAROUTTE, J.**

HABER v. BROWN et al. (No. 19,233.)

(Supreme Court of California. Feb. 28, 1894.)

NONNEGOTIABLE NOTE—TRANSFER AS SECURITY—ACTION AGAINST INDORSER—NECESSITY OF DEMAND.

1. A demand on the maker of a nonnegotiable note, indorsed in blank by the payee, is necessary to entitle the immediate indorsee to recover against the payee if the words written over the blank indorsement show that such indorsee treated the indorsement as if it were an indorsement of a negotiable note.

2. In an action against the indorser of a note not payable at any particular place, a complaint

which shows on its face that no demand was made on the maker, and which offers, as the only excuse for failure so to do, that he could not be found in the city in which the note was executed, is insufficient.

3. The payee of a nonnegotiable note, secured by mortgage, who transfers the note and mortgage as collateral security for a debt, is not liable to the transferee for any deficiency arising on foreclosure of the mortgaged premises.

4. One who transfers a note and mortgage on condition, *inter alia*, that the transferee pay him the interest then accrued, "when the same should be collected on said note and mortgage," is entitled, on foreclosure, to have the proceeds thereof first applied to such interest.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Joseph Haber against Martha L. Brown and Caroline G. Carter. Judgment for plaintiff. Defendant Carter appeals. Modified.

David L. Withington and E. E. Carter, for appellant. Hunsaker, Britt & Goodrich, for respondent.

VANCLIEF, C. Action to foreclose a mortgage executed by defendant Brown upon certain lots of land situate in the city of San Diego, to secure her promissory note for \$4,000, dated, "San Diego, Cal., Sept. 10, 1887," and payable one year after date, to the order of Caroline G. Carter, the appellant. The note contained a provision for the payment of counsel fees of 5 per cent. on the amount recovered in case of suit. The complaint contains two counts. The first alleges the indorsement of the note before maturity by Caroline G. Carter to the order of Dinkelspiel & Co., a firm consisting of Dinkelspiel, Josephi, and plaintiff, and a subsequent assignment by Dinkelspiel and Josephi of all their interest in the note to the plaintiff; and avers "that, at the maturity of said note, due search and inquiry were made for the maker thereof, the said Martha L. Brown, at the city of San Diego, in order that the same might be presented to her for payment, but she could not be found, and the said note was not paid;" that thereupon the said note was duly protested for nonpayment, and notice of protest and nonpayment was given to said Caroline G. Carter. The second count omits the allegations of indorsement, protest, and notice of nonpayment, and alleges, "that after the execution of said promissory note and mortgage, and before the maturity of said note, the said Caroline G. Carter assigned said note and mortgage to S. B. Dinkelspiel & Co., and in and by such assignment guaranteed the payment of said note to the said Dinkelspiel & Co." The defendant Caroline G. Carter demurred to each count of the complaint generally, and specially demurred to the second count. Both demurrers were overruled. In her answer she denied the allegations of the complaint as to the efforts to present the note to Martha L. Brown for

payment, and the allegation that she guaranteed the payment of the note; and alleged that the note was indorsed by her in blank, and delivered to Dinkelspiel & Co., as security for an antecedent indebtedness of her husband, John H. Carter, to Dinkelspiel & Co., and without other consideration; and that in December, 1888, after maturity of the note, she assigned the mortgage, and released all her interest in the note, to Dinkelspiel & Co., in consideration of which they agreed to pay her \$260 arrearage of interest due upon the note to December 10, 1888, out of the first moneys to be collected upon the mortgage. The court found that the note was indorsed by the defendant, simply by the writing of her name, "Caroline G. Carter," and, so indorsed, was delivered to Dinkelspiel & Co., as security for said antecedent indebtedness of John H. Carter, her husband, to Dinkelspiel & Co., and in consideration of an extension of time for payment of that indebtedness, and of the advancement of the sum of \$1,000 to John H. Carter. The evidence shows that this advance of \$1,000 was made prior to the delivery of the note to Dinkelspiel & Co., for the purpose of enabling John H. Carter to obtain the note from the California National Bank, where it had been deposited as security for a note made by the firm of Carter & Baker to that bank, for the sum of \$1,000. The court found that Caroline G. Carter did not guaranty the payment of the note otherwise than by her blank indorsement thereof. It further found, in the language of the complaint, the alleged search and inquiry at San Diego for Martha L. Brown, that she could not be found, the protest for nonpayment, and notice of protest and nonpayment to Mrs. Carter. It further found that in December, 1888, Mrs. Carter absolutely assigned and transferred the note and mortgage to Dinkelspiel & Co., in consideration of a credit of \$4,000 to John H. Carter upon his indebtedness to them, and of their agreement to pay to her, when collected, the interest which had then accrued on the note, (the first year's interest,) but found that there was no agreement to pay such interest from the first moneys collected. The court also found that it was understood between the parties at the time of the absolute assignment that Mrs. Carter was responsible upon her indorsement of the note, and liable to pay the same, less the interest thereon to December 10, 1888. The judgment was in favor of plaintiff, ordering a sale of the mortgaged property, and application of the proceeds (1) to payment of costs of suit and expenses of sale; (2) to the payment to plaintiff of the principal and interest, less the first year's interest, found due on the note; and (3) to payment to Mrs. Carter of the first year's interest and the compound interest thereon; and further ordering that, in case the proceeds of the sale should be insufficient to make the first two of the above-

mentioned payments, a judgment for the deficiency be entered against Mrs. Carter. Mrs. Carter appeals from the judgment on the judgment roll and a settled statement issued on her motion for new trial, the appeal having been taken within six months after the rendition of the judgment. Appellant contends that the court erred in ordering a personal judgment against her, and in postponing the payment to her of the first year's interest to that of the full amount due plaintiff.

1. The note is nonnegotiable, on account of the contingent provision for attorney's fees therein contained. *Adams v. Seaman*, 2 Cal. 636, 23 Pac. 53. In the case of *Bank v. Falkenhau*, 94 Cal. 141, 29 Pac. 866, it was held that, "In respect to the immediate indorsee of the payee of a nonnegotiable promissory note, the indorsement will ordinarily create the same liabilities and obligations as the indorsement of a negotiable note." If his rule, as stated, be strictly applied, the obligations of the payee, as an indorser, to the immediate indorsee, must depend upon demand upon the maker at maturity or sufficient excuse for its absence, and notice of nonpayment to the indorser, both of which are essential. In a number of cases which enforce the rule as stated, such conditional liability of the indorser is recognized, (*Jones v. Fales*, 4 Mass. 245, 254; *White v. Low*, 1 Barb. 204; *Aldis v. Johnson*, 1 Vt. 136; *Parker v. Riddle*, 11 Ohio, 102,) though in other cases it is held that the payee who indorses a nonnegotiable note in blank may be held liable to his immediate indorsee as an absolute guarantor, and that his indorsee may write a guaranty, or absolute promise to pay the note, over the indorsement, and that the indorser cannot require demand and notice of nonpayment, (*Ford v. Mitchell*, 15 Wis. 334; *Billingham v. Bryan*, 10 Iowa, 317; *Seymour v. Van Slyck*, 8 Wend. 404; *Cromwell v. Hewitt*, 40 N. Y. 491.) In the present case it appears that *Dinkelspiel & Co.* wrote no guaranty over the blank indorsement, but, instead thereof, wrote the words, "Pay to the order of S. B. Dinkelspiel & Co.," and themselves indorsed the note to the order of the London, Paris & American Bank, Limited, which in turn indorsed it to the order of the Consolidated National Bank for collection, which latter bank caused the note to be protested for nonpayment, and notice thereof to be given to each and all of the prior indorsers. The court has expressly found that there was no other guaranty of the note than by the indorsement thereof in blank. *Dinkelspiel & Co.*, as immediate indorsees, having elected to treat the indorsement to them as if it was an indorsement of negotiable paper, and not a guaranty, ought not to be allowed to alter the terms of the writing which they themselves placed above the blank indorsement. It is unnecessary to decide in this case whether demand and notice of nonpayment of a nonnegotiable note in-

dorsed in blank by the payee is required to be given in every case of a transfer of such note, in order to entitle the immediate indorsee of the payee to recover thereon against the payee; but such demand and notice ought to be required where the words written over the blank indorsement show that the signature was considered and treated by the indorsee as if it were an indorsement of negotiable paper. Applying this rule to the present case, the complaint is insufficient to charge the appellant as an indorser. It expressly shows upon its face that the note was not in fact presented at maturity to the maker, but presentment is sought to be excused merely upon the ground that the maker could not be found in San Diego, the place at which the note was dated. But the note was not by its terms payable in San Diego, though dated there; and, under the law merchant, a note not payable at any particular place is payable, and should be presented for payment, at the residence or place of business of the maker, or wherever he may be found, at the option of the presentor; and it is only where the maker has no place of business or residence within the state, or where his place of business or residence cannot be ascertained with reasonable diligence, that presentment for payment is excused. The complaint is insufficient, because it states no facts respecting the knowledge or ignorance of *Dinkelspiel & Co.* and their indorsees or agent as to the actual place of residence or business of the maker of the note, and does not allege what was her last known place of residence or business, or that any inquiry or presentment was made thereat. Merely looking for the payor at the place where the instrument is dated is not of itself due diligence, but presentment must be shown to have been made at the promisor's last known place of residence or business; and if his removal from the place of date, and the acquisition of a new domicile in the same state, were previously known to the indorsee, demand must be made at his new place of residence. *Wheeler v. Field*, 6 Metc. (Mass.) 290; *Anderson v. Drake*, 14 Johns. 114; *Bank v. Green*, 11 Iowa, 476. The allegation "that thereupon the note was duly protested for nonpayment," being directly coupled with the previous allegations, showing nonpresentment of the note to the maker, cannot be presumed to imply a presentment of it in fact, or to imply any other excuse for not presenting it to the maker than that previously alleged, which is insufficient for the reasons stated. No waiver of protest is alleged in the complaint, or found to exist; and the finding that, at the time of the assignment and release of the pledged note and mortgage, it was understood between the parties that the plaintiff was responsible upon her indorsement, is not only outside of the issues made by pleadings, but is not sustained by the evidence. The evidence discloses an un-

derstanding between Dinkelspiel & Co. and John H. Carter and Caroline G. Carter that any extension of time granted to the vendees of the mortgaged property should "in no way affect any obligation" of either of them to said S. B. Dinkelspiel & Co., and further discloses that Dinkelspiel & Co. at the time of the assignment, requested them to sign an absolute guaranty of "full and exact payment" of the note and mortgage, and to indemnify Dinkelspiel & Co. for all loss sustained by reason of its nonpayment, which Caroline G. Carter expressly refused to execute, and no extension of time was in fact granted.

2. The case has been discussed thus far upon the theory of the complaint, that the original transfer of the note in suit to Dinkelspiel & Co. was an absolute transfer thereof by indorsement, in the ordinary course of business; but the answer, proofs, and findings show that the transfer was by way of pledge, or collateral security, to secure the indebtedness of John H. Carter and of the firm of Carter & Barker to Dinkelspiel & Co. The Civil Code expressly provides that, "notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien." Civ. Code, § 2888. It is settled in this state that, as between the pledgor and pledgee, the general property in a pledge remains in the pledgor, notwithstanding an apparent transfer of legal title to the pledgee. *Cross v. Canal Co.*, 73 Cal. 306, 14 Pac. 885, and cases cited. The pledgee is but a trustee for the pledgor, (*Wheeler v. Neubould*, 16 N. Y. 398; *Hawks v. Hinchcliff*, 17 Barb. 492.) and is accountable to the pledgor for any surplus realized above the amount of indebtedness existing at the date of the enforcement of the pledge, (Civ. Code, § 3008.) The transfer of a pledged note and mortgage to the pledgee does not transfer the title any further than to enable the pledgee to collect the note and mortgage from the maker thereof. *Ponce v. McElvoy*, 47 Cal. 159. In no event, even under the law merchant, could an indorsement of negotiable paper by way of collateral security authorize any recovery against the pledgor beyond the amount remaining due upon the principal debt. *Williams v. Smith*, 2 Hill, 301. It is unnecessary to decide whether, under the Code rule respecting the retention of title in the creator of any lien, regardless of the form of the transaction, the indorser of negotiable paper by way of pledge is liable to the pledgee as an indorser under the law merchant; but it seems clear, in view of the Code provision, that a mere indorsement of nonnegotiable paper by way of pledge should be restricted in effect to an authority from the pledgor to the pledgee to enforce the obligation in his own name, as trustee and agent for the pledgor, and to apply the proceeds in payment of the debt secured, accounting to the pledgor for any surplus collected. It could

not operate as an assignment of the general title so long as the pledge subsists, and could only operate as such in case of an agreement that the pledge should be extinguished, and the amount of the collateral security applied as a payment upon the debt secured, or in case of a transfer of the collateral security by the pledgee to third parties. The Civil Code declares that "the lien of a pledge is dependent on possession," (Civ. Code, § 2988; and it is a rule applicable to collateral securities generally that if the pledgee transfers pledged paper to third persons, without authority of the pledgor, he will be deemed, at the election of the pledgor, to have taken it at its face value, in satisfaction of the debt for which it was pledged to him, and may be regarded as having pledged to his assignee his own personal responsibility, and not that of his pledgor, and no subsequent reassignment of such paper to himself will restore him to his original rights, (*Hawks v. Hinchcliff*, 17 Barb. 502;) and surely this must be true where the paper pledged is not negotiable. It follows, I think, from the foregoing considerations, that plaintiff is not entitled to judgment against Mrs. Carter for any deficiency.

3. I think the proceeds of the sale of the mortgaged property, after payment of costs and expenses of sale, should have been applied next to the payment of the first year's interest and the compound interest thereon to Mrs. Carter, in preference to any payment to the plaintiff. The question of preference is to be resolved solely by the contract between Mrs. Carter and Dinkelspiel & Co. The finding of the court that Dinkelspiel & Co. did not agree to pay that interest "out of the first money collected upon the said mortgage" was merely the court's construction of the contract, and therefore not the finding of a fact, but merely a conclusion of law. While it is true that the contract does not expressly say it shall be paid out of the first money collected, neither does the contract say it shall be paid out of the residue after payment in full to Dinkelspiel & Co. The language of the contract, as found, is that Dinkelspiel & Co. agreed to pay said sum to Caroline G. Carter, "when the same should be collected on said note and mortgage," without any other qualification than such as may be inferred from the circumstances and the consideration for the promise, all of which tend to show the intention of the parties to have been in accord with the ordinary meaning of the language used; namely, that the sum should be paid "when [as soon as] the same [that sum, not the whole amount due on the note] should be collected." The whole transaction was this: Mrs. Carter made an absolute assignment of a note and mortgage for \$4,000, drawing interest at the rate of 13 per cent. per annum, compounded quarterly, on which one year's unpaid interest had accrued to Dinkelspiel & Co., in consideration of which Dinkelspiel & Co. credited to her

husband's debt to them \$4,000, and agreed to pay her the amount of the then accrued interest when they should collect it. Had the maker of the note voluntarily paid \$4,000 on the note without suit, the law would have applied it, first, to the payment of interest, in the absence of any agreement for a different application; and the same rule applies where the payment is enforced by sale of property on foreclosure of a mortgage, and should have been adhered to in this case, even conceding that the contract is silent as to the order in which the payment to Mrs. Carter should be made. A new trial, however, is not necessary, since the only finding of fact not justified by the evidence is outside of the issues. I think the cause should be remanded, with instructions to the lower court to modify the judgment in conformity with this opinion.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the cause be remanded, with instructions to the lower court to modify the judgment in conformity with this opinion.

KENNEDY v. CALIFORNIA SAV. BANK et al. (No. 19,228.)

(Supreme Court of California. March 1, 1894.)

ESTOPPEL — NATIONAL BANK AS STOCKHOLDER IN SAVINGS BANK—LIABILITY—DEFENSE OF ULTRA VIRES

Where a national bank holds stock in a savings bank, and receives dividends thereon, it is estopped, in an action against it to enforce its liability as such stockholder to a depositor in the savings bank, from claiming that it is ultra vires for it to hold such stock, in the absence of a statute expressly prohibiting it.

Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by one Kennedy against the California Savings Bank, the California National Bank, and others, to recover money deposited by plaintiff in such savings bank, of which the other defendants are stockholders. From a judgment for plaintiff, defendant California National Bank appeals. Affirmed.

James E. Wadham, for appellant. Works & Works and W. H. Fuller, for respondent.

HARRISON, J. During the year 1891 the plaintiff deposited with the California Savings Bank, one of the defendants herein, different sums of money, for which the said defendant issued to him its several certificates of deposit, amounting, in the aggregate, to \$45,000. On the 12th of November, 1891, the plaintiff demanded of the savings bank payment of the amount of said certificates, and, upon its refusal, brought this action, making the other defendants parties to the action, for the purpose of recovering from them

their proportion of said indebtedness as stockholders in the California Savings Bank. Judgment was recovered against the savings bank for the full amount of the claim, and against the other defendants for their respective proportions thereof, as such stockholders. The California National Bank, one of the defendants, has appealed upon the ground that, by virtue of the statutes under which it is organized, it had no power to become a stockholder in another corporation, and that its act in becoming such stockholder is so far ultra vires that it cannot be made liable for any portion of the indebtedness of the corporation. The California Savings Bank was organized January 13, 1890. September 10, 1890, 990 shares of its capital stock were issued to J. W. Collins, cashier of the California National Bank, and on January 2, 1891, the certificates representing these shares were canceled, and one certificate therefor was issued to the California National Bank, and was thereafter held by it until after the commencement of this action. During this period, two dividends upon this stock were paid by the savings bank to the appellant. The defense of ultra vires is looked upon by courts with disfavor whenever it is presented for the purpose of avoiding an obligation which a corporation has assumed, merely in excess of the powers conferred upon it, and not in violation of some express prohibition of the statute. Courts are inclined to treat the corporation as estopped from setting up this defense in all cases where it has received and retains the benefit of the transaction, and seeks by this plea to avoid its correlative obligation. In *Evans v. Bailey*, 66 Cal. 112, 4 Pac. 1039, an action was brought against the stockholders of the California Fruit & Meat Shipping Company to recover from them their respective proportions of certain indebtedness to the plaintiff of that corporation. One of these defendants was the People's Ice Company, another corporation, which held a thousand shares of the capital stock of the corporation debtor; and, to its objection that it was ultra vires for it to hold stock in another corporation, it was held that, as it did not appear that it was not within the scope of its power to hold stock in the defendant corporation under any circumstances, or for any purpose, and as the circumstances under which it had acquired the stock were not shown, the defense could not be maintained. There is no provision in the statute by which a national bank is expressly prohibited from becoming a stockholder in another corporation; and, while it may be conceded that its subscription to the shares of another corporation would be so far in excess of the powers conferred by the statute under which it is organized that its executory contract therefor would not be enforced, it by no means follows that, if such contract is executed, and it has been registered as such stockholder, it is not entitled to a voice in its corporate man-

agement, or to its share of the corporate earnings, while the corporation is in existence, or of its assets upon a dissolution thereof. It may take shares in another corporation as collateral security for a loan made by it, and, if the loan is not paid, it may become the owner of those shares, and have them registered in its name upon the books of that corporation; and in such a case it is subject to the same liabilities as any other stockholder. In *Bank v. Case*, 99 U. S. 623, the bank had become a stockholder in another corporation under such circumstances, and it was held to be liable for its proportion of the debts of the corporation in which it had been a stockholder, although it had transferred the stock to one of its clerks for the purpose of avoiding such liability. As the appellant herein could have taken the stock of the savings bank in satisfaction of a loan for which it had been pledged to it as security, it was within the scope of its power to become a stockholder therein, so that it cannot be said that it was prohibited by statute from becoming such stockholder. Having caused itself to be registered upon the books of the corporation as a stockholder, any person dealing with the corporation would be justified in assuming that it had become such stockholder by virtue of a transaction within its power, rather than in violation of the laws of its creation, and, so long as it held itself out as such, it ought not to be permitted to defend against its liability as such stockholder by showing that it had become such in violation of law. "Strangers are presumed to know the law of the land, and they are bound, when dealing with corporations, to know the powers conferred by their charter. These are open to their inspection, and it is easy to determine whether the act is within the scope of the general powers conferred for that purpose; but they have no access to the private papers of the corporation, or to the motives which govern directors and stockholders, and no means of knowing the purposes for which an act that may be lawful for some purposes is done. The very fact that the appointed officers of the corporation assume to do an act in the apparent performance of their duty, which they are authorized to perform for the lawful purposes of the corporation, is a representation to those dealing with them that the act performed is for a proper purpose, and such is the presumption of the law; and, upon this presumption, strangers, having no notice in fact of the unlawful purpose, are entitled to rely." *Ditch Co. v. Zellerbach*, 37 Cal. 587. The appellant has not repudiated the agreement under which it received the stock, but still retains it, and, so far as is shown by the record, claims to be owner of it, and to share in all the earnings and assets of the corporation. During the period that it has claimed to be such owner, it has received dividends out of the assets of the savings bank, and to that extent diminished the corporate prop-

erty which otherwise might have been appropriated in satisfaction of the plaintiff's claim. See *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110. Having had the benefit of the transaction, and still enjoying its fruits, it is estopped from denying a liability which is correlative to such benefit and fruits, and dependent thereon. See *Morse, Banks*, § 73. The judgment and order are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

QUIGLEY et al. v. GILLETT et al. (No. 18,209.)

(Supreme Court of California. March 1, 1894.)
MINES AND MINING — RELOCATION — BURDEN OF PROOF.

1. In an action to try the right of possession to a mining claim, the sufficiency of plaintiff's protest against defendant's relocation filed in the land office is immaterial, and its admission is evidence cannot harm defendant.

2. The validity of a prior location being admitted, the burden is on the relocater to show that defendant failed to do his assessment work.

Department 1. Appeal from superior court, Plumas county; G. G. Clough, Judge.

Action by Louis T. Quigley and others against Charles E. Gillett and others to try right of possession to a mining claim. Judgment for plaintiffs. Defendants appeal. Reversed.

Goodwin & Goodwin and O. N. Harris, for appellants. P. O. Hundley and C. E. McLaughlin, for respondents.

PER CURIAM. This action was brought to determine the adverse claims of the parties to the right of possession of certain placer mining land in the county of Plumas. The complaint alleged, in substance, that on the 21st day of March, 1891, the land in controversy "was, ever since has been, and now is, gold-bearing, public mineral land of the United States," and that, on the day named, four of the plaintiffs and three other persons, the grantors of one of the plaintiffs, all of whom were then citizens of the United States, entered upon, took possession of, and located the same as a placer mining claim, which they designated and called the "Fortuna Placer Mining Claim," and that they and their successors in interest have ever since remained, and are entitled to remain, in the possession thereof; that on the 4th day of November, 1891, the defendants filed, in the proper United States land office, their application for a patent for the Diana placer mine, and included within their application the whole of the land and premises located as aforesaid by the plaintiffs and their grantors, and that defendants claim the whole of the said land adversely to the plaintiffs, and to be entitled to the exclusive possession thereof; that the register of the land office duly posted and published a notice of the

notice, plaintiffs filed with the said register their adverse claims for the said lands, and their protest against the issuance of a patent to the defendants, or either of them, the same; that the claim of defendants without right, and that they are not, nor either of them, entitled to the possession of the said land, or any part thereof, adverse to the plaintiffs. The answer denied, among other things, that on the 21st of March, 1891, the lands described in the complaint, or any part thereof, were, or ever have been, or now are, gold-bearing, or mineral lands of the United States, and alleged that, long prior to the time when the assignors of the defendant Charles Gillett entered upon the said lands, which were at that time free and open to exploration and purchase by citizens of the United States and those who had declared their intention to become such, and under regulations prescribed by law, and according to the local customs of miners, proceeded to and located the same as a mining claim, and at the time of such location were citizens of the United States; that afterwards they entered into the possession and occupation of said lands and every part thereof, and continued in such possession and occupation, in accordance with the laws of the United States governing the holding of mining claims, until they conveyed the same to this defendant, since which time he has occupied and held the same in conformity with such laws; denied that on the 2d day of January, 1891, or at any other time, plaintiffs filed with the register of the land office any sufficient adverse claim for the premises in controversy, or protest against the issuance of a patent therefor to the defendant; and alleged that neither the plaintiffs, nor either of them, have, or ever had, any right, interest, or estate in and to the said lands. The case was tried by the court without a jury, and the findings were that on the 21st day of March, 1891, the lands described in the complaint were gold-bearing, or mineral lands of the United States, were located by the plaintiffs and their assignors in every respect as required by law for the local customs, rules, and regulations of miners, as a placer mining claim, under the name of the "Fortuna Placer Claim," and on the day named, the locators were citizens of the United States, and ever since have been, and now are, the owners of, in the possession of, and entitled to the possession of, the said lands, and every part thereof, that on the 7th day of August, 1889, the assignors of the defendant Charles E. Gillett entered upon and located, in all respects as required by law and the local customs, rules, and regulations of miners, the lands and premises described in the complaint, under the name of the "Diana Placer Mining Claim," and each of them was then a citizen

of the United States, in interest did or performed, or caused to be performed, any work or labor upon said Diana placer claim, in the development thereof, or otherwise, or at all. Judgment was accordingly entered that the plaintiffs were the owners, and in the possession, and entitled to the possession, of all the lands and premises described as the Fortuna placer mining claim, and that the defendants were not entitled to the exclusive or any possession of said lands adversely to plaintiffs. From this judgment the defendants have appealed, and the case is brought here for review on a bill of exceptions, which contains specifications to the effect that each of the findings above referred to, except that as to the location made August 7, 1889, was not justified by the evidence.

1. The protest filed by plaintiffs in the land office was headed: "In the matter of the application of Thomas B. Ludlum, as the attorney in fact of Chas. E. Gillett, for a United States patent for the Diana placer mine or mining claim, and the land and premises appertaining to said mine, situated in an unorganized mining district in Plumas county, state of California;" and it is claimed by appellants that the paper did not constitute a sufficient protest, and therefore the court erred in admitting it in evidence over their objection. We see no prejudicial error in the ruling complained of. The action was brought "to determine the question of the right of possession" of certain mining land, and that was the only question involved. The court had nothing to do with the proceedings in the land office, and no power to determine as to their regularity or irregularity, sufficiency or insufficiency.

2. The defendants offered to prove that the lands in controversy were located as a reservoir site in May, 1881, by a corporation, but did not offer to show that any of the parties to this action, or their grantors, were connected with, or interested in, the said reservoir site or the said corporation. The offered evidence was objected to by the plaintiffs as irrelevant and immaterial, and was properly excluded by the court. The reservoir claimants, if any there were, were not before the court, and it had no power to determine as to their rights.

3. The statute provides that "on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year; * * * and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to re-location in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after

failure, and before such location;" and "provided that the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim." Rev. St. U. S. § 2324, as amended January 22, 1880. The bill of exceptions states that "no competent evidence was offered by the defendants showing, or tending to show, that any assessment work required by the act of congress or the local laws of the mining district, or that any work of any character for developing the Diana placer mining claim, had been done or performed on the said claim by the defendants, or any one else for them, between the 7th day of August, 1880, the time of its location, and the 8th day of September, 1891, or at any time prior to the location of the Fortuna placer mining claim, or that the defendants had resumed work prior to the 8th day of September, 1891." The record is silent as to whether any evidence was offered by the plaintiffs showing that no work was done on the claim between the dates above named, and, in view of the specifications, it must be presumed that none was offered; the presumption on appeal being that the statement or bill of exceptions contains all pertinent evidence upon points specified, although the record does not show affirmatively that such is the case. It must be assumed, therefore, that the findings of the court that no work was done by the defendants or their predecessors in interest during the year 1890, and that the said lands were public mineral lands of the United States in March, 1891, were based upon the theory that the burden was on defendants to show that sufficient work was done to meet the requirements of the statute, and that, in the absence of such showing, the findings must be against them. The question then arises, was this theory correct, and were the findings referred to justified? The evidence shows, and the court found, that the location of August 7, 1889, was a valid location, made in all respects as required by law. This being so, the ground located became the property of the locators, and could not be relocated until they lost, abandoned, or forfeited their rights to it. As said in *Belk v. Mengher*, 104 U. S. 284, 285: "A mining claim perfected under the law is 'property' in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent. * * * The language of the act is that the locators 'shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations,' which is to continue until there shall be a failure to do the requisite amount of work within the prescribed time. * * * The right of location upon the mineral lands of the United States is a privilege granted by congress, but it can only be exercised within the limits prescribed by the grant. Any attempt to go beyond that will be of no avail.

Hence, a relocation on lands actually covered at the time by another valid and subsisting location is void; and this, not only against the prior locator, but all the world, because the law allows no such thing to be done."

The question as to which side has the burden of proof in a case like this, where it is claimed that a prior valid location has been lost or forfeited by a failure to do the necessary work, arose directly, and was passed upon, in *Hammer v. Mining & Milling Co.* 130 U. S. 292, 9 Sup. Ct. 548. That was a suit to quiet the plaintiff's title to a lode mining claim in Montana. The complaint alleged that the plaintiff was a corporation duly organized, etc., that it was the owner of a certain quartz lode, known as the Garfield lode or mining claim, and that it and its predecessors in interest had been in the possession of, and entitled to, the lode ever since its discovery and location; that, notwithstanding its right to the possession, the defendant Hammer, on or about the 1st of January, 1883, assumed to enter upon the premises and relocate the same, and that he pretended to claim an interest or estate therein adversely to the plaintiff, and had made application to the local United States land office for a patent therefor, and that the plaintiff had duly filed in that office its adverse claim to the premises. The answer of Hammer denied that the plaintiff was the owner of the lode described, or of any part thereof, or that it was then, or had been for a long time, in possession thereof; and it set up that on the 1st day of January, 1883, one Wolf entered upon the premises described, the same being then vacant mineral land of the United States, and discovered thereon a vein or lode of quartz-bearing silver and other precious metals, which he located in accordance with the requirements of the law; that afterwards the defendant became the purchaser of the premises from Wolf, and had ever since been the owner and entitled to the possession thereof; and that whatever claim the plaintiff ever had to them became forfeited before the 1st of January, 1883, since which time it had not had any estate, title, or interest therein or possession thereof. The court, Mr. Justice Field delivering the opinion, said: "The answer does not distinctly put in issue the validity of the original location; it confines its traverse to the existing right and ownership of the plaintiff in the whole of the mining claim, to its long possession of the premises, and to the possession of the plaintiff and its predecessors since the discovery and location of the mining claim, and then sets up the alleged forfeiture of the claim by the plaintiff and the defendant's relocation of it. * * * As to the alleged forfeiture set up by defendant, it is sufficient to say that the burden of proving it rested upon him; that the only pretense of a forfeiture was that sufficient work, as required by law each year,

was not done on the claim in 1882. * * * A forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed, or improvements made, to the amount required by law." That decision is decisive of the question in hand, and must be followed, since the court rendering it has jurisdiction to review all cases like this when the amount in controversy is sufficient. *Chambers v. Harrington*, 111 U. S. 350, 4 Sup. Ct. 428. It follows that the theory on which the court below acted was not correct, and the findings complained of were not justified by the evidence. The judgment must therefore be reversed, and the cause remanded. So ordered.

PEOPLE v. CHRISTIAN. (No. 21,061.)
(Supreme Court of California. March 1, 1894.)

ASSAULT—INFORMATION—VARIANCE—NAME.

One complained against for an assault with a deadly weapon on the person of one George Magin cannot be informed against and tried for such an assault on one George Massino.

Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Harry Christian, convicted of assault with a deadly weapon, appeals. Reversed.

E. W. Wilson, for appellant. W. H. H. Hart, Atty. Gen., and T. H. Selva, Dist. Atty., for the People.

GAROUTTE, J. The defendant, Christian, was convicted of the crime of assault with a deadly weapon upon the person of one George Massino, and now appeals from the judgment and order denying his motion for a new trial. Upon being called to plead to the information, he moved to set it aside upon the ground that he had never been legally committed by a magistrate; and we think the proper disposition of that motion demands a reversal of the judgment. The inception of the present prosecution is founded in a complaint laid before a magistrate upon the oath of one Nick. Savage. In that complaint John Doe, alias, is charged with an assault with a deadly weapon upon the person of one George Magin. At the conclusion of the preliminary examination the magistrate entered his order of commitment upon the back of the complaint, reciting that, "It appearing to me that the offense of an assault with a deadly weapon, to wit, a pistol, has been committed, and that there is sufficient cause to believe that the within-named Harry Christian, arrested under the name of John Doe, guilty thereof, I order that he be held to answer to the same," etc. The district attorney thereupon filed an information against the defendant, Christian, charging him with the crime of assault with a deadly weapon upon the person of one George Massino, and upon that information he has been

tried and convicted. The defendant was not charged by the complaint before the magistrate with assaulting one George Massino; neither does the commitment indicate that he was held to answer before the superior court upon that character of charge. There is a wide difference between the offense of an assault with a deadly weapon upon John Doe and that of assault with a deadly weapon upon Richard Roe. The name of the party assaulted is a material element of the offense, and common justice to the defendant demands that he be notified of the particular offense for which he stands committed. In the present case he had no such notice. If the record gave him any information upon the subject, it would be an inference, at least, that he was to be tried for the assaulting of one Magin, the party named in the complaint; but it was only when he was called upon to plead that he for the first time became aware of the nature of the offense for which he was to be put to trial. Again, this party was arrested and brought before a magistrate to defend himself against a charge of assaulting one Magin. Under those circumstances, and under a complaint charging that offense, he could not be called upon to defend himself for assaulting one Massino, for there was no complaint on file upon which to base an examination of that character. The commitment furnishes the material matters upon which the district attorney should frame his information. If the defendant is committed for trial for the offense charged in the complaint, it is sufficient to so declare in the commitment; but, if he be held for some other offense, the commitment should state its general nature,—in other words, describe it with reasonable certainty. The district attorney, in framing his information, must confine himself to the record. He is not justified in placing therein any element of the offense, the information of which he has obtained from outside sources. This principle is declared in *People v. Parker*, 91 Cal. 91, 27 Pac. 537, and again affirmed in *People v. Wallace*, 94 Cal. 497, 29 Pac. 950. Assuming the complaint in this case to have been made a part of the commitment, we then have the defendant committed for an assault upon one Magin, and we have an information filed against him for an assault upon one Massino. This is a variance as fatal as though it arose upon the trial of the case.

The information not being based upon the commitment, can it be supported upon the theory that the evidence taken at the preliminary examination disclosed that the defendant committed an assault upon George Massino, and that, therefore, the district attorney was authorized in filing an information upon material furnished by that evidence? In the case of *People v. Vierra*, 67 Cal. 231, 7 Pac. 640, the defendant, by complaint, was charged with the crime of murder, and upon examination was committed for

manslaughter. Notwithstanding such commitment, the district attorney filed an information against him charging murder, and this court upheld that procedure. The same principle also arose in *People v. Lee Ah Chuck*, 66 Cal. 662, 6 Pac. 859, where the defendant was charged with an assault with intent to commit robbery, and committed for the offense of an attempt to commit robbery. The information was framed in line with the complaint, and alleged an assault with intent to commit robbery. While we have recognized the difference between the offense of assault with intent to commit a felony and the offense of an attempt to commit the same felony, (*People v. Lee Kong*, 95 Cal. 667, 30 Pac. 800,) yet the distinction is not a broad one, and they are so closely related that the evidence of one is usually sufficient to prove the other. Indeed, the attempt to commit a felony is always included in the assault with intent to commit the felony. In both of these cases the information charged the defendant with the offense alleged in the complaint upon which the preliminary examination was based, and there is no question but that they properly declare the law in that regard. There is also some general language found in *People v. Staples*, 91 Cal. 23, 27 Pac. 523, in line with the earlier cases we have quoted; but in that case the offense charged in the complaint and in the information was the same, and the opinion so states; consequently, the language used was obiter dicta. In *People v. Wheeler*, 73 Cal. 252, 14 Pac. 796, the defendant was charged with robbery, and committed for the crime of false imprisonment; and this case is the only one we find directly opposed to the views we entertain upon this question. The principle there declared is unsound, and must be cast out as no authority for future guidance. It is not law that a person may be charged by complaint with larceny, and held for trial for rape, even though the evidence taken at the preliminary examination indicates, to a certainty, that the defendant committed that offense. The case cited appears to go to the length of the illustration made, and cannot be sustained. It is violative of that provision of the constitution which does not allow a prosecution by information unless the defendant has previously had a preliminary examination upon the offense for which he is prosecuted. It is not only the right, but the legal duty, of the magistrate, to commit the defendant for a lower degree of the offense charged in the complaint whenever the evidence indicates his guilt of such lower degree; and, while it is properly held in the *Vierra* Case that the district attorney may file an information for murder against a defendant committed for manslaughter, yet, if the complaint upon which the defendant had been preliminarily examined had charged any other offense than that of murder, the action of the district attorney in filing the information would have been beyond the law. It

may be laid down as an unquestioned proposition that the district attorney has no authority to disregard the commitment, and cull from the evidence taken at the preliminary examination some real or imaginary offense, not included in the complaint upon which the defendant was charged and examined.

In the case of *People v. Giancoli*, 74 Cal. 646, 16 Pac. 510, a case where the district attorney filed his information from data taken from the evidence at the examination, this court held that, if there was any evidence whatever in the record indicating the commission of the offense charged in the information, the district attorney's action in the premises was beyond review and conclusive. For this reason, among others, we are not disposed to expand the doctrine declared in the *Vierra* and *Lee Chuck* Cases. The language found there may be broader than the facts of those cases; but any language which might be construed as holding that a defendant may be informed against for any offense shown by the evidence, regardless of the charge upon which he was examined, is too broad, and we do not desire it crystallized into a principle of law. The district attorney is not only required to file the information for some offense included in the allegations of the complaint, but the magistrate, likewise, only has the power to commit for some offense included therein. If such were not the true rule, the whole procedure as to preliminary examinations would be absurd, and, as to the defendant, a mockery. Where a defendant is brought before a magistrate, charged with having committed a public offense, he must be informed of the charge against him, and advised as to his right to the aid of counsel in every stage of the proceeding. He is entitled to a certain time to prepare his defense. These provisions of the statute clearly contemplate that he shall be required to defend himself against the crime with which he is charged, and no other crime. He has not been notified of any other charge, and consequently is not prepared to defend himself against another charge. There is no provision of the statute by which a defendant may take advantage of the admission of immaterial or incompetent evidence by the magistrate. Hence, all manner of crimes may be proven against him, and thus the district attorney would have the privilege of selecting the most heinous upon which to frame his information. Such is not the law, and whenever a defendant is informed against for an offense different from that charged in the complaint upon which he was examined, or not included therein, he has had no examination for that offense, and is entitled to have the information set aside upon the ground that he has not been legally committed. In *Ex parte Nicholas*, 91 Cal. 640, 28 Pac. 47, the general language found in the *Vierra* Case as to the right of the district attorney to file an information for any offense disclosed by

the evidence is reiterated; but the matter there before the court was purely a question of jurisdiction, involving the right to a writ of habeas corpus, and whatever may have been said upon these lines was not demanded upon a disposition of the merits of the question under discussion. We also refer to the views of Mr. Justice Paterson, as expressed in his concurring opinion in *Ex parte Nicholas*, as being in entire accord with what we deem the law to be upon the matter under discussion. It follows that the offense charged in this information is not the offense for which the defendant was examined, neither is it an offense included therein, and consequently not one upon which the district attorney was justified in filing an information based upon data found in the evidence taken upon the preliminary examination of the defendant. It is ordered that the judgment and order be reversed, and the cause remanded.

We concur: PATERSON, J.; HARRISON, J.

DULIN v. PACIFIC WOOD & COAL CO. et al. (No. 19,251.)¹

(Supreme Court of California. Feb. 27, 1894.)

CORPORATIONS—AGREEMENT AMONG STOCKHOLDERS—ENFORCEMENT.

Since Civ. Code, §§ 307, 312, provide that in a corporation election every stockholder must vote his shares in person, or by proxy, in writing, a president of a corporation cannot enforce a verbal agreement by the other stockholders that he shall continue as president for two years longer, the agreement providing no way for its accomplishment.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county, W. L. Pierce, Judge.

Action by E. G. Dulin against the Pacific Wood & Coal Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

D. L. Withington and Works & Works, for appellants. V. E. Shaw and Conklin & Hughes, for respondent.

HAYNES, C. Plaintiff had judgment, and the defendants appeal therefrom upon the judgment roll. This proceeding was brought under section 315 of the Civil Code, to set aside the election of B. D. Clugston, one of the defendants, as a director of the defendant corporation, and to confirm the election of plaintiff as such director. Clugston answered, and also filed a cross complaint, to which plaintiff filed an answer. The findings cover eight or nine pages of the transcript, but may be summarized as follows: The Pacific Wood & Coal Company is a corporation, having a capital stock of \$10,000, divided into 100 shares, of \$100 each. G. A. Garretson and the members of his family owned 69 shares of said stock, all

of which he controlled. Defendant B. D. Clugston owned 25 shares, J. S. Akerman 4 shares, and plaintiff 2 shares. That on June 17, 1892, defendant B. D. Clugston agreed verbally with G. A. Garretson to purchase the 69 shares owned and controlled by him, and to pay therefor \$140 per share, which agreement, if carried out, would have given Clugston all of the stock except 6 shares. That on the following day, and before this sale was consummated, a verbal agreement was made between the defendant Clugston, George G. Garretson, the son of G. A. Garretson, J. S. Akerman, and the plaintiff, with the consent of all the stockholders of the corporation, that defendant Clugston should retain 21 shares of the stock agreed to be purchased, making him the owner of 46 shares; that George G. Garretson and the plaintiff should each take and pay for enough of said stock to give each 25 shares; and that Akerman should retain the 4 shares then owned by him. It was further agreed that defendant Clugston should lend to George Garretson \$2,400, to be used to pay in part for his stock, to secure which loan he gave his note, and pledged 10 shares of his stock; and it was also agreed that the corporation should mortgage its property, and thereby raise the sum of \$4,000, for the benefit of George G. Garretson and the plaintiff, to be used to pay for the stock purchased by them, \$2,000 to each, —and for which they gave their several notes. The defendant Clugston agreed to this division of the stock, loaned the \$2,400 to George G. Garretson, and consented to the mortgaging of the property of the corporation, upon the verbal agreement of all the stockholders that defendant Clugston was to be president of the company for two years, at the expiration of which time the mortgage notes were to become due, and to receive a salary of \$125 per month while he retained an interest in the corporation, the plaintiff to be treasurer at the same salary, and that Akerman should use his four shares to protect defendant Clugston; and on the same day the notes were executed, the stock delivered, and the salaries fixed as above stated, defendant Clugston being then president. The election for directors here in question was held on November 17, 1892. Prior to this election, B. D. Clugston transferred to his daughter, L. Clugston, and to James Wells, each, one share of his stock. The board consisted of 5 directors, and 6 candidates were nominated, viz. the plaintiff, Dulin, the defendant B. D. Clugston, L. Clugston, Wells, Akerman, and Garretson. The plaintiff cumulated his votes for 3 candidates, viz. Akerman, Dulin, and Garretson, giving each 41½ votes. Garretson cumulated his votes for the same candidates, giving each 41½ votes. Akerman voted his 4 shares for 5 candidates, the 3 above named and Wells and L. Clugston, giving each 4 votes. Wells voted his 1 share cumulated for 3 candidates,

¹ Rehearing granted.

defendant B. D. Clugston, the president of the corporation, presided at the election, and L. Clugston was appointed teller. The president objected to counting the 10 shares belonging to Garretson, which were pledged to him. These 10 shares, cumulated, gave 50 votes, and were tendered in equal proportions to the 3 candidates Dulin, Akerman, and Garretson, amounting to 16⅔ votes each, and, if thrown out as cast, would have left these 3 candidates each 70⅓ votes, and the result would have been the election of B. D. Clugston, L. Clugston, and James Wells, and the remaining 3 candidates tied. But, in counting the votes, the 50 votes, being the cumulation of the 10 shares of Garretson's stock pledged to B. D. Clugston, were not counted; 8⅓ votes thereof being deducted from Akerman, and 41⅓ from Dulin, thus defeating Dulin, and electing Akerman and Garretson. Clugston, the pledgee of said 10 shares, did not claim the right to vote them, nor is it claimed or found that Garretson had agreed in any manner not to vote them; and if counted as they were cast, it is found by the court, Dulin would have been elected, and Clugston defeated. The cross petition of B. D. Clugston, however, sets up the verbal agreement hereinbefore stated, to the effect that Clugston should be president for two years, and should receive a salary of \$125 per month so long as he should retain an interest in the corporation, and that but for this agreement he would not have consented to part with a controlling interest in the stock, nor to the mortgage upon the company's property to aid Dulin and Garretson to purchase their stock, nor have loaned Garretson the \$2,400, and charges a conspiracy to defeat his election, and prays that it be adjudged and decreed that he and the said L. Clugston, James Wells, George G. Garretson, and J. S. Akerman were duly elected directors, and that he is entitled to be elected president. The court also found that said agreement was not reduced to writing; that it was material, important, and necessary to the protection of Clugston's interests; but that neither Dulin, Garretson, nor Akerman at any time agreed in express terms to elect Clugston as a director. As conclusions of law, the court found that said agreement was void, because not to be performed within a year, and not in writing, and that the votes cast for the plaintiff, including the 10 shares of pledged stock, should have been counted, and that Dulin was duly elected a director. No different conclusion of law could possibly

be reached, and the candidates receiving the number of votes shall be declared elected, and these votes must be cast by the owner of the shares in person, or by proxy, and only a member of the corporation can be a proxy. Civ. Code, §§ 307, 308. No proxy was given to the appellant by any of the stock held by Dulin, Garretson, or Akerman, nor was any required by agreement to be given. The agreement provided no means for the accomplishment of the end or purpose to be accomplished, and does not seem to be questioned that appellant and those co-operating with him have the right to vote their stock, but only that they should have been so voted as to elect appellant. But appellant had in his own hands enough stock to have elected himself one other director, in the face of the provision that could have been made. The court has no power to relieve him from his own error, or do that for him which he has the power to do for himself. If the election sought to be accomplished by the appellant were lawful and proper,—a point not considered,—no means being provided for the accomplishment, the specific performance of the election cannot be enforced. No legal objection rested upon plaintiff to cast his vote for appellant, and, appellant having been elected, the court cannot declare him elected. It is the circumstances such as to justify the ordering of a new election. Section 309, Civ. Code, provides that the court may, if firm the election, order a new one, "if such other relief in the premises is consistent with right and justice." It is not contended by appellant, that the power of the court by this section is an equitable one, but it is obvious that, if the plaintiff were legally elected, the court can only declare his election; and if appellant was elected through his effort to elect his directors Wells, as well as himself, the court cannot declare him elected; and, if not elected, neither the board that was elected nor the court can make him president, since a director is eligible to the office of president. But appellant suggests that the plaintiff's agreement might have been enforced by waiving an election, and continuing the old board of directors and officers. But that was not done, and it was to be done. The election was held without objection, and appellant freely participated and undertook to carry out the election by and through such election, and was

he pleases cannot be questioned, but he may confer upon another stockholder the right to vote his stock by giving a written proxy for that purpose; but the court cannot compel him to do so, in the absence of an agreement upon or for a valuable consideration that he would give such proxy. But the agreement was one absolutely incapable of enforcement, otherwise than by abstaining in an election, since any board that could be elected must be at liberty to choose its president, and its choice cannot be controlled by the court. It is conceded by counsel for appellant that a director cannot oblige himself to vote in a certain way, and, being so, the courts must be powerless to direct his vote; nor can we see any ground upon which the holding of an election could be enjoined, even if it had been agreed that it should be held, and, if it could not be so held, it cannot be vacated. But counsel say that "this is not an action to enforce the performance of a contract; that it is an action to uphold an election against the attacks of respondent." But, as we have seen, the result of the election, as declared by appellant, was by the arbitrary exclusion of votes legally cast; and, if it is not an action to enforce the performance of a contract, the violation of the agreement in the cross complaint and the finding of the fact are wholly immaterial. That appellant loaned \$2,400 to Garretson upon his promissory note, secured by a pledge of stock of that value, and that a mortgage was given by the corporation to aid him and respondent in the purchase of their stock, are not made the grounds of complaint because of any insufficiency of the security, but seem to be stated constituting a consideration for the agreement. The stock sold, however, was not that of appellant. He parted with no stock. He simply took less than he intended to buy, and let the remainder be sold to plaintiff and Garretson. Whether, under these circumstances, there was any valuable consideration for the agreement, such as is necessary to authorize a specific performance, may well be questioned.

The question as to the statute of frauds is important. As we have seen, appellant could not control respondent's stock, or any stock owned by himself, otherwise than by a written proxy, (unless transferred to him upon the books,) and this by force of the statute regulating elections by corporations. If the alleged performance of the agreement by appellant could not give him the control of the stock not held by him, nor authorize him to reject votes based upon it, whether the contract was one that might be wholly performed within a year or not. The court found that the performance of this agreement was necessary for the protection of appellant, but no facts are alleged from

seems not to have been based upon services to be rendered, but which was to continue as long as he retained an interest in the corporation. Such agreement is void. It may be that appellant will suffer wrong and injustice, but the mere apprehension of it will not justify the court in granting the relief here demanded, or any other relief under the facts now existing. We cannot assume that plaintiff, and those acting with him upon the board, will not properly conduct the business of the corporation, or injuriously affect the interests of appellant as a stockholder. When they do so, or threaten to do so, a court of equity will hear his complaint. I think the judgment should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

McFARLAND and FITZGERALD, JJ.
For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

DE HAVEN, J. I concur in the judgment.

DIXON v. PLUNS. (No. 14,429.)
(Supreme Court of California. March 2, 1894.)

COSTS—ON APPEAL—REVERSAL IN PART.

On appeal from a judgment and order denying a new trial, where the court orders the submission set aside as to the appeal from the judgment, and the hearing thereon continued until further orders, but on the other appeal reverses the order denying new trial, appellant is entitled to his costs.

In bank. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Katie E. Dixon against William J. F. W. Pluns for damages for personal injuries. Judgment for plaintiff. Defendant appeals. Reversed. See 31 Pac. 931; 33 Pac. 268. On motion to amend remittitur. Denied.

H. C. Firebaugh, for appellant. Nagle & Nagle, for respondent.

PER CURIAM. The appeal in this case was taken from the judgment and order denying a motion for a new trial. After the case was submitted for decision, the court ordered the submission set aside as to the appeal from the judgment, and continued the hearing thereon until the further order of the court. The appeal from the order denying a motion for a new trial was successful, and that order was reversed, with certain directions to the trial court. The remittitur issued upon the judgment of reversal allowed costs of appeal to appellant. A motion is now made to recall the remittitur, and amend or modify the same by striking out that portion giving appellant his costs on appeal. The motion is denied. The order denying the

motion for a new trial being reversed, the appellant is entitled to his costs on appeal, under rule 23 of this court.

**ANAHEIM UNION WATER CO. et al. v.
PARKER et al. (No. 19,247.)**

(Supreme Court of California. March 1, 1894.)

ACTION ON BOND—DEFAULT BY CORPORATE OFFICER—EXTENT OF LIABILITY—EVIDENCE—RELEASE OF SURETIES.

1. The sureties on an official bond are not liable for defaults committed by the principal before the execution of the bond, if this latter is not retrospective in its provisions.

2. A corporation cannot, as against the sureties on the bond of an officer thereof, apply payments made by the officer to the corporation, after the date of the bond, upon his indebtedness to the corporation prior thereto.

3. In an action on the bond of a corporate officer, required by the by-laws to turn in money as soon as collected by him, where it appears that he failed to turn in money collected six months before the execution of the bond, it is a question for the jury whether his default as to that amount did not occur before such execution.

4. Where, in an action on the bond of plaintiff's secretary, the complaint charged that he had a certain sum of money belonging to plaintiff, February 16, 1889, and thereafter, and before September 1, 1889, received from plaintiff certain other sums, of which he paid over a part, leaving due a certain balance on the date last named, evidence as to amounts received and paid in by him after that date were inadmissible.

5. The failure of the officers of plaintiff company to tell defendant sureties that the secretary had failed to pay over funds, though known to them, did not release them from liability on the bond, there being no actual intent to conceal or culpable negligence on their part.

Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by the Anaheim Union Water Company and others against one Parker and others. From a judgment for plaintiffs, defendants appeal. Reversed.

W. T. Kendrick and Victor Montgomery, for appellants. Richard Melrose and Edwin A. Meserve, for respondents.

PATERSON, J. It would be necessary, if we were to state the facts upon which all the points made by appellants are based, practically to copy the statement on motion for a new trial, as there are 92 assignments of error and specifications of insufficiency of the evidence, based upon 65 pages of the record. With the exception of those herein-after referred to, they are entirely without merit, although sufficiently plausible, as they are stated, to entall upon the court a great deal of unnecessary labor in passing upon them. Briefly stated, this is the case: The defendant Gardiner was secretary of the plaintiff (a corporation) from January 1, 1887, until February, 1891. On the 15th day of February, 1889, the defendants Kraemer and Parker as sureties, and Gardiner as principal, executed and delivered to plaintiff a bond for \$1,000, conditioned as follows: "Where-

as, the above-bound principal, J. S. Gardiner, was, at a meeting of the board of directors of the Anaheim Union Water Company, a corporation, held on the 2d day of February, 1889, duly elected to the office of secretary of said corporation, now, therefore, the condition of this obligation is such that if the said J. S. Gardiner shall well and faithfully perform all official duties now required of him by the by-laws of such corporation, and shall well and faithfully execute and perform all the duties of such office of secretary, as required by any law to be enacted by such corporation or its board of directors subsequently to the execution of this bond, then this obligation is to be void," etc. It is claimed by the plaintiff that, when this bond was executed, Gardiner held, of the moneys he had collected for the company, the sum of \$880.37; that between the date of the execution of the bond and September 1, 1889, he held moneys of the plaintiff amounting to \$16,073.52, including said \$880.37; and that he paid in, during that period, \$14,982.91, leaving a balance due the corporation of \$1,091.61. Of this amount there is evidence tending to show that \$1,000 was collected by Gardiner in August, 1889, on a note for that amount executed to one Beockman, but no record of the transaction appears in the books, except the order of the board authorizing the issuance of the note. Plaintiff recovered judgment in the court below against the sureties for \$1,000 and costs of suit, and from that judgment, and an order denying their motion for a new trial, defendants have appealed.

The court gave to the jury the following instruction: "If you find from the evidence that defendant J. S. Gardiner, on the 16th day of February, 1889, had, or should have had, in his hands as secretary of plaintiff, any moneys of plaintiff, and that the subsequent deposits and payments made by him to plaintiff and the treasurer of plaintiff between said date and the 1st day of September, 1889, (not applied to the payment of other accounts, balances, and receipts,) equaled such amount so found in his hands on said date, then, and in that event, the court instructs you to add the amounts found in his hands February 16, 1889, to the amounts received by him as secretary of plaintiff between said 16th day of February, 1889, and September 1, 1889, and deduct from this total amount the amount of payments made by him to the plaintiff and plaintiff's treasurer, as shown by the evidence. The balance, if any, would be the balance in the hands of said Gardiner as secretary of plaintiff, and would be the amount owing by him to plaintiff on said date, and for which balance of said amount, the court instructs you. you will render a verdict for the plaintiff, unless you also find that the sum has been subsequently paid." This instruction was erroneous. It declared to the jury that the sureties were liable for all moneys collected

by Gardiner, and not turned over to the company, prior to February 16, 1889, and assumes that he was not a defaulter in any sum prior to the time of the execution of the bond in suit. In this assumption the learned judge usurped the functions of the jury. It was for the latter to determine, upon all the circumstances of the case, whether Gardiner was a defaulter at the time the bond was executed; and, if he was, the sureties herein were not liable for his dereliction. Where a second bond is executed, the sureties are not liable for money converted by the officer prior to its execution, and the plaintiffs are bound to show a conversion after the execution of the bond sued upon. *Williams v. State*, 89 Ind. 570; *Governor v. Robbins*, 7 Ala. 82; *Thompson v. Dickerson*, 2 Iowa, 360. In the last case cited the court said: "This bond was not retrospective in its terms, and in such a case there can be no ground for claiming that it covered past delinquencies. * * * The money, as far as shown, was not, at the time, in fact in the principal's hands; and measuring the sureties' liability, as we are bound to do, by strict law, we cannot extend or alter the terms of their undertaking so as to cover past delinquencies." In *Inhabitants of Rochester v. Randall*, 105 Mass. 295, the court said: "The cause of action against him arose in 1862, when he rendered his account. * * * We cannot regard the defendants' bond as applying to it. * * * In *Myers v. U. S.*, 1 McLean, 493, Fed. Cas. No. 9,996, it is said that it would be doing great injustice to a surety to hold him responsible for a default consummated before he became bound; and in *Farrar v. U. S.*, 5 Pet. 373, it is said that the bond should be made retrospective in its language, if it is intended to cover past derelictions; and all the cases cited for the defendants sustain similar views." See, also, *Potter v. Trustees*, 11 Ill. App. 280; *School Dist. v. McDonald*, 39 Iowa, 564. In *Board of Education v. Fonla*, 77 N. Y. 358, the court said: "For any sum paid to a principal before the execution of a bond for official good conduct, there is but one ground on which the sureties can be held to answer, and that is that the principal still held the money in bank or otherwise. If still in his hands, he was, up to that time, bailee to the public; but, if he had become a debtor or defaulter thereto, his offense was already consummated." *Farrar v. U. S.*, 5 Pet. 373. It was said there that, if it was meant to cover past deeds, the bond should have been made retrospective, and that the sureties had not undertaken against his past misconduct. In *Vivian v. Otis*, 24 Wis. 520, the court said: "For any moneys paid Otis prior to the execution of this bond, and in his hands at the commencement of the second term, the sureties therein became answerable to the county; but, if he had already appropriated to his own use any of those moneys, he had

been guilty of a breach of duty; it was a past delinquency or default, for which they never became responsible. How does the fact that Otis was his own successor change the principle of law, or enlarge the liability of the sureties on the second bond? They did not undertake to make good any money which he had already misappropriated." In *Buffalo Co. v. Van Sickle*, 16 Neb. 363, 20 N. W. 261, the court said: "It is nowhere stated in the petition that the state treasurer, at any time during his said term covered by the bond sued on, had a dollar of the county money in his hands. * * * As I understand it, when it is sought to hold either securities or principal for moneys which the principal made default of within a certain term, although he may have made a report or an official statement which may estop him, either alone or with his sureties, to deny that he was chargeable with the moneys, it must be charged in the pleading directly, as a fact, that he had the money. Clearly, this must be so upon the theory of the above case, because we held that the sureties might deny that their principal had the money at the commencement of the term for which they were security, and that their liability would turn upon the proof of that fact, not upon the fact of their principal having stated, in a report or statement, that he had such an amount of the county's money in his hands; and, if it may be denied, and must be proved to enable the plaintiff to recover, it follows logically that it constitutes the material part of the cause of action to be alleged in the petition." In *Paw Paw v. Eggleston*, 25 Mich. 39, the court said: "Neither the principles involved in this case nor their proper application are in any way affected by the fact that the treasurer for the second year happened to be the same person who had held the office the year before." It will be found that there is not an entire agreement in the decided cases respecting the liabilities of sureties on second bonds; but the rule stated is deduced from the weight of authority, and is the more rational one.

It is claimed by respondents that it was shown conclusively that, the day after the giving of the bond, Gardiner had in his hands \$880.37 belonging to the company; that thereafter \$1,000 was paid to him for the company, the receipt of which is not shown on the books; that between February 15, 1889, and September 1, 1889, Gardiner frequently paid into the treasury of the company large sums of money, which must have been collected by him a long time prior thereto, and which was properly applied in payment of the first or oldest debt. It is true the record shows that Gardiner paid to the treasurer \$718.78 more than he had received subsequent to February 16, and prior to September 1, 1889, so far as the books showed, but there is nothing to show the source from which these moneys were

received. If they were, in fact, moneys collected by him prior to the execution of the bond, as claimed by the respondent, they would, to the extent stated—\$718.78,—have gone to pay off the prior indebtedness; and the same is true if they were taken from the private funds of Gardiner. This, however, would not cure the error of the instruction, which covers the whole amount of the defalcation. If the money referred to was actually collected subsequent to February 16, 1889, we cannot agree with respondent in his contention that the company, at least in the absence of direct instructions from the secretary to apply it to the prior indebtedness, could so appropriate the money, and render the defendant liable for the delinquency. The court, in allowing this, would be robbing Peter to pay Paul. In *Porter v. Stanley*, 47 Me. 515, it appeared that Stanley was collector of taxes for the years 1854, 1855, and 1856, and gave bonds with different sureties. As collector for the year 1854 he received moneys, and omitted to pay a portion of the same into the treasury. The selectmen appropriated, from moneys received on the assessments for the years 1855 and 1856, sufficient to balance the deficiency for the year 1854, without the request of Stanley, who nevertheless consented thereto. The court said: "The appropriations so made were manifestly inequitable, as respects the sureties, and, by the authorities cited for the plaintiffs, cannot be upheld. It is said in the opinion of the court in the case of *U. S. v. January*, 7 Cranch, 572: 'It will be generally admitted that moneys arising, due, and collected subsequently to the execution of the second bond cannot be applied to the discharge of the first bond without manifest injury to the surety in the second bond.'" See, also, *Rogers v. State*, 99 Ind. 224; *Bryant v. Owen*, 1 Kelly, 355. In *Phippsburg v. Dickinson*, 78 Me. 459, 7 Atl. 9, it was claimed that, it appearing that the collector had paid over, during the three years, more than he had collected on the assessment for the first year, the law presumes, in the absence of proof, that he performed his legal duty, and paid over all that he collected for that year. The court said: "But the legal presumption is just as strong as to each of the other years, and, as he could not legally appropriate, as against his sureties, what he received on one assessment in payment of what he received on another, the law will not apply the payments to the oldest debt." Speaking of presumptions in the absence of proof, the supreme court of Illinois, in *Trustees v. Smith*, 88 Ill. 185, said: "It is insisted that it is the presumption that the amount was then on hand at the expiration of the first term. We do not admit that. The defalcation is established, but the time at which it occurred—whether during the first term or subsequent to the reappointment—does not appear; and we do not see why it may not as well be

presumed that the treasurer misappropriated the money during the time of his first term of office as during the time which elapsed after his reappointment." The question as to when the defalcation occurred is one of fact, to be determined by the jury upon all the circumstances of the case. In *Bockenstedt v. Perkins*, 73 Iowa, 25, 34 N. W. 488, the court held that evidence that a guardian had received money only six days previous to the giving of the bond was admissible, as tending to show, or raise a presumption, that he had it when the bond was executed. In the case at bar there is evidence tending to show that the \$890.37 referred to was collected at least six months prior to the time of the execution of the bond. The by-laws required the secretary of the company to "keep an accurate record of the proceedings of such meetings, * * * receive and collect all moneys due or payable to the company, and pay the same to the treasurer forthwith, taking his receipt therefor." The jury might fairly have inferred, from this and all the circumstances, that he had converted the money to his own use prior to the giving of the bond; at least, we cannot say there is no evidence to induce such a conclusion. Cases cited in which the delinquent officers were public officials, and entitled to retain the moneys collected until the end of the term, are not in point. Here it was the duty of the secretary to turn the money over to the treasurer immediately, or within a reasonable time, at least, after he received it. The provision requiring the secretary to turn over the money forthwith was not an idle one, and the sureties had the right to assume that the board would enforce it. If it had been faithfully observed, the question in this case would never have arisen. In *Street v. Laurens*, 5 Rich. Eq. 251, the court said: "But admitting the construction of the decree of 1836 contended for on behalf of the appellants, and that the master was not ordered to invest this fund by that decree, this court is of the opinion that the master committed a default in not depositing the fund in bank, as required by the act of 1840; and, this default having been committed during those official terms for which Mrs. Laurens was his surety, she becomes, on that account, liable." We do not deem it necessary to indorse this proposition to the extent stated. A failure to pay over money to the treasurer forthwith, or at any other specific time, may be merely a breach of duty, not amounting to a default; but it is certainly an important element, in determining whether there has been a default, that there has been a long delay unaccounted for in the payment of the money, in violation of some statutory provision or by-law.

It is claimed by the appellants that the evidence does not support the verdict, and, as we understand the testimony of the experts and that of the plaintiff's treasurer,

us, at the time of the execution of the 1, \$880.37, he collected altogether "\$15,-52, and turned over \$14,982.91, as shown the books. This would leave a balance 90.61, as stated before. But it is claimed ; as there is no record in the books of Beockman check for \$1,000, it is apparent he failed to turn over \$1,091.61. It is fact, however, and not the condition of books, which fixes the liability of theseendants. It is in evidence and undisputas we understand the record, that the k of Beockman was paid by the Bank Anaheim, and credited to the account of plaintiff. There is nothing to show that secretary ever drew the money out. The 00 may still be on deposit in the bank. re is nothing to show the condition of plaintiff's account at the bank. Furmore, the secretary himself testified that, he \$1,152.40 receipted for by him on Au: 10, 1889, this identical \$1,000 was a . The defendants introduced a depositfor money deposited in the Bank of Ana-n, "by the Anaheim Union Water Com-y, per J. S. Gardiner, secretary, August 889," \$1,000; and it was stipulated byasel "that said tag was the original, show-the deposit of the Beockman check." reafter the treasurer was called in rebut-and testified, when shown said tag and receipt for \$1,152.40, of August 10th, that \$1,000 mentioned in the tag "was a por-of that receipt," and stated that, at the e the receipt was given, Dr. Gardiner ded him a piece of brown paper containing noranda showing the several items which it to make up the \$1,152.40 mentioned in receipt. The court erred in admitting lmony as to the amounts actually red and paid in by Gardiner between Sep-ber 1 and October 5, 1889. The com-nt charges that the defendant Gardiner, secretary, had in his hands \$880.37 on the 1 day of February, 1889, the property of plaintiff, and subsequently thereto, and or to the 1st day of September, collected received for plaintiff the sum of \$15,-15, aggregating the sum of \$16,073.52, of ch sum so received by him prior to said day of September he turned over to plain-the total sum of \$14,982.91, leaving a nce, on said 1st day of September, of \$1.61. The inquiry, therefore, should e been confined to the period stated. The ries in the books made subsequent to ember 1st might have been admissible evidence to show how much was collected ween the dates named, because the testi-ny shows that entries were made six aths after the transactions; that the ks did not balance; that the records were t on loose papers, one entry of \$14,000 ing been made on the back of a photo-ph; and one of the witnesses testified

10, 1889, and that the correct balance might be \$1, or it might be \$10,000. The records being in this condition, as stated before, the books may have been admissible as evidence of what had been collected prior to September 1st, but they were not admissible to show what was collected subsequently to that date.

We see no merit in any other exception. The exception to the refusal of the court to give instruction No. 11, which is the only one other than the one above referred to worthy of notice, is not well taken. The officers of the company may have had "reason to know and believe that the said Gardiner had failed in his duty to pay, in that he had failed to pay over the said sum to the treasurer of said company," and failed to communicate the fact to the sureties, yet, unless there was fraud,—an actual intent to conceal, or culpable negligence,—the sureties would not be released from their liability. Assurance Co. v. Thompson, 68 Cal. 208, 9 Pac. 1; Bostwick v. Van Voorhis, 91 N. Y. 357; Roper v. Trustees, 91 Ill. 519; Insurance Co. v. Mabbett, 18 Wis. 687; Railroad Co. v. Gow, 59 Ga. 604. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; GAROUTTE, J.

CHAPIN et al. v. BROWN. (No. 18,147.)
(Supreme Court of California. March 1, 1894.)

NOVATION—PARTNERSHIP—EVIDENCE TO ESTABLISH—ACCOUNTING—PARTIES.

1. The fact that a firm, which had contracted with one of its members to deliver him lumber, continued to deliver after such member had assigned part of his interest in the contract, does not show that the firm consented to accept the assignee for part of the assignor's obligation.

2. In an accounting on a contract between a firm and one of its members, one to whom such member had assigned part of his interest in the contract without the consent of the firm is not a necessary party.

3. Evidence that four persons associated themselves together to divide the profits arising from the carrying on of a certain business is sufficient to support a finding of a partnership between them.

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by J. E. Chapin and others against Albert Brown to dissolve a copartnership, and to compel an accounting between its members. From a judgment rendered, and from an order denying his motion for a new trial, defendant appeals. Reversed.

R. P. Davidson, for appellant. J. R. Webb and L. L. Cory, for respondents.

PER CURIAM. On August 15, 1887, the plaintiffs and the defendant were copartners, doing business in the firm name of Sugar

Pine Mill & Lumber Company. Their business was that of manufacturing and selling lumber. They owned 160 acres of timber land, upon or near which they had built a sawmill. On August 15, 1887, a written contract between the copartnership and two of its individual members, namely, Chapin and the defendant, Brown, was executed, by which the copartnership agreed to sell to Chapin and Brown, and the latter agreed to purchase, all the lumber to be sawed from the timber then standing or fallen on the said 160 acres of land, "or that may be sawed in the mill of the said parties of the first part [the copartnership] from other claims before finishing sawing the timber from the above-described claim." (the 160 acres,) at the price of \$9 per thousand feet, to be delivered in the mill yard. The parties of the first part further agreed that after the year 1887 they would deliver, as aforesaid, "an annual amount of one million feet or more, at the option of the said second parties." The agreement contains other stipulations not relevant to the issues in this case. On the same day (August 15, 1887) another agreement was executed between the copartnership and two others of its members, namely, T. E. Peckinpagh and Charles Peckinpagh, by which the latter agreed to cut, haul, and saw into lumber all the timber on said 160 acres of land, and to stack the lumber in said mill yard, for which they were to be paid \$6 per thousand feet. As to the amount of lumber to be sawed they agreed to be governed by the above-mentioned contract with Chapin and Brown. For the purpose of performing this contract, they were to have the use of said mill, but were to keep it in repair. This contract also contains matters not material to this case. Chapin and Brown assumed to constitute a distinct copartnership, under the firm name of North Fork Lumber Company, and transacted the business under their contract with the Sugar Pine Mill & Lumber Company in that name; but at some time prior to January 1, 1888, Chapin assigned his interest in their contract with the Sugar Pine Mill & Lumber Company to Brown, who agreed with him to perform all its obligations, and withdrew from the North Fork Lumber Company. Brown continued the business under the contract, in the name of North Fork Lumber Company, until January, 1888, when he assigned an interest in the contract to John Bartram, and on May 1, 1888, assigned another interest to B. F. Ellis. After these assignments, Brown, Bartram, and Ellis constituted the North Fork Lumber Company, and conducted the business with the Sugar Pine Mill & Lumber Company under the lumber contract in that name. In the fall of 1888, T. E. and Charles Peckinpagh assigned their contract with the Sugar Pine Mill & Lumber Company, of August 15, 1887, (above set out,) to the North Fork Lumber Company. By the performance of this contract on the part of the Peckinpaghs, the

North Fork Lumber Company became entitled to receive from the Sugar Pine Mill & Lumber Company \$6 per thousand feet for manufacturing the lumber which they were to purchase from the latter company at the price of \$9 per thousand. From and after this assignment by the Peckinpaghs, Charles Peckinpagh was employed by the North Fork Lumber Company, at a salary, to do the sawing, and he continued in that position during the years 1890 and 1891. The object of this action is to dissolve the Sugar Pine Mill & Lumber Company, to compel an accounting between its members, and especially between the copartnership and the defendant, who, it is alleged, owes the concern a balance of \$3,090 for lumber delivered to the North Fork Lumber Company during the year 1890, under the contract first above mentioned, called the "purchasing contract." The court found him to be individually responsible on that contract, and that he was indebted on that account to the other members of the company as follows: To Charles Peckinpagh, \$427.45; to T. E. Peckinpagh, \$471.85; to J. E. Chapin, \$483.80,—amounting to \$1,383.18; and consequently that he was indebted to the copartnership (of which he was an equal member) in the sum of \$1,844.14. The judgment was in accordance with this finding. The defendant appeals from the judgment, and from an order denying his motion for a new trial.

1. The appellant contends that there was a novation of the purchasing contract by which the assignees of portions thereof were substituted for the original contractors (Brown and Chapin) by consent of the Sugar Pine Mill & Lumber Company, and therefore that appellant is not individually liable, as found by the court. It is not claimed, however, that there was any evidence of such novation, or consent thereto, by the Sugar Pine Mill & Lumber Company, other than the facts that the lumber was delivered to and paid for (so far as payments were made) by the North Fork Lumber Company, as constituted at the time of such delivery and payments. Brown never assigned all his interest in the purchasing contract, but remained a member of the North Fork Lumber Company during all its transactions with the Sugar Pine Mill & Lumber Company. Nor is there any evidence that the latter company ever agreed or consented to discharge him or Chapin from their obligation on that contract, or to accept Bartram or Ellis in their stead for any part of such obligation. No objection on the ground of misjoinder or nonjoinder of parties to the action was made by demurrer or answer, or otherwise, in the court below, nor is any point made here on this ground. All the parties to the purchasing contract, and all the members of the Sugar Pine Mill & Lumber Company, were before the court, and, as there is no novation of that contract, neither Bartram nor Ellis was a necessary party to the accounting. The state of ac-

counts between the members of the North Fork Lumber Company is immaterial for any purpose of this action.

2. The only other point requiring special consideration arises on the following additional facts: During the year 1890, while Charles Peckinpagh was doing the sawing for the North Fork Lumber Company, as aforesaid, he and a Mrs. Bearden sold and delivered to the North Fork Lumber Company a lot of logs cut from other lands than the 160 acres belonging to the Sugar Pine Mill & Lumber Company, and to which the latter company held no title. These logs were sawed by Charles Peckinpagh during 1890, while employed by the North Fork Lumber Company, as aforesaid, and produced 683,923 feet of lumber, which was in the mill yard, and thence removed by the North Fork Lumber Company. The evidence tends to prove that these logs were sawed with the knowledge and consent of the plaintiffs, and with an understanding between plaintiffs and the North Fork Lumber Company that the latter were to pay the former, for the use of their mill in sawing those logs, only 50 cents per thousand. C. M. Peckinpagh testified that he and Mrs. Bearden sold those logs to the North Fork Lumber Company; that he, as an employe of the North Fork Lumber Company, sawed them; that he had a conversation with the North Fork Lumber Company with reference to the use of the mill to saw those logs; that he came to an understanding with them as to the price,—50 cents per thousand,—which was his own proposal, and that he considered 50 cents per thousand a fair price for the use of the mill. Chapin testified that he knew the North Fork Lumber Company were sawing the Bearden logs during the summer of 1890, and made no objection to their sawing those outside logs; and there is no evidence tending to prove that T. E. Peckinpagh did not know and acquiesce in that understanding between his brother and the North Fork Lumber Company, nor any evidence that the use of the mill in sawing those logs was worth more than 50 cents per thousand. Yet it appears that a considerable portion, if not all, of the lumber manufactured from those logs, must have entered into the estimate of the 1,030,000 feet alleged and found to have been sold and delivered to defendant under the purchasing contract of August 15, 1887, and charged to defendant at the rate of \$3 per thousand, after deducting \$6 per thousand for the sawing which was done by the North Fork Lumber Company. The appellant contends that the lumber produced from those logs purchased by the North Fork Lumber Company from the plaintiff Peckinpagh never was the property of the Sugar Pine Mill & Lumber Company, and therefore could not have been delivered as such to the defendant or the North Fork Lumber Company under the contract of August 15, 1887; and that the Sugar Pine Mill & Lumber Company were entitled to charge

only for the use of the mill in sawing the logs so purchased by the North Fork Lumber Company at the rate of 50 cents per thousand, and not \$3 per thousand, as per contract of 1887; and in this contention we think the appellant is clearly right.

It was stipulated at the trial that a certain written statement of the accounts between the Sugar Pine Mill & Lumber Company and the North Fork Lumber Company for the years 1890 and 1891 is correct. This account shows the amount of lumber sawed from the logs purchased by the North Fork Lumber Company during the year 1890 to have been 683,923 feet, and that the amount sawed from logs furnished by the Sugar Pine Mill & Lumber Company during 1890 and 1891 was only 735,121 feet, and also shows the amount of money paid by the North Fork Lumber Company to the Sugar Pine Mill & Lumber Company during those two years. The use of the mill in sawing the logs purchased by the North Fork Lumber Company would amount to nearly \$342, and the lumber sawed from logs furnished by the Sugar Pine Mill & Lumber Company, at \$3 per thousand, would amount to about \$2,205.35; so that the whole amount properly chargeable to the North Fork Lumber Company would appear to be \$2,547.35, to one-fourth part of which the defendant is entitled as the owner of one-fourth interest in the Sugar Pine Mill & Lumber Company, deducting which, the other partners (the plaintiffs) would be entitled to recover from defendant only \$1,190.52. But said statement of accounts shows that during the years 1890 and 1891 the North Fork Lumber Company paid to the plaintiffs \$1,313.63, leaving, according to the above calculation, a balance of only \$596.89 due them; yet the judgment in their favor against the defendant is for \$1,383.18. The statement of accounts, however, contains an interest account not carried into the above, which may change the result in favor of the plaintiffs, perhaps, to the extent of \$50. Although it is stipulated that said statement is correct, yet it is not in a perspicuous form, and may not lead to a correct conclusion; but it is quite explicit as to the amount of lumber sawed in 1890 and 1891, and states the whole amount sawed in those two years to have been 1,419,044 feet, of which 683,923 feet were sawed from the logs purchased by the North Fork Lumber Company; and the testimony of the Peckinpaghs is that those logs were sawed in 1890, in which year the court finds that the Sugar Pine Mill & Lumber Company sold and delivered to defendant 1,030,000 feet of lumber "in accordance with and by virtue of said contract," (of August, 1887,) and that, during the year 1891, it sold and delivered to defendant, under said contract, 389,044 feet; thus finding that all the lumber manufactured at the mill during 1890 and 1891, (1,419,044 feet,) including that sawed from the logs of the North Fork Lumber Company, was sold and delivered

to defendant under said contract of August 15, 1887, at \$9 per thousand, but crediting the North Fork Lumber Company \$6 per thousand for cutting the logs and sawing them under the Peckinpagh contract, which had been assigned to the North Fork Lumber Company. It therefore appears, from the stipulated statement of accounts and findings of the court, that the defendant was charged \$3 per thousand for all the lumber manufactured from the logs purchased by the North Fork Lumber Company, whereas he should have been charged only for the use of the mill in sawing those logs at the rate of 50 cents per thousand. This is the only error shown by the record. The evidence was sufficient to justify the finding that the Sugar Pine Mill & Lumber Company is a partnership. It shows that company to be an association of four persons for the purpose of carrying on business together, and dividing the profits between them. Civ. Code, § 2395. Moreover, Mr. Chapin, in his testimony, designated the members of the company as partners, and there is no evidence to the contrary. The judgment is reversed, and the cause remanded for a new trial.

LE MESNAGER et al. v. HAMILTON et ux.
(No. 14,903.)

(Supreme Court of California. March 3, 1894.)

MORTGAGE BY MARRIED WOMAN—SUFFICIENCY OF ACKNOWLEDGMENT—EVIDENCE—REVIEW ON APPEAL—OBJECTIONS NOT RAISED BELOW.

1. Under Civ. Code, § 1187, providing that a married woman's conveyance shall not be valid unless acknowledged on an examination without the hearing of the husband, and section 1093, providing that, unless so acknowledged, no estate in a married woman's lands shall pass, the certificate of acknowledgment is not conclusive, but may be impeached by parol evidence that she never appeared before the officer certifying thereto.

2. In an action to foreclose a mortgage, where the defense is that one of the mortgagors, a married woman, never appeared before the officer who certified to her acknowledgment thereof, she need not prove bad faith on the part of the mortgagee, or that he had notice of the falsity of the certificate.

3. Though the complaint alleged that defendant executed and delivered the mortgage, and the answer denied that she "executed" it, the failure to use the word "delivery" is not a failure to deny the "delivery" alleged; the word "execute," in its ordinary sense, importing delivery, and there being nothing in the answer to indicate that it was used in a restricted sense. Beatty, C. J., and McFarland, J., dissenting.

4. The objection that parol testimony was inadmissible to impeach the certificate of acknowledgment on the ground that the answer failed to deny delivery of the mortgage cannot be raised for the first time on appeal.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Le Mesnager and others against Samuel Hamilton and Adelaide Hamilton, his wife. From a judgment for plaintiff, and

an order denying a new trial, defendant Adelaide Hamilton appeals. Reversed.

J. R. Dupuy, E. H. Bentley, and R. Durigan, for appellant. R. B. Carpenter, for respondents. Graves, O'Melveny & Shankland, for interveners.

DE HAVEN, J. The defendants, Samuel Hamilton and Adelaide E. Hamilton, were and are husband and wife, and this is an action to foreclose a mortgage alleged to have been executed by them on January 2, 1889, to secure a promissory note, also executed by them on the same day, for the sum of \$7,000. The complaint contains a copy of the mortgage and of the certificate of acknowledgment attached thereto. The certificate is that of a notary public, and shows upon its face that the mortgage was duly acknowledged by the defendants upon the day of its date. The defendant Adelaide E. Hamilton filed an answer, in which she avers that the land described in the mortgage was and is her separate property, and in which she also denies that she ever executed or acknowledged the mortgage, and further "alleges that the statement in the certificate of said notary, appended to said pretended mortgage by said notary, reciting and stating that she * * * appeared before, or was in the presence of, said notary, * * * is untrue and false." The case was tried upon the issues thus presented, and resulted in a judgment for plaintiffs, in accordance with the demand of the complaint, and a decree of foreclosure directing the sale of the property mentioned in the mortgage to satisfy the amount adjudged to be due from defendants to plaintiffs on account of the note and mortgage. The defendant Adelaide E. Hamilton appeals.

Upon the trial of the action the appellant offered to prove that she never, in fact, appeared before the notary certifying to the acknowledgment attached to the mortgage, and that she did not acknowledge the mortgage, or know anything about its delivery to the plaintiffs. The plaintiffs objected to this evidence upon the general ground of irrelevancy, and particularly because "it made no difference whether the defendant Adelaide E. Hamilton was present and acknowledged the mortgage or not, as the certificate of said acknowledgment was conclusive." The objection was sustained, and the appellant was not permitted to prove the facts embraced in her offer. This ruling was clearly erroneous. At the date of the mortgage sought to be foreclosed, an acknowledgment was essential to the validity of a conveyance by a married woman. Section 1187¹ of the Civil Code, as it then read, ex-

¹ Civ. Code, § 1187, provides that a conveyance by a married woman has the same effect as if she were unmarried, and may be acknowledged in the same manner, except as mentioned in the last section; but such conveyance has no validity until so acknowledged.

provided that "no estate in the real property of a married woman passes by any purporting to be executed or acknowledged by her unless the grant or instrument acknowledged in the manner prescribed in sections 1186 and 1191." Such being the date of the mortgage in question, at once seen that the facts offered to own were material and relevant, and as directly at the existence of the age as would an offer to show that the cures thereto were forgeries; the acknowledgment of appellant being as necessary part of the execution of the mortgage or as her signature. The certificate of acknowledgment was not conclusive evidence of fact of acknowledgment, and such a certificate may be impeached by parol evidence that the person named therein never, or, appeared before the officer certifying to the acknowledgment. In such a case the act of the officer is wholly void, and the certificate is nothing but a fabrication. *Ston v. Wallace*, 53 Miss. 331; *Pickens v. Selsby*, 29 W. Va. 1, 11 S. E. 932; *Donahoe v. Mills*, 41 Ark. 421; *Meyer v. Gossett*, Ark. 377; *Williamson v. Carskadden*, 36 St. 604; *Michener v. Cavender*, 38 Pa. 34; *Borland v. Walrath*, 33 Iowa, 130. Of course, when it appears that a married woman has actually appeared before an officer for the purpose of acknowledging a mortgage, and has made some kind of an acknowledgment, the certificate of the officer in relation to the manner and terms, is as to the fact, of the acknowledgment, to be conclusive in favor of a purchaser in good faith, and who has relied upon the truth of the certificate.

The difference between such a case and one where the certificate is wholly void is very clearly pointed out by Campbell, J., in *Johns-*

on made, by law, his duty to inquire of her, separately and apart from her husband, as to her freedom from fear, threats, or compulsion of her husband in the execution of the deed; and it is his duty to decide upon this, and to certify the acknowledgment. His decision thus made, and duly certified, imports verity as to all persons acting on the faith of his official certificate in due form of law, and without any knowledge of any wrong or irregularity, or of any circumstance to excite inquiry, and point to such wrong or irregularity. The appearance of the person before him to acknowledge is the occasion for the performance of his duty by the officer; the proposal to acknowledge the deed before him is the circumstance which calls into exercise the legal power to examine as to the execution of the deed, and to decide the sufficiency of the statement made as to that; and then, in certifying, he is declaring his conclusion upon the fact he is called to decide. His official act, thus solemnly performed, must have sanctity, at least to the extent of being a safe reliance for every one who in good faith acts in the belief that it is true, as stated. But where the person never appeared before an officer to acknowledge the deed, but he falsely certifies that she did, his act is wholly without authority of law, and void in toto. All must be subject to the risk of an occasional forgery by officers authorized to take acknowledgments. Although liable to be deceived and imposed on by such an act, no one can claim that a married woman's estate should be divested by forgery; and when she did not in fact appear before the officer to acknowledge, although he may certify that she did, she may show she did not, for his act is wholly without authority, and she but rights herself, and wrongs no one, in proving the truth of the case, for no one can claim by virtue of a forgery." The cases of *Banning v. Banning*, 80 Cal. 274, 22 Pac. 210, and *De Arnaz v. Escandon*, 59 Cal. 486, cited by respondents, are not opposed to the principle declared in the case from which the foregoing quotation is made. In *Banning v. Banning* the wife acknowledged the deed through a telephone, and afterwards delivered the deed, apparently properly acknowledged, to the grantees, who were not shown to have had any notice of the manner in which the acknowledgment was taken. Under these circumstances, the court held that the certificate was conclusive, and that the married woman could not avoid her deed because of the fact that she did not personally appear in the actual presence of the officer certifying to the acknowledgment. That was all that was decided there, and that case is authority for nothing more. It is true that the court quotes with approval the following portion of section 538 of *Jones on Mortgages*: "As to statements

section 1186 provides that the acknowledgment of a married woman to an instrument purporting to be executed by her must not be made unless she is made acquainted by the officer with the contents of the instrument on an examination without the hearing of her husband certified, unless she thereupon acknowledges to the officer that she executed the instrument, and that she does not wish to retract such execution.

Section 1191 provides that the certificate of acknowledgment by a married woman must be substantially in the following form: "State of _____, County of _____ ss.: On this _____ of _____, in the year _____, before me _____, I, _____, insert the name and quality of the officer personally appeared _____, known to me and proved to me on the oath of _____ to be the person whose name is subscribed to the within instrument, described as a married woman; upon an examination without the hearing of her husband, I made her acquainted with the contents of the instrument, and thereupon she acknowledged to me that she executed the same, and that she does not wish to retract such execution."

of fact contained in a certificate of acknowledgment which is regular in form, such, for instance, as the fact that the grantor appeared and acknowledged the execution of the instrument, they can only be impeached for fraud. Evidence which is merely in contradiction of the facts certified to will not be received." This, however, was not necessary to be said in the decision of that case, and the attention of the court was not called to the particular question we are now discussing, and for that reason the language above quoted cannot be construed as an authoritative statement by the court of the law which governs a case like this. In *De Arnaz v. Escandon*, 59 Cal. 486, the facts were such as to bring it within the rule making the certificate of acknowledgment conclusive in favor of an innocent purchaser. In that case the wife actually appeared before the notary, and acknowledged the deed through an interpreter, and afterwards delivered the deed to the grantee, who had no notice of the matters relied upon to defeat the acknowledgment. The court held that upon that state of facts the certificate of the notary was conclusive of the facts which it recited. The cases of *Heeter v. Glasgow*, 79 Pa. St. 79; *Cover v. Manaway*, 115 Pa. St. 338, 8 Atl. 393; *Manufacturing Co. v. Rook*, 84 Pa. St. 442; and *Baldwin v. Snowden*, 11 Ohio St. 203,—also cited by plaintiffs,—were all cases in which the married woman had actually appeared before the acknowledging officer, and the attempt in each was to attack the certificate because of some defect in the manner of the acknowledgment; and neither of them can be considered as sustaining the proposition that a certificate cannot be impeached by evidence showing that the officer was entirely without authority to make it by reason of the fact that the person whose acknowledgment is certified never in fact appeared before the officer for that purpose. We think the distinction between the cases last referred to and the one at bar is a very broad one.

Nor was it necessary for the appellant to show, or offer to show, any fraud or bad faith upon the part of the mortgagee, or that he had notice of the falsity of the certificate. If the matters offered to be proven in this case are true, the appellant never executed the mortgage, and it has no more validity, as to her, than if her signature was forged thereto; and in such a case, if the wife has done nothing to estop her from showing the attempted fraud upon her rights, it is immaterial whether the persons claiming under the mortgage had notice of the matters affecting its validity or not. Their failure to ascertain that the mortgage was never in fact executed cannot be allowed to defeat the rights of appellant, if she was in fact without fault. The plaintiffs were not obliged to advance any money on the mortgage until after first satisfying themselves of its genuineness, and, if they failed to make the necessary inquiry,

the loss is theirs, and not that of appellant. *Edgerton v. Jones*, 10 Minn. 427, (Gil. 341).

It is also claimed by respondents that the answer of appellant admits that she delivered the mortgage to plaintiffs, and therefore that the error of the court, if any, in excluding the evidence referred to, is immaterial. The complaint alleges that defendants did "execute under their hands and seals, and deliver," the mortgage in suit; and appellant, in answering this particular allegation, denies that she executed the mortgage referred to, but does not supplement this with the further denial that she delivered it, thus negating the precise language of the complaint. The plaintiffs contend that the failure to use the word "deliver" in the denial referred to was a failure to deny the delivery alleged; but we do not think so. The word "execute" when applied to a written instrument, unless the context indicates that it was used in a narrower sense, as in sections 1185, 1186, 1189, 1190, and 1191 of the Civil Code, imports the delivery of such instrument. Code Civ. Proc. § 1933; *Joseph v. Dougherty*, 60 Cal. 358; *Clark v. Child*, 66 Cal. 87, 4 Pac. 1058; *Bagley v. McMickle*, 9 Cal. 430. There is nothing in the answer to indicate that the word "execute" was there used in any restricted sense, and it must therefore, be given its ordinary legal signification. The appellant denied that she executed the mortgage, and this put in issue the fact of the delivery, and every other fact necessary to its execution. The plaintiffs did not, in the language used by them, allege anything more than that the mortgage was executed; and, when this was denied, the allegation of the complaint upon this point, in its entire scope and meaning, was denied, notwithstanding the appellant did not see fit to notice the unnecessary verbiage contained in plaintiffs' complaint upon the subject of the delivery of the mortgage. But a complete answer to the contention of respondents on this point is that the objection to this offered evidence was not rested upon the ground that the answer admitted the delivery of the mortgage by appellant; nor is there anything in the record to suggest that the attention of the appellant was ever in any manner, during the trial in the court below, called to this alleged defect in her answer.

If it be assumed that the general objection to the effect that the offered testimony was "incompetent, irrelevant, and immaterial," if it had stood alone, would have been sufficient to raise such a question,—a point which it is unnecessary to decide at this time,—still, such objection was obviously insufficient for that purpose, when the particular ground upon which it was claimed that such offered evidence was incompetent, irrelevant, and immaterial was stated to be "for the reason that the certificate of the notary was conclusive as to all matters therein contained, and could not be contravened or contradicted by any

red to be inadmissible because of the
re of the answer to deny the delivery
e mortgage sued upon, and the respond-
cannot successfully raise such an objec-
here for the first time. Judgment and
reversed.

concur: FITZGERALD, J.; PATER-
J.; HARRISON, J.; GAROUTTE, J.

FARLAND, J. I concur in the judgment
versal, because the objections to the evi-
e offered by appellant, and sustained by
court, were not based upon any defect
e denials of the answer. The objections,
ruling of the court, were made solely up-
be broad ground that a notary's certifi-
of acknowledgment of a married woman
ways, and under all conceivable circum-
ces, absolutely conclusive. Under this
g the appellant, although she never ap-
ed before the notary, and never knew
he had made a certificate of her ac-
vledgment, and although she never de-
ed the mortgage or knew of its delivery,
ceived any of the money, and never did
act of ratification whatever, would still
orever estopped by the certificate from
ing the truth. This, in my opinion, is
the law. At the same time, I do not
that the delivery of the mortgage is
ed in the answer. It is true that, in a
ral sense, "execution" may be said to
ide "delivery;" but it is quite frequently
in the limited sense of signing, and,
re the law requires it, sealing, stamping,
nowledging, etc., a written instrument, so
make it complete on its face and ready
delivery; and the sense in which it is
can generally be seen from the context.
he case at bar the complaint avers that
defendants "executed under their hands
seals, and delivered," the mortgage in
tion. Here "executed" was clearly used
the limited sense, and "delivered" intend-
as a distinct and additional averment.
answer denies that defendants "executed
r their hands and seals," but either in-
rtently or intentionally avoids any de-
that they "delivered" the mortgage.
, in answer to such an averment, a mar-
woman might truthfully deny the execu-
in the sense as used in the complaint,
e believed that the acknowledgment was
ctive, while she might not be able at all
truthfully deny the delivery. And in the
at bar, as appellant refrained from de-
g the delivery, I apprehend that she could
be convicted on a prosecution for perjury,
ever clearly it might be proven that she
deliver the mortgage. But, as said be-
the point was not made at the trial.
objection had been made to offered evi-
on the ground that the answer did not
y the delivery, appellant would have been

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Justice McFARLAND.

OWEN v. HOWARD et al.

(Supreme Court of Arizona. Jan. 22, 1894.)

JUDGMENT LIEN.

The court cannot perpetuate a judgment
lien, and at the same time declare the judgment
void.

Appeal from district court, Mohave coun-
ty; E. W. Wells, Judge.

Action by H. A. Owen against John How-
ard and another to declare a judgment void,
set aside certain proceedings thereunder, and
restrain further proceedings. From a judg-
ment declaring the former judgment void,
but perpetuating the lien, plaintiff appeals.
Reversed.

James Wright, for appellant. Baldwin &
Johnston, for appellees.

SLOAN, J. This action was instituted by
appellant, H. A. Owen, in the district court
of Mohave county, against the appellees,
John Howard and G. Arthur Allen, to have
a certain pretended judgment entered in the
said district court on the 17th day of Feb-
ruary, 1879, in the suit of John Howard,
plaintiff, against H. A. Owen, R. Eccleston,
and M. Gueren, defendants, declared null
and void, as well as certain proceedings had
under and by virtue of said judgment, to
wit, certain sales of mining claims owned by
plaintiff, made under an execution issued out
of said court under said judgment, and to
have defendants restrained from further pro-
ceeding to collect said judgment. Upon the
trial the court below found for the plaintiff,
and entered its judgment as follows: "And
the court, having fully considered said
proofs and the law pertinent to the issues
herein, does order, adjudge, and decree that
the judgment rendered on the 17th day of
February, 1879, and the execution issued
thereon on the 10th day of February, 1884,
and all subsequent proceedings thereon, be,
and the same are hereby, declared null and
void, except as to the hereinafter mentioned
lien. It is further ordered, adjudged, and
decreed that the lien of said judgment be,
and the same is hereby, retained and con-
tinued upon any and all property affected
by said judgment, and that said lien be so
retained and continued until the further or-
der of this court," etc. The appellant ap-
peals from this judgment, and asks that so
much thereof as attempted to create or
perpetuate a lien upon his real estate be
vacated and set aside.

The sole question, therefore, presented to
us upon this appeal, is the power of the
court to perpetuate a judgment lien, and at
the same time to declare the judgment up-

on which such lien depends for its validity null and void. It appears to us that the mere statement of the proposition sufficiently shows that no such power does or can exist in any court. That a judgment may be void, and yet constitute a lien, is a proposition utterly at variance with reason or common sense. If the judgment be void, then no valid lien can exist under it. If the lien be valid, then the judgment cannot be a nullity. A valid lien under and by virtue of a void judgment, in the nature of things, cannot exist. "A void judgment is in legal effect no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it, are void." *Freem. Ex'ns*, § 30. "In order that there should be a lien, it is necessary that there be a valid and subsisting judgment. If the alleged judgment is absolutely void, and a mere nullity, it can, of course, create no lien." *Black, Judgm.* § 407. It is not the case of a judgment merely voidable. The latter has all the force and effect of a valid judgment until vacated or reversed in a direct proceeding to have its invalidity declared. It has accordingly been held that where the vacation of a judgment which is regular upon its face, though voidable, would otherwise operate to the injury of innocent third parties, by depriving them of any possible remedy, a judgment lien created by such judgment would be retained and perpetuated until a valid judgment could be entered. The case cited by appellees in their brief (*Bryant v. Williams*, 21 Iowa, 329) is such a case. An unauthorized appearance of an attorney was held good ground for setting aside the judgment, and, inasmuch as there had been delay in bringing the action to have such judgment set aside, the court, in that case, retained and continued the lien of the original judgment for the payment of such judgment as should ultimately be rendered in the case. But that is not this case, as appellees seem to think. The court, in the case at bar, found in its decree that the judgment was a nullity, and not merely voidable, and no right to any lien could be predicated thereon. So much, therefore, of the judgment of the court below as sought to continue or create any lien of the original judgment entered in the suit of *Howard v. Owen et al.* is vacated and set aside.

BAKER, C. J., and ROUSE, J., concur.
HAWKINS, J., not sitting.

DAVIS v. DODSON.

(Supreme Court of Arizona. Jan. 16, 1894.)

MORTGAGES—POWER OF SALE—PROCEEDS.

1. On foreclosure of a mortgage given to secure a note, for nonpayment of interest,

which provided that on default in payment of "said principal or interest" the mortgagee might sell the premises, and out of the proceeds "retain the said principal and interest," the mortgagee should be allowed to retain the principal as well as the interest of the note.

2. In a suit to foreclose a mortgage on default in interest payments, error in entering judgment for the principal, when not due, is a fundamental error, which will be considered without an assignment of error.

Appeal from district court, Pinal county: Joseph H. Kibbey, Judge.

Suit by George T. Dodson against Thomas Davis. From a judgment for plaintiff, defendant appeals. Affirmed.

Francis J. Heney, for appellant. G. C. Israel and W. R. Stone, for appellee.

BAKER, C. J. There was a judgment below for the amount of a promissory note, and foreclosing a mortgage made to secure the payment of the same, and ordering a sale of the premises to pay both the principal and interest of the note. There being no assignment of errors, we will not look further than to determine if there be any error apparent upon the face of the record, and which goes to the foundation of the action. *Gila R. I. Co. v. Wolfley*, (Ariz.) 24 Pac. 257. This disposes of the alleged error in denying the motion for a change of venue. It has not been saved in the record.

It is claimed, however, that the principal of the note was not due, although the interest was, at the time of the judgment, and that the court erred in entering judgment for the principal, and in ordering a sale of the premises therefor. If such appears upon the face of the record,—that is, that the principal was not due when suit was filed, and the judgment was rendered, and a sale of the premises ordered therefor,—we may consider it without any assignment of errors. The note is as follows: "\$7,500.00. Florence, Arizona, June 11th, 1891. On or before ten (10) years after date, I promise to pay to George T. Dodson or order seven thousand five hundred (\$7,500.00) dollars, value received, with interest thereon at seven (7) per cent. per annum, payable annually at Bank of Montreal, Chicago, on June 11th of each year. [Signed] Thomas Davis." The mortgage to secure such note, and foreclosed in the suit, contained the following clause: "And these presents shall be void if such payment be made according to the tenor and effect thereof. But, in case default be made in the payment of the said principal or interest of said note as herein provided, then the said party of the second part, his heirs, executors, administrators, or assigns, are hereby empowered to sell said premises, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the said principal and interest." It is not denied but that the interest was due upon the note when suit was filed. The clause in the mortgage should be construed

with the note, and, in so doing, we think it quite clear that the intention of the parties was that upon a default in the payment of the interest a foreclosure might be had, and from the proceeds of the sale the plaintiff be allowed to retain both the principal and interest of the note. In *Hooper v. Stump*, (Ariz.) 14 Pac. 799, the court said, construing a like clause in a mortgage: "The language is plain, and can mean nothing else than, on failure to pay principal or interest, power is given to sell the premises, and retain such principal and interest. If it were only to cover interest, why say to 'retain the principal?'" The clause of the mortgage passed upon in *Bank v. Johnson*, 53 Cal. 99, and relied upon by appellant, is entirely different from the mortgage in this case. It is not authority, as applied to the facts here. We are satisfied with the conclusion reached by the lower court, and the judgment is affirmed.

ROUSE and HAWKINS, JJ., concur.
SLOAN, J., not sitting.

BISHOP v. PERRIN.

(Supreme Court of Arizona. Jan. 12, 1894.)

JUDGMENT—RES JUDICATA.

1. A judgment in an action of forcible entry and detainer does not bar an action to quiet title, as in the former action, under Rev. St. par. 2016, only the right of actual possession can be litigated.

2. A judgment in a suit to restrain the issuance of a writ of restitution under a judgment in an action of forcible entry and detainer, and to declare such judgment void, does not bar an action to quiet title.

3. No judgment can be *res judicata* as to matters which the defendant had no right to have passed upon in the suit.

Appeal from district court, Yavapai county;
E. W. Wells, Judge.

Action by John Bishop against E. B. Perrin. From a judgment for defendant, plaintiff appeals. Reversed.

Herndon & Hawkins and Norris & Ellinwood, for appellant. Stewart & Doe and Baldwin & Johnson, for appellee.

BAKER, C. J. The appellant filed his complaint in the lower court, being in form an action to quiet title to certain premises. The appellee answered, disclaiming all interest, title, or right in the premises described in the plaintiff's complaint, except as to a portion thereof, designated as "Bishop's Lake." This he claimed, and to plaintiff's cause of action respecting such portion of the premises he pleaded in bar two judgments,—one being a judgment rendered against appellant and in favor of the appellee in action of forcible entry and detainer for the same premises, obtained before a justice of the peace, and being affirmed upon appeal; the other being a judgment of the district court dismissing a bill and denying an injunction to declare the

same judgment in forcible entry and detainer void, and to restrain the issuing of a writ of restitution thereunder. These pleas in bar were sustained by the lower court, and whether or not this constitutes error is the main contention here. The action to quiet title is an ordinary means of trying a disputed title between two opposite claimants. Pom. Rem. & Rem. Rights, p. 423. The question of possession cuts no figure, for it may be maintained by one, either in or out of possession, and against one who claims an interest adverse, whether the adverse claimant be in or out of possession. Sess. Laws Ariz. 1891, p. 66. In this action title is the main inquiry. But our statute expressly declares: "On the trial of any case of forcible entry or of forcible detainer, under the provisions of this act, the only issue shall be as to the right of actual possession; and the merits of the title shall not be inquired into." Rev. St. par. 2016. In forcible entry and detainer the right to present and immediate actual possession is the only question for adjudication. The statute is a conservator of the peace. It is too clear to require any citation of authorities that no judgment can be *res judicata* as to matters which the defendant had no legal right to have litigated or directly passed upon in that suit. The appellant, as we have just seen, by virtue of an express statute, could not, and as a matter of fact the title of "Bishop's Lake" was not, adjudicated in the forcible entry and detainer suit between the parties, and it was manifest error for the court to find in favor of the plea in bar. In the injunction proceedings the title was in no way involved, except it be incidentally. It was an effort to declare a judgment void, and restrain process thereunder. We do not think it concludes the appellant in this action, which is, as we have seen, an action to adjudicate title to the premises. The judgment might have been void independent of the title. The judgment is reversed, and a new trial ordered.

SLOAN and ROUSE, JJ., concur. HAWKINS, J., not sitting.

UNITED STATES v. ROMERO.

(Supreme Court of Arizona. Jan. 18, 1894.)

CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.

1. On a prosecution for murder under the United States laws it is error to instruct that if the jury believe beyond a reasonable doubt that deceased was found dead, and that defendant told witnesses that he had killed her, such statement would warrant them in finding defendant guilty of murder, as it omits the "malice aforethought," an essential element of murder.

2. Such error is not cured by reading the territorial statutes defining murder.

3. It is error to instruct that "if you have not an abiding conviction, to a moral certainty, of the truth of the charge against defendant, you have such a reasonable doubt that will warrant you in returning a verdict of not guilty;

otherwise you have not a reasonable doubt that will warrant an acquittal."—as such instruction is confusing and misleading.

Appeal from district court, Pinal county; Owen T. Rouse, Judge.

Vicente Romero was convicted of murder, and appeals. Reversed.

H. B. Summers and E. J. Edwards, for appellant. E. E. Ellinwood, U. S. Atty.

BAKER, C. J. The appellant was indicted for murder, alleged to have been committed in the killing of one Bill-gin-par, an Indian squaw, upon the White Mountain Indian reservation, in Graham county; hence his prosecution under the United States statutes. The result of the trial was the conviction of the appellant of murder, and therefore he was sentenced to death, that being the only penalty for that crime under the United States laws, in which there are no degrees of murder. It is sought to reverse the judgment of the lower court because of errors in the instructions of the court, one of which is as follows: "I charge you that if you believe, from the evidence in the case, that Bill-gin-par was found dead on the White Mountain Indian reservation, in this judicial district, on or about the 28th day of December, 1891, and believe from the evidence, beyond a reasonable doubt, that the defendant, after the death of Bill-gin-par, told the witnesses Ortego and Bennett that he had killed her, such statement would warrant you in finding the defendant guilty as charged in the indictment." It is enough of this instruction to say that it signally omits the principal ingredient in all murder,—malice aforethought. Its harmfulness may be readily seen in view of the evidence of the defendant at the trial, who testified, in substance, that he saw several Indians, among them the deceased, plundering his camp, and about to remove his provisions, and, upon his attempting to retake his provisions, they drew their rifles, and fired upon him, which fire he returned, no doubt killing the deceased. The instruction ignores all evidence about self-defense, and informs the jury that upon the bare statement of the defendant that he had killed the deceased he was guilty of murder. But it is contended that, inasmuch as the court had, prior to giving this instruction, read the territorial statute to the jury, defining murder, that the instructions, being taken as a whole, cured the faulty one. The United States statutes do not define the crime of murder, and it is far safer, when proceeding under them, to resort to the common law for a definition of the crime; but, conceding that our territorial statute is substantially the same as the common-law definition of the offense, still we do not think that its mere reading to the jury cured the defect so apparent in the instruction. The jury would be more likely to give attention to and heed a charge couched in the language of the court than the dry and perfunctory reading of

some statute. *People v. Valencia*, 43 Cal 552. Again, the court instructed the jury: "If, after you have given to the evidence in the case earnest, patient, and conscientious consideration, with the determination to arrive at the truth, you should find that you have not an abiding conviction, to a moral certainty, of the truth of the charge against the defendant, you have such a reasonable doubt that will warrant you in returning a verdict of not guilty; otherwise you have not a reasonable doubt that will warrant an acquittal." This instruction is confusing and misleading. *Territory v. Barth*, (Ariz.) 15 Pac. 673. It is difficult to understand just what idea was intended to be conveyed, and for these reasons it ought not to have been given. The judgment must be reversed. It is so ordered, and a new trial granted.

SLOAN and HAWKINS, JJ., concur.
ROUSE, J., not sitting.

TERRITORY v. HANCOCK.

(Supreme Court of Arizona. Jan. 12, 1894.)

AGGRAVATED ASSAULT—INSTRUCTION.

1. It is error to instruct merely that the jury may find defendant guilty of aggravated assault if he made the assault with a deadly weapon, as under Pen. Code, § 390, subd. 6, a premeditated design is necessary.

2. Such error is not cured by reading the section.

Appeal from district court, Gila county; Owen T. Rouse, Judge.

Harry Hancock was convicted of aggravated assault, and appeals. Reversed.

E. J. Edwards, for appellant. Francis J. Heney, Atty. Gen., for appellee.

BAKER, C. J. The appellant was indicted for assault with intent to commit murder, and convicted of an aggravated assault. The following instruction was given for the prosecution, the giving of which is assigned as error: "If you believe from the evidence beyond a reasonable doubt that the defendant, at any time within the time specified,—within five years next before the finding of the indictment,—made an assault upon Mrs. Huberkorn with a deadly weapon, then you might find by your verdict the defendant guilty of an aggravated assault." The charge in the indictment is that the assault was made with a deadly weapon, and this instruction was doubtless drawn and given as if authorized by subdivision 6 of section 390 of the Penal Code, being one of seven circumstances under which the aggravated assault may be committed, which reads as follows: "When committed with a premeditated design and by use of means calculated to inflict great bodily injury." But there is an entire absence in the instruction of any reference to the "premeditated design" nec-

essary to constitute the offense under this subdivision. The jury were told, in effect, that if the defendant made the assault with a deadly weapon, he was guilty of the offense of an aggravated assault, whether done with or without "premeditated design." The reading of the statute did not cure the defect. This we decided in the case of *U. S. v. Romero*, (delivered at this term,) 35 Pac. 1059. The whole of section 390 of the Penal Code was read to the jury. This defines no less than seven different circumstances under which an aggravated assault may be committed, many of which have no reference whatever to the evidence in this case. Instructions ought to have some slight reference to the case made by the evidence. *People v. Roberts*, 6 Cal. 217. An instruction having no reference to the evidence is calculated to confuse and mislead. *Amann v. Lowell*, 66 Cal. 307, 5 Pac. 363. The judgment is reversed, and a new trial granted.

SLOAN and HAWKINS, JJ., concur.
ROUSE, J., not sitting.

ALLEN v. KING.

(Court of Appeals of Colorado. Feb. 12, 1894.)

ACTION ON APPEAL BOND — COMPLAINT — PRAYER FOR JUDGMENT — IDENTITY — ASSIGNMENTS OF ERROR.

1. An assignment of error that "the judgment was contrary to the law and to the evidence," will not be considered where plaintiff in error did not appear.

2. In an action on an appeal bond, the complaint was not defective where it prayed judgment for the amount assessed as damages, instead of for the full penalty of the bond.

3. In an action on an appeal bond executed by "G. M. Allen," he was not prejudiced because the complaint was against "Gaines M. Allen," where there was no question of identity.

Error to Clear Creek county court.

Action by Theodore King against Gaines M. Allen on appeal bond. Judgment for plaintiff. Defendant brings error. Affirmed.

G. M. Allen, for plaintiff in error. C. C. Post, for defendant in error.

REED, J. In a certain action brought before a justice of the peace, appellee was plaintiff, and one Josie Wood was defendant. Judgment was obtained against the defendant for \$115, and costs, amounting to \$8.40, from which the defendant appealed to the county court, executing an appeal bond in the sum of \$300, with appellant and one Nicholas Ennis as sureties. A trial was had in the county court, resulting in a judgment against the defendant for \$113.33. Execution issued, and \$100 were collected. Ten dollars in costs were paid. Failing to make the balance, suit was brought upon the appeal bond. The summons was served upon the sureties; principal not found. The complaint contained

the facts above stated, and a prayer for judgment for \$87.98 and interest, to which appellant filed a demurrer, because "the said complaint does not state facts sufficient to constitute a cause of action; that said complaint is ambiguous, unintelligible, and uncertain." There was no appearance in support of the demurrer. It was overruled, and judgment entered upon the evidence for \$96.85, and costs, from which, appeal was prosecuted to this court.

The errors assigned are: First, "that the court erred in overruling appellant's demurrer;" second, "the judgment was contrary to the law and the evidence." There was no appearance or defense; consequently no exception taken to the judgment. Therefore the second supposed error will not be considered.

It is suggested in the argument that the complaint was defective, in not praying judgment for the full penalty of the bond; that the judgment, if any, should have been for the full penalty, and the amount due, assessed as damages; and *Davis v. Wannamaker*, 2 Colo. 637, is cited in support of the contention. Such was undoubtedly the practice before different forms of action were abolished. The action must then have been in debt upon the specialty. Since the Code there is but one form of action. All that is required of the pleader is to state in plain, unambiguous terms the facts, and the relief required. The appellee was the only obligee and beneficiary in the bond. Its nature was such that no subsequent damages could be awarded. The cause of action seems to have been clearly stated. If there was any error, it was in entering judgment, not in the complaint.

It is urged that the court erred, as the bond was executed by "G. M. Allen," and the allegations in the complaint were against "Gaines M. Allen." There is no question of identity. It is conceded that both are the same person. Appellant could hardly be prejudiced by being declared against by his full name. The supposed errors are untenable, and the judgment will be affirmed. Affirmed.

COMMISSIONERS OF ROUTT COUNTY v. COMMISSIONERS OF GRAND COUNTY.

(Court of Appeals of Colorado. Feb. 12, 1894.)

COUNTIES — ACTION TO ESTABLISH BOUNDARIES — SUFFICIENCY OF COMPLAINT.

1. In an action under Sess. Laws 1887, p. 238, § 1, to settle the boundary line between two counties, the complaint must show that, when the commissioners of one county petitioned the state engineer to establish the line, he called on the respective county surveyors, and with them, or alone, proceeded to establish the line; that he fixed and marked the line as required by statute, and furnished a description thereof to the board of county commissioners of each county; and that suit was brought within six months thereafter.

2. A complaint which alleges that a petition

was served on the state engineer some time in the year 1888, and that suit was brought July 15, 1889, is demurrable, as it fails to show affirmatively that suit was brought within six months after the state engineer filed his description of the boundary line.

Error to district court, Grand county.

Action by the county commissioners of Grand county against the county commissioners of Routt county to establish the boundary line between said counties. Defendant demurred. Demurrer overruled. Defendant brings error. Reversed.

Cranston & Pitkin and W. B. McClelland, for plaintiff in error. S. W. Jones and Chas. G. Clements, for defendant in error.

REED, J. A dispute arose between the respective counties in regard to the line between them. A discrepancy existed, whereby a strip of country about 14 miles in width and 36 miles in length was involved, both counties claiming the territory. To adjudicate and settle the controversy, the county of Grand brought suit on the 15th day of July, 1889, by filing a complaint, which, after citing at length section 460, Gen. St., being the section of the statute defining the boundaries of Grand county, and section 461, being the section defining the boundaries of Routt county, by the legislature in creating such counties, proceeds as follows: "That the southern portion of the boundary line between Grand and Routt counties has been for a few years past in dispute, and as plaintiff is informed and believes, and so charges the fact to be, the board of county commissioners of Routt county petitioned in the year 1888 Honorable J. S. Green, then state engineer for the state of Colorado, to run out, fix, and establish a boundary line between Grand and Routt counties, in this state. That the conflict and dispute over said county line arises over what is called the 'Gore Range.' Plaintiff charges the southwest corner of Grand county and the southeast corner of Routt county are near Yarmany peak, and from this point to the north until this line strikes the Rabbit Ear range, otherwise known as the 'Continental Divide,' that said Yarmany peak is situate in a branch or spur of the Gore range; that this line has been recognized by the county authorities of Grand county since the establishment of said Routt county, and is the correct boundary line between the said counties of Grand and Routt. Plaintiff avers the line established by said Green is erroneous and incorrect, in this: that it does not follow the boundaries of either Grand or Routt counties, as given and prescribed in the statute, in this: Said Green made the initial point of commencement fourteen miles east of said Yarmany peak, thereby taking from Grand county a strip of land of the width of fourteen miles and of the length of about thirty-six miles. That said Green made the initial point of

the common boundary line between Grand and Routt counties to be in a spur or range of mountains known as the 'Park Range,' which are south of the Grand river, but he treats said range as part and parcel of the Gore range, which they are not. The Gore range of mountains, and all the spurs therefrom, are north of the Grand river. That it is incorrect to say that the Grand river divides either the Park or the Gore range. Wherefore, plaintiff demands judgment: That the common boundary line between Grand and Routt counties, so attempted to be established by said state engineer, J. S. Green, be declared to be erroneous and wrong, and that the same be for naught held. That the correct boundary line between said Grand and Routt counties be established and adjudged as follows: Commencing at Yarmany peak, which is situate in a spur on the Gore range of mountains, thence running north from said peak, in a straight line, to where said line will cut and intersect the Rabbit Ear range, commonly known and called the 'Continental Divide.'" On the 20th day of August, 1889, a general demurrer was filed, "That the complaint did not state facts sufficient to constitute a cause of action, and that it was ambiguous, contradictory, and uncertain." On June 10, 1890, the demurrer was overruled, and defendant given 60 days to answer. Immediately following appears the following record entries: "And afterwards, and on, to wit, the 25th day of July, A. D. 1890, in vacation in said year, the following proceedings were had and entered of record in said court, in said cause, as follows, to wit:

"State of Colorado, County of Grand—ss.: Board of County Commissioners of the County of Grand, Plaintiff, vs. Board of County Commissioners of the County of Routt, Defendant. In the District Court of the Ninth Judicial District within and for the County of Grand. Now, on this date, comes the plaintiff, by its attorney, George D. Johnstone, in vacation, and files a motion to enter a default against the above-named defendant for the reason that no amended answer or other pleading has been filed in the said cause within the sixty days, as required by the order of the district court made on the tenth day of June, A. D. 1890, and the same is hereby allowed by the clerk of said court. Ed. J. Jones, Clerk.

"And afterwards, to wit, on the 21st day of July, A. D. 1891, the following proceedings were had and entered of record in said cause as follows, to wit: July 21st, 1891. The above date of July is hereby changed to August, as per order of court made on July 21st, 1891, and hereinafter below entered. David Bock, Clerk.

"In the Matter of the Commissioners of Grand County vs. the Commissioners of Routt County. This case coming on to be heard on motion of plaintiff, leave was granted to change date of record on page 196 from

to August, it appearing to the court a legal error.

July 21st, 1891. Judgment and decree of the court as follows:

State of Colorado, County of Grand—ss.: Board of County Commissioners of the County of Grand, Plaintiff, vs. Board of County Commissioners of the County of Routt, Defendant. Now, on this 21st day of July, A. D. 1891, the same being one of the regular term days of this court, and court being regularly and duly in session, and this case coming on to be heard, and it appearing to the court that a default was duly entered by plaintiff against defendant, which default is hereby approved, and the plaintiff, by its attorneys, Edgar & Johnstone, being present in court, doth ask to be allowed to introduce testimony in support of said complaint. The court thereupon ordered the sheriff to call the defendant three times at the door of the courthouse, and to call three times John M. Breeze, attorney for defendant. Each failing to appear, plaintiff is allowed to introduce its testimony. The court, after listening to the sworn testimony of all the witnesses, and being fully advised in the premises, doth find that said county is entitled to the strip of land in dispute, as set forth in said complaint, and the said J. S. Green, formerly state engineer of the state of Colorado, made mistake in running the survey mentioned in said complaint filed in this action, in this: that he made the south-east corner of Routt county south of Grand river, when in fact the line should have been north of said Grand river, and at a rock or surveyor's monument situated on Yarmany Peak, in order to comply with the description of said Routt counties as described in section 464 of General Statutes of 1883 of Colorado. The court further finds that said Yarmany peak is a portion of Gore range on the north side of said Grand river, and that said Gore range mentioned in said section 464 does not extend to the south side of said Grand river. It is therefore by the court ordered, adjudged, and decreed that the common boundary line between said Grand and Routt counties is hereby adjudged and decreed to be as follows: Commencing at Yarmany peak, at the rock or monument aforesaid, which said peak situate in a spur of the Gore range of mountains on the north side of Grand river; hence running north in a straight line to where said line will cut and intersect the Rabbit Ear range, commonly called and known as the 'Continental Divide,'—and that plaintiff have and recover his costs." Judgment was entered before time to answer had expired.

The record entry dated July 21, 1891, is a clerical puzzle: "The above date of July is hereby changed to August, as per order of court made on July 21st, 1891, and hereafter below entered." What office it was to perform, or how it was to affect the case,

cannot be determined. It appears from the record that on June 10, 1890, the demurrer was overruled, and 60 days given for answer; that default was entered on July 25th, and the finding and judgment of the court entered July 21, 1891. The default was premature, 60 days not having expired. If it was a mistake in regard to the date default was taken, and the date should have been August, the record entry made a year after could not cure the error. Without explanation, the order means nothing. If the proceedings were had July 25th, changing the date to August 25th could not cure the irregularity. July 25th could not be changed to August 25th, even by an order of court. As appears by the record, the default was premature, and judgment void.

It is contended that the district court erred in overruling the demurrer to the complaint. A statute was enacted in 1887 (Sess. Laws 1887, p. 238, § 1) providing the method by which controversies of this kind should be settled, as follows: "That whenever the boundary lines of any county in this state shall be so indefinite that a portion of territory, by reason of such indefinite description, is claimed by two counties, and such fact shall appear by petition of the board of county commissioners of either county, to the state engineer, it shall be the duty of such state engineer, in connection with the county surveyor of each of such counties, to run out and establish such lines as nearly as may be, in accordance with such boundary line, by plain and substantial mounds and marks, and unmistakable natural monuments, and to furnish the board of county commissioners of each of said counties with a description of such line as soon thereafter as may be practical; and when such line shall be so established it shall be the boundary line between said counties, unless one of said counties shall, within six months from the day of filing the description of said line, by the state engineer, with the board of county commissioners of such county, commence an action in a court of competent jurisdiction in this state, to determine and settle such disputed line, and prosecute the same with due diligence until its final determination, or shall have settled such disputed line, within said six months, by arbitration, as is now provided by law; provided, that if the county surveyor of either of such counties shall not appear and assist the state engineer in making such survey after due notice so to do, it shall in no manner affect or invalidate such survey, or boundary lines as they may be fixed by such state engineer." It is urged in the argument by the defendant in error that the statutory remedy is not exclusive; that, regardless of the statute, the common-law right to institute proceedings and adjudicate the differences remained, and that a county could make its election, and proceed by either; that, if the complaint was defective under

the statute, it was sufficient regardless of the statute. We need not necessarily decide this question. It would seem, however, that, a special statutory method having been provided, the maxim, "Expressio unius est exclusio alterius," would control; but, whether exclusive or cumulative, we do not determine. In either view of the case the complaint is defective. Leaving out the allegations attempted to be based upon the statute, no cause of action whatever is shown. It is evident from an examination that the pleader intended it as a statutory complaint. In the third paragraph of the complaint, it is alleged, on information and belief, that in the year 1888 the county commissioners of Routt county applied to the state engineer to establish the line, but there is no allegation that he established any line. The statute is mandatory upon the state engineer, when he has received the petition. The language is: "It shall be the duty of such state engineer, in connection with the county surveyor of each of said counties," etc. The supposition is that the state engineer performed the duty as required by law, and this may be inferred from the first clause of the fourth subdivision of the complaint, "Plaintiff avers the line established by said Green is erroneous and incorrect," etc. It is clear that the proceeding was intended to be statutory. Such being the fact, the complaint must contain affirmative and positive allegations showing the proceedings to have been such as to confer jurisdiction. They cannot be supplied by inference. The only direct allegation is that, in the year 1888, commissioners of Routt county petitioned the state engineer to establish the line. What time in 1888 is not shown; at what time it was done, is not stated; nor is it stated that he called upon the county surveyors of the respective counties, and, either aided by them or alone, proceeded to establish the line, and that he fixed and defined such line, and marked it, as required by the statute, or that he furnished the board of county commissioners of each or either of said counties with a description of such line, or the date such description was filed. It is alleged that the petition to the state engineer was served some time in the year 1888. Suit was brought the 15th day of July, 1889. For aught that appears, 12 or 15 months may have elapsed between the filing of the description by the engineer and the bringing of the suit. The statute requires the protesting party to institute suit within six months. In order to confer jurisdiction, the complaint must affirmatively show that suit was brought within the statutory time. All these important allegations, necessary to confer jurisdiction under the statute, are omitted. The court erred in overruling the demurrer. No cause of action was shown by the complaint. The judgment of the district court will be reversed, and the cause remanded. Reversed.

WATSON v. O'NEILL et al.

(Supreme Court of Montana. March 12, 1894.
CONTRACTORS' BONDS—CONSTRUCTION—PAROL EVIDENCE.

A bond conditioned that the principal shall furnish all materials and labor needed for a building "as specified and shown on plans as furnished by" the architect may be read in the light of the plans and specifications and the contract, (Code Civ. Proc. § 632,) all being contemporaneous, and requires no reformation in order to a recovery thereon for breach of the contract.

Appeal from district court, Lewis and Clarke county; Horace R. Buck, Judge.

Action by John R. Watson against John O'Neill, Frederick Elde, and Jacob Switzer for reformation of, and damages on, a bond. Judgment for defendants. Plaintiff appeals. Reversed.

Wm. M. Blackford, for appellant. Henry C. Smith, for respondents.

PEMBERTON, C. J. It appears that respondents, who were defendants in this action, executed and delivered to plaintiff, as sureties, an instrument as follows: "Know all men by these presents, that Jos. O'Neill and Jacob Switzer, of the city of Helena, county of Lewis and Clarke, state of Montana, are held and firmly bound unto John R. Watson, of the city of Helena, county of Lewis and Clarke, state of Montana, in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said John R. Watson, his executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, heirs, executors, and administrators unto John R. Watson firmly by these presents. Sealed with our seals, and dated this 3rd day of August, one thousand eight hundred and ninety-two. The condition of the above obligation is such that, should Frederick Elde begin and complete the brickwork on John R. Watson's business block, as follows: Frederick Elde is to furnish all the material, lime, sand, brick, and all labor necessary to the erection and completion of John R. Watson's business block, on Main St., as specified and shown on the plans as furnished by W. E. Norris, architect,—then the above obligation to be void; otherwise to remain in full force and virtue. Frederick Elde. [Seal.] Jos. O'Neill. [Seal.] J. Switzer. [Seal.]" This action was brought against said sureties on said bond to recover from them the sum of \$548.84 damages, alleged to have been sustained by plaintiff through the failure of defendant Elde to furnish certain material and labor necessary to, and which were used in, the construction of said building in accordance with the plans of the architect, mentioned in said bond. In bringing this action the appellant proceeded upon the theory that the bond above referred to is defective. In that it does not refer sufficiently to the contract to cover the damages sued for, and asks that said bond be so reformed as to

ct, and cover the ages as alleged, or the breaches thereof, after being so reformed by the court, he have judgment against these respondents for the amount of such damages. So he sets in his complaint a series of allegations to the effect that it was the intention of the respondents to said bond that it should refer to the building contract, in addition to the references in the bond to the "plans as furnished by W. E. Norris, architect." Answer made by defendant sureties, Switzer and Neill, denying all the allegations of the plaintiff, and trial ensued, whereat, upon close of the introduction of evidence on behalf of the plaintiff, respondents moved the court for judgment of nonsuit as to respondents O'Neill and Switzer, on the ground that the evidence does not prove, or fail to prove, any liability on the part of the sureties, which motion was sustained by the court, and judgment for nonsuit entered accordingly, from which judgment plaintiff seeks this appeal.

As appears from the case shown by the record that the motion for nonsuit was sustained on the ground that no sufficient showing was made to warrant the court in reforming the bond in the respect sought by plaintiff, without consideration as to whether, upon the whole case made out, plaintiff was entitled to the recovery of damages sought to be recovered upon the bond, as executed, without reference to reformation. The bond as executed is pleaded, together with all the facts relating to the failure of the contractor, Neill, in constructing said building and furnishing the material and labor therefor, as provided by the plans of the architect, referred to in said bond, and the payment therefor, which involved the damage sued for. And, although the plaintiff sought a reformation of said bond to secure the extension of the terms thereof to include the building contract, as well as the plans and specifications, we think the question arises, and should be considered by the court, first, whether plaintiff is entitled to the relief sought against said sureties, under the terms of said bond, and pleadings and proof, without reformation of the bond, as sought by plaintiff in this action; and, if that proposition should be resolved in the affirmative, would leave out of consideration the whole question of reformation of said instrument, and the allegations of the complaint setting up the facts upon which reformation was sought would stand as surplusage. In other words, in the view of this court, the question arises whether the trial court was warranted in granting a nonsuit, thereby denying plaintiff all relief in the action, upon the ground that he had not made out sufficient facts to sustain his demand for reformation of said instrument. We are of the opinion that the whole question of reformation of said bond was unnecessarily brought into said action. That

the terms of the bond, as executed, and providing that the sureties guaranty in the sum of \$1,000, to the effect that said Frederick Elde, the contractor and builder, should "begin and complete the brickwork on John R. Watson's business block, as follows: Frederick Elde is to furnish all the material, lime, sand, brick, and all labor necessary to the erection and completion of John R. Watson's business block, on Main St., as specified and shown on the plans as furnished by W. E. Norris, architect,"—were sufficient to sustain this action for the recovery of the sum of money which the plaintiff may have been compelled to pay out towards the furnishing of the material and labor necessary for the erection and completion of the structure according to said plans, as alleged in the complaint, without any reformation or extension of the terms of said bond. We think this action involves the construction and application of said instrument to the subject thereof, rather than the question of the reformation of the instrument. In construing and applying the instrument to the subject to which it relates, the court was entitled to receive evidence of the "circumstances under which it made, including the situation of the subject of the instrument, and of the parties to it, * * * so that the judge be placed in the position of those whose language he is to interpret." Code Civ. Proc. § 632. And when the order of the nonsuit was entered, as appears from the record, the court had before it, as disclosed in the evidence, sufficient of such circumstances and situation of the parties to the subject-matter of said bond to enable it to clearly find within the intentment of said instrument an obligation on the part of the sureties to guaranty the furnishing of the material and labor for the construction of the building, portrayed by the plans mentioned in the bond. *Id.* §§ 631, 636, 638. It is evident from the record that the plans and specifications of the building, the contract for the erection and completion thereof, and the bond sued on are all contemporaneous, and parts of the same transaction,—in fact, parts of the *res gestae*,—and, as such, should be construed together, in order to explain each other, and determine the rights, obligations, and liabilities of the parties thereto. For the reasons stated above, the judgment appealed from should be reversed, and it is so ordered. Reversed.

HARWOOD and DE WITT, JJ., concur.

STATE v. HUNTLEY.

(Supreme Court of Oregon. Feb. 26, 1894.)

BURGLARY—INSTRUCTIONS—PLEADING AND PROOF.

1. Instructions defining the crime of burglary in the language of the statute defining such offense are proper.

2. Under an indictment for burglary, charging a forcible entry by breaking windows, it

is sufficient to show that the entry was an unlawful one.

3. The refusal to grant a new trial cannot be reviewed.

Appeal from circuit court, Marion county; George H. Burnett, Judge.

A. S. Huntley was convicted of burglary, and appeals. Affirmed.

W. H. Holmes, for appellant. Geo. E. Chamberlain, Atty. Gen., and James McCain, Dist. Atty., for the State.

BEAN, J. The defendant was convicted of the crime of burglary, under an indictment the charging part of which is as follows: "The said A. S. Huntley, on the 15th day of November, A. D. 1892, in the county of Marion and state of Oregon, then and there being, did then and there unlawfully and feloniously break and enter, in the nighttime, a dwelling house, in which there was at the time a human being, to wit, Isabelle McKillop, with intent to commit the crime of adultery therein, by then and there forcibly breaking the window and window shutters of such house." The only assignment of error on this appeal is the giving of the following instructions by the trial court: "To constitute a breaking, within the meaning of the law, it is not necessary that the structure of the dwelling house should be demolished in any degree. Any unlawful entry into a dwelling house, where there is a human being at the time, with intent to commit a crime therein, would constitute a breaking, within the meaning of the statute, although the defendant may have gone in at an open door." And: "If you find from the evidence beyond a reasonable doubt that the defendant entered the dwelling house named in the indictment in the nighttime, and against the will of those in charge thereof, with intent to commit the crime of adultery, named in the indictment, then the entry was unlawful, and the defendant should be convicted, however the entry may have been made." These instructions substantially define a breaking within the meaning of section 1762 of Hill's Code, which provides: "Every unlawful entry of a dwelling house, with intent to commit a crime therein, shall be deemed a breaking and entering of said dwelling house within the meaning of section 1758." But the contention for defendant is that, the state having elected to charge a forcible entry by breaking the windows and window shutters of the house, it was not competent for it to prove a constructive breaking, as defined in section 1762; the argument of counsel being that, in order to bring a cause within the provisions of the section last noted, the indictment should not have charged an actual breaking. But we do not so understand the law. Section 1758, under which this defendant was indicted, provides that if any person shall break and enter any dwelling house in the nighttime, in which there is at the time some human being, with intent

to commit a crime therein, etc., he shall be punished as in the section provided; and section 1762 simply defines an unlawful entry or breaking within the meaning of section 1758, or, in other words, provides a rule of evidence by which such breaking may be proven. As was said by the supreme court of Wisconsin in construing a similar section: "This section merely establishes a rule of evidence whereby the scope of constructive breaking is enlarged so as to take in any unlawful entry of a dwelling house or other building with intent to commit a felony." *Nicholls v. State*, 68 Wis. 416, 32 N. W. 543. Under the statutes of this state the wrongful entry of a dwelling house with the intent to commit a crime therein constitutes burglary, and, while it is proper, if not necessary, to charge in the indictment an actual breaking, it is sufficient on the trial to show that the entry was an unlawful one. The assignment of error based on the refusal of the trial court to grant a new trial has so often and repeatedly been held untenable in this court that it requires no further consideration. It follows from what has been said that the judgment of the court below must be affirmed.

BUSH v. ABRAHAM.

(Supreme Court of Oregon. Feb. 26, 1894.)

NOTES—PAYMENT—WHAT CONSTITUTES.

1. Where a vendor of land gave the agent making the sale a note for his commissions, payable when the purchase-money notes were paid, the discharge of the notes with the consent of the parties, though money did not pass, constituted payment.

2. Defendant sold lands, receiving \$3,000 cash, and notes for the balance, secured by mortgage on the lands. Thereafter the vendee became insolvent, and in consideration of a reconveyance of the property, and an order on a third person for a certain sum, and to save the expense of foreclosure, the vendor discharged the mortgage, and canceled the notes. Held a substituted payment of such notes, and not a rescission of the sale.

Appeal from circuit court, Douglas county; H. K. Hanna, Judge.

Action by A. Bush against Sol Abraham. From a judgment for plaintiff, defendant appeals. Affirmed.

The other facts fully appear in the following statement by LORD, C. J.:

This is an action to recover money on a real-estate broker's contract. The complaint alleges, in substance: That, at the dates specified therein, defendant became indebted to one F. J. Strayer in the sum of \$1,500, for services rendered at the special instance and request of said defendant, in procuring the Glendale Lumber & Manufacturing Company, a private corporation, as purchaser of 4,000 acres of land, and the mill and fixtures thereon, and that no part of the same has been paid except the sum of \$300; that sub-

sequently the defendant, as a further payment thereon, made and delivered his certain promissory note to said Strayer, whereby he promised and agreed to pay him, one year after the date thereof, the sum of \$175, with interest at 6 per cent. per annum, and wherein it is provided: "That this note is subject to the following conditions: To be paid only when payment becomes due and is actually made on the note given this day by the Glendale Lumber & Manufacturing Company to Sol Abraham, for like term and interest. Value received." That the said note, before it became due, was transferred for a valuable consideration to the plaintiff, who is now the owner and holder thereof, of which transfer the defendant was duly notified at the time it was made. That, on the 2d day of May, 1891, the promissory note described in said condition was fully paid, canceled, and taken up by said company. As the other cause of action herein is identical, a statement of its facts is omitted. The defendant, after denying the facts alleged in the complaint, set up, as a further defense, Strayer's misrepresentations as to the solvency of the company, and his reliance thereon, whereby he was induced to deed the said land and mill property to the company, and to accept certain notes therefor, which are set out, and for which he took a mortgage on the property as security; the payment to Strayer of the \$300 mentioned in the complaint, etc., and the execution of the notes sued on; the inability of the company, owing to its insolvency, to pay the \$15,000 note when it became due; and the acceptance of the reconveyance of the property to save himself from further loss on account of such insolvency, whereby the transaction was rescinded, without having received payment of said purchase-price notes, etc. The reply put in issue the new matter set up as a defense. The record discloses that the testimony for the plaintiff tended to show that at the time of the purchase of the land, and mill and fixtures thereon, the company also purchased of the defendant a stock of merchandise, a store building, a lot of lumber and lath, to the amount of \$19,658.38; that there was paid on the same \$22,658.38, and that no part of such sum had been returned to the company; that the several notes executed by the company to the defendant for such property had been taken up and canceled, which notes, so canceled, were admitted in evidence; that the notes forming the basis of the present action had been transferred to plaintiff by the said Strayer, and that he was the owner thereof. The testimony for the defendant tended to show that he had contracted with Strayer, who was a real-estate agent, to negotiate a sale of the mill, plant, and land for the sum of \$60,000; that Strayer sent the company to him as a purchaser; that he sold the premises to it for the above sum, and received in part pay-

ment thereof the sum of \$3,000, and took a mortgage upon the premises to secure the payment of the remaining \$57,000; that the defendant afterwards received, on account of the purchase price, the sum of \$6,000 by accepting an order on one L. C. Beardsley for that amount, which order had not yet been paid; that these sums were all that he had ever received upon the purchase price of such property, and that he never returned any part thereof; that the defendant learned from Mr. Feller, the manager of the company, that it was insolvent, and unable to pay the purchase-price notes as they became due, and that Feller, also, represented to him that he, like nearly all the other stockholders, was unable to pay the balance due on his stock, and that the premises had been abandoned, and some of the machinery removed; that when the defendant learned that the company could not pay the balance of said purchase price, and that it was insolvent, he took a reconveyance of the premises, and canceled the notes for the remainder of the purchase price. It also appears that a year or so after such sale the company submitted to the defendant in substance the following proposition in writing, which was accepted by him: "That the defendant pay to the order of the company \$1,600 for sawed lumber, shingles, and timber on the mill yard, and the company reconvey to him all the real and personal property and contracts theretofore conveyed and assigned to it, together with all improvements thereon, free from incumbrance, except the mortgage given by the company for the purchase price; \$360 of the \$1,600 so to be paid to be applied in payment of the amount due on the five shares of stock held by defendant in the company, and he, in consideration thereof, to release and discharge the company from all claims, debts, or demands due him, discharge his mortgage of record, and discuss all pending actions, suits, or proceedings, at his own expense; the acceptance of such proposition to operate to discharge the company and its stockholders from all obligations, debts, claims, and demands, of every nature and description, due the defendant, and the company to satisfy and discharge of record all liens against the property of the company as the same appeared of record, with the understanding that the reconveyance of such property was not made for a full and valuable consideration, or any other than the mortgage held by the defendant thereon; and to avoid the trouble and expense incident to a foreclosure and sale of the property, which was not sufficient in value to meet the amount due on such mortgage; and with the further understanding that neither the company, its stockholders or directors, should hold any demand or claim whatever against its agent, L. C. Beardsley, but that said Beardsley is indebted to the defendant in the sum of \$6,000, and interest due thereon."

R. S. Strahan, for appellant. J. W. Hamilton, for respondent.

LORD, C. J., (after stating the facts.) From this statement of the evidence offered under the pleadings, it will be seen that the main question was whether there had been payment of the \$15,000 note, by reason whereof the notes upon which the present action is founded would become due and payable. The two notes upon which this action is brought are dated April 3, 1890, are due one year after date, and each contains this condition: That it is "to be paid only when payment becomes due and is actually paid on the note given this date by the Glendale Lumber and Manufacturing Company to Sol Abraham, for a like term and interest, value received."

The contention for the defendant is that this note was never paid by the company, within the meaning of the condition to which the notes sued on are subject, and that, therefore, the sums of money specified in such notes never became due and payable. This contention embraces two propositions: (1) That the payment of the \$15,000 note contemplated by such condition is full payment in money of such note; and (2) that the acceptance by the defendant, in consequence of the insolvency of the company, and to save himself from further loss and expense, of a reconveyance of the mill property in satisfaction and discharge of the purchase-price notes and other consideration named, was, according to the terms of the agreement executed by the company and himself, a rescission of the original sale of such mill property, and not a substituted payment or accord and satisfaction of such purchase-price notes, and hence that the note sued on never became due and payable. The condition is that the note is to be paid "only when payment becomes due and is actually made" on the company's note to defendant. Payment, in a restricted sense, is a discharge in money of a sum due. As usually understood, it means the transfer of money from one person, who is the payor, to another, who is the payee, in satisfaction of a debt. In such sense, it would not include an exchange or compromise, or an accord and satisfaction, but would mean the full satisfaction of a debt in money. But, in its general sense, payment is the performance of an agreement, or the fulfillment of a promise or obligation, whether it consists in giving or doing. The discharge of a contract or obligation in money or its equivalent, with the assent of the parties, would constitute payment. It may be made in something else than money; in fact, anything that the creditor will accept as payment. It is a mode of extinguishing obligations. To constitute payment, therefore, money, or some other valuable thing, must be delivered by the debtor to the creditor for the purpose of extinguishing the debt, and the creditor receive it for the same purpose. 18 Am. &

Eng. Enc. Law, tit. "Payment," p. 150. And a creditor may accept a part of his debt before the whole is due, in satisfaction of the whole, or, if the whole of the money be due, and there is an agreement to accept something else, though of less value, in satisfaction of a debt, the agreement in such case would be a bar to a recovery of the residue. But an agreement to substitute any other thing in lieu of the original obligation is void unless mutually carried into execution. *Smith v. Foster*, 5 Or. 44. The note of the company for \$15,000, being negotiable, was payable in money by its terms and the law applicable to it, but, after such note became due, if the parties so agreed, its payment could have been made in something else than money as an equivalent, or something else than money, though of less value. The company might offer anything as a substitute for the money due on such note, and, if the defendant took it in payment and satisfaction of the same, such an agreement would be valid, and the note satisfied and discharged. As payment is but a mode of extinguishing a debt, it lies with the creditor whether he will accept something different from that which was owing as payment of his debt. So that, if the defendant chose to enter into an agreement with the company to accept something else than money, though of less value, in satisfaction and discharge of the company's notes, when consummated, it would be a substituted payment, and as effectually extinguish such notes as though payment had been made in money. Such being the case, any agreement to that effect carried into execution by the parties would operate as payment of the note in question within the purview of the condition to which the notes sued on are subject. We hold, therefore, that the payment contemplated by the condition need not necessarily be in money, but any mode which operated as payment by which such note was satisfied and extinguished, to which the defendant agreed.

The other proposition is that the agreement, in the light of the testimony, operated as a rescission of the original sale of the mill property, and not as substituted payment, or in the nature of an accord and satisfaction of the purchase-price notes, among which was the note in question. Briefly, the undisputed facts show that the land and mill property were sold and conveyed by the defendant to the company for the consideration stated; that, at the time of the sale, there was paid the sum of \$3,000 on the purchase price, and several notes given for the residue thereof, which notes were secured by mortgage on the property; that the company went into possession, and operated the mill; that about a year thereafter it became unable to meet its obligations, and was, in fact, insolvent, whereupon it made certain written propositions to the defendant, which he accepted, whereby in consideration of a reconveyance of the property, and to save

trouble and expense of foreclosure and, also, an order on Beardsley for \$1,000, he agreed to discharge his mortgage, and to cancel and surrender the purchase-price notes which such mortgage was intended to secure, and to pay \$1,600 in the manner provided in such agreement. The testimony also shows that this agreement was carried into effect by the parties, the agreement itself shows, as already stated, the consideration upon which it was made. The defendant claims that the legal effect of these facts is to show that the transaction was a rescission of the original contract of sale of the mill property,—that the defendant simply took a reconveyance of the property, and canceled and surrendered the notes,—and that, as a consequence, there was no payment or satisfaction of the notes in question, without which the notes sued on would not become due and payable, and the trial court ought to have so charged the jury. The contract for the sale of the mill and mill property was executed, and the company was the owner and in possession of it, but was unable to pay the note in question when it became due. There was no doubt but what the property of the company was more than sufficient to secure the payment of said note, but there were other purchase-price notes, for large sums, which were payable subsequently, at different times, but which notes such property would be sufficient to satisfy and discharge. In the case stood, the defendant would be compelled to resort to foreclosure proceedings to enforce the payment of the note in question, and the other purchase-price notes would have fallen due, while the property was unsold; and in view of the insolvency of the company, the delay, trouble, and expense attendant on such proceedings, and to save itself from further loss, an agreement was made and carried into execution whereby the defendant accepted, in satisfaction and discharge of the purchase-price notes, a reconveyance of the mill property, and other conveyances named therein. This agreement evidently was intended to effect a complete payment, but it makes no provision for the refunding of the \$3,000 paid as part of the purchase price for such property; on the contrary, by the terms of such agreement, it permitted the defendant to retain the cash and the \$6,000 order on Beardsley, and the rest due thereon. As the original contract for the sale of the mill property was voided, there was no way to rescind it, except by an agreement that would operate as a rescission. The intention of a rescission is upon the parties in statu quo. To rescind a contract is to claim nothing under it. If the purpose of the agreement was limited to canceling or discharge of the purchase-price notes, in consideration of a reconveyance of the property, and in some way provided for the disposal of the \$3,000, it might be regarded, if this was all, as intended to leave the parties in statu quo, and that the

original contract for the sale of the mill property should be rescinded. But an agreement to accept something in lieu of money in satisfaction of debt, when carried into effect, satisfies such debt and discharges all right of action upon it. An overdue demand, whether liquidated or unliquidated, may by agreement be discharged by payment of a thing different from that contracted to be paid, although of less pecuniary value; for instance, £1,000 by the payment of a pepper-corn. *Pinnel's Case*, 5 Coke, 117; *Cumber v. Ware*, 1 Smith, Lead. Cas. 601. Although a money demand, liquidated and not doubtful, cannot be satisfied with a smaller sum of money, yet, if any other personal property is received in satisfaction, it will be good, no matter what the value. *Bull v. Bull*, 43 Conn. 455. In such case the court will not inquire into the adequacy of the consideration. *Reed v. Bartlett*, 19 Pick. 273; *Fisher v. May's Heirs*, 2 Bibb, 449. "A claim or demand," Mr. Sutherland says, "may be satisfied by the party liable delivering, paying, or doing, and the claimant accepting, something different from that which was owing or claimed, if they so agree. It is a substituted payment. When such agreement is executed,—carried fully into effect,—the original demand is canceled, satisfied, extinguished. It is thus discharged by what the law denominates accord and satisfaction. It is a discharge of the former obligation or liability by receipt of a new consideration, mutually agreed upon." 1 *Suth. Dam.* (2d Ed.) § 246. In support of such agreements, if the consideration has some value, the law regards it as sufficient without regard to its extent. *Savage v. Everman*, 70 Pa. St. 315. The fact that the mill property was of less value than the amount remaining unpaid of the purchase-price notes is not material if its conveyance was accepted in satisfaction and discharge of such notes. In *Strang v. Holmes*, 7 Cow. 224, it was held that a conveyance of land, given in satisfaction of money due on a bond, would operate as a release of the bond, if given and accepted in full satisfaction. *Sutherland, J.*, said: "The sufficiency of the satisfaction cannot be questioned. It was the conveyance of land which, like the gift of a horse, hawk, or robe, shall be intended might be more beneficial to the plaintiff than the money; or otherwise he would not have accepted it in satisfaction." In *Eaton v. Lincoln*, 13 Mass. 426, *Parker, C. J.*, said: "The execution and delivery of the deed by the defendant, in pursuance of the agreement of the creditors, and the acceptance of that deed by their agent, and his sale of the property afterwards, was a complete execution of the contract on both sides. These facts would have maintained the issue for the defendant upon a plea of accord and satisfaction." To constitute an accord and satisfaction there must be a satisfaction of the entire debt so as to completely extinguish it.

It would seem, therefore, in view of the

conceded facts, that the agreement made and executed by the defendant and the company was not a rescission of the contract of sale, but was, in effect, a substituted payment. It embraced new and additional considerations, and, when it was carried into effect, operated as payment of the entire debt,—not only the \$15,000 note, then due, but the other purchase-price notes, which were not due. This being so, the condition of such property, whether it was decreased in value by cutting off timber, or enhanced in value by putting in new machinery, was not material, but collateral. It is the right of a party to accept anything that may be offered in payment and satisfaction of his demand, and, when he does so, the transaction is closed, and no inquiry into the condition of the property, or whether the party made or lost by the agreement, can be material, in the absence of fraud. The fact alone that a part of the consideration for the agreement was to protect the defendant from further loss, and to avoid the expense of legal proceedings, would be sufficient to support it. All such matter, therefore, in the form of exceptions to different questions, was immaterial and collateral to the issue, and could not affect the right of the broker to his commissions. There is no pretense but what he furnished a purchaser who was acceptable to the defendant, or that the defendant did not make his own terms with such purchaser as to the time of payment. Besides, the record discloses that the defendant Beardsley testified fully on the subject of the condition of the property, although immaterial. We do not think, therefore, that in any view such questions were material, or that their exclusion can be considered as error.

It is claimed that the court erred in not giving an instruction asked by the defendant to the effect that if the jury believed that, "at the time the first note for \$15,000 made by the company to the defendant became due and payable, the same was not paid, by reason of the insolvency of the company, and that, in order to save himself from further loss, the defendant took back the property from the company, the sale of which was negotiated by Strayer, such reconveyance of said property is not payment of the \$15,000 note, and the plaintiff is not entitled to recover. The failure of the company to pay the note of \$15,000 is a complete bar to plaintiff's recovery in this action." It is insisted by counsel that this instruction embodies a correct statement of the law. He argues that "the writing sued on was payable on an expressed condition, to wit, the payment of this note for \$15,000. If this note was not paid, it was the duty of the court to declare, as a matter of law, that the money mentioned in the writing sued on had not become due and payable." But, we think, as a matter of law, that the agreement which was entered into and carried into effect by the parties operated as a sub-

stituted payment of the note in question which was payment within the meaning of the condition, and hence the notes sued on became due and payable. There was no failure to pay, for when the defendant accepted the company's offer, and the arrangement was completed, it operated as substituted payment. This being so, the defendant was paid the note in question within the meaning of the condition. Nor is there anything in the case of *McPhail v. Buell*, 87 Cal. 115, 25 Pac. 266, cited by counsel, opposed to this result. There the agreement was that the defendant would pay the plaintiff his commissions when the vendees paid to him (the defendant) the sum of \$20,000, on account of the purchase price, and executed to him their notes and mortgage for the balance. The purchasers executed their notes and mortgage, but failed to pay the \$20,000, and the defendant was compelled to take back the property. The court necessarily held that the failure to pay the money was a complete bar to any claim for commissions.

It is also claimed that the court erred in not giving the following instruction for the defendant: "Plaintiff not having pleaded a waiver of the conditions specified in the contract sued on, he cannot upon the trial rely upon waiver of such conditions." The plaintiff is not relying upon a waiver of such condition, but claims that a right of action accrued upon the note for the commission of his assignor when the defendant accepted anything different as payment from that contracted for, by which the note in question was satisfied and extinguished. The facts show, as well as the agreement, that the company did a good deal more than merely surrender the property to the defendant; hence, the objection to the second instruction given by the court is not erroneous. It is not necessary to prosecute our inquiries further in respect to the other exceptions to the instructions, as our view of the legal effect of the agreement is that it operated as a substituted payment, and not as a rescission of the original contract of sale. Besides, there is no sort of doubt or pretense but what the mill property was more than sufficient in value to pay the full amount of the note in question, and such being the case, if the defendant chose to retain payments made on such property, and accept a reconveyance of it in satisfaction and discharge, not only of such note then due, but of all the purchase-price notes which were payable subsequently at different dates, in order to avoid the delay and expense of foreclosure and sale, certainly such transaction ought to be deemed payment of the note in question, as between the plaintiff and defendant, within the meaning contemplated by the condition, so as to render the notes sued on due and payable, and the plaintiff's right of recovery maintainable. As these views of the law are decisive of the case, it results that the judgment must be affirmed.

HILL v. SMITH.

(Supreme Court of Washington. Feb. 28, 1894.)

GUARDIAN—ACCOUNTING—COMMINGLING FUNDS—
SUPPORT OF WARD—WHEN DISALLOWED.

1. Where a guardian is also one of the executors of the estate of his ward's ancestor, and he confuses the funds of the estate so that it is impossible to determine from his accounts as guardian from which fund the support of his wards has been paid, the court is justified in concluding that it was paid from the funds of the estate.

2. In such case the guardian is not entitled to any allowance for the support of a ward after she became of age, especially where it cannot be ascertained what portion of the expenses for support was contracted after, and what before, the ward became of age.

HOYT, J., dissenting.

Appeal from superior court, King county;
J. W. Langley, Judge.

Petition by Eliza Maud Hill for the removal of Eben Smith as guardian of petitioner and other minor heirs of George D. Hill and Ellen K. Hill, deceased, and for an accounting. Such guardian is also one of the executors of the estate of George D. Hill. From a judgment settling the account, but refusing to remove the guardian, the latter appeals. Affirmed.

Thomas T. Littell and Hughes, Hastings & Stedman, for appellant. Hays & Humphrey and A. W. Hastie, for respondent.

DUNBAR, C. J. From a close inspection of the record in this case we are unable to conclude that the findings and judgment of the lower court are not warranted by the testimony. It is scarcely worth while to cite authorities to sustain the proposition that the insurance money collected by the guardian is no part of the estate, for the law is well settled in this respect. This money goes direct to the heirs. The executors of the estate should have nothing to do with it, and it is the duty of the guardian into whose possession it comes to deliver it to the heirs as they become of age. Therefore the petitioner in this case was entitled on reaching her majority to one-fourth of the insurance money in the hands of the guardian, and this, with interest on the same from the date of its receipt by the guardian, was all she was allowed by the decree of the court.

It is contended by the appellant that there were not sufficient available funds of the estate to support the minor children, and that it therefore became necessary to use this insurance fund for that purpose; but the report of the guardian does not clearly show this state of facts. On the other hand, it shows that he has allowed this fund to become commingled and confused with the funds of the estate, and his accounts as guardian to become commingled and confused with the accounts of the executors, so that it was impossible for the court to determine what funds the expenses of supporting the children were paid out of; and,

in the absence of such clear and satisfactory showing, the court was justified in concluding that the minor heirs had been supported from the funds of the estate, and that the insurance money had been kept intact for the use of the beneficiaries.

It is urged by the appellant that, even if this view of the law be adopted by this court, the petitioner should in any event be charged with her maintenance since she reached her majority. The answer to this contention is twofold: First, it is impossible to tell from her guardian's accounts with the petitioner what portion of this expense bill was contracted before the petitioner arrived at the age of majority, and what portion was contracted since that time; and, second, for the reason above mentioned, that the accounts are so confused that it is impossible to tell whether these expense bills were paid out of the funds of the estate or out of the insurance fund; and, if out of the funds of the estate, they could not be made a set-off against petitioner's share of the insurance money, which is in no way connected with the estate. This court, being somewhat familiar with the history of this estate, as shown by many other cases which have been before us in which it was involved, appreciates the annoyance, inconvenience, and difficulties which necessarily beset the executors and the guardian in performing the duties which devolve upon them in the execution of their trust; but the very difficulties of the situation ought to prompt a strict compliance with the law in regard to the time and character of their reports to the court, and frequent, explicit, and distinct accountings, so that the court, who ought always to jealously guard the interest of minor heirs, could see at a glance the condition of the estate, particularly so far as its relations with the guardian and executors are concerned. We have examined the other propositions discussed by the appellant, but from all the circumstances of the case we think the judgment should be affirmed.

STILES, SCOTT, and ANDERS, JJ., concur. HOYT, J., dissents.

FISCHER et al. v. QUIGLEY et al.

(Supreme Court of Washington. Feb. 28, 1894.)

APPEAL—FINDINGS—SUFFICIENCY OF EVIDENCE—
RES JUDICATA—ACTION ON BOND—PRIOR JUDGMENT AGAINST PRINCIPAL.

1. A finding by the court in a law action will not be disturbed, where the evidence is conflicting.

2. A judgment against contractors, personally, for goods sold them as such for the use of the men employed by them in executing a contract for grading a street, is no bar to an action against them and the sureties on their bond after failure to collect the judgment.

HOYT, J., dissenting.

Appeal from superior court, King county;
R. Osborn, Judge.

Action by G. W. Fischer and Mary E. McDonald, executrix of the estate of J. R. McDonald, deceased, against James M. Quigley, Patrick Quigley, James Gill, and Timothy Ryan, on a bond for faithful performance of a certain grading contract. From a judgment for plaintiffs, defendants Gill and Ryan appeal. Affirmed.

Thompson, Edsen & Humphries, for appellants. Allen & Powell, for respondents.

ANDERS, J. James M. Quigley and Patrick Quigley as principals, and the other defendants as sureties, executed a bond in accordance with section 2415, 1 Hill's Code, for the faithful performance of a contract to grade Stewart street, in the city of Seattle, previously entered into by said Quigleys with said city. The Quigleys, the contractors, after the grading of said street was completed, were sued by the plaintiffs Fischer & McDonald for merchandise sold and delivered to them, and a judgment was obtained against them for the amount claimed. To that action the appellants were not parties. In the present action the same plaintiffs sue upon the bond, alleging that they have been unable to collect their judgment against the Quigleys on execution, and aver that the claim upon which that judgment was rendered was for merchandise sold to the Quigleys as contractors upon Stewart street, and for the purpose of being used for the maintenance of the men employed by them in grading said street. The cause was tried by the court without a jury, and the only question submitted for the determination of the court was whether the sale of the merchandise by the plaintiffs to the defendants Quigley was or was not with the understanding that the merchandise so sold was to be used upon the Stewart street grading contract. The court found as a fact that the merchandise was sold to be used upon the contract, as alleged by the plaintiffs, and accordingly rendered judgment against the defendants for the amount found due. The sureties have appealed from the judgment of the court, and the main question for our consideration, presented in the record, is whether the evidence is sufficient to sustain the finding and judgment.

The record discloses that there was a sharp conflict in the evidence, and this being an action at law, and the findings of the court being equivalent to the verdict of a jury, this court would not be justified in disturbing the findings and judgment unless the record shows a decided preponderance of the evidence against the court's finding, which we think it does not. *Yesler v. Hochstetler*, 4 Wash. 351, 30 Pac. 398; *Graves v. Banking Co.*, 3 Wash. St. 742, 29 Pac. 344. As the court below saw and heard the witnesses, it was better prepared to judge of their credibility than this court. Its conclusions will therefore not be disturbed.

The contention of the appellants that the judgment against the Quigleys personally is a bar to this action is not tenable. The appellants cannot complain that the respondents exhausted their remedy against the principals in the bond before attempting to collect the amount due from the sureties. The suit against the Quigleys was not an action upon the bond, and therefore cannot affect the rights of the plaintiffs in this action. *Brandt, Sur.* (2d Ed.) § 391.

The question of the validity of, or the necessity for, the bond sued on, was not raised in the court below, nor in the brief of counsel, and will not, therefore, be considered here, for the first time, on the argument. The judgment is affirmed.

DUNBAR, C. J., and SCOTT and STILES, JJ., concur. HOYT, J., dissents.

DE CORVET et al. v. DOLAN et al.
(Supreme Court of Washington. Feb. 20, 1894.)

Dissenting opinion. For majority opinion, see 35 Pac. 72.

STILES, J. I do not think that it was within the power of the territorial legislature to enact the bald rule which the court in this case has enforced. A resident of the territory, under the act of 1877, was entitled to personal service of summons issued in a case brought against him, or at least to have the summons left with some suitable person at his dwelling house or usual place of abode; and a nonresident was entitled to precisely the same treatment, if he could be found within the limits of the jurisdiction of the court. It is inseparable from any showing of nonresidence by which a plaintiff seeks to entitle himself to a service by publication that it be made to appear that, although the defendant is a nonresident, he cannot, at the time of the proposed service, be served personally. The mere fact that section 65 provided for an affidavit "stating" that the defendant was a nonresident, in my judgment, means no more than if it had used the word "showing." It has been universally held that the mere allegation, in an affidavit of this kind, stating nonresidence or absence or inability to make service, is a conclusion of law which is insufficient to base a substituted service upon. *Ricketson v. Richardson*, 26 Cal. 149; *Forbes v. Hyde*, 31 Cal. 342; *Yolo Co. v. Knight*, 70 Cal. 431, 11 Pac. 662; *Brady v. Seaman*, 30 Cal. 611; *Thompson v. Judge*, 54 Mich. 236, 19 N. W. 967; *Harrington v. Loomis*, 10 Minn. 366, (Gil. 293); *Beach v. Beach*, (Dak.) 43 N. W. 701; *Carlton v. Carlton*, 85 N. Y. 313; *Kennedy v. Trust Co.*, 32 Hun, 35; *McDonald v. Cooper*, 32 Fed. 748; *Alderson v. Marshall*, (Mont.) 16 Pac. 576; *Neff v. Pennoyer*, 3 Sawy. 274, Fed. Cas. No. 10,083; *Palmer v. McMaster*, (Mont.) 33 Pac. 132; *McCracken*

Managan, 127 N. Y. 493, 28 N. E. 385. A resident, within the terms of this statute interpreted, might be one whose actual domicile was in the territory, at a place well known to the plaintiff, and who, if he had expressly declared the intention of giving up foreign residence, would be entitled to personal service.

HINCHMAN v. CLEMENT et al.

Supreme Court of Washington. Feb. 27, 1894.)

MORTGAGES—REDEMPTION OF DEVISED PROPERTY—RESIDUARY DEVISE—ATTORNEY'S FEES.

1. Mortgaged property included in a residuary devise is not "devised," within Code Proc. § 35, which provides that if any person die, leaving mortgaged any real or personal estate, shall not have "devised" the same, or provide for the redemption thereof by will, the court, on application of any interested person, may order the executor or administrator to redeem the same. Dunbar, C. J., dissenting.
2. Where a mortgagee petitions, under Code Proc. § 1035, for the redemption of mortgaged property by the executor of the mortgagor, the court may order a sale of the property to pay the mortgage, as allowed by section 1037, but not allow an attorney's fee, as for foreclosure in addition to the amount due on the mort-

gage. Appeal from superior court, Pierce county; respondent, Nett N. Parker, Judge.

Petition by Charles S. Hinchman to have mortgaged property redeemed by Mary J. Clement and the Fidelity Trust Company, as executors of Horatio C. Clement, deceased. The court made a decree directing a sale of the mortgaged property, the executors appeal. Modified.

For appellants, Little & Fogg, for appellants. Stevens, for respondent, and Sharpstein, for respondent.

THE COURT. Respondent was the holder of a mortgage upon certain real property belonging to the estate of Horatio C. Clement, deceased. He filed his petition to have the property redeemed by the executors of the estate, as provided in section 1035 of the Code of Procedure. A hearing upon such petition was regularly had, and under the provisions of that section, and sections 1036 and 1037, the court, having determined that it was not for the best interest of the estate that the executors should redeem with the proceeds of other property of the estate, made an order that the property be sold under the provisions of said section 1037. To reverse such order, this appeal has been prosecuted. Appellants alleged that the court erred (1) in finding the property not to have been specifically devised; (2) in ordering the sale of the property the same having been willed to a devisee; and (3) in allowing an attorney's fee, for suit brought to collect the note and mortgage.

It will be seen that, excepting as to the allowance of the attorney's fee, the only reason alleged by the appellants for the reversal of the order is that, the property having been

specifically devised by the deceased, the proceedings in reference thereto were not authorized by the statute under which they were instituted. As to whether or not it was so devised must depend upon the construction to be given to the language used in said section 1035. This section provides that "if any person die, having mortgaged any real or personal estate, and shall not have devised the same, or provided for the redemption thereof by will, the court, upon the application of any person," etc. The contention of the appellants is that the property upon which respondent's mortgage rested had been devised, within the meaning of this section, and that for that reason the making of the order was erroneous. The will of the deceased party made certain specific devises, not covering the property in question, and then bequeathed unto his wife, Mary J. Clement, for her sole use and benefit, the entire residue of his estate, to do with as she saw fit, and bequeath to whomsoever she should desire. The property in question was covered by the clause which made the wife the residuary legatee. Did this constitute a devise of it, within the meaning of the section under consideration? The only reason that we can see why the legislature should make any distinction between property devised and that not so devised is that in the first case the property would, upon being redeemed from the mortgage, pass to the devisee, while in the latter it would become a part of the body of the estate. In the first-named case the property could not be sold to pay debts if there was property not so devised available for that purpose, while in the latter it could be so sold. And the same rule would apply as between property specifically devised and that which would pass by the terms of the will to the residuary legatee. That specifically devised would have to be kept intact, even although the condition of the estate required all the other property to be sold for the payment of debts. If the property had been specifically devised, it would not become a part of the body of the estate upon payment of the mortgage, but would pass to the devisee discharged therefrom. If, however, it was covered only by a residuary clause, it would be liable to sale for the purposes of administration, regardless of the question as to the amount of other property.

From this it will be seen that, unless the property has been so specifically devised as to take it out of the body of the estate, so that the devisee thereof, and not the estate in general, will get the benefit of the payment of the mortgage, there is no reason why the provisions of said section should not have force. Under the provisions of the will, this property was not so devised. Upon the payment of the mortgage it would go to swell the body of the estate. It would be first subject to the payment of the debts, and then pass to the residuary legatee. It is no doubt

true that for certain purposes a residuary devise may be treated as special; but for the purposes of this proceeding there is no reason why the residuary legatee should be held to occupy a different relation to the property than would an heir. She is simply entitled to that portion of the estate which shall be left after all its obligations have been discharged, and that is what would pass to the heir if there had been no will. Enough appears from the provisions of these sections to show that it was not the intent of the legislature to make them applicable only to intestate estates; and, if they should be applied at all where there is a will, there is no reason why they should not apply in such cases as the one under consideration. Besides, the language of the section is that the statute shall apply unless the property has been devised; and, even without any aid to the construction of the language used, it would be reasonable to hold that the property was not devised, within the meaning thereof, unless it was specifically, by description, set apart. The legislature, by the use of such language, may well be held to have intended thereby to provide that the property, as such, shall have been specifically described, in order to exempt it from the force of the section; and when we interpret the language in the light of the other provisions of the statute, and of the evident object of the legislation, it seems clear that such should be its construction. There is no reason for the application of the statute to an estate, the body of which will pass to the heir, which does not exist when it is to pass to the residuary legatee. In our opinion, the lower court correctly construed the statute, and there was no error in its action in ordering the property sold to pay the mortgage. As a part of such order, the court provided that, in addition to the amount due upon the mortgage, there should be paid to the holder thereof an attorney's fee, as upon foreclosure. In so doing we think it committed error. One of the main objects of the statute was to avoid the expense incident to foreclosure. The proceeding was not a suit to collect the debt, within the contemplation of the contracting parties. The order awarding the sale of the property will be affirmed, except that it will be so modified as not to authorize the payment to the respondent of the attorney's fee. Neither party will recover costs upon the appeal.

STILES, ANDERS, and SCOTT, JJ., concur.

DUNBAR, C. J. I agree with the majority in the disposition of the order granting the attorney's fee, but not in its construction of section 1035. In fact, I do not think the language of the statute is susceptible of construction. The argument of the majority might be a proper one to present to the legislature; but, inasmuch as that body has

seen fit to limit the application of this remedy to property not devised, I am not inclined to amend the act by construction, which can only be done by interpolating the word "specifically" before the word "devised."

CORLISS v. DUNNING.

(Supreme Court of Washington. Feb. 28, 1894.)

EASEMENT—TO DIG GRAVEL—TRESPASS—PLEADING.

1. Plaintiff, being entitled, by deed from their common grantor, to take gravel from defendant's land, cannot be confined to such places as defendant may select, and be prevented from using a gravel pit established over 10 years, and the most convenient for the purpose, on the ground that he is causing some caving of the surface.

2. An allegation of acts done by plaintiff "for the period of one year prior to the commencement of said cause" will not admit evidence of trespasses since suit begun.

Appeal from superior court, Thurston county; Mason Irwin, Judge.

Suit by B. F. Corliss against Patrick Dunning to enjoin obstruction of an easement. Judgment for defendant. Plaintiff appeals. Reversed.

Milo A. Root, for appellant. W. I. Agnew, for respondent.

STILES, J. By reservation made in a deed from the common grantor of plaintiff and defendant, the plaintiff, who was the owner of certain lands, with a mill and millpond located thereon, was entitled to take gravel from the defendant's land for the purpose of repairing his milldam. For a number of years he had taken gravel from a place on defendant's land where there was an established gravel pit, and immediately preceding the commencement of this action was desirous of taking more gravel therefrom, to make necessary repairs on his dam. This pit was at a point on defendant's land nearest to the location of the dam. The defendant, apparently denying the plaintiff's right to take gravel at all from his land, had obstructed the pit with logs and stumps, and built a fence across the mouth of the pit adjoining the highway; and when plaintiff went, with his help, to take gravel, he was opposed by the defendant with force and threats of assault. Plaintiff then brought this action to restrain the defendant's interference.

The reservation made in the deed which conveyed this land to the defendant was general in terms, and fixed no place, and provided no means for fixing the place, from which gravel should be taken; and the court below, on the trial of the case, seeming to consider that the defendant had a right to fix the place from which gravel should be taken, found against the plaintiff, on the ground that there were other points on defendant's land from which gravel might be procured with less damage to the defendant. In fact, the effect of the finding was that

plaintiff must take gravel in such places as would least damage the defendant. The only showing that defendant would be damaged at all by the taking of gravel from the old pit was the proof that this pit was located at the edge of a pasture or hay field, and that as gravel was taken away the surface of the soil tended to cave, and thereby slightly reduce the area of the field. While it may be said that the taking of gravel, under such a reservation as defined the plaintiff's right, should be accompanied with due care of the defendant's rights, we think under the facts that, for 10 years or more, gravel had been taken from this pit, and that it was an established pit, and that this was the nearest and most convenient place from which plaintiff could take gravel, and no other specific place was pointed out by the defendant which was equally convenient, the plaintiff should have been permitted to continue to take gravel therefrom, as his reasonable necessities required, and that the judgment should have been in his favor, continuing the injunction.

The second point in the case is that the court erred in permitting the defendant to introduce evidence tending to show two acts of the plaintiff, causing damage to the defendant, after the commencement of the suit. The first of these acts consisted in throwing down the fence at the pit, and leaving it down so that cattle entered defendant's field, and destroyed his growing crop of grass. This act, if properly pleaded, might, perhaps, have been a legitimate counterclaim, even in the action which plaintiff brought, but the other act complained of could not constitute a counterclaim in this action. It was alleged in testimony that after the commencement of this action the plaintiff had gone to a place upon his own land, and made an excavation therein so near to the defendant's land that, when rains came, defendant's land caved, and fell into the excavation, causing damage to his growing wheat. This trespass, if it amounted to one, was an independent transaction, not connected with the reservation authorizing plaintiff to take gravel, and not connected with his taking of gravel from defendant's land, and was no proper subject of counterclaim in an action to restrain the defendant from interfering with plaintiff's exercise of his right under the reservation. But, however that might be, none of this alleged damage was pleaded as a counterclaim at all, but merely as an affirmative answer; and if the affirmative answer were to be construed as a counterclaim, by reason of the prayer for damages, still the allegation of damage was insufficient to admit proof of the damage testified to. The allegation of the answer was "that for the period of one year prior to the commencement of said cause the plaintiff has wrongfully, maliciously, and oppressively claimed the right to go upon that portion of said premises improved and in cultivation as herein stated, and, disregarding the rights of this defendant in the

premises, has wrongfully and oppressively torn down defendant's fences, trampled down and destroyed his growing crops, and otherwise greatly damaged and injured this defendant, upon the pretext of exercising a right to make use of the earth and gravel upon defendant's land, none of which acts were necessary or requisite to the full enjoyment of plaintiff's supposed right to make use of the earth and gravel upon said premises for the purpose of repairing or building his said milldam; that by reason of said unlawful acts of plaintiff, as set forth in the preceding paragraph hereof, defendant has been damaged," etc. As was stated before, the only testimony concerning damages was as to acts which occurred subsequent to the commencement of the action. The defendant justifies the admission of this testimony on the ground that, although the first part of the paragraph quoted refers to a period prior to the commencement of the action, the charge is in the present tense,—“has wrongfully and oppressively torn down defendant's fences,” etc.,—which referred to the time of the filing of the answer, and that, therefore, the testimony was competent. This testimony was objected to at the trial on the ground that no such matters had been pleaded in the answer, so that the defendant had full notice of what was demanded of him. He might have amended, on leave of the court; and, unless the plaintiff showed surprise, the proof could have been admitted. But, reading the allegations as they stand, we cannot construe them otherwise than as the appellant contends, viz. that the whole paragraph was intended to describe transactions occurring before the commencement of the action.

The admission of the proofs, and the judgment which followed in favor of the defendant, for damages, was error. The judgment will be reversed and the cause remanded, with directions to the court to enter judgment in favor of plaintiff for the relief demanded in the complaint.

DUNBAR, C. J., and HOYT, SCOTT, and ANDERS, JJ., concur.

REINHART v. GREGG.

(Supreme Court of Washington. Feb. 2, 1894.)

SALE OF PERSONALTY—DELIVERY.

An oral sale of buildings on land of the buyer is sufficiently consummated by entry of the seller as the buyer's tenant and the latter's assumption of the relation of landlord.

Appeal from superior court, Lewis county; W. W. Langhorne, Judge.

Action by M. Reinhart against George A. Gregg for money due on the sale of certain buildings. Judgment for defendant. Plaintiff appeals. Reversed.

Daniel C. Millett and Henry S. Elliott, for appellant. Reynolds & Stewart, for respondent.

HOYT, J. Appellant sought by this action to recover the amount alleged to be due upon a sale of personal property to the respondent. The property consisted of certain buildings owned by the appellant, and situated on the land of the respondent. The price agreed to be paid therefor was more than \$50, and there was no memorandum of writing evidencing the sale. It was, therefore, void under the statute of frauds, unless there was such a delivery by the appellant, and acceptance by the respondent, as to satisfy the requirements of such statute.

At the close of the testimony of the plaintiff, the court below granted a motion for nonsuit, on the ground that such testimony was not sufficient to warrant the submission to the jury of the question as to whether or not there had been such delivery and acceptance. To reverse this ruling, this appeal has been prosecuted. It sufficiently appeared from the proofs that plaintiff was the owner of the buildings, with the right to remove them from the land of respondent any time before the 1st day of January, 1892, and that before that date he had several conversations with the respondent in reference to a sale of the buildings to him. Appellant claims that what passed between the parties at the time of the last conversation was sufficient to constitute a sale. In reference to that question, the testimony of appellant was substantially as follows: "Q. What did you do in regard to those buildings on or about the first day of January, as between you and Mr. Gregg, the defendant in this case? A. I went in as his tenant. Q. State the facts as to your going in. A. Some time prior to the first day of January, I met Mr. Gregg in the rear of the building occupied by Mrs. Nofstger as a grocery store, and I then proposed to sell him the buildings for six hundred dollars. Q. What buildings? A. The buildings that J. D. Rice & Co. occupied as a store prior to the first day of January. He to take the buildings for six hundred dollars, and I to take possession of them until I closed out the stock that I had in there; he to take twenty dollars a month rental from the purchase price of the buildings, and whenever I got through with the use of the buildings he to pay me the difference between twenty dollars a month for the time occupied and six hundred dollars, the purchase price. And he answered, 'All right.' Q. What, if anything, did you do next? A. I went in the buildings. Q. Under that agreement? A. Under that agreement. Q. How long did you occupy the premises?" Counsel for defendant then admitted that they were occupied by the plaintiff from the first day of January to the 22d day of May, 1892. "Q. During that time what, if anything, did you do about the rent? A. I did nothing at all. Q. Did the defendant at any time demand the rent for these buildings? A. Nothing done whatever. There was never any demand made

on me for rent." Appellant further testified that, some time after he had gone into possession of the buildings as the tenant of Mr. Gregg, he had a conversation with him, in which he stated that he hoped to be able to close out the remainder of his goods at an early day; that, upon his making such statement, respondent said that he must give him some notice, so that he could raise the money to pay the balance due for the buildings.

Did this testimony so far establish the delivery of the property by appellant, and an acceptance thereof by the respondent, as to authorize the submission of that question to the jury? That such question is ordinarily one of fact to be decided by the jury, and not one of law to be passed upon by the court, is well established by the authorities. See *Benj. Sales*, §§ 144, 145; *Smith v. Stoller*, 28 Wis. 671; *Mason v. H. Whitbeck Co.*, 35 Wis. 164. Such being the rule, the court committed error in taking this question from the jury, if any reasonable construction of the testimony on the part of the plaintiff would establish the fact that there had been a delivery and acceptance. If the delivery and acceptance was the best that could reasonably be expected under all the circumstances, it would take the case out of the statute of frauds. As to all bulky articles, not capable of actual, manual delivery, there may be a constructive delivery which will be perfectly good. Between the parties to the transaction there may be a legal delivery and acceptance without any actual change of possession. One may sell personal property, and remain in possession thereof as the bailee of the purchaser, and the sale be entirely valid. See *Benj. Sales*, § 182; *Janvrin v. Maxwell*, 23 Wis. 51; *Snider v. Thrall*, 56 Wis. 674, 14 N. W. 814; *Smith v. Bryan*, 5 Md. 141. That the possession of a tenant of a building is the possession of the landlord is too well established to require the citation of authority. It will follow that, if there was anything in the testimony of appellant that would warrant the jury in finding that on the 1st day of January, 1892, he went into possession of the buildings as the tenant of the respondent, the motion for nonsuit should have been denied. If he assumed the relation of tenant, his possession became that of the respondent. If respondent assumed the relation of landlord, he accepted the possession of the buildings.

In our opinion, there was sufficient testimony to warrant the jury in finding these facts, and that the question as to whether or not there had been a delivery and acceptance should have been left to it. Judgment must be reversed, and the cause remanded, with instructions to overrule the motion for nonsuit, and proceed with the cause.

DUNBAR, C. J., and STILES, SCOTT, and ANDERS, JJ., concur.

COLMAN et al. v. COLUMBIA & P. S. R. CO.
et al.

(Supreme Court of Washington. Feb. 7, 1894.)

INJUNCTION—EXTENSION PENDING APPEAL—
EMERGENCY ORDER.

An emergency restraining order, which is granted without notice, under Code Proc. § 270, "until notice can be given and hearing had," is not such "a temporary injunction or restraining order" as can be kept in force, under section 1409, pending appeal by the party at whose instance it was granted, on his giving bond. *State v. Lichtenberg*, 30 Pac. 716, 4 Wash. 407, followed.

Appeal from superior court, King county; R. Osborn, Judge.

Action by James M. and Agnes H. Colman against the Columbia & Puget Sound Railroad Company and others. Judgment for defendants. Plaintiffs appeal.

On motion by respondents to strike from the files an order of court. Granted.

Greene & Turner, for appellants. Andrew F. Burleigh, for respondents.

DUNBAR, C. J. This is a motion by respondents to strike from the files a certain order of the superior court of King county, made on the 17th day of January, 1894, on motion of appellants, fixing the amount of a bond to be given by appellants to keep in force, pending an appeal to this court, a certain order claimed by appellants to be a temporary injunction, made on the 15th day of October, 1889, and to strike from the files a certain bond filed in this action in pursuance of such order on the 17th day of January, 1894. The order restraining respondents was made in October, 1889. The case was not tried until December, 1893, when the court decided the issues in favor of the defendants, respondents herein, and judgment was rendered in accordance therewith. From this judgment the plaintiffs appealed, and the court made the order complained of in this motion; so that the only question is, will the restraining order remain in force during the appeal?

The contention of the respondents is that the restraining order, being without notice to defendants, was in its nature and effect an emergency restraining order; that the plaintiffs and appellants never applied for or obtained a temporary injunction in this action, nor served the defendants and respondents with notice of their intention to apply for one; and that no temporary injunction was ever ordered or allowed in this action. The affidavit on which the restraining order was based alleges that "if said defendants, or any of them, are informed, by service of summons or otherwise, that the plaintiff was about to apply for an injunction, that they would go upon said premises, and take possession thereof wrongfully and without right, and to the great damage of the plaintiff," etc.; and the order was made without notice to the defendants. This question was

before this court in *State v. Lichtenberg*, reported in 4 Wash. 407, 30 Pac. 716; and there we held that "where, on the ground of emergency, a restraining order has been granted without notice to the adverse party, and an order made requiring the adverse party to show cause on a day certain why a temporary injunction should not be granted, but, before hearing upon the application for the temporary injunction, the court dismisses the cause, such restraining order cannot be kept in force pending appeal from the judgment of dismissal." The questions involved here, it seems to us, fall squarely under that decision. In that case the statutes were construed at some length, and with considerable care, and the conclusion reached that the court had no authority, in the absence of notice, to do more than to grant an order, which would remain in force only long enough to enable the required notice to be given. The language of the opinion was: "And should the court, without notice, grant an order for a longer time, its action in so doing would be irregular. So soon as notice can be given, and an opportunity had for the party to present his application for an injunction, aided by such notice, the restraining order, granted without such notice, has served its purpose, and should, if necessary, be set aside by the court. It may well be held, however, that no action of the court in that regard is required, as such order would expire by its own force as soon as the parties were before the court, upon notice of the application for an injunction. The only purpose of such restraining order is to keep things in statu quo until the matter can be brought regularly before the court; and, whether such order terminates by its own force or is terminated by order of the court, the clear intent of the legislature appears in said section to protect the rights of a party from other than a temporary interference, without first giving him an opportunity to be heard. The court gets no jurisdiction in the matter for the purpose of interfering with the rights of either party until the giving of notice, as required by statute." We are satisfied with the decision of the court in that case, and it seems to us that it is decisive of the case at bar.

It is contended by the appellants that inasmuch as the respondents have for so long a time respected the restraining order, and have not moved against it, they have treated it as a temporary injunction, and should now be estopped from objecting to its power. But we do not think that any additional force could be given to it by any such negative compliance by the respondents, and that they should not now be refused relief because they have not sooner asked for it, or because they have not taken the responsibility of disregarding it. The appellants invoke the maxim, "Where there is a right, there is a remedy;" but it must be borne in mind that, at the common law, the appel-

lants were not entitled to a stay at all, and all the remedy that they can now claim is such remedy as is especially conferred by statute; and as, under our construction of the statute, the right to continue this restraint has not been given, they have nothing to complain of. The motion will therefore be granted, and the order and bond complained of will be stricken from the files.

SCOTT, HOYT, STILES, and ANDERS, JJ., concur.

LIEBENTHAL v. PRICE, Sheriff, et al.
(Supreme Court of Washington. Feb. 7, 1894.)

FRAUDULENT CONVEYANCES—HUSBAND TO WIFE—EVIDENCE—REVIEW ON APPEAL.

1. In an action for a wrongful levy under an execution against plaintiff's husband on property for which plaintiff held a bill of sale from him, where plaintiff's testimony that the conveyance was in payment of money loaned her husband was corroborated, and was not contradicted, a verdict for plaintiff should not be disturbed, though there were some circumstances tending to show that the conveyance was made by him with fraudulent intent.

2. Where no objection was made that a proper foundation had not been laid for the introduction of secondary evidence, an objection to the introduction of a paper on the ground that it was incompetent and immaterial, being a copy, and therefore secondary, cannot be considered.

Appeal from superior court, Pierce county; F. Campbell, Judge.

Action by Dora Liebenthal against James H. Price, sheriff of Pierce county, and the Rosenfeld-Smith Company, for damages for an alleged unlawful levy on plaintiff's property. From a judgment for plaintiff, defendants appeal. Affirmed.

Stevens, Seymour & Sharpstein, for appellants. Crowley & Sullivan, for respondent.

ANDERS, J. Some time prior to the month of April, 1891, Max Liebenthal, the husband of the respondent, and one Fournier, were engaged in the cigar and tobacco business in the city of Tacoma, under the firm name of Liebenthal & Fournier. This firm was dissolved by mutual consent on or about the date aforesaid, and Max Liebenthal, the husband of the respondent, took his partner's interest in the assets of said firm, and carried on the business until June 4, 1891. On that day he made a bill of sale of the contents of the store to the respondent in consideration of \$2,000, which he claimed to owe her. After this bill of sale was made and recorded, the Rosenfeld-Smith Company, a corporation, brought an action against Liebenthal & Fournier to recover a balance alleged to be due for goods sold and delivered; and in that action a writ of attachment was issued, and levied upon the contents of the cigar store by the appellant, James H. Price, then sheriff of Pierce county. A judgment was thereafter obtained in favor of the plaintiff, and

execution issued; and the property so attached was sold under said writ of execution at public auction, and was bid in by the Rosenfeld-Smith Company, and the proceeds applied in satisfaction of their judgment. Soon thereafter the respondent instituted this action for damages alleged to have been sustained by the wrongful levy and sale of the said property. The claim of the respondent was contested by appellants on the ground that the bill of sale was fraudulent and void, and designed as a shield to prevent the property of Liebenthal from being appropriated to the payment of his debts. On the trial the jury rendered a verdict in favor of the respondent, upon which judgment was subsequently entered.

It is contended here by appellants that the judgment must be reversed for the reason that the evidence is not of that clear and satisfactory character which the law requires. In order to establish the good faith of a transaction between husband and wife. In such cases the burden of proof is imposed by our statute upon the party asserting the good faith of such transaction. See 1 Hill's Code, § 1455. And it is generally held, when transfers of property from husband to wife are questioned on the ground of bad faith, that the payment of a valuable consideration must be shown by proof of the most satisfactory character. *Bump, Fraud. Conv. p. 306; Horton v. Dewey, 53 Wis. 410, 10 N. W. 590; Fisher v. Shelver, 53 Wis. 498, 10 N. W. 681.* It is shown by the testimony of the respondent that, some years prior to the making of the bill of sale, she loaned her husband \$3,000, which she had procured from the representatives of her father's estate, and that the bill of sale in question was given in part payment of this loan. In this she was corroborated by her husband, and her brother also testified that she received said sum from the estate of her father. No positive testimony was offered to contradict this evidence, but it was attempted to impeach the good faith of the parties to the transaction by showing that Max Liebenthal, at the time the bill of sale was given, was largely indebted to divers parties, and that, on or about the date of the bill of sale, he sold and conveyed other property under circumstances showing an intention to prevent his creditors from reaching it, and that the respondent's testimony concerning this sale, on a former occasion, was, in several particulars, at variance with her testimony upon the trial.

The respondent, as further proof that she actually received \$3,000 from her father's estate, offered in evidence a copy of a receipt which she claimed she had given to the representative of the estate for the money received by her. It is urged by counsel for appellants that the court erred in permitting this copy to be given in evidence over their objection. A reference to the record discloses the fact that this paper was objected to on the ground that it was incompetent and im-

material,—being only a copy, and therefore secondary, and not the best evidence,—and the objection was urged upon that ground in this court. If the point had been made in the court below that the original receipt, if produced and offered in evidence, would have been incompetent, and not merely that a copy thereof was inadmissible, then its reception would undoubtedly have constituted error. No objection was made that a proper foundation had not been laid for the introduction of secondary evidence, and no error is, or could be, assigned on that ground. It therefore follows that the copy, under the circumstances, was properly permitted to go to the jury.

While there are some circumstances in evidence having a tendency to show that the bill of sale in question was executed by Liebenthal to the respondent for the purpose, as claimed by appellants, of hindering, delaying, and defrauding creditors, yet, in view of the positive testimony in the record that the transfer was made in payment of a bona fide indebtedness, we are unable to say that the evidence, as a whole, was not sufficiently clear and explicit to justify the verdict of the jury. We are not satisfied from the evidence that the respondent, in receiving the bill of sale of the goods in controversy, intended to defraud any of the creditors of her husband; and, in the absence of such an intention, she should not be deprived of the property so purchased.

Some objections are made in the brief of counsel for appellants to the charge of the court to the jury, but, as the instructions given do not appear in the record, we must presume that the law was properly given by the court. In fact, all objections but those we have considered were waived on the argument by the learned counsel for the appellants. The judgment is affirmed.

DUNBAR, C. J., and HOYT, SCOTT, and STILES, JJ., concur.

GRAVES v. CITY OF SEATTLE et al.

(Supreme Court of Washington. Feb. 12, 1894.)
MUNICIPAL ELECTION—NECESSITY OF REGISTRATION.

Registration of voters at a municipal election held under Act March 3, 1893, "An act to provide means for the validation of certain evidence of indebtedness on the part of cities," is not necessary.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by Edward O. Graves against the city of Seattle and others to restrain said city from issuing certain bonds. Judgment for defendants. Plaintiff appeals. Affirmed.

Bausman, Kelleher & Emory, for appellant. Geo. Donworth and James B. Howe, for respondents.

HOYT, J. By this proceeding, appellant sought to prevent the issuing by the city of

Seattle of certain bonds which had been authorized by an election in said city held under the provisions of the act of March 3, 1893, on the ground that the requirements of the statute had been so far departed from, in the conduct of such election, as to render it of no force. It is conceded that all of the forms of law were complied with, in the holding of such election, except that there was no registration of voters, and that the provisions of the law relating to registration and the furnishing of poll books, etc., had not been complied with. That there were no such formalities is conceded by the respondents. They contend, however, that without them the election was valid. Hence, the question presented for determination is as to whether or not registration was a part of the qualifications of a voter at such election. That the general registration law does not apply to elections of this kind was held by this court in the case of *Seymour v. City of Tacoma*, 6 Wash. 138, 32 Pac. 1077; and that decision is decisive of this case, unless, by force of the statute under which the election was held, registration was required at such election. We have carefully examined the statute, and are unable to find that anything has been enacted therein requiring registration. There are expressions contained in the act which clearly show that at the time of its enactment the legislature was of the opinion that the general registration law applied to elections of this kind, but such opinion is in no manner enacted into a law making such general registration law apply to such elections. It is a familiar rule of statutory construction that the opinion of a legislative body as to the construction of a law can have no force, unless it is given force by being enacted into a law. That the legislature has, by way of recitals or otherwise, shown that it thought a certain law already upon the statute books would receive a certain interpretation, cannot influence the courts in construing such statute. It is the duty of the legislature to enact laws, not to interpret them; and while it is competent for it, by enactment, to require a law to be construed in a certain way, it is because of the fact of such enactment that it is binding upon the courts, and not by reason of the opinion of the legislature that as it stood, without such enactment, it was capable of such construction.

For these reasons, we must hold that there is nothing in the laws enacted subsequently to the decision above referred to which changes the rule therein announced; and as, in our opinion, this question comes within the reason, if not the express holding, of our former decision, the ruling of the superior court that such election was valid without registration, and its judgment rendered thereon, must be affirmed.

DUNBAR, C. J., and STILES, ANDERS, and SCOTT, JJ., concur.

WALLACE v. TOWN et al.

(Supreme Court of Washington. Feb. 12, 1894.)

ATTORNEY AND CLIENT—CONVEYANCE BETWEEN—INTENTION.

1. On the issue whether a deed from a client to his attorney was intended as absolute, in payment for his services, or as a mortgage to secure him a reasonable fee, no fraud or mistake being alleged, the grantee has not, by reason of his relation to the grantor, any extraordinary burden to prove the deed absolute.

2. Subsequent negligence of the attorney in the service for which he was employed is immaterial on the question of intention in the making and acceptance of the deed.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Suit by David Wallace against Ira A. Town and W. W. Likens to compel reconveyance of certain land. Judgment for defendants. Plaintiff appeals. Affirmed.

M. L. Clifford, for appellant. Ira A. Town and W. W. Likens, pro se.

DUNBAR, C. J. Respondents, a law firm, were employed by the appellant to transact certain legal business involving a five-acre tract of land owned by appellant near the city of Tacoma. Appellant executed to respondents a warranty deed for one-eighth of this tract of land. The claim of appellant is that this deed was intended as a mortgage to secure respondents' attorney's fees, while the respondents claim that it was an actual payment of their attorney's fees agreed upon; so that the question to be determined is, was the deed mentioned intended to be an absolute deed, as expressed on its face, or was it intended to be a mortgage for the security of a reasonable attorney's fee? This is a case of pure conflict of testimony. This court has often said, where the jury—or, when tried by the court, the court—had weighed the testimony, this court would not disturb such findings, when there was sufficient testimony to sustain the same. It is urged by the appellant that the testimony in this case, where the relation of attorney and client is shown to exist, must be weighed by a different scale from that employed in weighing testimony generally. While it is true that, where this relationship exists, courts will closely inspect the testimony, and the whole transaction between the attorney and client, yet it seems to us that, under the circumstances of this particular case, this deed cannot be construed with reference to any particular relationship, but that it becomes a case involving simply the credibility of witnesses. The appellant swears that the deed was intended as a mortgage, and that no specific amount of attorney's fees was agreed upon. This testimony is flatly contradicted by respondent Likens, who swears positively that there was no talk or understanding about any security, but that, after considerable discussion as to what their attorney's fees should be, it was positively

understood and agreed that they were to have a deed and absolute title to one-eighth of the land for their fees. In answer to the question if it was not understood that they were to hold the land until the attorney's fees were paid, the witness testified: "No, sir; I understood, and he understood, that we were to have absolute title to one-eighth of that land for our fees. There was no understanding, or anything said, about any other arrangement. We were to have the absolute, unqualified ownership. Q. Did you tell him the effect of making that deed to you? A. He knew it was a deed, and that we were going to record it. Q. Did you tell him as to the effect of that deed,—that it meant an absolute deed of one-eighth of all of that property,—at the time the deed was executed? A. The agreement was that we were to have a warranty deed for an undivided one-eighth of the property, and that warranty deed was executed according to that agreement." It seems to us that this becomes simply a question of veracity, and that one or the other of these witnesses was not telling the truth, and that, if the court believed the testimony of respondent, it could not believe the testimony of appellant, and that no relation of attorney and client, or any other relation, could affect the credibility of the witnesses, so far as the weight of testimony was concerned. Nothing in this case showed that, by reason of the relationship of attorney and client, any advantage was taken of the want of technical understanding on the part of the appellant. It was a plain proposition, which any man of ordinary understanding, outside of the legal profession, could comprehend. The record shows that the appellant was a man having had some experience with deeds and mortgages, and he evidently knew the difference between a deed and a mortgage. If his testimony is true, the fact is that the instrument was intended as a mortgage to secure the attorney's fees. If the testimony of the respondent is true, the fact is that the instrument was intended as an absolute deed or payment of the attorney's fees. And, as we have before said, it is simply a question of which witness was telling the truth. The court who heard the testimony believed the testimony of respondent, and we think that, from all the circumstances of the case, he was justified in so believing.

We recognize the force of the authorities cited by the learned attorney for the appellant to the effect that, when the relation of attorney and client is shown, it devolves upon the attorney to show the entire fairness of the transaction, and that the reasonable value of the services was equal to the value of the land deeded. But these cases are not in point here. This question of the unequal value of the services and the land was not raised by the pleadings. It is nowhere claimed in the complaint that the services were not commensurate with the value of the

land, but appellant alleges that he has been put to great expense and cost by reason of the misconduct of the defendants while employed by him as his attorneys, and that the amount of such expense and costs is far greater than the reasonable value of all services rendered by said defendants as his attorneys. While it does not appear to us that this allegation is borne out in any manner by the testimony, yet any act of negligence on the part of the attorneys subsequent to the making of the deed could not be taken into consideration in determining the intention of the parties at the time of the execution of the deed. We think, under all the circumstances of the case, that the finding of the court below was justified by the testimony, and the judgment will therefore be affirmed.

ANDERS, HOYT, STILES, and SCOTT, JJ., concur.

EUREKA SANDSTONE CO. v. PIERCE COUNTY et al.

(Supreme Court of Washington. Feb. 12, 1894.)

COUNTIES—LIABILITY TO GARNISHMENT.

Where the statute, in general terms, makes the county a body corporate, which may sue and be sued "in the manner prescribed by law," a further provision that it can only be sued on contract after rejection of the claim by the board of commissioners will protect it from garnishment on a contract claim not so rejected. Dunbar, C. J., dissenting.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by the Eureka Sandstone Company against the county of Pierce, garnishee, and John T. Long and others. Garnishment dismissed. Plaintiff appeals. Affirmed.

Arthur N. Jordan, for appellant. W. H. Snell, Pros. Atty., and Chas. Bedford, for respondent Pierce county. Crowley & Sullivan, for respondent J. T. Long.

HOYT, J. Plaintiff brought this action against J. T. Long and others to recover for goods sold and delivered, and instituted proceedings, by way of garnishment, against the county of Pierce. The county appeared, and asked to be dismissed without answer, on the ground that it could not be held liable as a garnishee defendant. Its application was granted, and, from the order dismissing it without answer, this appeal is prosecuted.

The briefs of the respective parties have gone extensively into the question of the liability of a county in this state as garnishee in a suit against the principal defendant. We do not find it necessary to discuss many of the questions presented by the briefs. There is much force in the position of the respondent that public policy will not allow the business of a county to be interrupted by proceedings of this kind; but we do not need to say anything in regard to that question. Under the statute law of this state, a county

can only be sued upon a contract liability after the rejection, in whole or in part, by the board of county commissioners, of a claim against the county growing out of such liability; and the general provision, in the statutes relied upon by appellant, that counties are bodies corporate and may sue or be sued, must be interpreted in the light of other provisions of the statute, pointing out the manner in which it may be sued. This would probably be so if such section contained no express reference to other provisions of the statute, and, when the right to sue is expressly limited to "the manner prescribed by law," it is made clear that such section must be construed in the light of other statutory provisions. It must follow that the principal defendant could not, under the circumstances disclosed by this record, maintain an action against the county. If he cannot do so, the plaintiff cannot, as the general rule is that garnishment will only lie when an action could be maintained by the principal defendant. We have been unable to discover anything in the statute relating to garnishment that in any way tends to change the rule as to suits being instituted against a county; and, as the same principle of public policy would require that counties should be excused from responding in garnishee proceedings as in suits by principal defendants, there is nothing to show why the general rule above referred to should not have force. What we have said has been upon the supposition that the statute as to garnishment was broad enough to make it applicable to counties, but as to whether or not this is so is a question of grave doubt; but, the other reasons which we have suggested being sufficient to sustain the action of the court below, it is not necessary for us to say anything in regard thereto. The order appealed from must be affirmed.

STILES and SCOTT, JJ., concur. DUNBAR, C. J., dissents.

REICHENBACH v. SAGE et al.

(Supreme Court of Washington. Feb. 13, 1894.)

APPEAL—RECORD OF JUDGMENT.

1. There is no judgment of record from which an appeal can be taken when the judgment prepared by the court was lost, never found, and never entered.

2. A lost and unentered judgment will not be reversed when the only record thereof is an affidavit by appellee's attorney attempting to describe it.

Appeal from superior court, Pierce county; Frank Allyn, Judge.

Action by Charles Reichenbach against Frank Sage, B. L. Stratton, John F. Hart, James Hambly, and Hugh McMillan on contract. From a judgment for plaintiff, defendants appeal. Appeal dismissed.

Town & Dillon, for appellants. Taylor & McKay, for respondent.

DUNBAR, C. J. Respondent moves to dismiss the appeal herein, for the reasons: (1) that the appeal was not taken or perfected within the time required by law; (2) the notice of appeal does not refer to any judgment or describe any judgment in this case; (3) that the notice of appeal was not served or given as required by law.

It appears from the record in this case that the judgment which was prepared by the court was lost, was never found, and never was entered; so that there is no judgment of record from which an appeal can be taken. There is set forth in the record an affidavit of E. W. Taylor, who was attorney for respondent below, which attempts to describe the judgment; but this does not constitute such record of a judgment as would warrant the reversion of the original judgment by this court. The court not being, then, properly informed what the judgment is that is appealed from, it is impossible for us to review it. The appeal is therefore dismissed.

ANDERS, STILES, and SCOTT, JJ., concur. **HOYT, J.,** concurs in the result.

SOULES v. McLEAN et al.

(Supreme Court of Washington. Feb. 20, 1894.)

COSTS ON APPEAL — UNNECESSARY TRANSCRIPT — APPROVING APPEAL AND STAY BONDS — WHEN ALLOWED.

1. Costs for unnecessary part of a transcript will not be disallowed on motion of the defeated party in the supreme court, where such unnecessary part consists of matters made part of the transcript by Acts 1891, p. 345, § 15.

2. The clerk of the trial court is not entitled to any fees for approving appeal and stay bonds, since there is no statute authorizing him to approve them.

Motion to retax costs. Motion sustained in part, and denied in part.

For former opinion, see 35 Pac. 364.

SCOTT, J. A motion to retax costs, and to strike therefrom certain items taxed as fees of the clerk of the superior court, which relate to filing and making copies of the notice of appeal, the appeal bond, the bond for stay of proceedings, and for approving said bonds, and to disallow \$40 of the \$91 taxed for making the transcript, on the ground that said sum of \$40 was incurred for transcribing the original complaint and answer, which it is claimed was unnecessary, as there had been amended pleadings filed, has been made, and submitted to the court by stipulation, without argument, and without any proof as to how much the cost of transcribing said original pleadings by said clerk amounted to.

It seems that this appeal was taken under the appeal law of 1891, which, by section 15, p. 345, made all of such matters a part of the transcript. Much of it was unnecessary to a hearing of said cause in this court, and the expense of transcribing the same might

have been avoided by the parties by taking action at the proper time, but, it having been the duty of the clerk to transcribe it otherwise, such action by the respondents is now too late. The item of \$2 for approving said bonds will be disallowed, as we are unaware of any law authorizing the clerk to approve the same. Otherwise the motion will be denied.

DUNBAR, C. J., and ANDERS, HOYT, and STILES, JJ., concur.

FORD v. DURIE, City Treasurer.

(Supreme Court of Washington. Feb. 23, 1894.)

TAX DEED—WHAT STATUTE GOVERNS.

The law in force at the time land is sold for taxes, and not the statute in force at the time a tax deed is made, governs the execution of such deed by the treasurer.

On rehearing. Denied.

For prior report, see 35 Pac. 595.

HOYT, J. Upon the hearing of this cause the argument was confined to a single question, and the opinion heretofore filed had reference only to that question. The petition for rehearing calls to our attention the fact that such opinion, technically construed, would warrant the conclusion that the statute of 1893 would constitute the law under which the deed in question should be executed by the treasurer. We therefore deem it necessary now to say that we did not intend so to hold. The sale was made when the law of 1891 was in force, and the right to the deed then fixed, except that the time in which the property could be redeemed had not fully expired. Under these circumstances the power of the legislature to provide that the right which, under the law, would become fully vested by the lapse of time, should be taken away, unless something which constituted an additional burden upon the purchaser should be performed by him, may well be questioned. It is not, however, necessary that we should decide as to that, as, in our opinion, the law of 1893, for other reasons, did not apply to the sale in question. Under such statute, the right of the purchaser would be entirely destroyed, unless, within 41 days after the passage of the act, he took the additional step required. This was not a reasonable time. Hence, under well-settled principles of statutory construction, it must be held that such statute was not applicable to the sale in question.

STILES, ANDERS, and SCOTT, JJ., concur.

WEBSTER v. SEATTLE TRUST CO. et al.¹

(Supreme Court of Washington. Feb. 20, 1894.)

PROBATE COURTS—POWER TO CONSTRUE WILLS.

1. The Probate Code of Washington, by necessary implication, authorizes probate courts

¹ Rehearing pending.

to construe wills, so far as may be necessary to effect the distribution or partition of estates which they are required to make.

2. Such Code, in so far as it confers such jurisdiction, is not in conflict with the organic act (10 Stat. 172) creating the probate courts, and providing that their jurisdiction shall be "as limited by law."

On rehearing. Denied.

For prior report, see 33 Pac. 970.

STILES, J. Owing to the peculiar disposition made of this case at the May, 1893, session of the court, a petition for rehearing was granted, as matter of course; and argument has been heard upon the question suggested by the former decision, viz. the finality of the judgment of the probate court of Jefferson county, decreeing distribution of the estate of Henry A. Webster. The respondent submits that this decree was not a binding adjudication, because the court which rendered it did not have jurisdiction of the subject-matter of it, and was also without jurisdiction to render a decree that the will was void, or that the decedent died intestate. In order that there may be no mistake, we quote the three propositions made in the brief, in full, viz.: "(1) Assuming for the moment that the provisions of the probate practice act of the territory, in force during the administration of the Webster estate, were within the legislative powers of the territorial legislature, and that the legislature intended thereby to vest in said court jurisdiction to construe wills of decedents, and render decrees of distribution involving the construction of wills, which decrees should have the binding force of prior adjudications upon questions of disputed titles subsequently raised, nevertheless said probate court could have no jurisdiction to decide that a person, who left a will did in fact die intestate, and could have still less jurisdiction to distribute, under the laws of descent, the estate of one who himself, by his will, had otherwise distributed his own estate, as was attempted in this case. Or, to state the proposition in other words, the court being one of special and limited jurisdiction, deriving all its powers from statutes, and being required to proceed within certain limits marked out by the statute, and it appearing on the face of its proceedings that in distributing the estate of one who died testate, as though he had died intestate, and otherwise, or to other persons than directed by the will, it has exceeded the authority given it by the statute, its decree is absolutely void, and should be treated as a nullity. (2) Assuming that the provisions of the said probate practice act did not in any respect conflict with the organic act, nevertheless the legislature did not intend by said act to vest in said court jurisdiction to construe a will, or to render a decree distributing real property devised by will, where the decree involved the determination of doubtful provisions of a will, or the construction

of a will at all; certainly, not that a decree so rendered should be of force as a binding adjudication of property rights between persons in esse. (3) If the said legislature so intended, the provisions of said act, so far as calculated to effectuate such intention, were and are in conflict with the organic act, and therefore void." Reduced to simple terms, these propositions are: (1) The probate court had no power to construe a will; (2) the decree entered involved the construction of a will; (3) therefore, the decree was void. Certainly, no more important matter has come up for our determination, since we cannot but be aware that the probate courts of the territory, for well-nigh 40 years, proceeded as they were apparently directed by the statute, and made many decrees such as that here in controversy.

The organic act (10 Stat. 172) created the territorial probate courts, and provided that their jurisdiction should be "as limited by law." This phrase, "as limited by law," was construed in *Ferris v. Higley*, 20 Wall. 375, to mean that the territorial probate courts should have such jurisdiction as the history of English and American jurisprudence shows to have been conferred upon courts organized for the establishment of wills and the administration of the estates of decedents, with such functions as have been added by statute concerning the guardianship of infants, allotment of dower, and others related more or less to the same general subject. The legislature of Utah had attempted to make the probate courts of that territory courts of general jurisdiction, co-ordinate in their powers with the district courts; and counsel argued that, as the authority conferred upon the legislature extended to all rightful subjects of legislation, the definition of the jurisdiction of the probate courts was within that authority, and that the law meant by the phrase "as limited by law" was the acts of the territorial legislature, in the absence of congressional enactment. These positions were denied, and the law was held void, but in deciding the case the court said: "We are not prepared to say that, in deciding what law is meant in this phrase, 'as limited by law,' we are wholly to exclude laws made by the legislature of the territory. There may be cases where that legislature, conferring new rights or new remedies, or establishing anomalous rules of proceedings within their legislative power, may direct in what court they shall be held. Nor are we called upon to deny that the functions and powers of the probate courts may be more specifically defined by territorial statutes, within the limit of the general idea of the nature of probate courts, or that certain duties not strictly of that character may be imposed on them by that legislation." *Locknane v. Martin*, 1 Kan. 494; *Moore v. Koubly*, 1 Idaho, 55; *McCray v. Baker*, 3 Wyo. 192, 18 Pac. 749,—are to the same effect, each holding that the terri-

territorial legislature was incompetent to confer upon the probate courts general jurisdiction in law and equity. *Moore v. Koubly* construed a statute of Washington Territory, and the decision was cited with approval in *Ferris v. Higley*. *Chadwick v. Chadwick*, 6 Mont. 566, 13 Pac. 385, held that a territorial probate court could not entertain a proceeding, even upon stipulation, where the gist of the relief asked was the construction of a will, because the construction of wills is a branch of equity jurisprudence,—a proposition not to be in the least questioned. No statute is referred to in the Montana case as support for the jurisdiction there exercised by the probate court, nor do counsel in this case contend that there has been any attempt to confer upon the probate courts of Washington Territory anything in the way of general chancery powers, including this matter of construing wills. But it does appear that when this will was probated our statute expressly authorized the court to do what it did in distributing portions of the estate to the minor children, and, unless the authority conferred and exercised contravened the law of congress, its action was lawful. Congress left the entire matter of declaring who might make wills, who inherit, and what should constitute a will, to the territorial legislature. Neither did it assume to interfere with the method of administering estates, or with their custody during administration, or with the means and manner of distribution. The legislature enacted a code of laws governing these subjects, and intrusted the administration of them to the probate courts, which it might lawfully do, unless, in some given particular, the jurisdiction thus conferred transgressed the limitation fixed by congress. In this Probate Code there is no attempt to confer general equity powers, but there is some delegation of equity power in connection with the subject-matter of the law. For instance, probate courts were authorized to partition real estate in aid of final distribution, (chapter 108, Code 1881;) and partition, in the absence of statutory provisions, is a distinct branch of equity, and yet it is quite commonly, in this country, within the jurisdiction of probate courts. 17 Am. & Eng. Enc. Law, p. 712; *Woerner, Adm'n*, § 567. Under provisions of the constitution and the statutes of Oregon, which were very materially different from ours, the supreme court of that state, in *Hanner v. Silver*, 2 Or. 337, held that upon the discharge of the administrator the real estate went directly to the heirs at law, without any order or decree therefor, and that, therefore, the probate court had no power to make partition. The difference remarked as existing between the law of Oregon and that of Washington consists in the provision of our Code, (1881.) § 1444, which is that the administrator or executor shall take possession of and hold the estate, both real and personal, "until the estate shall be

settled or delivered over, by order of the probate court, to the heirs or devisees," and in the elaborate rules governing partitions contained in chapter 108. Concerning the distribution, the provisions of two sections in this chapter are as precise as language could make them, viz.: "Sec. 1581. Upon the settlement of the account of the executor or administrator or at any subsequent time, upon the application of the executor or administrator, or any heir, devisee or legatee, the court [meaning the probate court] shall proceed to distribute the residue of the estate among the persons who are by law entitled. Sec. 1582. In the decree the court shall name the person and the portion or part to which each shall be entitled; and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same in possession." Subsequent sections provide for partition by the same court when the respective shares are not separated and distinguished, upon request. As affecting the personal estate, these sections of our statute declare nothing more than the common law of courts of probate, with few exceptions; for their sole, ultimate purpose is distribution, and, unless they are clothed with some authority to determine the persons by law entitled to shares in the estate, that purpose would be defeated.

Respondent insists that, in the case of a will, the probate court could do but two things, viz. establish the will, and distribute the estate to the persons designated in it as devisees, leaving the claims of third persons to be asserted by proper action in the courts of general jurisdiction. But the statute will not admit of that construction for the purposes of this case. Section 1325 directs the probate court, in cases where children are not provided for, to assign to them such proportion of the estate as they would have been entitled to had there been no will, and closes with these words: "And all the other heirs, devisees and legatees shall refund their proportional part." But the legislature was not content with this direction in general terms, and added section 1336, as follows: "When any devisees, legatees or heirs shall be required to refund any part of the estate received by them, for the purpose of making up the share, devise or legacy of any other devisee, legatee or heir, the probate court, upon the petition of the person entitled to contribution or distribution of such estate, may order the same to be made, and enforce such order." Now, although it is nowhere stated, in terms, that the probate court should have power to construe a will, these portions of the statute compel the conclusion that, in so far as construction may have been necessary to accomplish the ends provided for, the jurisdiction to construe was conferred. The petition for probate of the will, filed by the respondent, made it appear to the probate court, at the commencement of

the proceedings, that the survivors of the deceased were herself and two minor children. Proof of the will, in its entirety, followed; and in due time, after settlement of the executrix's final account, she petitioned for the distribution of the residue of the estate to the persons entitled. A hearing was had upon the petition, after notice, and the court made the usual findings of fact, and further found that respondent was the wife of the deceased, and that the two minors were his children; that the children were born after the execution of the will; and that, by reason of their not being mentioned in the will, their father died intestate. The conclusion of law found was: "That said Mary E. Webster, widow of deceased, in accordance with the law, is entitled to one-third of the separate real property, and the one-half of the community property, real and personal, * * * and that the said descendants [Hetty Amelia Webster and Betsy Bartlett Webster, minors] of deceased are entitled to the residue in equal portions." Decree at length accordingly. The course taken was in strict accordance with the statute, except that the conclusion that the deceased died intestate was not quite true, inasmuch as the intestacy was limited to the children, and the distribution was to the widow and children, as though there were no will, whereas the will remained in force as to all that portion of the estate not distributed to the children. But the effect was the same, so far as the proportions allotted to the wife and children were concerned.

Under this state of facts, the only question which can occur to disturb this decree of distribution is that as to whether, in conferring such a power upon the probate courts,—conceding it to be a power to construe a will, and therefore equitable in its nature,—the legislature overstepped the bounds implied in the organic act by the words, "as provided by law." The case of *Ferris v. Higley*, above cited, throws no positive light upon this question, as it is addressed solely to the matter of the general jurisdiction in law and equity sought to be conferred upon probate courts in Utah. But it is implied, we think, that the federal supreme court would probably not have held a statute of a territory void which contained the provisions of our statute, for it said: "Nor are we called on to deny that the functions and powers of the probate courts may be more specifically defined by territorial statutes within the limit of the general idea of the nature of probate courts, or that certain duties not strictly of that character may be imposed on them by legislation." Courts of probate, in this country, usually depend upon statutes for their jurisdiction and procedure, and a number of cases are cited to our attention where the power here in discussion has been denied, because not found in the statute law. In *Hanscom v. Marston*, (Me.) 19 Atl. 460, it was held that the probate courts of Maine

had no jurisdiction to adjudicate the distribution of a residuary estate. "The executor," it was said, "like other officers, must learn the law; and, like many other officers, he can obtain from the equity court an authoritative construction of the will." But it was also said that "such power is given to probate courts in some other states;" and a reference to *Woerner's Law of Administration* (chapter 61) shows how general this jurisdiction is. Section 567 treats of probate partitions of real estate in equally general terms. The "as limited by law" of congress must have contemplated such laws of distribution as were commonly in force, and laws similar to our own existed long before 1853. In *Shelby's Ex'rs v. Shelby*, 6 Dana, 60, in 1838, it was held that, in the case of children unprovided for, the circuit court, which was the court of probate, ought to have distributed their proper shares to such children, it appearing from the record that they were entitled under the statute. In *Levin v. Stevens*, 7 Mo. 90, in 1840, it was assumed, as matter of course, that the county court wherein was vested the probate jurisdiction would have been the "appropriate and peculiar tribunal for the settlement of controversies of this kind," (pretermitted children,) but the statute had directed otherwise. Numerous cases, of which *Cox v. Cox*, 101 Mo. 168, 13 S. W. 1055, is a fair example, have been cited to us, in which it has been held that, where the mere question of admitting a will to probate is concerned, the due execution of it is the only matter to be inquired into, and that the legality of the provisions contained in the instrument is in no wise at issue. But there is no dispute before us on that point, and none is likely to occur.

Counsel have urged upon us the view that since the probate court found that Webster died intestate, and distributed the residue of the estate in the same proportions as though there had been no will, therefore the title of the widow would have to be considered as derived from the order of distribution alone. But the order did not assume to declare the interest or estate which the widow would have in the property distributed to her, and, in not doing so, the court avoided any attempt at construction which would have been beyond its jurisdiction. The will undoubtedly governs her estate in such of the property as she derived through it, viz. that which belonged to the separate estate of her husband; but, as to the community property, she has no more than the law gave her, for her husband could dispose of only one-half of that by will, and that half has been given to the children. The will did not assume to dispose of anything but what the statute permitted the husband to devise.

We are therefore constrained to hold, as before, that the statutes of the territory required the probate court to do just what was done in this case, so far as it made distribution to the children; that its decree was

final and binding, unless appealed from, it not being contrary to the limitations of the organic act; that the respondent did not have the title which she had contracted to convey; and that the disposition of the case should be as before ordered.

DUNBAR, C. J., and ANDERS and SCOTT, JJ., concur. HOYT, J., not sitting.

WARD v. TUCKER.

(Supreme Court of Washington. Feb. 24, 1894.)

MARINE INSURANCE BROKER — ACTION FOR PREMIUMS — EXPENSE OF TELEGRAMS — WHEN MAY RECOVER — EVIDENCE — BURDEN OF PROOF.

1. Where it is the custom for marine insurance brokers to buy the insurance and deliver policies to the insured on their own account, a broker can recover of the insured the premiums on policies procured by him, though he has not paid such premiums to the insurer.

2. Where a marine insurance broker in the state of Washington procures for a customer insurance in a foreign state and country, recovery of the premiums cannot be defeated because the insurers are not authorized to do business in Washington.

3. In an action to recover premiums on insurance policies, the burden is on defendant to show that the policies were not what they purported to be.

4. An insurance broker may recover of the assured the expense of the telegrams relating to the insurance sent at the latter's request, without proof that they were received by the parties to whom they were sent.

5. Where premiums are payable in English money, a witness may testify as to the result of calculations made by him to find the equivalent in money of the United States.

On rehearing. Denied.

For prior report, see 35 Pac. 128.

STILES, J. It appears that the record showing service upon the respondent of the notice of the settlement of the statement of facts had been supplied before this case was heard, but as it was not bound with the rest of the transcript, and the case was submitted on briefs, it escaped observation. The order to strike is therefore revoked, and the case will be decided upon its merits.

The respondent brought suit, as broker, to recover \$583.14, as premium on certain marine insurance policies procured by him for the appellant, as lessee of the schooner Alice Blanchard, and for \$35 expended, at appellant's request, in telegraphing in connection with the procurement of the policies. A multitude of errors have been assigned in the brief, but they seem to be reducible to a few classes, and we shall treat them in that manner. So far as the facts established go, they seem to us to sustain the allegations of the complaint. The appellant, being lessee of the schooner, which was then at sea, applied to the respondent, who was a broker, to procure for him insurance to a given amount, at the best rates obtainable. By means of the telegraph he obtained policies in London and St. Paul, which were made

in the usual manner of making such instruments, payable "to whom it may concern." The total premium was \$2,500, and the short or surrender rate was specified. The policies were delivered by the respondent to the appellant, and were by him accepted; but within a short time, learning that the vessel had arrived safely in port, he desired that they be canceled, and requested the respondent to that effect. They were canceled, and it is the short rate and the cost of telegrams that are sued for.

The first point made is that the respondent did not show that he had actually paid the premium. The general rule as to agents, of course, is that one who merely acts for another in the making of a contract cannot himself sue for the money due his principal; but the rule is different with regard to brokers in cases of marine insurance, as was made to appear by the evidence in the case, which clearly showed that it was the custom for the broker to be his own principal. In effect, he buys the insurance from the insurer, and delivers the policies upon his own account. The existence of this custom obviates the necessity of passing upon many technical points made against the policies, and their sufficiency as insurance of the interest of the appellant in the vessel. Marine insurance policies, in this respect, differ very materially from policies covering either fire or life risks. *Hooper v. Robinson*, 98 U. S. 528; 14 Am. & Eng. Enc. Law, 324; Am. Ins. §§ 30, 69.

The next objection is that there could be no recovery for any premium due on these policies because the insurers were not authorized to do business in this state. But the contracts were made in England and in St. Paul, and therefore they are not covered by the local law governing insurance companies doing business within the state. The policies were canceled because it was a part of the contract that the rules as to short rates should apply, which left it optional with the insured to surrender, upon payment of the short rate, whenever he saw fit. He expressed his desire that there be a cancellation, and that was sufficient to terminate the insurance.

The errors alleged as to the admission of the policies were not well taken. The policies were received by the appellant, and he promised to pay for them; and the burden was upon him to show that they were not what they purported to be, viz. actual policies covering his interest.

The jury seems to have excluded from their verdict the item covering telegrams, and appellant is hardly in a position to urge any error in connection therewith. But the record shows no error. The telegrams were sent at the request of the appellant, and he promised to pay their cost, as well as the cost of the answers. It was wholly unnecessary for the respondent to follow the dispatches, and prove that they had been re-

in money of the United States, in any way; and we know no better way than which was adopted, viz. to allow a witness to testify as to the result of the calculations made by him. *Kermott v. Ayer*, 11 Mich. 181; *Comstock v. Smith*, 20 Mich.

on the charge of the court, although much used, is, we think, open to the single objection that it was far more full and specific than the facts of the case required. Finding no error, the decision will be affirmed.

DUNBAR, C. J., and SCOTT, HOYT, and ERS, JJ., concur.

THE ex rel. HUNT et al. v. SUPERIOR COURT OF CHEHALIS COUNTY et al.
Supreme Court of Washington. Feb. 7, 1894.)
RECEIVERS—ATTACHED PROPERTY—POSSESSION.

When creditors of a corporation have attached its property, and maintained their lien on the actual possession of the sheriff, a receiver appointed in a suit by a stockholder, to which attachment creditors were not parties, has no right to possession of the attached property, and the sheriff must keep and dispose of it under writ. *Dunbar, C. J., dissenting. State v. Superior Court*, (Wash.) 34 Pac. 430, following.

Prohibition on relation of Edward M. Hunt and Frederick Mottet, trading as Hunt & Mottet, to the superior court of Chehalis County and others. Writ made perpetual.

Writ made perpetual. M. J. Cochran & Turner, for relators. M. J. Cochran and J. B. Bridges, for respondents.

MR. J. Only one substantial question presented by the return of the respondents is the alternative writ of prohibition heretofore issued in this cause, and that is as to the relative rights of the relators as attaching creditors of a certain corporation, and a receiver appointed for said corporation. The relators obtained a lien upon the property in question by virtue of attachment proceedings, and have maintained such lien by compelling the sheriff to retain the actual possession of the property in question from the time of the initiation of such lien. The receiver was appointed in a suit instituted by a stockholder of the corporation for the purpose of winding up its affairs. Such suit commenced long after the lien of the relators on the specific personal property had been obtained, and they were not made parties to it. Under this state of facts, the relators contend that their right to have the property retained in possession of the property, and not turned over to the payment of their judgment, was affected by the appointment of the receiver.

This question was before this court in the case of *State v. Superior Court*, (Wash.)

court, should not be reopened until it is made affirmatively to appear that such decision was not in accordance with correct legal principles. We have carefully investigated all the authorities cited by the respondents, and the result of such examination has made it unnecessary that we should bring to the aid of our former decision any of the numerous authorities cited in the able brief of the attorney for the relators. The respondents contend that the authorities cited by them establish the doctrine that, whenever a receiver is appointed, he is entitled to the possession of all the property of the corporation for which he is appointed, regardless of the question as to whether the actual possession of such property is in such corporation or in that of a third person, a stranger to the suit in which such receiver had been appointed. We are unable to find anything in any of the cases so cited which warrants this contention. The general proposition is laid down in *Gluck & Becker on Receivers*, *Beach on Receivers*, *High on Receivers*, and in the *American & English Encyclopedia of Law*, that a receiver only takes such rights in the property of the corporation as it had at the date of his appointment, or at most at the date of the commencement of the action in which the appointment is made; and the author of each of these works cites abundant authority to sustain such general proposition. Among the numerous cases cited by respondents we have been unable to find a single one which goes to the extent of holding that a receiver, without other authority than that of the order appointing him, had the right to interfere with personal property in the actual possession of third persons under claim of right. There are some cases which hold that, by making such persons parties to the suit in which the receiver was appointed, they may be compelled to surrender the property to him and adjudicate their rights in that action; and in some cases the order appointing the receiver has directed him to take possession of certain specifically designated property, and in such cases it has been held that the person holding such property could not question the authority of the receiver under such order; but none of these cases aid the contention of the respondents. The order in this case, in general terms, directed the receiver to take the property of the corporation, and required such corporation to surrender possession thereof, but said nothing as to any specific articles, or as to the rights or duties of those not parties to the action; hence, under the general rule referred to, the receiver only took such rights as the corporation had, and, as the corporation had no right to interfere with the property in question, it must follow that the receiver could

not rightfully assert any claim thereto not subject to the lien of relators, and the right of the sheriff to retain possession, and proceed in the enforcement of the process in his hands.

There are many cases which hold that a receiver once in possession of property cannot be disturbed in such possession, even by one who has a superior lien thereon. Not only are there many cases which establish this doctrine, but, so far as we know, there is an unbroken line of authority going to that extent. The reason why the possession of a receiver must not be disturbed is that it is the possession of the court, and its dignity will not allow any one, without its permission, to interfere with that of which it has possession. But the research which we have been able to give to the subject has not brought to our notice a case in which it has been held that property in the actual possession of a third person, under claim of right, came into possession of the court upon the appointment of a receiver in a suit to which the person in possession of the property was not a party. The case most relied upon by respondents, and which comes nearer to sustaining their contention than any other that has been brought to our attention, is that of *Wiswall v. Sampson*, 14 How. 52. An examination of that case, and of the briefs of counsel, will show that it went no further than to establish the well-recognized doctrine that a court will brook no interference with property in the actual possession of its receiver. It is contended on the part of respondents that, in the case just cited, the possession of which the court speaks in its decision was simply the constructive possession in the receiver, growing out of the fact of his appointment. But it appears clearly, from the briefs of counsel, that the property was in the actual possession of the receiver. This also appears from the opinion of the court, as the following quotation will show: "The receiver was appointed on the 27th June, 1845, and on the same day Ticknor, who was in possession of the premises, attorned to him, who held possession until the sale was made in pursuance of the decree. * * * At the time, therefore, of this sale, the receiver was in the possession of the premises under the decree of the court of chancery." Such being the status of the property as to which the court was speaking in deciding that case, it has little weight in support of the contention of respondents. Besides, there was another reason given by the court for its decision, aside from that growing out of the actual possession of the property by the receiver, and that was that the parties attempting to assert a legal right as against his title had been brought into the action; and from what is said by the court it is probable that the case would have been decided differently if the one claiming the adverse title had not been made a party to the suit in which the receiver had been appointed.

ed. Upon that subject the court speaks as follows: "We agree that the person holding the prior legal lien or incumbrance must have notice, and an opportunity to come in and claim his prior right to the property or interest in the fund, before his legal right can be affected; and the proper way is by summons or notice upon the order or direction of the court." In a similar manner, every case cited by respondents can be analyzed, and abundant reasons for the decisions found, without invoking the harsh rule contended for by respondents,—that one in the actual possession of property under claim of legal right may be deprived of such possession without any opportunity to be heard in defense of his rights. That the affairs of a corporation can be so changed, by the appointment of a receiver at the instance of one of its own stockholders, as to take a legal right from one claiming property adversely to it, without his being brought into court for the purpose of having his right thereto adjudicated, is so contrary to our understanding of what constitutes due process of law that we cannot yield assent to such a doctrine. It is laid down, by the text writers to whom we have referred, that under such circumstances a receiver must resort to an action at law to obtain possession. The corporation could only assert its rights to the possession of property thus situated in an action at law, and, except when aided by statute, the receiver can do no more. In many states there are express statutory provisions which require all those claiming property of a corporation to yield the same to a receiver or assignee when proceedings for the appointment of such receiver or assignee have been instituted by or on behalf of such corporation; but we have no such statutory provision in this state, and without some aid of this kind we are unable to see any sufficient reason for holding that the appointment of a receiver should authorize him to take possession, without legal process, of property in the adverse possession of another under claim of right. We are satisfied with what we held in the former case, and, applying it to the facts in this one, it follows that the receiver was not justified in interfering with the possession of the property in controversy, nor with the right of the sheriff to proceed against the same, as required by the process in his hands. The alternative writ must be made perpetual.

ANDERS, SCOTT, and STILES, JJ., concur.

DUNBAR, C. J. I am unable to agree with the conclusion reached by the majority. I think, in the first place, the demurrer to the petition should have been sustained; and, in the second place, the answer of the receiver and the return of the court conclusively show to my mind that no injury or damage was threatened to the petitioners by the court or the receiver. The

opinion of the majority starts out with the proposition that the receiver only takes such interest in the property of the corporation as it had at the date of his appointment, or, at most, at the date of the commencement of the action in which the appointment was made; and the case of *State v. Superior Court*, (Wash.) 34 Pac. 430, is cited to sustain this proposition. The decision of this point was not necessarily involved in the case above referred to, and the opinion expressed in that case, in my judgment, was wrong, and not borne out by the authorities, and is not consistent with the orderly administration of courts of equity in settling insolvent estates. This question was, however, before this court in the case of *Meeker v. Sprague*, 5 Wash. 242, 31 Pac. 628, and there it was flatly decided that the party having a mortgage lien must foreclose his lien in the court having jurisdiction of the settlement of the insolvent estate, even where the mortgage alleged that the property upon which he had a first lien would be charged with a greater proportion of the expenses of the receivership than would be just. In that case all the right that the receiver could take, according to the doctrine announced in the majority opinion in this case, was the right of the equity of redemption, which was all the right that the insolvent corporation had under the law. It is true that the property involved there was real estate; but the doctrine that the receiver only takes the right to the property that the corporation had at the date of his appointment, if tenable at all, must be applied to all the property. Nor was there any attempt made, in *Meeker v. Sprague*, supra, to distinguish this lien from the lien on personal property, but the decision was based upon the theory that the court would respect the lien, and that it would do exact justice in the premises. "It cannot for a moment be presumed," said the court in that case, "in aid of the contention of the appellant, that the lower court will not do as full and exact justice to each person or corporation claiming a lien upon any of the property of the defendant corporation, when presented in such original suit, as it would when presented by means of an independent action. It would be the duty of such court to determine each of the claims presented in said original action by the same rules, and grant to them the same rights, as it would if each of the claimants were the plaintiff in an independent action. While each of them will be adjudicated in the original action, they will be so adjudicated upon the facts of the particular claim, as related to the entire property of the corporation. And in the adjustment of the expenses incident to such suit, and of the services of the receiver, the principles of equity will, of course, be applied; and if any of the liens are upon property over which the receiver has but a nominal control, it will, of course, be the duty

of the trial court to see that the holders thereof are protected from having their security in any material degree decreased by the costs and expenses incident to the receivership. And, upon the question of the effect of the deed from the corporation to the receiver, it seems to us clear that it can in no manner affect the rights of the appellant. Such corporation could not convey to the respondent any of its rights, and the court will see to it that, in the final adjustment of the rights of all the claimants, the appellant, together with all others like situated, is protected against any diversion, or attempted diversion, of the property upon which he had a first lien, to the payment of subsequent liens, of whatever nature or kind they may be." The reading of the return of the court to the alternative writ issued in this case would seem to justify the action of the court, considered with reference to the opinion of this court just quoted. A portion of the return is as follows: "And respondent further says that it was not, nor is it now, doing the things complained of for the purpose, and with the intent, of destroying and making worthless the said executions of the relators, but that the same should be respected by the said receiver; that the receiver should take and hold the said property subject to whatever right, title, and interest in and to the said property the relators had or have by virtue of such executions; that the said receiver should take the said property subject to any and all liens or levies; that the property of the said company should be sold under the direction of this court, and managed, under its direction, by said receiver; and that any and all moneys coming to the said receiver from or out of the said property should go towards discharging and satisfying the executions of relators, if the court should finally decide that the said executions were valid and prior liens thereon." The doctrine announced in *Meeker v. Sprague*, supra, is in harmony with the doctrine that the creditor has no vested right in methods or remedies. In this case the creditor has a right to make his money out of the property which is the subject of the lien, but he has no right whatever in the particular manner in which the money is to be made. Taking the return of the court to be true, (which this court must do,) it is seen that the method is all that is contended for here by the petitioners; and it is elementary that the writ of prohibition should not issue unless some right is invaded or threatened; and all the right the petitioners have here is the right to be paid out of the first proceeds of the sale, which right will not be denied them by a court of equity. The court will simply direct its receiver to act in the premises, and this court will not, as it said in *Meeker v. Sprague*, supra, assume that the property upon which the first lien exists will be charged with a greater proportion of expenses by reason of its set-

tlement by a court of equity. The receiver is appointed for the benefit of all concerned,—the judgment creditor, as well as the other creditors, and the corporation itself; and it is the duty of the court, in the interest of all of the creditors, as well as in the interest of the corporation which is deprived by the law of the right to settle its own estate, to see that the property is sold in such a way that the best results will be obtained. So, in this case, the creditor is not threatened with loss of any right, but the court, merely to prevent harmful confusion and additional costs, which would be the inevitable result of clashing acts of authority, and for the benefit of all parties concerned, proposes to prescribe the method which in its judgment will obtain the best results. The citation of authorities on this proposition by the majority I do not think fairly sustains their contention. The rule laid down by Gluck & Becker on Receivers (page 130) is as follows: "Persons having liens upon the property, acquired before the receiver's appointment, have no right to interfere with its possession by the receiver, and, without any application to, or adjudication of, the court, sell and dispose of it; and sale of property so made is illegal and void,"—citing *Wiswall v. Sampson*, 14 How. 52, a case of which I will hereafter speak. It is very plain, from an investigation of the authorities, that the possession of the receiver referred to is a constructive, and not an actual, possession, the theory of the law being that, when the receiver is appointed to administer upon the estate, the possession immediately vests in him. The same author (on page 134) says: "The title to property in the hands of a receiver is not in him, but in those for whose benefit he holds it. Nor, in a legal sense, is the property in his possession. It is in the possession of the court, by him as its officer." And again, in section 48: "The receiver of an insolvent corporation, while, as a general rule, he is to be regarded as the representative of the corporation, asserting its rights, taking its title, and subject to its liabilities, in one respect occupies a broader position, and represents, not only the corporation, but also the creditors; and when, in any proceeding, he occupies exclusively the latter status, he may do, and under some circumstances must do, many things which, if his acts were strictly limited to those of a representative of a corporation, he could not do." It is plain that, if he represents the corporation as well as the creditors, he represents all the interests, and must necessarily have possession of all the property.

It is contended that, if possession is yielded up to the receiver, the result will be that the lien will be destroyed; and the establishment of the truth of this proposition is really the only logical ground upon which the writ in this case can issue. But I think that the doctrine cannot be established, either on reason or authority; especially it cannot

obtain here, where the answer of the court affirmatively shows that the lien will be respected and maintained until the question of priority is adjudicated. There is, in my mind, a great deal of fanciful importance attached to this idea of possession. It is true that, under our statutes, an attachment levy creates a lien. But it is not the object of the lien to create any right of possession in the creditor. The sole object is to keep the property in statu quo to prevent the debtor from disposing of it, or any one else obtaining it, until it can be made to respond to the judgment. When the creditor is sure of this result, he has no cause for complaint whatever, and should not be allowed to interfere with the orderly procedure of the court by captious or arbitrary insistence upon any particular method or mode of procedure. *Wiswall v. Sampson*, 14 How. 52, is a well-considered case, which, in my opinion, sustains the contention of the respondent. It does not very clearly appear in this case whether the court is speaking of the actual or constructive possession of the receiver, but it does appear that the court intended to lay down the broad doctrine that the estate of an insolvent debtor, where a receiver had been appointed, must be administered by direction of the court, and that, where a lien had been obtained, it was not necessary for its perpetuation that the property be sold by legal process, but that such lien would be protected by the court having jurisdiction of the settlement of the estate; and the court lays down the doctrine that the party having a lien must apply to the court for the protection of his rights. "The effect of the appointment," says the court, "is not to oust any party of his right to the possession of the property, [and here it must evidently appear that the court was not referring to property in the possession of the receiver at the time he was appointed, but in the possession of the other party,] but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it; and, when the party entitled to the estate has been ascertained, the receiver will be considered *his* receiver, and the master will usually be directed to inquire what incumbrances there are affecting the estate, and into the priorities, respectively." (The italics in the quotation are my own.) If the receiver is to be considered the creditor's receiver, then it is all folly to talk about a creditor's losing his lien by reason of the possession of the receiver. "When," the court, continuing, says, "a receiver has been appointed, his appointment is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. This was held in *Angel v. Smith*, 9 Ves. 335, both with respect to receivers and sequestrators. When, therefore, a party is prejudiced by having a receiver put in his way, the course has

either been to give him leave to bring an ejectment, or to permit him to be examined pro interesse suo. And the doctrine that a receiver is not to be disturbed extends even to cases in which he has been appointed expressly, without prejudice to the rights of persons having prior legal or equitable interests; and the individuals having such prior interests must, if they desire to avail themselves of them, apply to the court, either for liberty to bring ejectment, or to be examined pro interesse suo; and this, *though their right to the possession is clear*,"—citing *Bryan v. Cormick*, 1 Cox, Ch. 422; *Anon.*, 6 Ves. 287. It would seem that this expression by the supreme court of the United States was sufficiently convincing that it was not attaching any great importance to the question of physical possession. Further, quoting Chancellor Kent in *Codwise v. Gels-ton*, 10 Johns. 507, the court says: "But, when the law gives a priority, equity will not destroy it; and especially where legal assets are created by statute, as in case of a judgment lien, they remain so, though the creditors be obliged to go into equity for assistance. The legal priority will be protected and preserved in chancery." And still further, showing that the question of possession was not the basis of this opinion, the court, proceeding, says: "It has been argued that the sale of the premises on execution and purchase occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court, and that a sale, therefore, in such a case, should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made; and, in order to effect this, the court must administer it independently of any rights acquired by third persons pending the litigation; otherwise, the whole fund would have passed out of its hands before the final decree, and the litigation become fruitless. It is true, in administering the fund, *the court will take care that the rights of prior liens or incumbrances shall not be destroyed*; and will adopt the proper measures, by reference to the master, or otherwise, to ascertain them, and bring them before it. Unless the court be permitted to retain the possession of the fund, thus to administer it, how can it ascertain the interest in the same to which the prosecuting judgment creditor is entitled, and apply it upon his demand?" There can be but one interpretation of this case, and that is that the court, under all circumstances, is entitled to the possession of all of the property

of the estate; that the receiver, as an officer of the court, represents not only the creditors, but the estate; and that the whole settlement of the estate, both property that is subject to liens and that which is not, devolves upon the receiver as an officer of the court; and that all priorities will be ascertained and protected by the court.

This was also the doctrine announced by the court of appeals of New York. *Walling v. Miller*, 108 N. Y. 173, 15 N. E. 65. This was a case where the property involved was personal property, and levy was made under execution on the 12th day of May. Two days thereafter a receiver was appointed. On the day of his appointment he took possession of the property. According to the theory of the majority, if the sheriff had yielded up the possession of the property to the respondent, the lien would have been lost; but the court there seemed to be of a different opinion, for it says: "The lien of the execution was not destroyed by the appointment of a receiver, but the rights and interests of all parties in the property were thereafter to be adjusted by the court which appointed the receiver; and the property could not be taken out of the possession of the receiver, and sold upon the execution, without leave of the court. The execution creditor could bring his lien to the attention of the court in the action in which the receiver was appointed, and ask to have the execution satisfied out of the proceeds of the property; but persons having liens upon the property had no right to interfere with its possession by the receiver, and, without any application or adjudication of the court, sell and dispose of it, and thus dissipate it, and deprive the court of jurisdiction to administer it." So that it will be seen that the court, instead of holding that the yielding up of the possession to the receiver would destroy the lien, hold exactly the reverse, viz. that the creditor had no right to retain the possession, thus interfering with the possession of the receiver, but, by yielding up to the receiver, the lien of the execution would be protected. In this case the court went so far as to hold a sale of the property made under an execution void, where the levy was made prior to the appointment of the receiver. But that is just what the petitioners in this case are striving to do, and what this court has said, by the majority opinion, they have a right to do, viz. to interfere with the possession of the property by the receiver, and sell and dispose of it without any application by the court. "When a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment, or to permit him to be examined pro interesse suo. The rule that the possession of a receiver is not to be disturbed extends even to cases in which he has been appointed expressly, without prejudice to the rights of persons having prior estates and the individuals having such prior estates

must, if they wish to avail themselves of them, apply to the court either for liberty to bring an ejectment, or to be examined pro interesse suo; and this, although their right to take possession is clear." 3 Daniell, Ch. Pl. & Pr. p. 2057. That author states that the same rule applies where an estate has been sequestered. Turning to section 1269, we find the rule laid down thus: "The proper course to be pursued by any person who claims title to an estate or to property sequestered, whether by mortgage or judgment, lease or otherwise, or who has a title paramount to the sequestration, is to apply to the court to direct the plaintiff to exhibit interrogatories before one of the masters, in order that the party applying may be examined as to his title to the estate. * * * The mode of proceeding is the same where the property is in the possession of a receiver. Anon., 6 Ves. 287. * * * An order for the examination of a party pro interesse suo may be obtained as a matter of course by the party claiming, but it cannot be granted till after the sequestrators have made their return, because, till then, it cannot appear to the court what is sequestered. Id."

The whole theory of the law and of the authorities simply is that a court of equity which has jurisdiction of the settlement of the estate will protect the liens and priorities of every kind, when they are brought to its attention, but that it will do it in the manner best calculated to preserve the interests of all parties concerned; and this doctrine is expressed very concisely in *Glines v. Order of Iron Hall*, (Sup.) 21 N. Y. Supp. 736, where it was decided that the fact that one, before the appointment of a receiver, levies an attachment upon certain funds, does not give him a preference enforceable generally against the receiver as to the judgment obtained, but only a preference in the funds themselves. A recent case cited from the supreme court of Texas (*Ellis v. Water Co.*, reported in 23 S. W. 860) very fully and forcibly sustains the respondent's contention. The court there said: "It is well established, we think, that, after property has been placed in the hands of the receiver, it is not subject to levy and sale under execution. Being in the custody of the law through the appointment of a receiver by a court of competent jurisdiction, it cannot be interfered with by process from another court. A party having a claim upon it must intervene in the court of the receivership, and in the case in which the receiver has been appointed, and establish his right in that tribunal, or must obtain leave of that court to bring an independent action. But the question here is, can the sheriff who has made a levy upon real estate before the appointment of a receiver over it proceed to sell, and pass the title, after the receiver has been appointed?" The very statement of this case shows that it is the constructive possession of the receiver that the court is talking about, and

that his possession is presumed to follow his appointment. After reviewing some cases where it was held, as the majority hold in this case, that the receiver only took such title as was conveyed to the receiver by the deed of the party over whose property he was appointed, and that this conveyance passed the property subject to the lien of the judgment under which it was sold, and that, therefore, the purchaser at execution sale took the superior title, the court sums up as follows: "However that may be, we think *Wiswall v. Sampson* lays down a doctrine that is founded upon good reason and sound policy. To permit the control of the receiver to be interfered with by virtue of process from another court would be a practice fraught with injustice and productive of confusion; and that remark applies with especial force to the receivers of insolvent corporations. After all the assets of a corporation have been taken from the hands of its managers, and placed under the control of a receiver, is it just to allow the property to be sold under execution? The court, having deprived the corporation of the power of paying the debt and of avoiding the sale, should, in the interest of all concerned, protect its property from the sacrifice. The receivership does not destroy any liens that may have been acquired before the appointment, but the remedy for their enforcement should be sought in the court in which the whole estate is being administered." In view of the logic of this case, and of the others which we have cited, it must be seen that the question of actual physical possession cuts no figure whatever, but that the broad and equitable doctrine is that the interest of the insolvent corporation, the interest of the unsecured creditors, and the interest of the attaching creditors must all be taken into consideration, (giving due consideration to the rights of priority,) and equitably protected, by the court administering upon the estate; and that it is not the policy of the law, and that no good reasons can be given for the division of this settlement into the hands of different tribunals or officers; and in the case at bar all the interest that the petitioners can have is the interest in the fund which is to be obtained from the sale of the property upon which they have a lien, and that the procedure or manner of obtaining that fund, and of applying it, can be safely intrusted to the discretion of the court. The writ should be denied.

STATE ex rel. SHELLY et al. v. SUPERIOR COURT OF CHEHALIS COUNTY et al.

(Supreme Court of Washington. Feb. 7, 1894.)

Prohibition, on relation of G. W. and H. E. Shelly, to the superior court of Chehalis county and others. Writ made perpetual.

Greene & Turner, for petitioners. M. J. Cochran and J. B. Bridges, for respondents.

HOYT, J. This case presents the same questions as that of *State v. Superior Court of Chehalis Co.*, 35 Pac. 1087, and, for the reasons stated in the opinion in that case, the alternative writ of prohibition must be made perpetual.

STILES, ANDERS, and SCOTT, JJ., concur.

STATE v. BUTLER.

(Supreme Court of Washington. Feb. 6, 1894.)

ADULTERY—ATTEMPT TO COMMIT—SOLICITATIONS.

Solicitation to commit adultery is not an attempt to commit adultery.

Appeal from superior court, Douglas county; James Z. Moore, Judge.

James Butler was convicted of an attempt to commit adultery. From an order granting his motion in arrest of judgment, the state appeals. Affirmed.

E. K. Pendergast, for the State.

SCOTT, J. The defendant was charged with attempting to commit adultery, and was tried and convicted. The body of the information is as follows: "Comes now E. K. Pendergast, prosecuting attorney for Douglas county, in the state of Washington, and by this, his information, as provided by law, charges one James Butler with the crime of attempting to commit adultery in the following manner, to wit: He, the said James Butler, on the 3d day of September, A. D. 1892, in the county of Douglas and state of Washington, did unlawfully, willfully, maliciously, and feloniously intend then and there to have carnal knowledge of the body of one Caroline Skett, the lawful wife, then and there, of one Julius Skett, who was then alive; and the said James Butler, in pursuance of the said unlawful, willful, malicious, and felonious intent, then and there falsely, wickedly, unlawfully, and maliciously, by means of promises of the payment of money, and by direct invitation by word of mouth, and by laying on of hands by the said James Butler upon the person of the said Caroline Skett in a lewd and lascivious manner, and in the absence of all other persons except the said James Butler and the said Caroline Skett, and by various other means, did solicit and incite, and endeavor to persuade and procure, the said Caroline Skett to have sexual intercourse, then and there, with him, the said James Butler; and the said James Butler was then and there the lawful husband of one certain person other than the said Caroline Skett, and whose true name is to said prosecuting attorney unknown,—all of which is contrary to the statute in such case made and provided, and against the peace and dignity of the state of Washington." A motion in arrest of judgment, on the ground that the information did not charge any offense, was made, which the court granted, and ordered the defendant discharged. The state appeals.

No brief has been filed by the respondent. From the argument of appellant it seems

that some question was raised as to whether adultery is a crime in this state; but without going into the question as to whether our statutes upon this subject, which were enacted while we were under a territorial form of government, were repealed by virtue of certain congressional legislation affecting the territories, we will, for the purposes of this case, take it for granted that they are in force. No statement of facts was settled, and the testimony introduced at the trial is not here. The only question presented and argued by appellant is as to whether solicitation to commit adultery is an attempt to commit adultery. It is not contended that Caroline Skett was a consenting party, or willing to commit the act with the defendant. The information contains no such allegation, and the case stands as though she was an unwilling and resisting party. It is not contended that there was any act on the part of the defendant going to an attempt beyond soliciting the said Caroline Skett, and endeavoring to obtain her consent. Is mere solicitation an attempt to commit adultery? It being impossible for one alone to commit adultery, as that requires the co-operation of two persons, it would seem to follow logically that one acting singly could not make an attempt. One person could no more attempt to commit adultery than he could attempt to commit a riot, which, under our statutes, requires the participation of three or more persons. The instances given in the books where the solicitation of another to commit a crime is held to be an offense generally relate to those acts or crimes which can be performed or committed by one person, or where the solicitation to commit the crime is an offense in itself, as distinguished from an attempt. It is urged that a person may be convicted of adultery, or of an attempt to commit adultery, although not a direct participant in the act, by reason of aiding or abetting; but in such a case, where an attempt is charged against such third person, it should appear that there were two persons willing to commit the act of adultery, and that something was done in the way of an attempt. The cases upon this subject are very limited in number. The case of *State v. Avery*, 7 Conn. 266, cited by counsel for appellant, which was decided in 1828, does not sustain his contention. That case was based upon a letter sent by the defendant to the wife of another man, containing words importing that she had acted libidinally towards the writer, and inviting her to an assignation for adulterous purposes; and it was held that the writing and sending of such letter was libelous. It was further said that it was immaterial to inquire whether the facts stated in the information amounted to a libel, or a solicitation to commit a greater crime, for, if they constituted an indictable offense within the jurisdiction of the superior court, it was sufficient for the purposes of that case. It was not decided that solicitation was an

attempt to commit adultery. In *Smith v. Com.*, 54 Pa. St. 209, decided in 1867, it was held that such solicitation did not amount to an attempt.

A distinction has been sought to be drawn, in this particular, to the effect that solicitation to commit adultery is indictable as an attempt in those states where adultery is a felony, which was the case in the state of Connecticut, while in Pennsylvania adultery was but a misdemeanor. The distinction attempted to be drawn, it seems to us, is not sound in principle. It is based on the ground that in trivial misdemeanors the law will look upon an attempt to commit them as not of sufficient gravity to justify or call for punishment. The decision of the case last cited, however, was not founded upon this distinction, although it recognizes the fact that such a one has been sometimes made, in citing *State v. Avery*. The court evidently entertained a different view. The opinion says: "An attempt to commit a misdemeanor is a misdemeanor, whether the offense is created by statute or was an offense at common law. These were the words of Baron Parke in the case of *Rex v. Roderick*, 7 Car. & P. 795, delivered in the year 1837. They have been adopted by the compilers on criminal law. 1 Russ. Crimes, 46; 1 Archb. Cr. Pl. 19; Whart. Cr. Law, 79, 873." And apparently this had the sanction of the court. The reasons given in that case showing why solicitation should not be held an attempt to commit adultery apply with equal force whether adultery be a misdemeanor or a felony. These relate to the difficulty of determining what is a solicitation. "What expressions of the face," says the court, "or double entendres of the tongue, are to be adjudged solicitation? What freedoms of manners amount to this crime? Is every cyprian who nods or winks to the married men she meets upon the sidewalk indictable for soliciting to adultery? And could the law safely undertake to decide what recognitions in the street were chaste, and what were lewd? It would be a dangerous and difficult rule of criminal law to administer." If adultery is a crime in this state, it is a felony, and, if solicitation is an attempt to commit adultery, it is a criminal offense here. Pen. Code, § 303. It will be observed that this section makes no distinction between an attempt to commit a felony and an attempt to commit a misdemeanor, except as to the degree of punishment; and the distinction above mentioned could not be recognized here, even if adultery was but a misdemeanor under the statutes. It may be well to note, however, what some of the courts and law writers have said relating to the subject under consideration. In the case of *Com. v. Willard*, 22 Pick. 476, it was held that the purchaser of spirituous liquor sold in violation of the statute does not subject himself to any penalty, either at common law, as inducing the seller to commit a misdemeanor, or under the statute. It

was said in that case: "It is difficult to draw any precise line of distinction between the cases in which the law holds it a misdemeanor to counsel, entice, or induce another to commit a crime, and where it does not. In general, it has been considered as applying to cases of felony, though it has been held that it does not depend upon the mere legal and technical distinction between felony and misdemeanor. One consideration, however, is manifest in all the cases, and that is that the offense proposed to be committed by the counsel, advice, or enticement of another is of a high and aggravated character, tending to breaches of the peace or other great disorder and violence, being what are usually considered mala in se, or criminal in themselves, in contradistinction to mala prohibita, or acts otherwise indifferent than as they are restrained by positive law." In the case of *Com. v. Harrington*, 3 Pick. 26, it was held that the letting of a house for the purposes of prostitution, with the intent that it should be thus used, was an offense at the common law. The keeping of such a disorderly house was not a felony, but a misdemeanor of a high and aggravated character tending to general disorderly breaches of the peace, and a common nuisance to the community. There was no statute in Massachusetts relating to it. In Whart. Cr. Law, (9th Ed.) § 179, in speaking of solicitations, the author says: "Are solicitations to commit crime independently indictable? They certainly are, as has been seen, when they, in themselves, involve a breach of the public peace, as is the case with challenges to fight and seditious addresses. They are also indictable when their object is interference with public justice; as, where a resistance to the execution of a judicial writ is counseled, or perjury is advised, or the escape of a prisoner is encouraged." "But," says the author, "is a solicitation indictable when it is not either (1) a substantive indictable offense, as in the instances just named, or (2) a stage towards an independent consummated offense?" And he says: "The better opinion is that, where the solicitation is not in itself a substantive offense, or where there has been no progress made towards the consummation of the independent offense attempted, the question whether the solicitation is, by itself, the subject of penal prosecution, must be answered in the negative;" and he maintains that solicitation is not an attempt to commit adultery. In speaking of the subject further, he says: "For we would be forced to admit, if we hold that solicitations to criminality are generally indictable, that the propagandists, even in conversation, of agrarian or communistic theories, are liable to criminal prosecutions; and hence the necessary freedom of speech and of the press would be greatly infringed. It would be hard, also, we must agree, if we maintain such general responsibility, to defend, in prosecutions for soliciting crime, the publishers

of Byron's *Don Juan*, of Rousseau's *Emile*, or of Goethe's *Elective Affinities*. Lord Chesterfield, in his letters to his son, directly advises the latter to form illicit connections with married women. Lord Chesterfield, on the reasoning here contested, would be indictable for solicitation to adultery. Undoubtedly, when such solicitations are so publicly and indecently made as to produce public scandal, they are indictable as nuisances or as libels; but to make bare solicitations or allurements indictable as attempts not only unduly and perilously extends the scope of penal adjudication, but forces on the courts psychological questions which they are incompetent to decide, and a branch of business which would make them despots of every intellect in the land. What human judge can determine that there is such a necessary connection between one man's advice and another man's action as to make the former the cause of the latter? An attempt, as has been stated, is such an intentional preliminary guilty act as will apparently result, in the usual course of natural events, if not hindered by extraneous causes, in the commission of a deliberate crime. But this cannot be affirmed of advice given to another, which advice such other person is at full liberty to accept or reject. Following such reasoning, several eminent European jurists have declined to regard solicitations as indictable, when there is interposed between the bare solicitation, on the one hand, and the proposed illegal act, on the other, the resisting will of another person, which other person refuses assent and co-operation." In a somewhat later work, (1 Bish. Cr. Law,) a partially contrary view is indorsed. This author goes further. In section 768 he says: "Though, to render a solicitation indictable, it is, as in other attempts, immaterial, in general, whether the thing proposed to be done is technically a felony or a misdemeanor, still, as the soliciting is the first step, only, in a gradation reaching to the consummation, the thing intended must, on principles already explained, be of a graver nature than if the step lay further in advance." He is of the opinion that solicitation is an attempt to commit adultery as a necessary step or ingredient in the offense. Section 767.

The question is a somewhat vexed one under the conflict of authorities relating to the various phases of the subject. The inquiry in this case is not whether solicitation to commit adultery is an offense in itself of a distinct character, but whether it is an offense because it is an attempt to commit adultery. The instances of such solicitation which have been brought to the attention of the courts are but few indeed, extending over a long period of years, but resort can be had to some of a kindred nature, or perhaps, more properly, which have a bearing on some of the principles involved. In the case of *Rex v. Butler*, 6 Car. & P. 368, decided in 1834, sometimes cited, it was said: "An at-

tempt to commit a misdemeanor created by statute is a misdemeanor itself;" citing *Rex v. Harris*, 6 Car. & P. 129. In *Shannon v. Com.*, 14 Pa. St. 226, it was held that a conspiracy to commit adultery was not an offense; and in *Miles v. State*, 58 Ala. 390, a similar decision was arrived at. Adultery was but a misdemeanor, however, in that state also, though it is not apparent that any importance was attached to this fact in either of these cases. In *Cox v. People*, 82 Ill. 191, it was held that solicitation to commit incest was not an attempt to commit the crime of incest, which was a felony. We have not failed to note the criticism of this case, and the citation it relies on from Wharton's *Criminal Law*, above quoted by Mr. Bishop in his valuable work. But the case also relies on *Smith v. Com. and Com. v. Willard*, supra; and these cases are authority, as we view them, with other authorities herein cited, on the ground that the distinction mentioned sometimes drawn between attempts to commit felonies and attempts to commit misdemeanors, or between attempts to commit grave, as distinguished from trivial, misdemeanors, is not a well-established one, nor well founded, when viewed merely as an attempt, and not as a substantive offense.

Now, it seems to us that solicitation to commit adultery is no part of the act of adultery itself, and consequently cannot be held to be an attempt. What is it? It involves the expression of a desire and a willingness on the part of one person to commit the act of adultery with another, and an attempt to get that person's consent, but no more. Follow it a step further. Suppose the consent of the other person is obtained, and, in pursuance of it, if there is no immediate opportunity to gratify the then mutual desire, a conspiracy is entered into to commit the offense between these persons, which involves the expressed consent and agreement of both of them, and some understanding between them as to when and where the offense shall be committed, and the naming of a propitious time and place to commit it. It seems that this would be much more in the way of an attempt than the case presented here; and, if that does not amount to an offense or an attempt, how can it be said that such an intention and willingness, coupled with solicitation upon the part of one person only, can amount to an attempt to commit the offense? We are of the opinion that the judgment of the superior court should be affirmed.

DUNBAR, C. J., and HOYT, STILES, and ANDERS, JJ., concur.

LANDERS v. McINTYRE et al.

(Supreme Court of Washington. Feb. 7, 1894.)

SPECIFIC PERFORMANCE—WHEN ENFORCEABLE.

1. Defendants negotiated a sale of land to plaintiff, guarantying 20 per cent. profit within a year, and binding themselves to buy it from

plaintiff a year from date, if she so elected; and the owner gave plaintiff a bond for a deed. *Held*, that specific performance of the contract could not be enforced, on plaintiff's offer to have the bond assigned to defendants, as defendants were entitled to a deed transferring a good title.

2. It was further ground to refuse specific performance that plaintiff had not complied with the conditions of the bond, and could not enforce a conveyance of the premises by the owner.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by Annie J. Landers against John F. McIntyre and another to enforce specific performance of a contract to purchase land. From a judgment for defendants, plaintiff appeals. Affirmed.

Hudson & Holt, for appellant. Rupert & Fitzgerald, for respondents.

ANDERS, J. It appears from the complaint in this action that on September 23, 1889, the respondents McIntyre & Plum, a real-estate firm, negotiated a sale to J. A. Reid of certain described real estate in the city of Port Townsend, owned by one William Payne. On the same day they entered into a contract with said Reid, whereby, in consideration of said purchase, they guaranteed to him that said property would pay him 20 per cent. profit in one year from that date, and thereby bound themselves to purchase said property at said advance one year from date, if said purchaser should so elect. On September 24, 1889, said Payne executed a bond for a deed of said property to the said Reid, in which time was made of the essence of the contract, conditioned that if the obligor therein, on or before the 24th day of September, 1890, should make, execute, and deliver unto the said Reid—provided that the said Reid should on or before that day pay to the said obligor the sum of \$2,000, with interest thereon at the rate of 10 per cent. per annum from date until paid, in the manner therein specified—a good and sufficient conveyance of said property, with the usual covenants of warranty, then the obligation should be void; otherwise, to remain in full force and virtue. On December 6, 1889, the said Reid duly assigned said bond to the appellant. On April 30, 1892, the said Reid assigned and transferred to the appellant all of his right and interest in and claim under the aforesaid agreement of September 23, 1889. At the time of the making and delivery of the bond, the said Reid paid to the said Payne the sum of \$500, and thereafter paid the further sum of \$875, in accordance with the stipulations of said instrument. Nothing further was paid by him upon the bond. It is alleged by the appellant that in all these transactions the said Reid acted as her agent, and that the money so paid was paid in fact by her, as principal. It is also alleged in the complaint that said Reid, on behalf of the plaintiff, and at her direction, within and at one year from the date of said guaranty

and agreement, did elect to have said defendants purchase the property described in said contract and agreement, and did inform the defendants of the fact of his said election, and did call upon and demand of them that they should comply with the said contract and agreement, and take said property and bond for a deed, and did, acting on behalf of said plaintiff, offer to have said bond, and all right and title acquired thereunder, duly transferred and assigned to them, but that the said defendants, in violation of their said contract, failed and refused to purchase the said property, or to accept any assignment of said bond for a deed, or to pay to the plaintiff any portion of the sum which they agreed to pay for the said lots under the said contract. A general demurrer was interposed to the complaint, and was sustained, and this ruling is the only error assigned.

From the above, it will be seen that neither the appellant nor Reid tendered a deed, or even an assignment of the bond, to the respondents. Said Reid simply offered to have said bond, and all right and title acquired thereunder, transferred and assigned to them. And it is contended on behalf of the respondents that the plaintiff, upon the allegations of the complaint, is not in a position to maintain this action. The respondents McIntyre & Plum proposed to purchase the property, at the price mentioned in their contract, within one year from the date thereof. In a contract of this kind, where nothing is said as to the nature and extent of the title to be conveyed, the law implies that a conveyance transferring a good and sufficient title shall be made, and this is not satisfied by a tender of a contract to convey. See *Witter v. Biscoe*, 8 Eng. (Ark.) 422; *Ankeny v. Clark*, 1 Wash. St. 549, 20 Pac. 583. At the time this offer was made the title to the property in question was still in Payne, and he was the only person who could have made a conveyance of the same; and, according to some of the authorities, such a contract as the one now under consideration would not be fulfilled even by a tender of a valid deed from a third person. *Hussey v. Roquemore*, 27 Ala. 231. And, besides, the appellant and her agent, Reid, having failed to comply with the conditions of the bond, were not in a position to enforce a conveyance of the premises, even from Payne himself.

Without undertaking a discussion of the question as to whether the contract between McIntyre & Plum and Reid was assignable or not, we are of the opinion that the complaint in this action does not state facts sufficient to constitute a cause of action against the respondents, and that the demurrer thereto was properly sustained. The judgment is affirmed.

DUNBAR, C. J., and STILES, SCOTT, and HOYT, JJ., concur.

CITY OF ABERDEEN v. HONEY et al.

Supreme Court of Washington. Feb. 14, 1894.)

STREET RAILROADS—FRANCHISE—BOND FOR CONSTRUCTION—CONSIDERATION—DAMAGES.

1. Where a city ordinance granted a franchise to a street-railway company, and required the grantee or its assigns to execute a bond to the city for completion of the railway within a year, a bond executed by individuals, and not by the street-railway company, was not such a bond as was required.

2. The bond of the individuals was without consideration to the obligors, the franchise not having been granted or assigned to them.

3. Judgment cannot be rendered for the full amount of a penal bond made to a city, and binding the obligors to construct a street railway, when there is no evidence of any actual damage to the city, caused by failure to construct the railway.

4. Since Laws 1890, p. 184, § 117, subd. 13, which authorized a certain city to permit the construction and operation of a street railway under such restrictions as it might deem proper, did not authorize the city to contract for its construction or to take a bond for the purpose of profit if the grantee of the franchise failed to proceed with the work, the requirement of a bond by the city, on granting the franchise, to secure the construction of the railway in a certain time, if for liquidated damages only, was not within its corporate powers.

Appeal from superior court, Chehalis county; Mason Irwin, Judge.

Action by the city of Aberdeen against Albert A. Honey, Lewis M. Hamilton, C. S. Bridges, and E. N. Quinette on a penal bond. From a judgment for plaintiff, defendants appeal. Reversed.

Wm. W. Archer and Ben Sheeks, for appellants. Wm. O. McKinlay, for respondent.

STILES, J. The respondent, the city of Aberdeen, is a city of the third class, and brought suit to recover of the appellants the sum of \$2,500, which was the penal sum in a certain bond theretofore executed by the appellants to the respondent city under the following circumstances: The Pacific Wheelless Electric Railway Company was, in 1891, a corporation authorized to do business in this state, and in that year made application to the respondent city for a franchise to construct and operate a street railway in said city. In compliance with the company's request, the city, by its council, passed an ordinance, which contained the following: "Sec. 18. Said grantees shall deposit with the city clerk of Aberdeen, at the time of the filing of their acceptance of this ordinance, a bond in the sum of \$2,500, gold coin of the United States of America, to be approved by the council, conditioned that they will pay said sum to the city of Aberdeen in the event that said grantees do not construct and complete said road in accordance with the terms and conditions of this ordinance." The grantees mentioned as named in the ordinance were the "Pacific Wheelless Electric Railway Company, and their assigns." The ordinance was duly accepted

by the company, and, in assumed compliance with said section 18, a bond was executed which is the bond now in suit. This bond was not executed by the Pacific Wheelless Electric Railway Company, but by four individuals, who are the appellants here. The bond is in the penal sum of \$2,500, and is conditioned as follows: "The conditions of the above obligation are such that if the above-bounden obligors shall, on or before the 14th day of April, 1891, actually commence, in good faith, the work of constructing the street railway under and according to the provisions of that certain franchise, right, or privilege heretofore granted by the said city of Aberdeen, acting by and through its mayor and common council, by ordinance duly passed and signed upon the 14th day of February, 1891, unto the Pacific Wheelless Electric Railway Company, and shall well and truly construct, finish, and in all things complete the said railway on or before one year from the said 14th day of April, 1891, according to the provisions of the ordinance aforesaid, then this obligation to be void; otherwise, to remain in full force and effect." Judgment in the full sum of the bond was rendered against appellants, and they now urge several reasons why the judgment should be reversed. These reasons we hold to be amply sufficient, and they are as follows: (1) The bond in question was not the bond required by the ordinance. It was not the bond of the Pacific Wheelless Electric Railway Company, to which the ordinance granted the franchise. (2) There was no consideration running to the obligors in the bond, for the reason that no franchise had been granted to them, and they, as individuals, would have had no right to construct any street railway under the franchise granted to the Pacific Wheelless Electric Railway Company, it not appearing that the franchise had been assigned to them. (3) The bond was a penal bond, and no proof was offered showing any actual damages which had accrued to the city by reason of the failure to construct the railroad. There was a total failure, nothing ever having been done towards its construction. (4) If the bond were considered to be one for liquidated damages, it was not within the corporate powers of the city of Aberdeen to take such a bond. The law of its incorporation (Laws 1890, p. 184, § 117, subd. 13) authorizes it "to permit, under such restrictions as they may deem proper, the laying of railroad tracks, and the running of cars drawn by horses, steam or other power thereon." This provision did not authorize the corporation to build or operate a street railroad, and it could not, therefore, make a lawful contract for the building of one. Neither could it take such a bond for the purpose of making a profit out of it in case the grantee of the franchise should not proceed with the contemplated work. Its only authority to obtain revenue was under its charter, through

should have been sustained, and the cause dismissed. The judgment will be reversed, and the cause remanded with directions accordingly.

DUNBAR, C. J., and HOYT, ANDERS, and SCOTT, JJ., concur.

AMERICAN ASPHALT CO. v. GRIBBLE et al.

(Supreme Court of Washington. Feb. 16, 1894.)

APPEAL—NOTICE TO SETTLE STATEMENT OF FACTS
Where appellant's notice of the filing of the statement of facts fails to name the place at which he will ask its settlement, (Code Proc. § 1422,) respondent may disregard it altogether, and the statement will not be considered by the supreme court.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Suit by the American Asphalt Company against F. M. Gribble and Mary Coffor on account for roofing, and to enforce a lien on a building owned by Mary Coffor. Decree for plaintiff. Defendants appeal. Affirmed.

Snell & Johnston, for appellants. Best & Munn, for respondent.

ANDERS, J. The notice of filing the statement of facts herein which was served on the respondent failed to designate a place at which the appellants would apply to the court or judge who tried the cause, or rendered the judgment complained of, to settle and certify said statement of facts. The notice, therefore, omitted one of the positive requirements of the statute then in force, (Code Proc. § 1422,) and consequently was wholly ineffectual for the purpose intended; and the respondent was at liberty to disregard it entirely, which it appears it did. It follows that the statement of facts was in effect settled and certified without notice to the respondent, and hence cannot be considered by this court. The motion of respondent to strike the statement from the record must therefore be granted. And as the cause is one of equitable cognizance, and the facts upon which the judgment was based not being properly in the record, the judgment must be affirmed, and it is so ordered.

DUNBAR, C. J., and STILES, SCOTT, and HOYT, JJ., concur.

BOOK v. WILLEY et al.

(Supreme Court of Washington. Feb. 20, 1894.)

JUDGMENT AGAINST LESSEE—EVIDENCE AS TO LESSEE'S INTEREST.

Where in an action to foreclose a mortgage a defendant claims a superior interest by

that, after the mortgage and prior to the lessee and lessor abrogated the lease, the lessee made a contract of purchase, and the records still showed him to have the hold interest.

Appeal from superior court, Chehalis county; Mason Irwin, Judge.

Action by William P. Book against A. L. Willey and others to foreclose a mortgage. Defendants other than Willey defaulted. He was held to have a superior interest. Plaintiff. Plaintiff appeals. Reversed.

Ben Sheeks and Hogan & McGerry, for appellant. J. C. Cross, for respondent.

SCOTT, J. This action was brought by appellant in the superior court of Chehalis county to foreclose a mortgage on certain real estate. Said mortgage was executed by John and Sarah Pace Henson to appellant, February 7, 1891. Respondent, Willey, a defendant Cormier were made parties defendant, under an allegation in the complaint that they had or claimed some lien or interest in the mortgaged premises which was alleged to be subject to the mortgage of appellant. The defendants, excepting respondent, Willey, failed to answer, and default was entered against them. Respondent, Willey, answered, and admitted the execution and nonpayment of the note and mortgage set forth in the complaint; and he further alleged that he had an interest in said lands which was superior to the lien of appellant's mortgage.

The respondent's claim is based upon the following facts: That the defendant John Henson, on the 28th day of July, 1890, executed a written contract of lease of said lands to the defendant Cormier for the term of five years from said date, at an annual rental of \$200, which lease provided that the termination thereof the lessee might remove any building erected by him upon the premises during the existence of the lease, and said Henson also gave Cormier an option to purchase the premises at any time during the term of the lease for a sum specified. And said respondent further alleged that he recovered a judgment in the superior court of Chehalis county against said defendant Cormier, and that on the 28th day of January, 1893, he caused a transcript thereof to be filed in the office of the county auditor of said Chehalis county, thereby making said judgment a lien upon the real estate of said defendant Cormier, by virtue whereof respondent claimed a lien upon the leased interest of Cormier in the mortgaged premises, and that the same was paramount to the mortgage of appellant, and he asked for a dismissal of the action as to him. Appellant set up, by way of reply to this answer, that after the recording of appellant's mortgage, and on the 8d day of August, 1891, Cormier then being in default in payment of

rent on the lease aforesaid, by mutual agreement between said John Henson and said Cormier said lease was abrogated, and declared to be of no further force, and a new contract in writing was on said date entered into between said Henson and said Cormier, by the terms of which Cormier was to buy the mortgaged premises from Henson subject to the lien of appellant's mortgage; and that at said time Cormier assumed the payment of appellant's mortgage, and thereafter paid part of the debt thereby secured.

At the trial, respondent offered evidence in support of the allegations contained in his answer, and in rebuttal appellant offered in evidence the deposition of said Cormier, wherein he testified in substance that, before the alleged recovery by respondent of his judgment against him, said lease had been forfeited by him, and that it was abrogated and set aside by mutual agreement of both parties to it, and which deposition also contained further testimony in support of the other matters alleged in appellant's reply aforesaid. The court, upon objection by respondent, refused to admit this deposition as evidence; whereupon appellant offered to prove the facts alleged in his reply by another witness, and such testimony was likewise excluded. It seems these rulings were based on the ground that appellant could not prove any fact in contravention of Cormier's interest in said property as shown by the records in the auditor's office, and on the ground that respondent's judgment became a lien upon such leasehold interest as disclosed by the records, regardless of what the actual claim or interest of said lessee was in said mortgaged premises at the time the lien attached. This was error. The lien of said judgment could only attach upon the actual interest of the judgment debtor in said lands, regardless of the fact that it appeared by the county records that he had a different or greater interest therein. We believe the authorities are practically unanimous in support of this proposition. Consequently, the testimony offered by appellant in support of the matters alleged in his reply should have been admitted, and it follows that the judgment must be reversed, and the cause remanded for further proceedings.

DUNBAR, C. J., and HOYT, STILES, and ANDERS, JJ., concur.

BARNETT, Sheriff, v. O'LOUGHLIN et al.
(Supreme Court of Washington. Feb. 20, 1894.)

ATTACHMENT—WRONGFUL LEVY—ACTION BY
SHERIFF ON INDEMNITY BOND.

It is no defense to an action by a sheriff on an indemnity bond, in an attachment case, that after the claimant got judgment against the sheriff for the wrongful attachment, and the judgment was satisfied, the sheriff sold the property at private sale by direction of plaintiff in attachment.

Appeal from superior' court, Lewis county; W. W. Langhorne, Judge.

Action by John W. Barnett, sheriff of Lewis county, against J. V. O'Loughlin, John T. Laraway, and others. Judgment for plaintiff. O'Loughlin and Laraway appeal. Affirmed.

Swasey & Lemley, for appellants. Reynolds & Stewart, for respondent.

SCOTT, J. This action was commenced by the respondent against the defendants to recover on an indemnity bond given by them to him, as sheriff, to indemnify him from loss by reason of the levy of a writ of attachment issued in the suit of O'Loughlin against one Hunt, and levied on certain personal property which was claimed by one Dixon. After said seizure, Dixon demanded said property of the sheriff, and O'Loughlin refused to allow the surrender of it, whereupon Dixon brought suit against the sheriff to recover its value. After this suit was commenced, O'Loughlin, as principal, with the other defendants as sureties, executed the indemnity bond to the sheriff. Such proceedings were had in the suit brought by Dixon against the sheriff that a judgment was rendered in his favor against said sheriff, amounting to nearly \$2,000. O'Loughlin and the sureties in said indemnity bond having failed to satisfy the judgment so recovered against the sheriff, he brought this action on the bond. O'Loughlin recovered judgment in his suit against Hunt, and execution was issued thereon, and the property attached was sold, excepting that which was claimed by Dixon. The sheriff was directed not to sell that property in consequence of the litigation, as it was uncertain and undetermined at that time whether the property belonged to Hunt or to Dixon. After Dixon recovered judgment against the sheriff, said sheriff sold the property which he had seized as aforesaid, and which was in controversy in the suit with Dixon, at private sale, for the sum of \$619.50. The sheriff recovered judgment upon said indemnity bond, and an appeal was taken by the defendants.

Appellants contend that the sheriff had no right or authority to sell said property at private sale, that in doing so he committed a trespass, and that it was immaterial whether he was directed or authorized to make such sale by the defendants; and this is practically the only point presented upon the appeal. Certain authorities are cited by appellants to the effect that a sheriff will not be protected in a willful violation of the law, although directed by other parties to do the act, and that he cannot recover, in such case, upon an indemnity bond given to protect him therein. But these authorities have no application to the facts of this case. If, as contended by respondent, he was authorized to sell this property at private sale by O'Loughlin, and there was testimony to show

that he was so authorized, he unquestionably had a right to make such sale. Upon the satisfaction of the judgment obtained by Dixon against the sheriff, the title to said property passed from Dixon to the sheriff, although, under the circumstances, having seized it upon a writ of attachment issued in favor of O'Loughlin, it passed to him in trust for O'Loughlin. Consequently, it could then be no trespass against Dixon to sell the property in any way that the parties saw fit to sell it. It could be no trespass against Hunt, the execution defendant in the original suit, for it was found not to have been his property, and he could make no claim to have it sold on the execution issued in that suit.

Complaint is made as to the expenses incurred by the sheriff in taking care of said property pending the litigation with Dixon. It was shown that the property consisted principally of Judson and giant powder, which had to be kept in an isolated place, and that it was necessary to have some one to look after it. There was also testimony to show that a keeper was employed to take charge of the property by direction of, and with the consent of, O'Loughlin, and that the sheriff acted under direct authority from him in making the seizure and retaining the property, and in contesting the title with Dixon, and in selling it as he did; and the jury found in favor of the plaintiff on the issues made. No error having been shown, the judgment rendered is affirmed.

DUNBAR, C. J., and HOYT, STILES, and ANDERS, JJ., concur.

STATE v. WHITE.

(Supreme Court of Washington. Feb. 9, 1894.)

CRIMINAL LAW—APPEAL BY STATE—CERTIORARI TO JUSTICE.

1. Where the superior court, on certiorari to a justice, reverses his judgment of conviction, and orders accused "released from the penalty," as not having had a fair trial, there is no acquittal on the merits, such as will make an appeal by the state a second jeopardy.

2. 2 Hill's Code, § 1621, allowing certiorari to one who conceives himself injured by error of a justice of the peace, applies to criminal as well as civil proceedings.

3. In the light of 2 Hill's Code, § 1223, requiring the clerk of court to furnish defendant a copy of the indictment, or to permit him to make one, Const. art. 1, § 22, entitling accused "to have a copy" of his accusation, is complied with, in a justice's court, when the justice hands accused the original complaint, and tells him he can copy it, if he please. Dunbar, C. J., and Stiles, J., dissenting.

4. A justice's judgment of conviction is not bad, as undated and unsigned, where his docket shows that the verdict was rendered on such a date, and judgment rendered the same day; that two adjournments were granted at defendant's request; and that at the last date a writ of certiorari was served,—the signature being at the foot of the consecutive entries.

Appeal from superior court, Stevens county; Jesse Arthur, Judge.

William K. White was convicted of assault and battery before a justice, and removed the case to the superior court by writ of certiorari. The judgment was reversed, and the state appeals. Reversed.

L. B. Reeder, Pros. Atty., and W. J. Galbraith, for the State. John B. Slater and Charles A. Mantz, for respondent.

SCOTT, J. The defendant was arrested upon a charge of assault and battery, and brought before one G. M. Welty, a justice of the peace of Stevens county. Upon an application for a change of venue, the cause was transferred to one I. I. Hughes, a justice of the peace for the same county, before whom a trial was had; and defendant was found guilty, and fined one dollar and costs of suit. The defendant removed said cause, by writ of certiorari, to the superior court of said county; and a judgment was there rendered reversing the judgment of the justice of the peace aforesaid, and ordering "that the defendant be released from the penalty thereof." From this judgment of the superior court the state has appealed.

The defendant urges that no appeal could be taken by the state, for the reason that it does not come within any of the provisions of the statute (section 1, subd. 7, *Sess. Laws* 1893, p. 120) authorizing an appeal by the state in criminal actions, and on the further ground that the defendant has been acquitted on a trial upon the merits, and that a reversal of the judgment of the superior court would be putting him twice in jeopardy. We do not think the judgment rendered in the superior court can be considered as an acquittal of the defendant upon the merits, within the meaning of the section aforesaid, nor would a reversal thereof have the effect of putting the defendant twice in jeopardy. Such an appeal does not involve a retrial of the original issue.

It is contended by the state that certiorari will not lie to remove a criminal action from a justice of the peace to a superior court, but we are of the opinion that this objection is not well taken. The statute in question, (volume 2, § 1621, of the Code,) giving a remedy by certiorari, does not attempt or purport to limit the proceedings to civil actions, nor is there any apparent reason or ground why the same should be so limited.

It is further contended by the state that, if the writ would lie, there was no error in the proceedings before the justices of the peace aforesaid sufficient to warrant a reversal of the judgment in the superior court. To determine this, it will be necessary to examine the points which were raised by the defendant in the superior court in the certiorari proceeding:

It is contended by the defendant that these proceedings were erroneous, upon several grounds, one of which is that he was refused a copy of the complaint upon which he was

tried. It appears that, when the defendant was first brought before Justice Welty, he demanded a copy of the complaint, but that the same was refused, and that upon the trial, before Justice Hughes, after a jury had been impaneled, he again demanded a copy of the complaint, whereupon the justice handed him the original complaint, with the remark that he could make a copy, if he chose to. No objection was made to this by the defendant, and, as far as the record shows, he acquiesced therein. He contends, however, that under section 22, art. 1, of the constitution, he would be entitled to a copy, and to have the same prepared for him by the court, or under its direction. There is no act of the legislature requiring justices to furnish a copy. The only legislative provision is with reference to the furnishing of a copy by clerks of the superior courts, and that provides a copy shall be furnished the defendant, or that he shall be given an opportunity to make one. 2 Code, § 1223. The legislature has thus deemed an opportunity to take a copy a sufficient compliance with this constitutional provision, and there is no substantial reason for holding that it is not. The constitution does not, in terms, require the court to make the copy, or cause one to be made, and delivered to the defendant, but says, substantially, that the defendant shall have a right to a copy. No point is made in respondent's brief over the fact that he was refused a copy of the complaint by Justice Welty.

It is further contended that the judgment of the justice of the peace is void on the ground that it was not signed, and that the transcript does not show when such alleged judgment was entered. A transcript of the justice's docket, showing the proceedings had in the cause, appears in the record. It shows that the verdict was rendered March 30, 1893, and that a judgment was rendered thereon, for the amount thereof, on the same day; and it shows that the cause was then adjourned, at the request of the defendant, to March 31st, and again, at his request, until April 3d, at which time he served the writ of certiorari. These proceedings were entered by the justice in his docket, consecutively, under the title of the cause, as is the custom in courts of justices of the peace, and at the conclusion thereof he signed the docket, and this is all that is required.

It appears that the costs were taxed by the justice of the peace under the provisions of section 2086 of the 1881 Code, which had been repealed by the act of March 9, (Sess. Laws 1893, p. 143,) and which reduced the costs in such cases very materially. We do not think the record discloses any material error, aside from this, in the proceedings in the justice's court. Consequently, the judgment rendered by the superior court is reversed, and the cause remanded, with instructions to set aside its judgment of reversal, and to affirm the judgment rendered

in the justice's court, with the exception that the costs shall be retaxed by the superior court under the law aforesaid, in force at the time of the trial, and that the costs of this appeal be included in such judgment, and judgment rendered for the whole thereof. It is further considered that the judgment so rendered be enforced in the superior court, if not paid or stayed by the defendant, by a levy upon his property, or by proceeding upon the bond filed by him in removing said cause by the certiorari proceeding aforesaid, or by again apprehending the defendant, and enforcing the same by imprisonment, as provided by law.

HOYT, J., concurs. ANDERS, J., concurs in the result.

DUNBAR, C. J., (dissenting.) I am unable to agree with the majority in their construction of section 22, art. 1, of the constitution. The section is as follows: "In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed." It seems to me that under that section it becomes the imperative duty of the court to furnish the defendant a copy of the information, when it is demanded, and that it is not enough to give him access to the record, with permission to copy. It is a copy, and not the record, that is guaranteed to him by the constitution. He is entitled to a copy to take with him for careful inspection of himself or counsel. He may not be able to copy the indictment himself, and the constitution expressly says that he shall not be compelled to advance money or fees to secure this right. It might as well be said that he should be compelled to serve the process for the attendance of witnesses, if the subpoenas or warrants were placed in his hands. It seems to me that the constitution could not, in more explicit language, have provided for furnishing him a copy; and I never will consent to a court's depriving a defendant of this plain constitutional right by an assumption that some other right is equivalent to the right guaranteed by the constitution, which is the only theory upon which the action of the court in this case can be maintained. There is nothing in the record, in my judgment, to show any acquiescence on the part of the defendant. He made a demand which was refused, and there was nothing left him

but to remain silent. As I think he was entitled to a writ of certiorari, the judgment should be affirmed.

STILES, J., concurs.

RATHBUN v. THURSTON COUNTY.

(Supreme Court of Washington. Feb. 12, 1894.)

ACTION AGAINST COUNTY — SUFFICIENCY OF COMPLAINT—ANSWER—EVIDENCE.

1. In an action to charge a county on a contract for printing, by the terms of which plaintiff was to publish certain notices in the "Olympia Review," a complaint alleging, as the only performance, that the notices were published in the "Weekly Standard" with the consent of the county, is demurrable.

2. In an action on a contract by which plaintiff was to print certain notices, an answer alleging that defendant was compelled by the neglect of plaintiff to have the printing done by another sets up a good defense.

3. In an action on a special contract, plaintiff's testimony that he was not permitted to do the work justifies a finding against him.

Appeal from superior court, Thurston county; W. W. Langhorne, Judge.

Action by J. C. Rathbun against the county of Thurston on a contract for printing. Judgment for defendant. Plaintiff appeals. Affirmed.

Phil. Skillman and J. O. Rathbun, for appellant. Milo A. Root, for respondent.

DUNBAR, C. J. This is an action brought by the appellant to recover pay for services alleged to have been rendered under a contract made with the county of Thurston for the publication of certain notices between the 1st day of July, 1890, and the 1st day of July, 1891. The amount claimed to be due is the sum of \$3,659.90. Respondent admits entering into the contract with appellant, but denies that the appellant performed the services alleged, and alleges that, upon the failure and refusal of appellant to carry out said contract, it entered into another contract with one B. M. Price, and the work was so done by Price, and not by the appellant. The case was tried in the superior court, resulting in a verdict for the respondent. Judgment was entered, and from such judgment the appeal is taken to this court.

The contract was to do the work of the county from July 1, 1890, to July 1, 1891; and the notices were to be published in the newspaper named the "Olympia Review," a weekly newspaper published at Olympia, of which appellant was the publisher. After the execution of the contract, but before the publication of the notices which were involved in this action, the appellant sold the Review to one B. M. Price, and its name was changed to the "Weekly Capital." The publications of the notices involved were thereafter made in the Weekly Capital, under a contract made by the county with

Price, the publisher of the Capital. The claim of the appellant is that when he sold the Review he made arrangements with Price to continue the county printing, and the work was thereafter done by Price, his agent, and that he is therefore entitled to pay for the same.

The first assignment of error by appellant is the sustaining of respondent's demurrer to appellant's original complaint. We think the demurrer was properly sustained, if the allegation of services in the complaint was as follows: "That the adverse and official publication of all notices of the defendant from April 11, 1891, to July 1, 1891, were published in the said Weekly Capital with the consent of defendant, and by its directions." There is no allegation whatever that such work was done by the plaintiff, or that he had any interest whatever in the Weekly Capital, and no presumption that such was the case can be indulged in. If it could be, the defense which the county has made to this complaint could not be entertained, for the very essence of the defense is that such publications made in the Capital were not made under the contract with the appellant.

An amended complaint was filed, to which an answer was interposed, alleging that prior to the 11th day of April, 1891, plaintiff had sold the paper referred to in his complaint as the Weekly Capital to one B. M. Price, and had failed, refused, and neglected to carry out and perform his contract, and thereby reason of said neglect, failure, and refusal on the part of the plaintiff, the defendant was compelled to, and did, enter into a contract with B. M. Price, as the publisher of the Capital, to do the printing for the county between the 11th day of April 1891, and the 1st day of July, 1891, and that the printing done for said county was done under contract with said B. M. Price, and not under any contract with this plaintiff; whereupon, plaintiff moved to strike from the answer the allegation of the sale of the paper to Price, and the contract entered into by the county with Price, and all that portion of the answer concerning its transaction with Price, which motion was overruled by the court. It is urged by the appellant that as party to a contract cannot escape his liability by making a new contract covering the same work with the agent or servant of the other party, and that it is not proper to offer such contract in evidence when defending an action brought on the first contract. There is no doubt of the correctness of this proposition, and, had this action been brought against the county for breach of contract, the answer objected to, and the proof offered thereunder, would have been irrelevant, and it would plainly have devolved upon the county to have proven that plaintiff had abandoned his contract. In that event, it would have made no difference whether he had entered into any subsequent contracts or

not, for they would have been relieved of the payment of this claim by reason of such abandonment. But plaintiff does not sue the county, in this action, for the violation of any contract, but for services rendered under the contract; and the allegations objected to are relied upon by the county to show that some one else, and not the plaintiff, performed the services, which we think, in this character of action, was perfectly admissible, because, if proven, they would certainly be a perfect defense to the complaint. We think the instructions given by the court were substantially correct, and that if there was any error at all committed by the court, in such instructions, such errors were in favor of appellant.

This brings the case to the question of the sufficiency of the evidence. It is urged by the appellant that the jury being taxpayers, and this action being an action against the county, the jury are, to a limited extent, interested. This is an interest that is not taken into consideration by the law. They are qualified jurors, in such cases, and their verdict must receive the same consideration at the hands of this court as the verdict of a jury in any other case. Even if we should have a different view of the weight of the testimony from that reached by the jury, we would not feel justified in disturbing it. But an examination of the record in this case leads us to the conclusion that the verdict was sustained by the clear weight of testimony. We are of the opinion that the testimony of the plaintiff, alone, justified the request of the respondent for a nonsuit. We do not think that under the statute the county can be placed in the position which the testimony of the appellant shows that he sought to place the county in this case. Conceding, for the purposes of the case,—which we are not now prepared to say we would concede, if the question was properly before us,—that the county would be bound by its contract, where the paper with which it had contracted had been sold to another publisher, and its name changed, it is asking too much of the county to have its notices placed on wheels, to be run around to different papers in the county, the standing of which was not taken into consideration by the county when it entered into the contract, and to be drawn into the inconvenience of, and made a party to, any such controversy as the testimony of the appellant shows existed between him and Price, the publisher of the Capital. But, outside of this question, we say the testimony of the appellant shows, not only that he had deprived himself of the power of complying with the contract, but that the commissioners actually refused to allow him to do the work, for he testified as follows: "The work was done by the Standard for a short time, when the commissioners or the auditor's office refused to give me any more work at all. They paid the bill, however, for the work I had done

at the Standard." If this is true,—that the commissioners refused to give him work,—then, even presuming that he had not rendered himself incompetent to do the work, there was a plain violation of the contract by the commissioners; and his remedy was a suit for damages for violation of the contract, and not for services performed, which evidently were not performed by him, if the commissioners refused to give him the work to do. The auditor, Tweed, testifies that Rathbun made a formal demand that the printing be delivered to him, and that it should not be sent to the Capital; that he (the auditor) insisted that it should go to the Capital. He also testifies positively that the work was done under the new contract with Mr. Price. Garfield, the deputy auditor, testifies that the appellant demanded of him that he should not take the county printing to the Weekly Capital for publication; that it should go to him for publication; that it should not be taken to the Capital; that he afterwards had a conversation with the appellant, and the appellant informed him that he was the contractor for the county printing, and that it should be taken to the office of the Weekly Standard for publication; and, when asked by what authority he took the notices to Mr. Price, his answer was, "By authority of the contract which existed between the county and Mr. Price, and by the direction of the executive in the office." It seems very plain to us, from the testimony, that whatever rights the appellant may have against the county for violation of contract, where the measure of damages would be altogether different, there is no testimony here to support his claim for services rendered. In fact, he testifies himself that he was present when they were awarding further contracts for this same work, and entered a protest against the action of the commissioners in that respect. We think the judgment must be affirmed.

ANDERS, HOYT, STILES, and SCOTT, JJ., concur.

TOOF et al. v. CRAGUN.

(Supreme Court of Kansas. March 10, 1894.)

APPEAL—TIME OF TAKING—SETTLING CASE.

1. The appellate jurisdiction of this court is subject to the regulation of the legislature, and, unless a party brings himself within the requirements of the statute prescribing the time and manner of removing a case to this court, he is not entitled to a review.

2. While this court may exercise auxiliary authority in aid of appellate jurisdiction once obtained, it cannot, in the absence of any jurisdiction in the proceeding before it, afford a remedy for the loss of a case made before the same was settled and signed by the trial judge.

3. The loss of an unsigned case made, which had been duly served, will not prevent the trial judge from requiring its reproduction, nor from signing and settling the same, upon

due notice, at any time within the year allowed for taking cases to the supreme court.

(Syllabus by the Court.)

Error from district court, Kingman county; S. W. Leslie, Judge.

Action by Toof, McGown & Co. against John A. Cragun. There was judgment for defendant, and plaintiffs bring error. Dismissed.

Peckham & Peckham, for plaintiffs in error. Gillett & Libby, for defendant in error.

JOHNSTON, J. We are asked to review the rulings made in a case in the district court, without any authentic record of the proceedings in that court. Nothing is presented except a verified statement of a futile effort to obtain a record for review. From this statement we learn that Toof, McGown & Co. brought an action against John A. Cragun to recover \$4,684.16, and that on April 17, 1889, a trial was had, and a verdict returned in favor of the defendant. On the 19th of the same month, a motion for a new trial was filed, which was heard and overruled on April 25, 1889. Ninety days were given plaintiffs to make and serve a case for the supreme court, thirty days were allowed for defendant to suggest amendments, and it was provided that the case was to be settled in ten days thereafter, upon three days' notice. A case was made and served on July 24, 1889, which was the last day upon which service could be made; and after notice the case was presented to the judge for settlement on August 31, 1889, when settlement was resisted upon the ground that it had not been legally served. Testimony was taken by the judge upon this point, after which the judge announced that he would settle and sign the case presented as a true case made, but would accompany it with the evidence taken on the hearing of the objections to the service, to the end that such objections and such evidence might be examined by the supreme court, and that he would sign and certify the case as soon as the official stenographer of the court could transcribe the oral evidence produced upon that hearing. The judge took the unsettled case into his possession, and left it temporarily with the clerk of the district court for safe-keeping until he should be able to conveniently take the same to his residence. On the next morning the judge called on the clerk for the case made, with the intention of taking and holding it until it was completed and signed, when he was informed by the clerk that the case had gone from his custody and possession. While it was in the charge of the clerk, it was kept in an open and exposed place that was accessible to any one who might be in the clerk's office. Since that time it does not appear that the case has ever been seen, and there is no satisfactory evidence of how the same passed from the custody of the clerk, or of

what disposition has been made of it. In October, 1889, counsel for plaintiff learned of the loss of the case, and instituted a fruitless search for the same. No further steps were taken until April 19, 1890, when application was made to the judge for the delivery of the case made, and on April 24, 1890, a verified petition or statement of the transactions enumerated was filed in this court, with a view of obtaining a review of the proceedings in the district court. No further steps were taken in the case until more than three years had elapsed, to wit, in July, 1893, when an application was made for leave to substitute, in lieu of the case made which had been lost, a transcript of the records of the district court of Kingman county, together with a stenographic transcript of the proceedings and evidence in the case taken by the official reporter. The application was granted, and on September 4, 1893, some of the files of the case in the district court, and what purports to be a transcript of the evidence, certified by the stenographer, were brought to this court. No certified transcript of the proceedings in the district court has been produced, and, what is worse, the clerk of that court certified that he was unable to find that any entry was ever made upon the journal of that court of any proceedings whatsoever had in the case. We have, therefore, neither a case made nor a transcript of the record as a basis of review, and are therefore unable to award any adequate relief to the plaintiff.

There are only two methods of obtaining the review of a civil case,—one upon the case made, and the other upon a transcript. In no other way can the appellate jurisdiction of the court to review such cases be invoked or exercised. It is insisted that plaintiffs were entitled to a review, and that a denial of that right when they are without fault is a gross injustice, which this court should in some way correct. While the court may exercise auxiliary authority in aid of its appellate jurisdiction, it is powerless to furnish a remedy, or assist parties in obtaining a record, where it is wholly without jurisdiction. A review in an appellate court is not a natural and inherent right, but only exists by authority of law. The appellate jurisdiction of this court is subject to the regulation of the legislature, and, unless a party brings himself within the requirements of the statute, he is not entitled to a review. The loss of the unsigned case made did not prevent the reproduction and signing of the case. It had been served within the required time, had been examined by the judge, and, under the power vested in him in settling cases, it might have been reproduced, and, upon proper notice, settled and signed, at any time within the year allowed for taking cases to the supreme court. While a case must be served within the prescribed time, "no such limitation exists with respect to settling and signing a case, and hence the

court may postpone such action, and cause it to be done, upon reasonable notice, at a later time." *Hill v. Bank*, 42 Kan. 364, 22 Pac. 324. Instead of attempting to have the case reproduced and signed, the plaintiffs endeavored to find the lost papers, and no steps were taken here until the day preceding the expiration of the year within which the case could be removed to this court. The plaintiffs insist that, if what they have brought here cannot be considered a record, the circumstances warrant the court, by virtue of its inherent power, in remanding the case to the district court for another trial. If this court had jurisdiction of the case by virtue of a transcript, and if it were shown that the case made had been lost through the fraud of the defendant, some such step as that suggested might have been taken. In an unreported case brought to this court, where it was shown that the defendant in error had fraudulently secreted a case made which had been served upon him, the court required that the case made be reproduced by the defendant within a given time, or, failing in that, the judgment would be reversed, and the cause remanded for another trial. This power exists by virtue of the innate right of the court to maintain its dignity and independence, and to preserve its inherent jurisdiction, as well as to protect and enforce the judgment that it may render. In this case we have nothing, however, upon which to rest jurisdiction, and, besides, there is no satisfactory evidence that the defendant was responsible for the loss of the case. It is true that he was interested in its loss, and that he and others were in the room where it was kept; but the testimony of the clerk in whose possession it was placed has not been taken, or at least has not been produced before us. His whereabouts were known, and it would seem that his testimony might have accounted for the missing case; and, while some statements alleged to have been made by him are included in an affidavit, they are only hearsay evidence, and cannot be received. If we had jurisdiction, and it was shown that the loss was due to the fraud of the defendant, we would freely exercise such auxiliary authority as we possess in preventing the accomplishment of a wrong, and in protecting the plaintiffs' rights. It is a matter of regret that the record is not in a condition which would enable us to afford the plaintiffs a remedy, but entire absence of jurisdiction renders it impossible, and requires a dismissal of this proceeding. All the justices concurring.

CHICAGO, K. & W. R. CO. v. SHELDON
et al.

(Supreme Court of Kansas. March 10, 1894.)
CONDEMNATION PROCEEDINGS — RIGHTS OF MORTGAGEES.

1. In condemnation proceedings to obtain a right of way for a railroad, no personal notice
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is required to be served upon mortgagees of the land over which the right of way is to be taken, nor need they be named in the award which is made.

2. The mortgagee is not an owner, within the meaning of the statute relating to condemnation proceedings; and when full compensation is awarded for the right of way, and the award is deposited with the county treasurer, a complete easement vests in the railroad company, as against the owner, as well as any others who may have liens upon the land.

3. When the award is paid into the county treasury, any one having an interest in the land, or a lien on the same, may, where equity warrants it, resort to the fund awarded for the right of way.

(Syllabus by the Court.)

Error from district court, Saline county; R. F. Thompson, Judge.

Action by Benjamin R. Sheldon against the Chicago, Kansas & Western Railroad Company and others to foreclose a mortgage. From the judgment rendered, defendant railroad company brings error. Reversed.

A. A. Hurd and Robert Dunlap, for plaintiff in error. R. A. Lovitt and William A. Norris, for defendants in error.

JOHNSTON, J. By condemnation proceedings, the Chicago, Kansas & Western Railroad Company obtained a right of way over a tract of mortgaged land. Due notice of the proceedings was given by publication, but no personal notice was served upon the mortgagee, nor was he named in the award. The amount of the award was deposited, as the law requires, with the county treasurer, who afterwards paid the same to the owner of the land. The mortgagee never attempted to subject the award, as a fund in equity, to his claim, and never received any portion of the same, nor had any benefit therefrom. In this proceeding for a foreclosure, it was contended and held that the mortgage was a lien upon the right of way, and that the same might be sold to satisfy the mortgage. The condemnation proceedings appear to have been legal, and, in the absence of a showing to the contrary, it will be presumed that the commissioners acted right, and that their proceedings were regular. *Railway Co. v. Meyer*, 50 Kan. 25, 31 Pac. 700. The general notice by publication is sufficient, and, when legally made, all persons who have an interest in the land must take notice of the subsequent proceedings, whether they are named in the notice or not. If any owner is dissatisfied with the award when it is made, he may protect his interest by taking an appeal. *Railroad Co. v. Grovier*, 41 Kan. 687, 21 Pac. 779. When the award is paid into the county treasury, any one having an interest in the land or a claim upon the fund may take proceedings to protect his interest or claim. The mortgagee, however, had only a lien upon the land out of which the right of way was taken. He was not an owner of the same, nor the owner of an estate therein.

Not being an owner, within the meaning of our statutes, it was not necessary to name the mortgagee in the proceedings, nor to make any award to him. *Goodrich v. Commissioners*, 47 Kan. 355, 27 Pac. 1006; *Rand v. Railway Co.*, 50 Kan. 114, 31 Pac. 683. When full compensation was awarded for the right of way, and the award was deposited with the county treasurer, a title to the right of way was obtained by the railroad company, as against the owner, as well as any others who may have had liens upon the land. The mortgagee is not without protection, as, having had notice by the publication, he may, where equity requires, resort to the fund awarded for the right of way. It follows that the judgment must be reversed, and the cause remanded, with instructions to enter judgment upon the agreed statement of facts in favor of the plaintiff in error. All the justices concurring.

CITY OF HORTON v. TROMPETER.

(Supreme Court of Kansas. March 10, 1894.)

APPOINTMENT OF ADMINISTRATOR FOR MINOR'S ESTATE—MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS.

1. The probate court is presumed to have lawfully exercised its jurisdiction, and, where the steps taken in that court in granting administration upon the estate of a minor appear to be regular, it makes a prima facie showing of authority to issue the letters of administration.

2. The deceased was eight years of age, and an inhabitant of the state, owning property of the value of \$2.25 at the time of her death. *Held* that, upon a proper application by the father of the deceased, the probate court had jurisdiction to grant letters of administration.

3. A person who has knowledge that a sidewalk had previously been overturned by the wind, and had since been repaired, has a right to assume, in the absence of knowledge to the contrary, that it had been properly repaired, and safely anchored to the ground, by the city authorities. Even a knowledge that it was somewhat defective would not debar him from the use of the street. Nor is notice that it is unsafe or out of repair necessarily negligence in one who travels over it.

(Syllabus by the Court.)

Error from district court, Brown county; R. C. Bassett, Judge.

Action by Joseph Trompeter, administrator of the estate of Frona Trompeter, deceased, against the city of Horton, to recover for the death of decedent. There was judgment for plaintiff, and defendant brings error. Affirmed.

James A. Clark, for plaintiff in error.
Frank H. Foster, for defendant in error.

JOHNSTON, J. While Frona Trompeter, a child about eight years of age, was passing over a street in the city of Horton, a sidewalk upon the same was caught up by the wind, blown over upon her, and she was thereby killed. Her father, Joseph Trompeter, as administrator of the de-

ceased, brings this action to recover damages for her death, claiming that it resulted from the negligent construction and maintenance of the sidewalk. There was an abrupt slope on one side of the street whereon the sidewalk was built, and one side of a portion of the walk was held up by props or stilts from one to three feet long; thus forming a pocket under the walk, through which the wind could not escape. Instead of complying with the city ordinance, which required the walks to be built of plank two inches in thickness, this walk was constructed of boards only one inch in thickness, and at this point it had blown over several times before the killing of Frona Trompeter. Special findings were made by the jury to the effect that the street commissioner, shortly before the accident, had repaired the sidewalk, but had failed to make it reasonably safe for the use of the public. It was also found that the city had notice of the defective condition of the sidewalk before it blew over, and that such notice was given to the mayor and street commissioner. In answer to a question, the jury stated that the day on which the accident occurred was not an unusually windy one, for that time of the year, and, further, that Frona Trompeter died owning personal property of the value of \$2.25. The jury assessed the damages of the plaintiff below at \$2,500, and the city alleges several grounds for reversal.

The negligence of the city in building and maintaining the sidewalk which caused the death of the child cannot be denied. The contention that there was contributory negligence on the part of the child or her parents has not been maintained. It is true that they had frequently passed over the walk, had probably observed its general character, and may have known that it had previously been turned over by the wind. They had a right to assume, however, that it had been properly repaired, and safely anchored to the ground, by the city authorities. Even a knowledge that it was somewhat defective would not debar them from the use of the street. Nor would such use, with notice that it was unsafe or out of repair, necessarily constitute contributory negligence. *City of Emporia v. Schmidling*, 33 Kan. 485, 6 Pac. 893; *Langan v. City of Atchison*, 35 Kan. 326, 11 Pac. 38. While it appears that a strong wind was blowing, there is testimony to sustain the finding of the jury that it was not an unusual wind; and whether the wind was unusually strong, or whether there was negligence in the child going, or being permitted to go, out upon such a day over this walk, were questions of fact, for the consideration and determination of the jury.

There is a further contention that the deceased left no estate to be administered,

Probate court in was absolutely void. The deceased was an inhabitant of the state at the time of her death, and, whether necessary to the granting of administration or not, there appears to have been an estate sufficient to give jurisdiction for the letters that were issued. The probate court is presumed to have lawfully exercised its jurisdiction, and the steps taken in that court appear to be regular, and make a prima facie showing of authority to issue the letters of administration. Such letters may be granted upon the estate of a minor, as well as upon that of an adult, and the inventory recites property valued at \$10.75. Possibly, some of that inventoried cannot be regarded to have been that of the child, but some of it, undoubtedly, can; and the finding of the jury, based upon competent testimony, shows that she had property, although not very valuable, which, in any event, would justify administration. *Wheeler v. Railroad Co.*, 31 Kan. 640, 3 Pac. 297; *Railway Co. v. Dunden*, 37 Kan. 1, 14 Pac. 501.

The remaining objections are made against the instructions of the court, most of which relate to the question of contributory negligence. In view of the finding of the jury that it was not an unusually windy day when the girl was killed, this question is of little importance. The fourth request needs no attention, because no exception to its refusal was taken, and the fifth might properly have been refused on the ground of ambiguity. The seventh related to the subject of whether it was negligence for the mother to send the child out in an unusual wind or storm, but this question has become immaterial, through the finding of the jury.

The measure of damages was correctly stated by the court, and, while the instruction might have been elaborated, no request of that kind was made, and we think no error in that respect was committed. While the damages were liberal, they cannot, within the rules of law, be said to be excessive, and we find no ground for disturbing the verdict of the jury. Judgment affirmed. All the justices concurring.

ENGLISH v. ENGLISH.

(Supreme Court of Kansas. March 10, 1894.)

PARTITION—PLEADINGS—EVIDENCE—FINDINGS.

1. In an action for partition of one tract of land, where the defendant claims title to the whole under an agreement with plaintiff's father with reference to the tract of which partition is asked by plaintiff, and also to two other tracts, it is not error for the court to consider and determine the rights of the parties with reference to all of the lands included in the agreement, even though some portions of them had been conveyed away by the defendant, and the court did not err in refusing to strike out

averments in the answer with reference to such other tracts.

2. *Held*, that the findings in this case are supported by the evidence, and show that all the lands in controversy were in equity the property of the defendant, and that so much of the legal title thereto as rested in the plaintiff's father at the time of his death was by him held in trust for the defendant.

3. It is not error for the trial court to call on the attorney of the successful party to write out findings of fact in the case, in accordance with the decision of the court as announced orally, where, after the findings are so prepared, the court examines, approves, and adopts them as the findings of the court.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by William T. English against Alexander English for partition of land and for an accounting. There was judgment for defendant, and plaintiff brings error. Affirmed.

The other facts fully appear in the following statement by ALLEN, J.:

The plaintiff in error brought this action, alleging that he was the owner of the undivided half of a 69-acre tract of land in Atchison county, which had been in possession of the defendant, and of which he had received the rents and profits, from November 15, 1859, asking for a partition and an accounting for profits. The defendant filed a very voluminous answer, containing—First, a general denial; second, a detailed statement alleging that the father of the defendant left an estate, consisting of both real and personal property in Indiana, to the defendant and to his brothers John and Thomas; that Thomas English, whose son the plaintiff claims to be, was the guardian of the defendant during the latter portion of his minority, and, as such, received his share of the personal estate; that the real estate belonging to the three brothers was sold, and most of the proceeds thereof were received and retained by Thomas; that the three brothers together came to Kansas; that the land described in the petition was purchased from Jacob Reese, and a deed therefor executed to Thomas English and Alexander English, but that a note signed by all three of the brothers was given for the purchase price thereof, and that this note was afterwards paid by the defendant alone; that the N. W. $\frac{1}{4}$ of section 14, township 6, range 17, was bought from one Sparling for \$456, and that a military land warrant was located on the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 29, township 5, range 18; that both of these tracts, though deeded to Thomas English alone, were paid for with trust funds in the hands of said Thomas belonging to the defendant; and that all of this land had been in the possession of the defendant, as his own, for many years. The answer also alleges that Thomas English went back to Indiana, and there married Lavinia Killian; that by her he had two children, who died; that the said Thomas died on September 6, 1866; that before his death it was agreed, by letters passing be-

tween the parties, that the defendant should have all of the lands in Kansas in consideration of said Thomas having received and retained a large portion of defendant's share of the proceeds of their father's estate; that Thomas died without having carried out this agreement; that his widow, on the 22d of October following her husband's death, married one John Slatton, and that said Lavinia and John Slatton, in consideration of the moneys due the defendant from said Thomas English, and of the sum of \$100, before the birth of the plaintiff conveyed by quitclaim deed to the defendant all of the lands described in the pleadings; that thereafter the defendant bought in an outstanding tax title on a part of said lands, and paid off the tax liens that had accrued against all of it. The answer alleges that the plaintiff was not born until April following his mother's marriage with said Slatton. It seems to be conceded, however, that the plaintiff is the son of Thomas English. The answer also shows that the defendant had sold, and executed deeds to, several portions of the lands before described, and was still in the possession of the balance. The case was tried by the court, and very full findings of fact were made, sustaining all the essential averments of the answer, and thereupon the court rendered judgment in favor of the defendant, not only as to the land described in the petition, but also confirming his title to other tracts described in the answer.

J. T. Allensworth, for plaintiff in error.
W. W. & W. F. Guthrie, for defendant in error.

ALLEN, J., (after stating the facts.) The first complaint is of the court's ruling on the plaintiff's motion to make the amended answer more definite and certain. We think the court's ruling was right. The answer certainly is not wanting in fullness of detail.

The next assignment of error is in overruling the plaintiff's motion to strike out all reference to other lands than those described in the petition, and it is contended that, as to the lands which the defendant had already deeded away, he had no right to relief. It may be that the defendant could not maintain an independent action to quiet the title to lands he had already conveyed to another; yet, inasmuch as the transactions between Thomas and Alexander English related to those tracts, and as it is claimed by the defendant that it was finally agreed between them that he should have all the Kansas land, we see no impropriety in settling the whole controversy in one suit. All the rights of the parties growing out of the same transaction may properly be determined in an action depending on such transaction.

The third and principal contention of the plaintiff in error is that the findings are unsupported by the evidence. We have patiently read the testimony contained in the record, and find that every material fact

found by the court is supported by competent testimony. To consider each of the matters which the court has deemed worthy of especial mention, separately, would consume needless space. We think the testimony is ample and satisfactory, and the court's conclusions correct. While it might, perhaps, be necessary, in order to establish a resulting trust, to show that the identical money belonging to the defendant was invested in this Kansas land, in this case we have proof of an express recognition by Thomas English of the trust, and an agreement in writing, by his letters, to convey the lands, in pursuance of that trust, to the defendant; and the evidence abundantly shows that Thomas English, at the time of that agreement, held considerably more funds belonging to the defendant than the amount invested in the Kansas lands. Complaint is also made because the findings of fact were prepared by the attorney for the defendant. It appears that at the conclusion of the trial the court orally announced its decision upon the facts and the law, and requested the defendant's attorneys to prepare and submit findings; that this was done, and the findings so prepared were examined and approved by the court. Nothing is more common, in the conduct of business in court, than for attorneys to draft orders and journal entries of all kinds. Of course, it would be error to permit the attorney of one of the parties to dictate as to what should be included in the findings; but where the court, as will always be assumed to be the case, without an explicit showing to the contrary, passed an intelligent judgment on the findings submitted, and approved them, we see no objection to allowing an attorney in the case to perform the clerical labor of writing up findings in accordance with the decision of the court as announced, leaving to the judge only the duty of examining, correcting, if necessary, and finally approving. We perceive no substantial error in the record, and the judgment is affirmed. All the justices concurring.

GRAY v. DELAY, Sheriff.

(Supreme Court of Kansas. March 10, 1894.)
CHattel MORTGAGES—SALE ABSOLUTE IN FORM—CREDIBILITY OF WITNESS.

1. "A bill of sale of personal property, absolute upon its face, if taken as security, is only a chattel mortgage." *Butts v. Privett*, 38 Kan. 711, 14 Pac. 247.

2. The jury are the judges of the weight and credibility of a witness, and, where the plaintiff's statements concerning material facts are contradicted by another witness, the jury are at liberty to reject his evidence altogether. (Syllabus by the Court.)

Error from district court, Books county; Charles W. Smith, Judge.

Action in replevin by V. M. Gray against Reuben Delay, as sheriff. There was judgment for defendant, and plaintiff brings error. Affirmed.

M. C. Reville, for plaintiff in error. A. H. Ellis, for defendant in error.

HORTON, C. J. This was an action of replevin for certain cattle and horses, alleged to be of the total value of \$3,300. The case was tried by a jury, who found for the defendant. Judgment was rendered in favor of the defendant for a return of the property, or, in case a return could not be had, then for \$2,103, the value of the property, and for costs. The plaintiff brings the case to this court.

V. M. Gray, the plaintiff, is the father of Irad W. Gray. The plaintiff claimed upon the trial that on the 25th of March, 1889, Irad W. Gray, who lived at Plainville, Rooks county, in this state, finding himself in failing circumstances, sold the cattle and horses in controversy to him; that he took possession of the same, and mortgaged them to the First National Bank of Hays City to secure two promissory notes aggregating \$2,000, signed by Irad W. Gray as principal and himself as surety. Reuben Delay, as sheriff, attached the cattle and horses, as the property of Irad W. Gray, in several cases brought against the latter by his creditors on the 29th of March, 1889. The alleged bill of sale under which V. M. Gray claimed the property was dated March 25, 1889, but probably executed on March 26th. On the part of the defendant, it was claimed that the so-called "bill of sale" was executed as a security or a chattel mortgage only, and that V. M. Gray never filed the same for record, and never took possession of any of the cattle or horses before the levy thereon. The First National Bank of Hays City did not intervene, and was not a party to the record.

The claim that the property was transferred by an absolute title of sale is not supported by the findings of the jury, and there was sufficient evidence offered upon the trial to support this finding. "A bill of sale of personal property, absolute upon its face, if taken as security, is only a chattel mortgage." *Butts v. Privett*, 38 Kan. 711, 14 Pac. 247. As the so-called "bill of sale" or chattel mortgage was not filed for record, the question of possession of the cattle and horses at the time of the levy of the attachments was the pivotal fact in the case. At the time of the transaction between the plaintiff and his son, Irad W. Gray, the larger number of the cattle and horses were on the ranch of Irad W. Gray, four miles south of Plainville, in Rooks county. One Kane, his hired man, was in charge thereof. Twenty-five head of the cattle were at Chris. Christiansen's farm, adjoining the ranch. The plaintiff testified that after the so-called "bill of sale" was delivered to him, and on the 26th of March, he went to the ranch of Irad W. Gray, where Kane was in charge, and also to the farm of Christiansen, and took possession of the cattle, and made

arrangements with those parties to cure for the same for him. At the time of the trial, Kane was dead, but Christiansen was living. He testified that the plaintiff did not see him about the cattle upon his farm, or take any possession of the same, until after the sheriff attached them. The jury specially found that after the execution of the so-called "bill of sale," and before the levy, there was no actual change in the possession of the cattle and horses on the Irad W. Gray ranch; and all of their findings, including the general verdict, tend to show that they did not believe the testimony of the plaintiff as to his taking possession of any of the cattle or horses. The jury were under no obligation to believe the plaintiff's statements about his alleged possession of the property before the levy, and, under the circumstances of this case, entirely at liberty to reject it altogether. The jury must take evidence with all its surroundings, and often other things which go to characterize it are more convincing than the positive evidence of any single witness, especially if he is interested.

Some of the instructions given by the court might be criticised; but as it is conceded that the so-called "bill of sale" was never filed for record, and as the jury found that it was taken as security only, and therefore was only a chattel mortgage, and as it appears from the further findings of the jury that the plaintiff never took any actual possession of the cattle and horses before the levy, we find nothing substantial in the alleged errors to affect the verdict, or to cause a new trial. The other alleged errors we have considered, but they are wholly unimportant. The judgment of the district court will be affirmed. All the justices concurring.

CHIPMAN et al. v. CARROLL et al.

(Supreme Court of Kansas. March 10, 1894.)

INSURANCE ON MORTGAGED PREMISES—RIGHTS OF MORTGAGEE—HOMESTEAD EXEMPTIONS.

1. Where there is an agreement between the mortgagor and the mortgagee that the mortgagor shall keep the premises insured for the benefit of the mortgagee, and in fulfillment of this agreement the mortgagor takes out a policy of insurance in his own name, which is not assigned to the mortgagee, or made payable to him in any way, the mortgagee is regarded as having an equitable lien upon the proceeds of the policy; and where the mortgagee obtains judgment upon his mortgage, but before there is any sale or conveyance the mortgagor takes out a policy of insurance in his own name, and a loss occurs before any sale, the mortgagee is entitled to recover the loss, as the judgment does not extinguish his debt.

2. Where the husband and wife jointly execute a mortgage upon their homestead, and there is an agreement that the premises shall be insured for the benefit of the mortgagee, and subsequently the husband takes out a policy of insurance upon the premises in his own name, and soon after a loss occurs, the mortgagee has an equitable lien on the proceeds of the policy, and such proceeds are not exempt upon the ground

that the policy was upon the homestead of the parties.

3. After a loss, the insurance company may be garnished, where the payment of the loss is not conditional on anything remaining to be done.

(Syllabus by the Court.)

Error from district court Miami county; John T. Burris, Judge.

Action by Daniel L. Chipman and Ephraim Mower against Jennie C. Carroll and others, defendants, and the People's Insurance Company, garnishee. From the judgment rendered, plaintiffs bring error. Reversed.

The other facts fully appear in the following statement by HORTON, C. J.:

On June 2, 1887, Frank S. Carroll and wife executed a note and mortgage for \$1,500 to Daniel L. Chipman, and on the same day executed a second note and mortgage, for \$500, to Ephraim Mower. The land described in the mortgages then constituted the homestead of Frank S. Carroll, and the title to the same was in him. The mortgage to Chipman contained the following clause: "But if default be made in such payment, or any part thereof, or interest thereon, or the taxes, or if the insurance is not kept up thereon, then this conveyance shall become absolute." Frank S. Carroll transacted the business in negotiating the loans, and Chipman and Mower, then and ever being non-residents of this state, transacted their business through C. W. Chandler, their agent at Paola, in this state, who was afterwards succeeded by Chandler Bros., and that firm continued acting as the agents of Chipman and Mower. After the execution of the mortgage, the dwelling was insured by Frank S. Carroll, and, by clause attached to the policy, the loss, if any, was made payable to Chipman or his assigns. On November 27, 1889, judgment was rendered upon the mortgages above recited for \$1,636.64, with 9 per cent. from that date, in favor of Chipman, and for \$569.42, with 9 per cent. from that date, in favor of Mower, and the land ordered sold by virtue of the mortgages. On March 29, 1890, Frank S. Carroll, in his own name, negotiated insurance upon his dwelling with the People's Insurance Company, of New Hampshire, in a sum over \$1,200, and with the Burlington Insurance Company, of Iowa, in the sum of \$900. On April 13, 1890, the dwelling was totally destroyed by fire. On April 21, 1890, special execution was issued, ordering the sale of the land to satisfy the judgments in favor of Chipman and Mower. On April 26, 1890, Chipman and Mower, by F. M. Chandler, of the firm of Chandler Bros., their agent, filed an affidavit for garnishment against the insurance companies, stating the amount of the judgments; that the same were still in full force, wholly unpaid, and not subject to any counterclaim or set-off; that execution had been issued thereon, but would not be returnable for more than 30 days; that

Frank S. Carroll and Jennie C. Carroll had not property enough, subject to execution, to satisfy the judgments, or even the half thereof; that the money due from the insurance companies was not exempt,—and reciting other material facts. On the same day a garnishee summons was issued to the insurance companies, and served by the sheriff, by delivering copies thereof to N. W. Wells, as the manager and agent of the companies at Paola, in this state, and by delivering a copy thereof to the defendants Frank S. Carroll and wife. On May 10, 1890, another garnishment summons was issued, and served May 12, 1890, by the Kansas state superintendent of insurance. On May 10, 1890, and immediately after receiving a copy of the garnishee summons, Frank S. Carroll went to Kansas City, Mo., and attempted to make an assignment of the insurance due from the People's Insurance Company to one S. Schullen. On May 27, 1890, the People's Insurance Company filed in the action its answer as garnishee, in which it stated that, by its policy No. 69,957, it insured the one-story frame building and additions of Frank S. Carroll for \$1,200, and on May 23d received proofs of loss, by fire, of April 13th, and afterwards received notice of the alleged assignment to Schullen, and that it was ready to pay the \$1,200 due under the policy to the party entitled to receive it. On June 4, 1890, Frank S. Carroll and wife filed their verified answer to the affidavit for garnishment, stating (1) that Mower and Chipman should not maintain their action, because no general execution had been issued upon the judgments of Chipman and Mower prior to the filing of said affidavit; (2) that the property and credits sought to be garnished were the proceeds of their homestead, and exempt from execution; (3) that they had assigned their claim against the People's Insurance Company to Schullen; (4) that they denied every allegation in said affidavit. On June 11, 1890, said Schullen filed his answer in said garnishment, setting up the alleged assignment to him. On June 24, 1890, a trial was had upon the matters under the pleadings. On July 16, 1890, the court decided the issue between Chipman and Mower and the People's Insurance Company, in substance, as follows: "That the insurance company pay the sum due from it to the clerk of the district court for the use of said Frank S. Carroll and Jennie C. Carroll, and that upon the payment of that sum to the clerk of this court the People's Insurance Company, garnishee, be, and it is hereby, discharged; and that said Daniel L. Chipman and Ephraim Mower pay the costs herein, taxed at \$——." Daniel L. Chipman and Ephraim Mower excepted, and brought the case here on August 21, 1890. In the month of February, 1891, Frank S. Carroll, the principal defendant in this case, died; and thereupon Chipman and Mower revived this case in

the name of his surviving widow, Jennie C. Carroll, and her children.

John C. Sheridan, for plaintiffs in error.
W. H. Browne, for defendants in error.

HORTON, C. J., (after stating the facts.) The judgment upon the mortgage of Frank S. Carroll and wife to Daniel L. Chipman was rendered November 27, 1889, for \$1,636.64. The insurance policy which is involved in this case was obtained by Frank S. Carroll on March 29, 1890. The dwelling was burned and loss occurred on the 13th of April, 1890. The judgment rendered has not been paid or satisfied, in whole or in part. The insurance company issuing the policy admitted that it is ready to pay \$1,200 due under the policy to the party entitled to receive it.

The question that we are called upon to decide in this case is whether Chipman has an equitable claim or lien upon the money due on the policy. If there was no covenant in the mortgage, or agreement between the parties, that the premises would be insured for the benefit of the mortgagee, the mere fact that Chipman's mortgage covers the property insured, and the insurer is personally liable for the debt, gives Chipman, the mortgagee, no corresponding claim upon the policy, or the proceeds of it. 1 Jones, Mortg. § 401; Lees v. Whiteley, L. R. 2 Eq. 143; Ames v. Richardson, 29 Minn. 330, 13 N. W. 137; Stearns v. Insurance Co., 124 Mass. 61. But where a mortgage provides that the mortgagor shall keep the premises insured for the benefit of the mortgagee, and, in fulfillment of this covenant, he takes out a policy of insurance in his own name, which is not assigned to the mortgagee, or made payable to him, the mortgagee is regarded as having an equitable lien upon the proceeds of the policy. 1 Jones, Mortg. § 400, and cases cited. It was expressly ruled in Miller v. Aldrich, 31 Mich. 408, that "where the agreement to keep insurance for the benefit of the mortgagee was merely verbal, but the mortgagor had acted upon it by obtaining such insurance, and his grantee, having knowledge of the agreement, subsequently surrendered this policy, and took another, which was not payable to the mortgagee, it was held that he was nevertheless entitled, in equity, to have the insurance money applied in payment of the mortgage debt." In this case the mortgage stipulated, "If the insurance is not kept up thereon, then this conveyance shall become absolute." To explain this provision, it was competent for Chipman, the mortgagee, to prove, if he could, that there was a verbal agreement between the mortgagors and the mortgagee that the insurance referred to in the mortgage was for the benefit of the mortgagee. This agreement would not vary or contradict the terms of the mortgage. It would tend to explain the language of the mortgage, and

show what the parties intended thereby. Again, if there was no insurance clause in the mortgage, yet if, to obtain the loan secured by the mortgage, it was verbally agreed between the parties that insurance was to be kept up on the mortgaged property by the mortgagors for the benefit of the mortgagee, as additional security, and subsequently the mortgagors, acting upon this agreement, obtained insurance, with loss payable to the mortgagee, and, after this expired, took out another policy, not payable to the mortgagee, the latter would be entitled to an equitable lien on the proceeds of the policy if any loss by fire occurred. The court committed error in refusing to receive the evidence offered tending to show the verbal agreement, if any, at the time of the loan between the parties, concerning the application of the insurance which was to be kept up on the mortgaged premises.

It is insisted that, as the mortgage was merged in the judgment, any agreement to keep up the insurance on the premises for the benefit of the mortgagee lapsed. The agreement to keep insurance for the benefit of the mortgagee, if any such agreement was made, was for the protection of the mortgagee, or rather as an additional security for his debt. The judgment did not extinguish the mortgage debt, either in whole or in part. The mortgagee, after his mortgage was merged in the judgment, was as much interested in protecting the property by insurance as prior thereto; and if the mortgagee would have had an equitable lien upon the proceeds of the policy, if taken before judgment, he would clearly have a lien upon the proceeds after judgment, if no sale had taken place. It was decided in National Bank of D. O. Mills & Co. v. Union Ins. Co., (Cal.) 26 Pac. 509, that "where the loss is payable to the mortgagee of the property, and occurs after sale under foreclosure, but before the time for redemption has elapsed, the mortgagee is entitled to recover the loss, as the foreclosure is no extinguishment of his debt until the deed has been made and the time for redemption has expired." Dunlop v. Avery, 23 Hun, 509; Ames v. Richardson, 29 Minn. 330, 13 N. W. 137.

The claim that the proceeds of the policy are exempt because obtained from a policy upon the homestead is not tenable. If the dwelling house had not been destroyed by fire, it and the premises with which it was connected could have been sold in satisfaction of the judgment, as both the husband and wife jointly executed the mortgage. If the insurance company had rebuilt and replaced the dwelling house after its destruction by fire, it could also have been sold, with the premises, to satisfy the judgment. The proceeds of the policy of insurance merely take the place of the dwelling house destroyed by fire, and, while they would be exempt as against general creditors, they are not exempt if Chipman, the mortgagee, has

an equitable lien thereon under the mortgage given by the husband and wife, and the agreement—if any exists—with them to keep up insurance for his benefit. The judgment will be reversed, and cause remanded. All the justices concurring.

CITY OF MOUND CITY v. SNODDY.

(Supreme Court of Kansas. March 10, 1894.)

ATTORNEY—UNAUTHORIZED EMPLOYMENT BY CITY OFFICER—RATIFICATION.

A mayor of a city, by virtue of his office alone, cannot employ an attorney, and create a liability against the city for the services of such attorney; but if such employment is made, and an action is begun in the name of the city, and the city council has knowledge of the institution and pendency of the suit, and allows the attorney to proceed with the litigation for a considerable time without protest or repudiation, and afterwards acquiesces in and accepts the fruits of the service, it will operate as a ratification of the employment, and render the city liable for the value of the services.

(Syllabus by the Court.)

Error from district court, Linn county; J. S. West, Judge.

Action by James D. Snoddy against the city of Mound City to recover for services rendered. There was judgment for plaintiff, and defendant brings error. Affirmed.

R. F. Wilbur, for plaintiff in error. James D. Snoddy, in pro. per.

JOHNSTON, J. This was an action by James D. Snoddy to recover from Mound City for legal services rendered in behalf of that municipality. The city had voted and issued waterworks bonds to the amount of \$12,000, and had placed them in the hands of a broker in Kansas City for sale, who advanced to the city \$2,500 upon them. He did not succeed, and the city constituted J. H. Trego as its agent to negotiate the sale of the bonds, and directed that Robert Kincaid should forthwith go to Kansas City, and obtain the bonds, and deliver them to Trego. In accordance with this direction, Kincaid went to Kansas City, taking with him a sufficient amount of money, given him by Trego, to pay the amount which the broker in Kansas City had advanced upon the bonds. Having paid the claim of the Kansas City broker, he obtained the bonds, and returned with them to Mound City; but, instead of turning them over to Trego, they were deposited in the Citizens' Bank, of which Robert Kincaid and Harlan Underhill were officers. Learning that the bonds had been returned, and not delivered to Trego, in accordance with directions, the mayor of Mound City and its agent demanded the possession of the bonds, but the demand was refused. The mayor and Trego employed Snoddy as an attorney to obtain possession of the bonds, and at once he instituted an action in replevin, in which the city of Mound City and J. H. Trego were

made plaintiffs, and the Citizens' Bank, Robert Kincaid, and Harlan Underhill were made defendants. The action was begun on February 20, 1888, and judgment was given against the defendants therein at the succeeding April term of the court. The city contended that Snoddy was not legally employed, that he rendered no substantial services to the city, and that there has been no ratification of his employment. The jury found the issues in favor of Snoddy, and awarded him \$200 as compensation for the services which he rendered.

The evidence tends to sustain the verdict of the jury. The bonds were required to be forthwith obtained and delivered to Trego, and the proof goes to show that they were wrongfully withheld from the city and its agent by the defendants. The excuse for not delivering them was that there was an outstanding option for the sale of the bonds by the broker at Kansas City, and that the possession of the bonds was withheld to await the result of that option. The bonds, however, had been surrendered by the broker, and, under the order of the city, they should have been delivered at once to Trego, the agent of the city. There is testimony, therefore, that the action was brought in good faith, and the proof clearly shows that legal services of the character rendered were not overvalued by the jury. Of course, the mayor, by virtue of his office alone, could not make an employment which would create a liability against the city for the services rendered; but if the city had knowledge of his employment, and of the rendition of the services, and acquiesced in and accepted the fruits of the same, the employment would bind the city. When the suit was begun, the city attorney had resigned, and a successor was not appointed until April 9, 1888. With knowledge of the institution and pendency of the suit, the city allowed Snoddy to proceed with the litigation until April 14th, when a resolution was passed by the city council, directing that notice should be given to Snoddy not to represent the city, and instructing the city attorney, who had been appointed, to take charge of the case, and to take such steps as would best protect the interests of the city. Within two or three days after the passage of this resolution, and while court was in session, but before judgment was rendered, notice of the same was given to Snoddy. The city attorney, however, instead of dismissing the action, allowed it to proceed to a judgment against the defendants for the possession of the bonds. Their possession was therefore determined to be wrongful, and, in view of the finding of the jury, it cannot be said that the action was brought without cause or justification. The court below properly instructed the jury that if the city, knowing the facts in relation to the employment, permitted Snoddy to act as attorney and represent the city, its conduct would

operate as a ratification and acceptance of the acts of the mayor in making the employment, and that the city would be liable for what his services theretofore rendered were reasonably worth, unless, with reasonable promptness, it had notified him to discontinue the services. If the city desired to dispense with the services of the attorney, or desired not to ratify the acts of the mayor in employing him, it was its duty, upon learning of the employment and institution of the action, to notify him, within a reasonable time, that the contract was repudiated, and that further service upon his part was not desired. There is testimony tending to show that this was not done, and the question whether the city had knowledge of all the facts, and acted with reasonable promptness in repudiating the employment, was for the jury to determine. The general finding of the jury upon the testimony offered practically settles the controversy in favor of the defendant below. The acquiescence in the employment, and the acceptance of the fruits of the service, operate as a ratification, and renders the city liable for the value of the services. *Ehrsam v. Mahan*, 52 Kan. —, 34 Pac. 800; *City of Logansport v. Dykeman*, (Ind. Sup.) 17 N. E. 587. The judgment of the district court will be affirmed. All the justices concurring.

MCCORMICK v. DALTON.

(Supreme Court of Kansas. March 10, 1894.)

DURESS—WHAT CONSTITUTES.

What will constitute duress must depend upon the circumstances of each particular case. But where D. claims he had a parol contract with M. for the grading of a mile of the roadbed of a railway, at a stated price per cubic yard, and that M., desiring to abrogate the verbal contract, demanded of him the signing of a written contract for one-half mile, only, of the heaviest work of the grading, at the same price per cubic yard, and, upon his refusing so to do because the written contract did not correspond with the verbal agreement, M. said to the men working for him, "I will stand good for no more work you do for D., and D. can stop at once," and D., on account of his financial condition, was unable to carry on the work unless M. paid the men, and, after studying over the matter a few days, signed the written contract. *Held*, that the contract cannot be said to have been signed by D. under duress.

(Syllabus by the Court.)

Error from district court, Phillips county; Louis K. Pratt, Judge.

Action by James H. Dalton against Ed. McCormick for a breach of contract. There was judgment for plaintiff, and defendant brings error. Reversed.

The other facts fully appear in the following statement by HORTON, C. J.:

This action was commenced by James H. Dalton against Ed. McCormick, on the 22d day of November, 1887, for the recovery of \$1,008.11 damages, which Dalton claimed to have sustained by reason of McCormick's re-

fusal to allow him to perform and complete certain railroad grading according to the terms of an alleged verbal contract. The plaintiff below alleged, among other things, in his petition, "that on or about the 18th day of July, 1887, he entered into a verbal contract with McCormick to do the grading of one mile of the roadbed of the Chicago, Kansas & Nebraska Railway, in Phillips county, in this state, at and for the price of 13 cents per cubic yard." The answer of McCormick denied generally the allegations of the petition, and alleged that the contract, and the only contract ever entered into between the parties, was a written contract for the grading of one-half a mile of roadbed being a part of the roadbed mentioned in the petition, located between the west end of station 3,335 and the east end of station 3,367, and that all the conversation had between the parties about any contract for grading was finally reduced to writing and then signed by both parties. The trial of the case commenced on September 9, 1889. The jury returned a verdict for Dalton, assessing the amount of his recovery against McCormick at \$609.50. The court rendered judgment upon the verdict of the jury. McCormick excepted, and brings the case here.

G. A. Spaulding, for plaintiff in error. N. B. McCormick and Frank McKay, for defendant in error.

HORTON, C. J., (after stating the facts.) Dalton, the plaintiff below, claimed damages for a breach of a verbal contract with McCormick, the defendant below, to grade a mile of the roadbed of a railway. The principal defense was that, after some preliminary conversation between the parties concerning grading, a written contract was finally consummated between them for the grading of one-half a mile only. Upon the trial the court instructed the jury that, if they believed the written contract was the only one entered into between the parties, Dalton had no case whatever. Dalton testified upon the trial, among other things, that after the verbal contract had been made, and on or about the 14th of August, 1887, a written contract was presented to him by McCormick, which he refused to sign, giving as his reason that the contract was not as previously agreed upon; that McCormick, on his refusal to sign the contract, said to his men, "I will stand good for no more work you do for Dalton," and "that he [Dalton] could sign the contract or stop work;" that he (Dalton) "rested a few days, and, after studying over the matter, signed the contract for the grading." He was unable to carry on the work, on account of his financial condition, unless McCormick paid the men, or stood good for their pay. Upon the trial this evidence was objected to, but the court overruled the objection, and stated as follows: "This testimony is for the purpose of

furnishing an excuse for signing the contract afterwards. * * * He [Dalton] did it under duress." The court also instructed the jury as follows: "The defendant denies in toto that he made any contract with the plaintiff for him to grade one mile. On the contrary, he claims that he entered into a written contract with him, which was the only contract he did enter into, which was finally consummated, for one-half mile, and that the plaintiff graded the one-half mile, and he paid him for it. Now, if you believe that is the contract, then the plaintiff has no case whatever, and you must find a verdict for the defendant. If they simply had a talk or had negotiations about one mile, but afterwards it all culminated in a written agreement for one-half mile, then, of course, the plaintiff cannot recover. But if the contract was a verbal contract for one mile, and afterwards the defendant, by duress, and by taking an unfair means, compelled him to accept a written contract for this half mile, and he afterwards insisted on his right to grade the other half mile, and was not allowed to, the plaintiff may recover the damages he has suffered."

It is apparent from the evidence given by Dalton upon the trial that the execution of the written contract was not procured by duress. *Cable v. Foley*, (Minn.) 47 N. W. 1136; *Hackley v. Headley*, (Mich.) 8 N. W. 511; *Peckham v. Hendren*, 73 Ind. 47; *Emmons v. Scudder*, 115 Mass. 367. Duress, in its more extensive sense, is that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness. Text writers divide the subject into "duress per minas" and "duress of imprisonment." See *Anderson v. Anderson*, 9 Kan. 112; *Helm v. Helm*, 11 Kan. 19; *Bank v. Croco*, 46 Kan. 620, 26 Pac. 939. The reply was a general denial, unverified. No duress was alleged. The remark of the court that "Dalton signed the contract under duress," followed by the instruction that if McCormick compelled Dalton, by duress, to accept the written contract, he was entitled to recover, was misleading, and under the facts, as disclosed upon the trial, erroneous, and prejudicial to the rights of McCormick. As it does not appear from the evidence that any duress, as defined in law, was used by McCormick to obtain the written contract, that feature ought not to have been interjected into the case. The court ought not to have made the remark referred to, or given any instruction concerning duress. Whether the alleged verbal contract was merged into a subsequent written contract was a question for the jury to determine upon proper instructions. Upon the theory of the trial court, the written contract was wholly eliminated from the case, because there could be no merger or any substitution of the written contract for the verbal one, if

the written contract was executed under duress. The judgment of the district court will be reversed, and cause remanded for a new trial. All the justices concurring.

ATCHISON, T. & S. F. R. CO. v. RICHARDSON et al.

(Supreme Court of Kansas. March 10, 1894.)

CARRIERS—DAMAGES TO FREIGHT—CONNECTING LINES—EVIDENCE.

1. Where a shipper sues a railroad company for damages to perishable freight, and alleges in his petition that such shipment was made to a point which is in fact beyond the line of defendant's road, under a written contract, by the terms of which it is expressly provided that the defendant shall not be responsible as a common carrier beyond its line of road, it is error to render judgment against the defendant because of delays occurring beyond the line of its road, where there is no showing of negligence on the part of the defendant, or of any injury to the freight while in its possession.

2. The annual report of the board of railroad commissioners, made to the governor, is not, of itself, evidence of the facts there stated with reference to the ownership and operation of a line of railroad, but the official reports made by the railroad companies, under oath, to the board of railroad commissioners, and required by law to be filed with them, or copies thereof duly certified by the secretary of the board, are competent evidence against the company making them.

(Syllabus by the Court.)

Error from court of common pleas, Sedgwick county; Jacob Balderston, Judge.

Action by George C. Richardson and others, as Richardson, Simon & Co., against the Atchison, Topeka & Santa Fe Railroad Company. There was judgment for plaintiffs, and defendant brings error. Reversed.

The other facts fully appear in the following statement by ALLEN, J.:

Richardson, Simon & Co. brought this action in the court of common pleas of Sedgwick county against the Atchison, Topeka & Santa Fe Railroad Company, alleging that on the 31st day of March, 1886, at Leavenworth, they delivered to the Leavenworth, Topeka & Southwestern Railway Company 135 barrels of apples consigned to themselves at San Francisco, Cal.; that, in consideration of \$40.50 paid to said Leavenworth, Topeka & Southwestern Railway Company by the plaintiffs, said company entered into an agreement in writing, a copy of which is attached to the petition, and marked "Exhibit A;" that, in pursuance of said agreement, said Leavenworth, Topeka & Southwestern Railway Company delivered the said goods to the defendant, to be delivered at their destination; that said Leavenworth, Topeka & Southwestern Railway was operated by the defendant company. The written agreement set up is as follows: "Leavenworth, Topeka & Southwestern Railway Company, Leav., Kansas, Station, March 31, 1886. Will receive the undernoted property, and transport it over the road, and deliver to consignees, or the next company or carriers,

if same is going beyond its line of road, for them to deliver at the place of destination of said property, it being distinctly understood that this company shall not be responsible, as common carriers, for said property beyond its line of road, or while at any of its stations awaiting delivery to such carriers, the company being liable as warehousemen only." It is alleged that the defendant did not use due care and diligence in transporting the same; that they were delayed and decayed on the road, to the plaintiffs' damage. The second count in the petition alleges the shipment in the same manner, and under a written contract substantially the same, of a car load of onions to the same point. The defendant answered, denying the allegations of the petition, except the written contracts, which are admitted. The case was tried to a jury, and a general verdict for \$1,272.77 rendered in favor of the plaintiffs. Special questions were also answered, among which are the following: "Q. How long a time transpired in shipping said apples from Topeka to Albuquerque? A. About seven days. Q. From the evidence, what appears to the jury to have been a reasonable time, in days, for the shipment of the apples and onions in controversy from Leavenworth to San Francisco? A. About 12 days. Q. Is it not a fact that Albuquerque was the western terminus of the defendant's road at the time in question? A. Do not know. Q. How many days were consumed by the defendant in transporting the car of onions from Topeka to Albuquerque? A. About 5 days. Q. How many days were ordinarily consumed in transporting a car of freight from Topeka to Albuquerque, including the necessary delays at division points and other necessary stops? A. Do not know; have not sufficient data to determine. Q. How much do you find the apples were damaged in value, if any, by reason of delay in transporting them from Topeka to Albuquerque, when they reached Albuquerque? A. Do not know. Q. Is it not a fact that the defendant, at Albuquerque, delivered the goods in question to the Atlantic & Pacific Railroad Company, one of the connecting lines over which the goods were transported? A. Yes." The evidence shows that the apples were received in San Francisco on April 22d, and the onions on April 27th. The apples were very badly rotted, and the onions sprouted, and many of them rotten. They were delivered at San Francisco by the Southern Pacific Railroad Company. E. H. Davis, a witness called by the defendant, testified that the western terminus of the defendant's road was at Albuquerque, and that it there connected with the Atlantic & Pacific, a separate and independent road.

A. A. Hurd and Robert Dunlap, for plaintiff in error. W. S. Morris and Howe & Mastin, for defendants in error.

ALLEN, J., (after stating the facts.) An elaborate brief is filed on behalf of the plaintiff in error, but there is no appearance in this court by the defendant. It appears from the plaintiff's petition that the shipments were made under written contracts, by the terms of which the liability of the company as a common carrier was limited to its own line of road. There is no attempt to allege or prove any other or different contract from that contained in the shipping bills. Although the jury found, in answer to special questions, that there was a through contract to transport the onions from Leavenworth to San Francisco, there is neither an averment in the petition, nor any evidence in the record, to support such finding. In answer to the question as to whether or not Albuquerque was the western terminus of the defendant's road, the jury answered: "We do not know." There was direct and uncontradicted evidence showing that Albuquerque was the western terminus of the defendant's road, that the freight was there delivered to the Atlantic & Pacific, an independent railroad company, and that it was delivered at San Francisco by the Southern Pacific, still another company.

The syllabus of the case of *Berg v. Railroad Co.*, 30 Kan. 561, 2 Pac. 639, in which the opinion was written by Justice Brewer, reads as follows: "Where a railroad company receives goods for transportation to a point beyond its line, upon a special contract in which is no express agreement to transport to such point, but the place is only named as the point of destination, and in which it is expressly agreed that the goods are to be transported over the company's road, and delivered, in good order, to the connecting carrier, and that the company is not to be responsible as carrier beyond its line, and its liability, as such, is to terminate upon delivery of the goods to the connecting carrier, held, (1) that there is no uncertainty or ambiguity in the contract, and that it is clearly only a contract for transportation over its own line, and delivery to a connecting carrier; (2) that such contract, being no contract for through transportation to the point of destination, presents no questions of an attempt to limit the common-law liability of the carrier as to anything happening beyond its own line; and (3) that the company transporting over its own line, and delivering the goods in safety to the connecting carrier, performs its contract, and is not liable for any subsequent loss or damage." That case is directly in point, and decisive of the one before us. Even assuming that the evidence—which is conflicting, and not entirely satisfactory—shows that the Leavenworth, Topeka & Southwestern Railroad was operated by the Atchison, Topeka & Santa Fe, and therefore that its contract was binding on the defendant, there is absolutely nothing here showing either an attempt on the part of the defendant to limit, by contract, its

common-law liability as a carrier of goods, nor an agreement to transport plaintiff's goods to their destination. In fact, the validity of the written agreement is alleged by the plaintiff, and that written agreement expressly provides that the defendant's liability shall terminate when the consignments are delivered to the connecting carrier. The evidence fails to show any great delay occurring on the defendant's road, or that the apples or onions were injured any in transit to Albuquerque, the cars having reached Albuquerque in five and seven days, respectively, after shipment. The jury say they do not know, in answer to a question as to whether a large portion of the delay occurred west of Albuquerque. This finding is manifestly unfair, for it is apparent from the other findings that the principal time consumed was after the cars reached Albuquerque. As to the right of railroad companies to limit their liability to what happens on their lines, see, also, *Myrick v. Railroad Co.*, 107 U. S. 102, 1 Sup. Ct. 425; *Lawson, Carr.* §§ 102, 236; *Hutch. Carr.* § 149b; and cases cited in *Berg v. Railroad Co.*, supra. There is no evidence showing that the plaintiffs were injured by the negligence of the defendant.

Many questions are discussed with reference to the rulings of the court on the admission of testimony, and also on the instructions. The report of the board of railroad commissioners for the year ending December 1, 1893, which was read in evidence, was not competent testimony as a report, but that part of the report which was certified to by the secretary of the road as a true and correct copy of the report of the defendant company, required by law to be made and filed with the board of railroad commissioners, was competent. The judgment is reversed, and a new trial ordered. All the justices concurring.

PARKHURST v. FIRST NAT. BANK OF CLYDE.

(Supreme Court of Kansas. March 10, 1894.)

USURY—PENALTY—FAILURE TO DISCHARGE MORTGAGE.

1. The case of *Thomas v. Reynolds*, 29 Kan. 304, followed.

2. Where the maker of a promissory note has paid usurious interest to a national bank, and has recovered a judgment against the bank for twice the amount of the interest thus paid, he cannot, in an action for penalty against the bank for not satisfying a chattel mortgage given to secure the note, demand that the usurious interest paid by him shall be applied in satisfaction of the principal of the note.

3. Where, in an action brought by the mortgagee against the mortgagor to recover the statutory penalty for refusing to enter satisfaction of the chattel mortgage, it is shown that there is a bona fide controversy between the mortgagor and mortgagee whether the chattel mortgage is paid or not, and it is further shown that the mortgagee refused in good faith to satisfy the mortgage because he be-

lieved it was not paid, *add*, the mortgagee will not be liable for the penalty.

(Syllabus by the Court.)

Error from district court, Cloud county: F. W. Sturges, Judge.

Action by George L. Parkhurst against the First National Bank of Clyde to recover the statutory penalty for neglecting and refusing to enter satisfaction of certain chattel mortgages. There was judgment for defendant, and plaintiff brings error. Affirmed.

Howard Hillis and Kennett, Peck & Matson, for plaintiff in error. Pulsifer & Alexander, for defendant in error.

HORTON, C. J. The principal questions in this case arise upon instructions given by the trial court.

1. The court instructed the jury that, before the plaintiff was entitled to recover, the mortgagee must be the defendant, or the defendant must be the assignee of the chattel mortgage by an assignment filed or recorded. This instruction follows the rule adopted in *Thomas v. Reynolds*, 29 Kan. 304. It was held in that case that, "where a mortgage has been assigned, no action under the statute will lie to recover the penalty, without proof of an assignment of record. The purpose of the statute being to clear the record, the defaulting party must have record title, or his satisfaction will apparently be only an impertinent interference by a stranger." See, also, *Coffman v. Hillard*, 44 Kan. 538, 24 Pac. 1098.

2. The instruction concerning usury or illegal interest, to the effect "that, if the plaintiff intended to take advantage of the interest law, he should have so notified the defendant at the time, but, if he did not do so then, he cannot now," was not prejudicial, upon the evidence disclosed upon the trial. The defendant is a national bank, and it appears from the evidence of Parkhurst that, prior to the trial of this case, he had recovered judgment against the bank for twice the amount of interest paid by him. When a national bank makes a loan, and stipulates in the note for usury, it can only recover the actual sum loaned, without interest; but, if usurious interest is charged and collected, the person paying it may recover back twice the amount of the interest paid. This penalty must be enforced in the manner provided in the act of congress, and resort cannot be had to any other mode or form of procedure. *Bank v. Grimes*, 49 Kan. 219, 30 Pac. 474. Parkhurst, having recovered twice the amount of interest paid, cannot be allowed to apply the same interest in reduction of the debt secured by the chattel mortgages. As to waiver of usury by tender, see *Canfield v. Conkling*, 41 Mich. 371, 2 N. W. 191.

3. The trial court instructed the jury that if the defendant, in refusing to release any of the mortgages, acted in good faith, and upon the honest belief that the same had not been paid, the plaintiff was not entitled to

recover the statutory penalty. This court has already decided that "the statute is a penal one." Gen. St. 1889, pars. 3892-3910; Thomas v. Reynolds, *supra*. In Joyce v. Means, 41 Kan. 234, 20 Pac. 853, Valentine, J. observed: "The action is for the recovery of a penalty given by statute, although the statute giving the action designates the thing to be recovered as damages. We have heretofore designated these damages as a penalty. Such has always been the view of this court." We think the trial court committed no error in giving this instruction. The weight of authority is that, if the mortgagee in good faith believes the mortgage is not paid, he is not liable for the penalty. Wilber v. Pierce, (Mich.) 22 N. W. 316; Burrows v. Bangs, 34 Mich. 304; Myer v. Hart, 40 Mich. 517; Canfield v. Conkling, *supra*; Haubert v. Haworth, 9 Phila. 123. If the mortgagee refuses to satisfy the mortgage from mere inadvertence, inattention, or indifference, the penalty may be incurred. To be relieved from the penalty, there must be a real controversy as to payment, and an honest doubt concerning the same on the part of the mortgagee.

4. We have examined the other alleged errors, but, upon the record as presented, we do not think they are sufficiently important to require comment, and none of them compel a new trial.

The judgment of the district court will be affirmed. All the justices concurring.

McDONOUGH v. MERTEN.

(Supreme Court of Kansas. March 10, 1894.)

TAX DEED—SUFFICIENCY OF DESCRIPTION.

1. A tax deed is void upon its face if it fails to state, by description, acres, or otherwise, the property bid for at the tax sale, and the granting clause of the deed fails to cure or supply such defect. In such a case, the description of the land purporting to have been bid off at the tax sale, and conveyed in a tax deed, is not sufficiently specific or definite, and therefore is not designated with "ordinary and reasonable certainty."

2. Dodge v. Emmons, 34 Kan. 732, 9 Pac. 951, referred to, and distinguished.

(Syllabus by the Court.)

Error from district court, Clay county; R. B. Spilman, Judge.

The facts fully appear in the following statement by HORTON, C. J.:

This was an action in the nature of ejectment, commenced on December 28, 1887, by Patrick McDonough against H. H. Merten, to recover the S. W. $\frac{1}{4}$ of section 6, in township 9, of range 3 E. of the sixth P. M., in Clay county, in this state. The defendant answered with a general denial. The first trial was had on the 19th day of June, 1889, and judgment was rendered in favor of the defendant. The plaintiff demanded another trial, which was granted, and the cause was again tried at the November term of the court for 1889, and on the 5th day of De-

cember of that year. The plaintiff relied upon a patent from the United States dated April 1, 1872. The defendant, to maintain the issues on his part, offered in evidence a tax deed dated the 30th day of May, 1876, reciting a tax sale on the 6th day of May, 1873, for the taxes of 1872. It also appeared upon the trial that the defendant and his grantors have been in possession of the property ever since 1873; that the plaintiff failed to pay the taxes for 1872, and has never paid the same. The trial court decided, as a matter of law, that the tax deed conveyed an absolute title, in fee simple, to Edward A. Small, the grantee of the deed, and one of the prior grantors of the defendant. Patrick McDonough excepted, and brings the case here. Reversed.

Harkness & Goddard, for plaintiff in error.
M. M. Miller and C. C. Coleman, for defendant in error.

HORTON, C. J., (after stating the facts as above.) The only question involved is as to the validity of the tax deed introduced upon the trial against objections of the plaintiff. The serious defect complained of is in the recital of the sale, which is as follows: "And whereas, at the place aforesaid, John R. Taylor, of the county of Clay and state of Kansas, having offered to pay the sum of thirty-four dollars and twenty-six cents, being the whole amount of taxes, interest, and costs then due and remaining unpaid on said property, for year 1872, — which was the least quantity bid for." The statutory form covering that portion of the deed reads as follows: "And whereas, at the place aforesaid, A. B., of the county of — and state of —, having offered to pay the sum of — dollars and — cents, being the whole amount of taxes, interests and costs then due and remaining unpaid on said property, for (here follows a description of the property sold.)" The county clerk has failed to include in the tax deed a description of the property, or any property, bid for at the sale. The words in the deed, "which was the least quantity bid for," on account of this omission, do not refer to any property, and it cannot be ascertained from the deed what amount of the property was sold to pay the taxes of 1872. This fatal omission is not supplied in the granting clause of the deed, because there is no description therein of the property sold at the tax sale or conveyed in that clause. The only description is, "the real property last hereinbefore described." If the tax deed had described correctly the amount of land bid for at the tax sale, or if the number of acres bid for had been stated, as in Dodge v. Emmons, 34 Kan. 732, 9 Pac. Rep. 951, following that case, we could say that "the real property last hereinbefore described" referred to the attempted description or acres bid in; but in this case, unlike the

Emmons Case, there is no description of any property bid for, whether by acres or otherwise. The Emmons tax deed described the tract, "Beg. at the S. E. cor. of the S. W. $\frac{1}{4}$ of sec. 24, T. 10, R. 24, and containing 90 acres." This tax deed is not as full or complete as the tax deed construed in that case. The legislature intended that at least two descriptions should be included in every tax deed—First, a description of the property assessed, taxed, and offered for sale; and, following that, a second description, showing the least quantity bid for. It was the intention of the lawmakers that the granting clause of the deed should refer to and convey the property actually bid for at the sale. The property actually bid for being omitted, the granting clause refers to nothing. At least, it is vague and uncertain. *Black, Tax Titles, § 401; Norton v. Friend, 13 Kan. 532.* In the last case it was said: "A tax deed should follow the form given by statute only so far as it can do so truthfully, and, where it cannot do so truthfully, it should state the facts as they really exist. The form given by statute is for tax deeds for land sold at tax sales to individuals." We are not unmindful of the rule that a tax deed which has been of record for more than five years should be liberally construed, for the purpose of upholding it, but a tax deed must substantially comply with the form prescribed by the statute. It should show that the provisions of the law have been followed substantially, and, if there is any fatal omission, which ought to have been embraced in the deed under the provisions of the statute, the courts cannot supply or cure such fatal defects. The tax deed, on account of the omission of the property bid for at the sale, did not vest in the grantee thereof an absolute estate in fee. The judgment of the district court must be reversed, and cause remanded, with direction to the court below to render judgment in favor of the plaintiff upon the findings of fact, and such other proceedings will follow as the statute in such cases directs. All the justices concurring.

STINSON v. COOK.

(Supreme Court of Kansas. March 10, 1894.)

COURTS—APPELLATE JURISDICTION—AMOUNT OF JUDGMENT.

The plaintiff brought an action to recover the possession of two horses, a buggy, and harness, and recovered a judgment for the possession of the horses; but judgment was awarded to the defendant for the possession of the buggy and harness, which were of the value of \$70. The plaintiff brought the case to the supreme court, and asked a reversal of so much of the judgment as awarded the buggy and harness to the defendant. Held that, as the amount or value in controversy is less than \$100, the supreme court has no jurisdiction to review the case.

(Syllabus by the Court.)

Error from district court, Norton county: Louis K. Pratt, Judge.

Action in replevin by George W. Stinson against Gus. Cook. From a judgment for plaintiff for part, only, of the property, he brings error. Dismissed.

Stinson & Gill and George W. Stinson for plaintiff in error. J. R. Hamilton, for defendant in error.

JOHNSTON, J. This was an action of replevin, and involved the right to the possession of two horses, each valued at \$65; a buggy, valued at \$60; and a set of harness, of the value of \$10. The trial resulted in a judgment in favor of the plaintiff for the possession of the horses, but it was decided that the defendant was entitled to the possession of the buggy and harness, which were found to be of the value of \$70. The plaintiff attempts to bring the case here, and complains that the court erred in awarding the buggy and harness, or the value of the same, to the defendant. It will readily appear that the only amount in controversy in this court is the value of the buggy and harness, which, as we have seen, does not exceed \$100. The appellate jurisdiction of the supreme court cannot be exercised in any civil action unless the amount or value in controversy, exclusive of costs, exceeds \$100, except in certain cases, and the present case does not come within any of the exceptions. *Gen. St. 1889, par. 4642; Coal Co. v. Barber, 47 Kan. 20, 27 Pac. 114; Loomis v. Bass, 48 Kan. 26, 28 Pac. 1012; Skolin v. Limerick, 50 Kan. 465, 31 Pac. 1051.* As there is no jurisdiction to review the case, it will be dismissed from this court. All the justices concurring.

FRANKLIN v. FRANKLIN.

(Supreme Court of Kansas. March 10, 1894.)

DIVORCE—DESERTION—EVIDENCE.

1. To reverse the judgment of a district court refusing a divorce on the ground of abandonment, the evidence showing an intentional desertion for at least one year must be clear, convincing, and uncontradicted, and it must also appear that such abandonment was not the result of the plaintiff's own wrongdoing.

2. The case of a wife who has been afflicted with temporary insanity will be viewed with especial care and consideration, and all her actions will be weighed in the light of her physical and mental infirmities.

(Syllabus by the Court.)

Error from district court, Brown county: R. C. Bassett, Judge.

Action by James B. Franklin against Clara A. Franklin for a divorce. From a decree denying the petition, plaintiff brings error. Affirmed.

James Falloon, for plaintiff in error. Webb & Raymond, for defendant in error.

ALLEN, J. James B. Franklin commenced this action in the district court of

Brown county to obtain a divorce from his wife on the ground of abandonment. She answered, denying such abandonment, alleging cruelty on the part of her husband, praying a divorce from him, and for alimony. The court, after hearing the evidence, denied both the application of the plaintiff and of the defendant for a divorce.

It is contended in this court that the plaintiff clearly proved an abandonment, and that, having done so, he is entitled as a matter of strict legal right to a divorce. No appearance is made here by the defendant. In section 643 of the Code it is provided that, "when the parties appear to be in equal wrong, the court may in its discretion refuse to grant a divorce." It appears from the evidence that the parties were married in 1873, in Illinois, where they resided until the defendant became temporarily insane. While the defendant was in the insane asylum at Elgin, Ill., the plaintiff came to Kansas. The defendant remained in the asylum about a year and a half. When she had recovered sufficiently to be discharged, the plaintiff went back to Illinois, and brought her out to Kansas with him. The parties have two children, both boys. One day the younger one, about six years old, went to a neighbor's to play with a little girl. The father had forbidden his going. The mother, not knowing what the father had done, gave him permission to go. At night the father whipped him for his disobedience, in the presence of the mother. She opposed his doing so, and a scuffle took place between them; she striking him, and he pushing her roughly. Soon after this she left, and went back to her father in Illinois. The evidence is somewhat conflicting as to just what took place immediately before her departure. The plaintiff testified that he told her she must not go. The defendant's father, who was present at the time, testified that he told her, "You can go, but you cannot take anything but your wardrobe." There is testimony showing that, at the time the defendant left her husband, she intended never to return. She herself testifies that she did not then think she would ever come back, but, after being away four or five weeks, she wanted to return. It appears that she wrote at least twice to the boys, and once to her husband, but never received any answer from either of them. Just before she became insane, there was trouble in the family over an accusation made by the defendant against the plaintiff's mother of having taken some little things of trifling value from their house. The defendant seems to have been much disturbed, and to have brooded over it a great deal. At the time the defendant left her husband, it is clear that he refused to permit her to take anything away but her own clothing; that he would not allow

her to take household goods that belonged to her.

Under these facts, and others of minor importance disclosed by the record, we do not think that the plaintiff has shown either a clear cause of action in his own favor or that he is not in equal wrong. The defendant was for a time afflicted with the greatest misfortune that can possibly be visited on a human being,—the loss of her reason. This entitled her to the most kind and charitable treatment at the hands of all mankind, and most especially from her husband. While it appears that she was restored to a fair degree of health, she afterwards performed all of the household duties for their family, and testifies to being afflicted with very violent headaches. The record does not show positive cruelty on the part of her husband, but, on the other hand, there is testimony tending to show that he was not at all times as considerate as he should have been, in view of his wife's weakness and infirmity. We think the shortcomings of the wife, and her somewhat erratic actions, are to be viewed charitably, and, being so viewed in connection with the conduct of the husband, failed to disclose any ground for the dissolution of the marriage tie. Counsel for the plaintiff in error comments harshly on the testimony of the defendant. We have read it all over carefully, and, while there is nothing but the written record before us, her statements appear to be entirely candid. There is no apparent effort to conceal or evade anything bearing against herself, and we think the criticisms, as addressed to this court, wholly unwarranted. We do not think that husbands who have wives so afflicted should be encouraged to seek to be rid of them, but, rather, should be held to a more strict performance of their marital duties. The record does not show extreme cruelty on the part of this husband. At most, he was guilty of a lack of kindly consideration for his wife at times. On the whole record, we are satisfied that the trial court reached correct conclusions, and the judgment is affirmed. All the justices concurring.

DISTLER v. DABNEY.

(Supreme Court of Washington. Dec. 22, 1893.)

For majority opinion, see 35 Pac. 138.

DUNBAR, C. J. I dissent. I do not think the matters stricken out had any office to perform in this kind of a case, unless it would be to distract the mind of the jury from the true issues to be determined in the case. So far as the probabilities of the truthfulness of the witnesses is concerned, I do not care to discuss them. All questions of fact were submitted by the law to the judgment of another tribunal. They have exercised their judgment, and it is binding upon me. The judgment should be affirmed.

SCOTT, J., *concur.*

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An appeal from an order granting a new trial will be dismissed, if not taken within the prescribed time. (Mont.) 227.

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An appeal will not be dismissed because of defective bond until such defect has been adjudged, and opportunity given to amend. (Wash.) 600.

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Judge can correct his certificate only according to facts as shown by statement at time of settlement. (Wash.) 120.

Where assignee did not appear at settlement of facts, and record does not contain copy of notice of settlement served on him, statement may be struck. (Wash.) 126.

Improper matter in transcript will be stricken out on motion. (Idaho) 173.

Where appellant delivers statement of facts to the clerk in the evening of the last day, the appeal will not be dismissed, though the clerk does not mark the statement as filed until the next morning. (Wash.) 411.

No bill of exceptions is needed on appeal from an order settling the executor's account, where the clerk's certified transcript contains the accounts, reports, and exceptions thereto. (Cal.) 345.

Where the transcript does not show that the findings and conclusions set out in it were signed and filed, and that judgment was entered, the appeal will be dismissed. (Cal.) 309.

An appeal from an order denying a change of venue may be brought up without a transcript or bill of exceptions. (Mont.) 228.

The appellate court may consider the admissibility of the record of a prior suit that had been excluded in the trial court, though the statement of facts does not contain such record. (Wash.) 427.

Where original notice is to settle statement of facts and bill of exceptions, and statement

filed is so entitled, court can proceed as for settlement of facts, though papers are later settled as bill of exceptions. (Wash.) 600.

Affidavit in records will not be considered in support of assignment of error in motion for new trial, if not designated as having been used in support of motion. (Okl.) 576.

Where amendments to statement on motion for new trial are complete in themselves, they may occupy a separate position at the end of the statement. (Mont.) 878.

Statement on motion for new trial will not be considered on appeal if not presented, with proposed amendments, for settlement, within the statutory time. (Cal.) 990.

Statement on motion for new trial will not be stricken because evidence is not all in narrative form, unless the abuse exceeds a just indulgence to litigants. (Mont.) 878.

Appeals from inferior courts.

The filing and approval of a bond within 10 days from judgment before the justice completes the appeal. (Kan.) 211.

Where an appeal bond from a justice is insufficient in form, the party appealing is entitled to amend in the district court. (Kan.) 211.

The act of 1885, as to notice, etc., in appeals from county courts, does not apply to probate cases. (Colo. Sup.) 914.

The time for filing bonds in appeals from the county court sitting in probate may be extended by the court. (Colo. Sup.) 914.

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A question of practice on appeal from order dissolving attachment will not be reviewed, several years later, on appeal in action by creditors' bill against attaching creditor. (Mont.) 467.

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Erroneous instruction, which cuts off substantial defense on the merits, is cause for reversal. (Cal.) 627.

Exceptions will not be considered, unless saved. (Idaho) 715.

Sufficiency of findings of fact to support conclusion of law cannot be considered on appeal from denial of new trial. (Cal.) 763.

An assignment of error that the judgment was contrary to the law and the evidence will not be considered, where plaintiff in error did not appear below. (Colo. App.) 1061.

That a copy of a paper was not admissible as being secondary evidence cannot be considered when no objection was made that a proper foundation for secondary evidence had not been laid. (Wash.) 1078.

Plaintiff waives objection to the sustaining of a demurrer to his complaint by moving to dismiss the action. (Wash.) 180.

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In action against constable for killing one resisting execution of writ, plaintiff cannot, for first time, on appeal, insist that the writ was not pleaded in justification, if evidence of justification was not objected to. (Cal.) 627.

An objection to commissions allowed an administrator cannot be first raised on appeal. (Mont.) 960.

In action for conversion, where counterclaim is set up, defendants cannot raise the question on appeal for the first time that plaintiffs, by not objecting to the counterclaim, waived the tort. (Utah) 507.

Assignments of error for refusal to give instructions will not be considered where the abstract and transcript fail to show that exceptions were taken to refusal. (Utah) 508.

An objection that certain evidence was not admissible under the pleadings cannot be made for the first time on appeal. (Wash.) 372.

Remarks of the trial court, unless specifically called to that court's attention, cannot be assigned as error. (Wash.) 390.

Objections cannot be first raised on appeal to proof of liens by judgment establishing them, that the claims were barred by limitation. (Wash.) 396.

Objection to the admissibility of evidence cannot be raised for the first time on appeal. (Cal.) 1054.

Objections to stating causes of action in pleading in general terms will not be considered when raised for the first time on appeal. (Colo. Sup.) 44.

Discretion of trial court.

Allowance of attorney's fees on foreclosure will not be disturbed if the appeal is brought up on the judgment roll alone, and record does not show that the court abused its discretion. (Cal.) 642.

Grant of new trial because verdict was excessive will not be reversed because supreme and trial courts differ as to what is proper verdict. (Cal.) 572.

Determination of trial court as to preliminary proof needed for introduction of documentary evidence will not be disturbed in absence of abuse of discretion. (Cal.) 871.

The issue being of fact, the court will not reverse an order granting a new trial. (Mont.) 514.

Presumptions.

Order will be presumed to be prejudicial unless the contrary affirmatively appears. (Idaho.) 39.

Erroneous instruction will not be presumed harmless because all the instructions are not in the records. (Or.) 31.

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Weight and sufficiency of evidence.

Findings of a referee on facts are as conclusive as a verdict of a jury. (Colo. Sup.) 44.

Where appeal is not taken within 60 days after judgment, the sufficiency of the evidence to sustain the verdict will not be reviewed. (Idaho) 39.

A finding will not be disturbed where the evidence is conflicting. (Wash.) 1071.

Judgment will not be disturbed where there is evidence to support it. (Colo. App.) 193.

Findings upon conflicting evidence will not be disturbed. (Cal.) 323.

Where the evidence is conflicting, the verdict will not be disturbed. (Utah) 506.

Findings on conflicting evidence will not be disturbed. (Cal.) 433.

Where the evidence is conflicting, the verdict will not be disturbed. (Cal.) 559.

Where there is no bill of exceptions, nor any objections to the proceedings in the trial court,

It will be presumed that the evidence sustained the complaint. (Colo. Sup.) 532.

A verdict on conflicting evidence will not be disturbed. (Idaho) 711.

The appellate court will weigh the evidence in an action tried to the lower court if it was reported to such court in writing. (Colo. Sup.) 738.

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In action for price, where the question of sale, delivery, and acceptance was properly submitted, the verdict will not be disturbed. (Idaho) 715.

Sufficiency of evidence to support finding of fact will not be considered when there is no specification in that regard on motion for new trial, and the point is not made by counsel. (Cal.) 763.

The fact that parties to a conveyance contradict each other will not warrant reversal of finding that conveyance was not fraudulent. (Cal.) 764.

A finding of the jury on conflicting evidence will not be disturbed. (Kan.) 777.

The findings will not be disturbed where the evidence is conflicting. (Cal.) 865.

The evidence cannot be reviewed where the trial judge does not certify that the bill of exceptions contained all the evidence. (Colo. App.) 918.

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A judgment will not be disturbed where there is evidence to support the verdict. (Colo. App.) 987.

The action of the court in granting new trial for insufficiency of evidence will not be reviewed when evidence is conflicting. (Cal.) 1024.

Review—Harmless error.

Where a judgment is correct, it will not be reversed because the court gave a wrong reason for its rendition. (Cal.) 1021.

The fact that party was not allowed to call the number of expert witnesses which the court had fixed upon is not ground for reversal, if those who were called abundantly protected his rights. (Colo. App.) 671.

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No appeal lies on account of error in entry of judgment which has been corrected. (Colo. Sup.) 533.

Admission of testimony as to statements made by plaintiff in his own favor is harmless, when plaintiff testified to the substance thereof. (Cal.) 559.

Instruction upholding sale, though purchaser knew it was to defraud creditors, is harmless error, when jury finds that purchaser had not such knowledge. (Wash.) 607.

A judgment that is correct on the facts will not be reversed because of an erroneous instruction. (Wash.) 395.

Where defendant seeks damages for breach of special contract, the ruling relating to the measure of damages is immaterial, where the existence of the contract is not shown. (Colo. Sup.) 46.

The decision of trial court on the evidence will not be reversed where it is conflicting, and there is sufficient to sustain verdict. (Wash.) 61.

Review—Errors not apparent on record.

If it does not appear when action is begun a finding that action is not barred by limitations will not be disturbed. (Cal.) 635.

An order denying a new trial will not be reviewed where the statement on motion contains no specification of errors. (Utah) 487.

Where there is neither a case made nor a transcript of the record, there can be no review. (Kan.) 1103.

Where there was no bill of exceptions in the record, an instruction on the evidence cannot be reviewed. (Colo. App.) 187.

Where instructions do not appear in the record, the court cannot determine whether error was committed in refusing new trial. (Colo. App.) 192.

That evidence was admitted, not within issues formed, cannot be considered, unless exception was taken, and the evidence made a part of the record. (Okla.) 576.

If evidence is not part of record, error in instructions as to facts will not be considered, unless clearly inapplicable to any facts. (Okla.) 576.

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On appeal by surety from judgment against him alone, where the action is wrongfully dismissed as to other surety, the judgment will be modified so as to correct such wrongful dismissal. (Mont.) 958.

The supreme court cannot modify a judgment not void on its face, nor fraudulent, several months after a remittitur has been sent down. (Wash.) 603.

Where the statement was not filed within 30 days after judgment, and the question is involved is controlled by the statement, the statement will be stricken, and the appeal dismissed. (Wash.) 68.

That no bill of exceptions has been taken is no ground for dismissing an appeal. (Cal.) 443.

The fact that a decree is uncertain is no ground for reversal where all the papers are before the appellate court. (Utah) 487.

An appellate court that is unable to review a cause because of the absence of the case made, which was lost while in hands of clerk of trial court, will not remand without proof that appellee was responsible for the loss. (Kan.) 1103.

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It is proper for the findings on a trial of the issue for which a new trial had been granted to set forth the proceedings of the former trial and the subsequent order granting the new trial. (Cal.) 437.

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The owner of property attached under a writ issued by a justice as the property of another may intervene to have the property released. (Colo. Sup.) 741.

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A lien is not waived by judgment and execution sale of attached goods pending appeal, with supersedeas, from order dissolving the attachment. (Mont.) 515.

An attachment on property fraudulently conveyed by a judgment debtor at the time of the attachment, standing in the names of the fraudulent grantee and trustees in a trust deed made by the grantee to secure a debt, is an attachment of the surplus moneys arising from a subsequent sale of the property under the trust deed. (Cal.) 433.

Where complaint does not state that the action includes a claim not due, the recovery will be restricted to such as are due. (Colo. Sup.) 44.

Right to attach.

The execution by a debtor of a chattel mortgage to secure bona fide debts is not of itself sufficient to support an attachment on the ground that he has disposed of his property with intent to delay creditors. (Kan.) 799.

Plaintiff, by uniting unsecured claims with a secured claim, cannot have the benefit of an attachment for any of the claims sued on. (Idaho.) 37.

Where land is sold, the purchaser going into possession, and title remaining in vendor until price is paid, he has such a lien as bars him from bringing attachment. (Idaho.) 37.

Persons actually in the state are not "non-residents," within Code Civil Proc. § 537, authorizing attachment in certain cases. (Cal.) 432.

Land in the hands of a fraudulent grantee is subject to attachment by the grantor's creditors. (Colo. Sup.) 532.

Bond.

A complaint in action on attachment bond which alleges that the principals "gave" the bond with their codefendants as sureties is defective as to sureties. (Wash.) 381.

A complaint in action on attachment bond which fails to allege nonpayment of the dam-

ages sustained by reason of the attachment is defective. (Wash.) 881.

Bond in attachment should be at least equal to the amount stated in the affidavit. (Idaho,) 77.

ATTORNEY AND CLIENT.

Right to jury in disbarment proceeding, see "Constitutional Law."

Where attorney claims a conveyance to him as absolute, in payment for services, and the client alleges it is simply a mortgage, the grantee has no extraordinary burden to prove the deed absolute. (Wash.) 1080.

Right of action of attorneys for services rendered. (Colo. Sup.) 545.

Where an attorney persuades a person to appear in the land office, and make oath to an affidavit, and falsely personate and represent herself to be one who had, prior thereto, made an entry at such office, he will be disbarred. (Idaho) 839.

It is ground for disbarment that attorney disbarred in another state secured admission to practice in Oklahoma upon certificate issued before such disbarment. (Okl.) 578.

An attorney may be disbarred for refusing to pay over to his client money collected. (Mont.) 108.

An attorney who obtained money for services from a guardian, who had been directed by a judge, not having any jurisdiction of the case, not to pay out any money, is not guilty of contempt, warranting disbarment. (Cal.) 77.

ATTORNEY GENERAL.

An assistant attorney general has no power to bring an action by the state on his relation. (Kan.) 455.

Award.

See "Arbitration and Award."

BAIL.

A recognizance must state the charge in which the accused was held. (Colo. App.) 56.

Where a demurrer to the complaint is being argued before the time set for trial, defendant should not be called pending the hearing, and his bail forfeited. (Cal.) 1007.

Bailment.

See "Banks and Banking;" "Carriers;" "Pledge;" "Warehousemen."

Bankruptcy.

See "Assignment for Benefit of Creditors;" "Insolvency."

BANKS AND BANKING.

A bank to which a draft against a firm is sent for collection cannot bind the drawers by taking the acceptance of one partner only. (Colo. App.) 193.

A bank that receives the proceeds of a note given it for collection holds such proceeds as a trust. (Wyo.) 470.

In action against bank for money loaned, and on note for balance due, it is immaterial whether the note was authorized, if loan and balance are established. (Cal.) 639.

Bill of Exceptions.

See "Exceptions, Bill of."

Bills and Notes.

See "Negotiable Instruments;" "Nonnegotiable Instruments."

Blasting.

See "Negligence."

Bona Fide Purchasers.

See "Negotiable Instruments;" "Vendor and Purchaser."

BONDS.

See, also, "Principal and Surety."

For attachment, see "Attachment."

Of executor, see "Executors and Administrators."

On appeal, see "Appeal."

Liability of signer of a blank bond. (Cal.) 328.

In action on bond of plaintiff's secretary, where complaint charges him with a balance due on a certain date, evidence as to amounts received and paid in by him after that date is inadmissible. (Cal.) 1048.

Where officer failed to promptly turn in to corporation money collected by him six months before date of bond, as was his duty, it is for the jury whether the default did not occur before date of bond. (Cal.) 1048.

Judgment cannot be rendered for full amount of penal bond executed to city, when there is no evidence of damage to city by its breach. (Wash.) 1097.

Where a principal's liability is fixed by contract, or operation of law, his failure to sign the bond does not affect the liability of his sureties. (Mont.) 958.

BOUNDARIES.

Between counties, see "Counties."

Method of determination. (Cal.) 348.

Where a section exceeds 640 acres in area, the surplus should be divided pro rata among the fractions of the section, the quarter section corners being lost. (Cal.) 880.

BREACH OF MARRIAGE PROMISE.

Plaintiff may allege and prove seduction as an element of damage. (Or.) 250.

Whether the fact of seduction shall be considered in estimating damages is for the jury. (Or.) 250.

Where defendant's offer is denied by him, plaintiff's declarations in his absence that she was engaged are not admissible. (Or.) 250.

BRIDGES.

Action for injuries from defective bridge—Sufficiency of evidence. (Utah) 503.

Evidence that horses became frightened at a hole in a bridge is competent to show notice to the city. (Utah) 503.

Brokers.

See "Factors and Brokers."

Burden of Proof.

See "Evidence."

BURGLARY.

Where accused is charged with a forcible entry, it is sufficient to show that the entry was unlawful. (Or.) 1065.

Under indictment alleging attempt to enter a house with intent to commit larceny, one may be convicted of attempted burglary. (Cal.) 84.

Where evidence shows burglary in the night-time, if at all, an instruction that, if defendant is guilty, it is a burglary in the first degree, is proper. (Cal.) 88.

CARRIERS.

See, also, "Horse and Street Railroads;" "Rail-road Companies."

A shipper of goods in less than car-load lots has no interest entitling him to enjoin the board of railroad commissioners from reducing rates on car-load lots to a less sum than rates on less than car-load lots. (Kan.) 217.

Whether an express messenger was negligent, because, when his car was detached from the engine, it started down a grade, and he failed to jump off, is for the jury. (Colo. App.) 923.

Carriers of goods.

A carrier that takes goods for shipment beyond its own line, under contract limiting its liability to its own road, is not liable for injuries received by such goods, in absence of showing that the injuries were received while goods were in its possession. (Kan.) 1114.

Sufficiency of complaint in action for delay in transporting goods. (Cal.) 630.

Liability of carriers accepting goods for delay on connecting line caused by snowstorm which had previously commenced. (Cal.) 630.

Carrier stipulating not to be responsible beyond its line is not liable for delay in delivery to connecting line, due to latter's inability to receive. (Cal.) 630.

A contract to carry freight at less than the schedule rate is not prima facie void. (Colo. Sup.) 744.

Carriers of passengers.

It is not negligence per se for a passenger to stand on the front platform of a trailing car of a cable train. (Wash.) 422.

One riding in a car on a pass, containing a condition exempting the company from liability for injuries occasioned by the negligence of the company's servants, cannot recover for injuries caused by such negligence. (Wash.) 422.

Whether passenger's cries when attacked and beaten on the train could have been heard by employees if they were in their proper places is a question for the jury. (Colo. App.) 196.

Where a passenger is robbed and beaten on the train, the carrier is liable, though it employed sufficient men to protect the passengers under ordinary circumstances, if any of them failed to come to the passenger's assistance. (Colo. App.) 196.

If plaintiff, by want of ordinary care, contributed to the injury, defendant is not liable. (Colo. App.) 269.

Where horses run away, and driver tells passenger in carriage to jump out, the question of her negligence in so doing is for the jury. (Or.) 660.

In action against owner of coach; evidence that horses ran away, and that driver lost control of them, raises presumption of defendant's negligence. (Or.) 660.

Cannot escape liability for injury caused by driving over unsafe road by showing that passenger injured chose that road. (Or.) 660.

CERTIORARI.

The action of a city council in passing a resolution of intention to extend a street is not subject to review on certiorari. (Cal.) 353.

An order of a city council, declaring that certain land is condemned for public use, is subject to review on certiorari. (Cal.) 353.

2 HILL's Code, § 1621, allowing certiorari to one injured by error of justice, applies to criminal proceedings. (Wash.) 1100.

On certiorari by a taxpayer to review proceedings of a county board in issuing a certificate of indebtedness, papers not presented and made part of the proceedings cannot be filed. (Nev.) 485.

Change of Venue.

See "Venue in Civil Cases."

CHATTEL MORTGAGES.

See, also, "Fraudulent Conveyances."
Affidavit to mortgages, see "Affidavit."

A bill of sale of personal property, absolute on its face, if taken as security, is a chattel mortgage. (Kan.) 1108.

A mortgage on furniture used in a lodging house is valid, as between the parties thereto, though not given to secure the purchase price thereof. (Cal.) 641.

The fact that the affidavit states that the mortgage "was," instead of "is," made in good faith, does not affect its validity. (Wash.) 396.

The failure to file does not render chattel mortgage void, in the absence of fraud, as against a subsequent mortgagee. (Or.) 264.

Failure to file raises a presumption of fraud, in the absence of a change of possession. (Or.) 264.

A mortgagee, who believes in good faith that the mortgage has not been paid, is not liable to statutory penalty for refusal to satisfy it. (Kan.) 1116.

The assignee of a chattel mortgage is not liable to penalty for failure to enter satisfaction of the mortgage, in the absence of proof of an assignment of record. (Kan.) 1116.

Sufficiency of record to show third persons the existence of a valid subsisting lien. (Colo. Sup.) 747.

Sufficiency of allegations in complaint by chattel mortgagee for conversion of mortgaged goods. (Wyo.) 933.

Children.

See "Guardian and Ward."

City.

See "Municipal Corporations."

Claim and Delivery.

See "Replevin."

CLERK OF COURT.

Power to enter default, see "Judgment."

Is not entitled to fee for approving appeal and stay bonds. (Wash.) 1082.

Collateral Security.

See "Pledge."

Common Carrier.

See "Carriers."

Community Property.

See "Husband and Wife."

Compromise.

See "Payment."

Condemnation Proceedings.

See "Eminent Domain."

CONFLICT OF LAWS.

In absence of evidence to contrary, law of another state is presumed to be the same as that of California. (Cal.) 630.

Constable.

See "Sheriffs and Constables."

CONSTITUTIONAL LAW.

A riparian owner who builds a wharf in navigable waters of a stream, as permitted by Code, § 4227, acquires a vested right, which is not affected by a subsequent act authorizing the construction of a public bridge at that point. (Or.) 256.

The constitution of Washington, permitting prosecution to be begun by information, does not contravene the enabling act. (Wash.) 362.

An act providing for the organization of a county is not special or local legislation. (Cal.) 302.

A statute authorizing the sheriff of a certain county to appoint a night watchman is in violation of an article of the constitution providing for a uniform system of county government throughout the state. (Nev.) 833.

Defendant in disbarment proceedings is not entitled to trial by jury. (Okla.) 578.

Where a company contracts to construct works for a city, and the same are accepted by the city, the validity of the contract is not impaired by the enactment of a statute that went into effect after the contract was made. (Idaho) 693.

An ordinance permitting prisoners committed for violation of ordinances to be employed at labor on the streets in working out fines is not void as compelling involuntary servitude. (Kan.) 819.

Due process of law.

Personal notice to those whose lands are to be taken for public use is not necessary, to constitute due process of law. (Cal.) 353.

Gen. St. § 2798, making railroads liable for damages by fire caused by locomotives, is constitutional. (Colo. Sup.) 537.

Gen. St. 1883, c. 93, as amended by Laws 1885, pp. 304, 338, making railroad companies unconditionally liable for all stock killed, is unconstitutional. (Colo. Sup.) 47.

Regulation of commerce.

An ordinance forbidding salesmen of nonresidents to sell by sample without first procuring a license is void. (Wyo.) 472.

An act prohibiting Chinese from coming into the state is unconstitutional, as regulating commerce with foreign nations. (Cal.) 556.

Statute requiring foreign corporation to file certificate before suing for price of goods brought from another state is a regulation of interstate commerce. (Colo. Sup.) 538.

CONTEMPT.

There can be no appeal from a conviction for contempt in violating an injunction. (Utah) 524.

In case of criminal contempt, judgment imposing costs as part of fine, and ordering imprisonment one day for each dollar, is proper. (Utah) 524.

CONTINUANCE.

Where default judgment has been vacated, and the trial set on day suggested by defendant, continuance because of the absence of defendant's attorney was properly refused. (Wash.) 385.

Sufficiency of affidavit as to plaintiff's sickness to authorize a continuance. (Cal.) 636.

The court properly directed a cause, when reached for trial, to proceed in absence of defendant and counsel, where the only showing as to such absence was a letter of defendant requesting a continuance because of illness. (Colo. App.) 927.

CONTRACTS.

See, also, "Arbitration and Award;" "Assignment for Benefit of Creditors;" "Bonds;" "Carriers;" "Chattel Mortgages;" "Deed;" "Factors and Brokers;" "Frauds, Statute of;" "Fraudulent Conveyances;" "Insurance;" "Interest;" "Landlord and Tenant;" "Master and Servant;" "Mortgages;" "Negotiable Instruments;" "Partnership;" "Pledge;" "Principal and Agent;" "Principal and Surety;" "Sale;" "Specific Performance;" "Vendor and Purchaser."

Made on Sunday, see "Sunday."

Of cities, see "Municipal Corporations."

Of corporation, see "Corporations."

Restraining breach, see "Injunction."

On issue as to whether purchase by M. was under contract assigned to defendant, evidence that M. said that he represented defendant was admissible. (Cal.) 559.

The liability of an obligor cannot be affected by showing that another person instigated him to make the contract. (Cal.) 559.

Remedy for breach. (Or.) 450.

Obligee is not bound by an agreement with one of two joint obligors to rescind unless such obligor is merely a surety for the other. (Wash.) 133.

Default in payment on a contract for work justifies a rescission and action of quantum meruit by contractor. (Cal.) 146.

Validity.

Where a mortgagee residing in the state transfers the mortgage to a nonresident to avoid taxation, the nonresident cannot enforce the same, whether he took the assignment with fraudulent intent or not. (Kan.) 201.

Entered into by correspondence — Validity. (Utah) 492.

Sufficiency of consideration of bond executed by individuals for construction of street rail-

lica's liens on buildings and owner thereof. (Cal.) 148.

Interpretation.

Construction of contract for sinking wells. (Cal.) 865.

A provision, on sale of a good will, that the seller shall not engage in similar business for three years, will be limited to such time as the buyer carries on the business. (Cal.) 985.

An agreement by building contractor to furnish all materials and do all labor is not satisfied unless the materials and labor are paid for. (Mont.) 958.

Action on contract.

Complaint alleging that plaintiff demanded payment, which defendant refused, and that the same is due and unpaid, sufficiently alleges nonpayment. (Cal.) 559.

In an action on a contract to publish notice in the "Olympia Review," a complaint alleging as performance publications in the "Weekly Standard" is demurrable. (Wash.) 1102.

In an action on a contract, where the answer alleges that defendant was compelled by neglect of plaintiff to have the work done by another, it sets up a good defense. (Wash.) 1102.

When a contract is declared on in haec verba, the complaint must show in direct terms all facts which it would have been necessary to allege in setting it forth by averment. (Idaho) 171.

Evidence.

In an action on a contract, evidence by plaintiff that he was not permitted to do the work justifies a finding against him. (Wash.) 1102.

In action on a contractor's bond, the plans, specifications, and contract may be considered. (Mont.) 1064.

Evidence that a third person agreed to pay plaintiff a part of the sum sued for was properly excluded. (Cal.) 559.

Action to recover stipulated consideration for the assignment of a contract—Competency of evidence as to circumstances attending the making of the contract of assignment. (Cal.) 559.

In an action for damages for refusal to allow plaintiff to sink wells according to contract, evidence of the profit on wells in the neighborhood, of the probable depth of the wells contracted for, is sufficient to establish the damage. (Cal.) 865.

Contributory Negligence.

See "Master and Servant."

Conversion.

See "Trove and Conversion."

Conveyances.

See "Chattel Mortgages;" "Deed;" "Fraudulent Conveyances;" "Mortgages;" "Sale;" "Vendor and Purchaser."

CORPORATIONS.

See, also, "Banks and Banking;" "Carriers;" "Insurance;" "Irrigation;" "Municipal Corporations;" "Railroad Companies;"
Misrepresentations by promoters, see "Deceit."

plication of attorney general, court cannot appoint receiver to take charge of effects during appeal. (Cal.) 549.

In an action by the attorney general to dissolve an insolvent insurance company, the court cannot on decreeing dissolution appoint receiver and restrain corporation and its officers from interfering with or taking possession of its assets. (Cal.) 555.

When neglect of directors sufficient to authorize stockholder to sue. (Wash.) 68.

A mercantile business for sale of goods is an "industrial business," and may be incorporated under Rev. St. U. S. § 1899. (Ariz.) 983.

Right to assume liabilities of promoters considered. (Kan.) 776.

Since, in corporate elections, every stockholder must vote his shares in person, or by proxy, in writing, a verbal agreement by the stockholders that one of them should be president cannot be enforced. (Cal.) 1045.

Payment by the corporation of interest on bonds issued by it shows that it received value for the bonds. (Wyo.) 475.

Contracts—Authority of officers.

Knowledge by one director that the president has executed notes in corporation's name does not estop corporation from attacking their validity. (Wash.) 376.

Authority in general manager to issue notes will not be implied from the fact that he had formerly issued notes, where these notes were taken care of by him without the knowledge of the directors. (Wash.) 376.

An unratified promise of the president of a corporation to assume the debts of a person is not binding on the corporation. (Cal.) 304.

Where directors of a corporation make a contract with a secret arrangement for a commission, the corporation may rescind the contract, and no commission can then be recovered. (Or.) 245.

The issuance by a corporation of bonds secured by trust deed ratifies the act of the president in executing the trust deed. (Wyo.) 475.

Where directors, on discovery of unauthorized mortgage by president, made no objection to mortgagee's taking possession, and did not disaffirm mortgage for several months, the mortgage is ratified. (Or.) 848.

Liability of mining company for wages of men wrongfully employed by superintendent in name of company to work his mines. (Colo. App.) 677.

Evidence bearing on authority of president under resolution of directors to mortgage property to secure debt. (Or.) 848.

Stock and stockholders.

Where stock has been assigned, but the company has refused to transfer it, equity will not permit it to be attached by the creditors of the assignor. (Colo. Sup.) 183.

When assignment of stock carries absolute title, as against creditors of assignor, though not transferred on books of corporation. (Colo. Sup.) 183.

Under statute authorizing directors, when one-fourth of stock is subscribed, to levy assessments on "subscribed capital stock," a notice describing the assessment as "levied upon the capital stock" is sufficient. (Cal.) 349.

A subscriber to stock is liable for an assessment levied by directors chosen by a majority of subscribers. (Cal.) 349.

In action on assessment, a subscriber cannot show, in contradiction of the secretary's minutes, that directors were not elected by ballot. (Cal.) 349.

One who, by his acts, has recognized a company as a de facto corporation, is liable for his unpaid subscriptions to the capital stock. (Utah) 510.

A subscriber who pays three installments, in answer to calls made in accordance with a resolution, cannot afterwards assail the resolution's validity. (Utah) 510.

Validity of assessments on stock. (Utah) 494.

One who agrees to take stock in a corporation to be organized with a capital of \$200,000 is not liable on his subscription to creditors of a corporation organized with only \$60,000 capital. (Colo. App.) 281.

Stock for which a corporation has received nothing but quitclaim deeds to land, in which the grantor had no interest, may be treated by the corporate creditors as unpaid stock in enforcing the stockholders' liability. (Utah) 495.

In action to enforce stockholders' liability, allegations that the corporation is insolvent, and that payment of plaintiff's judgment has been demanded and refused, sufficiently show that the judgment is unpaid. (Utah) 495.

An action to enforce stockholders' liability is properly founded on the judgment against the corporation. (Utah) 495.

A stockholder, though delinquent, may maintain an action against other delinquent stockholders to enforce payment of a judgment obtained by him against the corporation. (Utah) 488.

The liability of a stockholder terminates upon a bona fide transfer of his stock. (Kan.) 798.

The liability of a stockholder against whom an execution may be issued is measured by the number of shares held by him at the time execution against the property of the corporation is found to be ineffectual. (Kan.) 798.

Actions.

Where, in an action by a corporation to foreclose a material man's lien, the answer admits the contract, defendant is estopped to deny corporate existence. (Wash.) 413.

Failure of foreign corporation to file certificate does not affect its right to bring suit. (Colo. Sup.) 538.

COSTS.

See, also, "Mechanics' Liens."

In foreclosure proceedings, see "Mortgages."

The fact that a motion to retax costs has never been decided does not stay the execution of the judgment. (Nev.) 300.

Where a judgment is reversed in part, appellant is entitled to costs. (Cal.) 1047.

Costs for unnecessary transcript will not be disallowed where such part consists of matters made part of the transcript by Acts 1891, p. 345, § 15. (Wash.) 1082.

When the items of a cost bill are denied, the burden of proof is on the party claiming the costs. (Idaho) 704.

Under Code Civ. Proc. § 1025, in an action for damages, where plaintiff recovers less than \$300, neither party is entitled to costs. (Cal.) 859.

Witnesses' fees.

A successful party, who has paid his witnesses, may have the amount so paid included in his judgment, though witnesses did not ap-

pear before the clerk within two days after the trial. (Utah) 501.

Where a witness makes no charge, the successful party cannot tax the losing party the fees to which such witness would have been entitled if he had charged therefor. (Idaho) 704.

The fees of a witness who is not called though in attendance, are not chargeable to the losing party. (Idaho) 704.

In criminal case.

The county is not liable for the fees of witnesses of an accused, where the subpoena was issued by the court in vacation. (Idaho) 841.

Costs in successful prosecution of felony that are chargeable to the state. (Wash.) 361.

COUNTIES.

See, also, "Highways;" "Irrigation;" "Schools and School Districts."

Erection of levee district, see "Levee." Mandamus to board, see "Mandamus."

Sufficiency of averments in complaint under Sess. Laws 1887, p. 233, § 1, to settle the boundary line between two counties. (Colo. App.) 1061.

It is no objection to a bill providing for the organization of a county that it does not divide the county into supervisor districts. (Cal.) 302.

Barber county cannot purchase bridge on public highway unless payment be made in county bonds or proceeds thereof, or for more than its true value. (Kan.) 19.

Under a provision that counties can be sued on contract only after rejection of claim by the county board, a county is not liable to garnishment on a claim not so rejected. (Wash.) 1061.

In the absence of statute, equity cannot inquire into the legality of a county-seat election. (Wash.) 536, 757.

A judgment against a county, and not against the board of county commissioners, is a nullity. (Colo. App.) 918.

County board.

A county board has no authority to fill a vacancy in the office of a city justice of the peace. (Cal.) 830.

All orders of a board of county commissioners are reviewable. (Idaho) 712.

County commissioners may be punished for unlawfully issuing county warrant or order. (Kan.) 19.

A board has no jurisdiction to act on a claim after objections to its allowance have been filed, and proceedings instituted in court to determine its validity. (Nev.) 485.

Before a board of county commissioners can employ counsel, the necessity therefor must be apparent. (Idaho) 712.

A county board has no authority to devolve upon an appointee of its own the duties which are affixed to another office. (Idaho) 712.

A county board has no authority to appoint a legal adviser for a period of two years. (Idaho) 712.

Commissioners cannot make allowance to clerk of statutory per diem for serving as clerk of the board, conditional on his payment of such amount to the treasurer. (Colo. App.) 880.

Officers.

County clerk must pay to treasurer the per diem allowed for serving as clerk of board of commissioners. (Colo. App.) 880.

county clerk. (Colo. App.) 880.

County clerk has no power to bind county by contract for printing copies of the great register. (Cal.) 897.

Action on county treasurer's bond for money paid on fraudulent school land—Sufficiency of evidence to sustain judgment. (Cal.) 153.

By absence of officer from state for more than 60 days without supervisors' consent, a vacancy in his office is created. (Cal.) 163.

Where a warrant was regular on its face, the amount paid cannot be recovered against the treasurer because charged to the wrong account. (Cal.) 556.

COURTS.

See, also, "Justices of the Peace."

Jurisdiction, territorial limits, see "Mines and Mining."

Supreme court has no jurisdiction where the amount in controversy is less than \$100. (Kan.) 1118.

A court will not interfere to determine title to public lands till adverse claims are determined by land department. (Okl.) 575.

State court will not review decision by secretary of interior as to whether claimant of land as an adjoining homestead was entitled thereto. (Cal.) 141.

A motion for rehearing, and not for new trial, is proper practice, in supreme court, in cases of original jurisdiction. (Cal.) 642.

The supreme court will not pass on a question submitted by the governor in relation to a controversy between him and the penitentiary commissioners, if litigation involving private rights is likely to arise from such controversy. (Colo. Sup.) 915.

Probate courts in Washington have power to construe wills so far as may be necessary to distribute or partition estates. (Wash.) 1082.

When case in probate court exceeds jurisdiction of justice of the peace, pleadings and practice are the same as in the district court. (Okl.) 578.

Transfer of insolvency proceedings against insurance company to department in which attorney general has filed application to dissolve such company does not affect department's jurisdiction. (Cal.) 549.

COVENANTS.

In action for breach of covenant, on issue as to time purchaser was to pay certain sum to discharge existing mortgage, evidence that such sum would extinguish mortgage at maturity, but not at time of sale, is inadmissible. (Or.) 658.

One purchasing with covenant against incumbrances may recover from vendor the sum paid by her to discharge mortgage in excess of what she agreed to pay therefor. (Or.) 658.

Where a railroad company fails to build a ditch along the right of way, as covenanted in the deed therefor, a report of appraisers appointed by the landowners, as to the damages caused, is not admissible in action for same. (Wash.) 596.

CREDITORS' BILL.

Where the property is ascertained, a creditors' bill need not be preceded by supplementary proceedings. (Mont.) 515.

See also, "Habeas Corpus;" "Indictment and Information;" "Jury;" "Witness."

CRIMINAL LAW.

Particular crimes and prosecutions, see "Burglary;" "False Pretenses;" "Forgery;" "Homicide;" "Intoxicating Liquors;" "Larceny;" "Receiving Stolen Goods."

Accused is allowed a copy of his accusation, as required by the constitution, when justice hands him original complaint, and tells him he may copy it. (Wash.) 1100.

On renewal of a motion for change of venue several months afterwards, it will not be presumed that the same conditions existed as at the first motion. (Idaho) 708.

The appointment of an elisor to take charge of a jury during a homicide case is within the discretion of the court. (Idaho) 886.

Indulgence by the jury in intoxicating liquor is no ground for reversal, in the absence of evidence of injurious effect from the use. (Idaho) 706.

On trial of H., indicted with R. for murder, it is proper to permit counsel for R. to be heard on H.'s motion to have a microscopical examination made of the bullet alleged to have caused the homicide. (Idaho) 836.

Expert testimony that tends to aid the jury in reaching conclusion is competent. (Idaho) 836.

On motion for a new trial from a conviction of assault, on an information charging assault with intent to kill, it is immaterial whether the information sufficiently charges an assault with intent to kill. (Kan.) 815.

Pleas and motion to quash.

A motion to quash because of defects in the arrest and preliminary examination must be made before plea. (Idaho) 710.

Where defendant has pleaded guilty, and sentence has been passed, the court can permit the plea to be withdrawn, and a plea entered of not guilty. (Kan.) 206, 210.

A plea of defense entered on the minutes, reciting that "defendant thereupon interposes a plea of not guilty" as stated in the information, is sufficient. (Cal.) 862.

A defendant who has demurred to an information does not waive his right to move in arrest of judgment by moving for a new trial. (Cal.) 1022.

Evidence.

Evidence that admissions of accused were made after consultation with counsel is admissible. (Or.) 976.

Shoes worn by defendant when arrested are admissible to identify him as the person committing the crime. (Wash.) 382.

Statements of accused tending to explain incriminating circumstances are admissible. (Colo. Sup.) 179.

Preliminary hearing.

A complaint made before a justice on preliminary examination may be dismissed, and a new charge made before another justice. (Wash.) 352.

An order of commitment entered in the docket of the committing magistrate is valid, though not indorsed on the depositions taken at the preliminary examination. (Idaho) 710.

Former jeopardy.

Appeal by state from judgment of superior court reversing justice's judgment on certiorari does not cause second jeopardy. (Wash.) 1100.

Discharge under habeas corpus is not bar to subsequent prosecution on newly-discovered evidence. (Kan.) 23.

Time of trial.

Defendant must be tried within 60 days after filing indictment, unless there is good reason for not doing so. (Wash.) 137.

Where one indicted was twice brought to trial within the time prescribed by law, but, pending an appeal by the state, two terms elapsed without a further trial, there was no failure to give speedy trial, though it was decided that the state had no right to appeal. (Mont.) 240.

Presence of accused.

The absence of accused from a view of the premises is not ground for new trial, where the view was directed upon motion of accused, and no request was made by him to be present at the view. (Idaho) 706.

Continuance may be granted without personal appearance of defendant. (Wash.) 117.

Witnesses.

An affidavit for witnesses, which does not state the facts showing that such witnesses are material, is insufficient. (Idaho) 841.

A conviction will not be reversed because witnesses whose names did not appear on the indictment testified for the state, where no continuance was asked. (Wash.) 367.

Notice to defendant of the addition to information of new witnesses is sufficient, without the furnishing of another copy of information. (Wash.) 382.

Instructions.

On a murder trial, it is proper to instruct the jury that they may consider defendant's interest, in determining credibility of his evidence. (Wash.) 382.

It is error to omit instruction that jury shall not infer guilt from defendant's failure to testify. (Wash.) 580, 756.

An instruction that a reasonable doubt is such a doubt as would make a man of ordinary prudence hesitate in arriving at a conclusion in considering a matter of like importance to himself as the case at bar is to defendant is proper. (Wash.) 357.

Where defendant asked instruction, he cannot complain because court gave a more complete statement than he requested on point in question. (Wash.) 117.

Instructions defining the crime in the language of the statute are proper. (Or.) 1065.

An erroneous instruction is not cured by reading the statute applicable to the case. (Ariz.) 1059.

Intimidation by court of belief in defendant's guilt—What constitutes. (Wash.) 367.

Verdict and sentence.

On prosecution for burglary, a verdict of guilty, which does not fix the degree, is erroneous. (Cal.) 566.

The time during which a defendant convicted of felony remains in jail pending appeal must be deducted from his sentence. (Wash.) 71.

A judgment of conviction under an ordinance cannot be enforced if, pending an appeal, the ordinance is repealed. (Cal.) 869.

New trial.

When new trial for newly-discovered evidence should be granted. (Wash.) 367, 382.

The fact that a juror, before trial, stated that from what he had heard he believed defendant would be convicted, and that, if what he heard were true, he ought to be convicted, is no ground for granting a new trial. (Wash.) 417.

Appeal.

A state cannot appeal from an order granting defendant a new trial. (Mont.) 228.

An appeal will not be dismissed for failure to file transcript, where delay was caused by misunderstanding with the clerk of court. (Wash.) 377.

An improper remark of the court which did not affect the result is not ground for reversal. (Kan.) 780.

The giving of an erroneous instruction is harmless, where defendant is acquitted of the offense to which it applied. (Cal.) 862.

The failure of the court to instruct, as required by the Code, that no inference of defendant's guilt shall be drawn from his failure to testify, will not cause reversal where defendant did not ask for such instruction, nor except to the court's failure to give it. (Wash.) 756.

A verdict on conflicting evidence will not be set aside. (Wash.) 367.

Objections to evidence on a subject which defendant opened cannot be raised by defendant on appeal. (Colo. Sup.) 179.

The refusal to grant a new trial cannot be reviewed. (Or.) 1065.

Sufficiency of evidence cannot be reviewed where the point was not raised below. (Cal.) 84.

CUSTOM AND USAGE.

In action for injuries caused while crawling under a car that blocked a street, evidence of a custom of people to crawl under cars so blockading streets is incompetent. (Idaho) 700.

DAMAGES.

For conversion, see "Trover and Conversion."

For death of child, see "Death by Wrongful Act."

For failure to deliver telegram, see "Telegraph Companies."

For trespass, see "Trespass."

Where a person, who has leased a pond for harvesting ice, fails to supply it with sufficient water, according to agreement, the lessee's measure of damages is the value of the ice he failed to put up, less the cost of putting it up. (Utah) 506.

In action for negligence causing death, an instruction that the jury should award such damages as they think plaintiff entitled to is erroneous. (Idaho.) 39.

An instruction that jury may consider plaintiff's "condition and station in life" is misleading. (Or.) 653.

No damages should be awarded for causing death of minor child for loss of child's society, where no demand therefor was made, and no proof offered. (Idaho.) 39.

DEATH BY WRONGFUL ACT.

A parent or guardian has a right of action for death or injury to a child only when it is a minor. (Or.) 250.

For causing death of minor child, the measure is not the value of the child's services until he comes of age, less the expense of support. (Idaho.) 39.

Exemplary damages cannot be recovered in an action for the death of a child. (Wash.) 620.

In action for death of minor, defendant can show the expense of educating and maintaining the child, and the probable value of its earnings. (Wash.) 620.

The parents of a minor child may recover, without proof of actual pecuniary damages. (Wash.) 620.

Owner of land wrongfully held by another is not civilly liable for death of occupant while resisting attempt, with reasonable force, to regain possession. (Cal.) 627.

Decedents.

See "Descent and Distribution;" "Executors and Administrators;" "Wills."

DECEIT.

See, also, "False Pretenses;" "Fraudulent Conveyances."

Promoters of a corporation, who falsely represent that the price paid by the corporation for property conveyed by them to the corporation is the cost thereof to themselves, are liable to the stockholders for their profits in the transaction. (Cal.) 444.

Sufficiency of evidence to show fraudulent representations by purchaser as to his financial condition. (Mont.) 722.

Declarations and Admissions.

See "Evidence."

DEDICATION.

A dedication as a street of a part of the public domain before the passage of the donation act is not binding on one acquiring title to the street under such act. (Or.) 256.

One holding parol contract for land cannot dedicate it, so as to estop him from afterwards acquiring title. (Kan.) 5.

An expression of a purpose to dedicate ground by one seeking to obtain title thereto is not a dedication if purpose abandoned before title obtained. (Kan.) 5.

Effect of plat designating land as a street to show dedication. (Or.) 256.

Where a plat of land shows the name of a street, but without the width designated, as provided by statute, there is no dedication. (Wash.) 583.

DEED.

See, also, "Fraudulent Conveyances;" "Specific Performance;" "Vendor and Purchaser."

Injury arising from recorder's negligence in recording conveyance in wrong book must fall on the parties to the conveyance. (Cal.) 646.

Constructive notice by record arises when instrument is actually recorded in proper book. (Cal.) 646.

Recording by the grantor, without the direction or knowledge of the grantee, is not of itself sufficient to show an acceptance. (Colo. Sup.) 736.

A description of land as "the S. 10 acres" of a government subdivision is sufficient. (Cal.) 766.

After one conveys right of way to railroad company for road as already constructed, he cannot make claim for damage caused by defective construction of road. (Cal.) 643.

Defective Appliances.

See "Master and Servant."

Defective Streets.

See "Municipal Corporations."

DEPOSITION.

Admissibility. (Utah) 508.

It will be presumed that the reason for taking a deposition still exists at the time of the trial. (Wash.) 585.

A deposition should be suppressed where it does not appear in the certificate that it was taken at the place named in the notice, and where the adverse party was not present. (Okl.) 949.

DESCENT AND DISTRIBUTION.

See, also, "Executors and Administrators;" "Wills."

A testator who makes no provision out of community property for his children dies intestate as to this property. (Wash.) 360.

Extrinsic evidence is inadmissible to show that a testator who made no provision for certain of his children by will otherwise provided for them. (Wash.) 360.

An heir cannot maintain an action to quiet title to his ancestor's land until after the close of administration. (Wash.) 602.

There must be a final settlement and a distribution of the property to constitute a termination of the administration. (Wash.) 602.

Detinue.

See "Replevin."

Devise and Legacy.

See "Wills."

Disbarment.

See "Attorney and Client."

Discharge.

See "Payment."

Dismissal.

See "Practice in Civil Cases."

District and Prosecuting Attorneys.

Mandamus to control discretion, see "Mandamus."

DIVORCE.

To entitle plaintiff to divorce on the ground of abandonment by a wife temporarily insane, the evidence must be convincing and uncontradicted. (Kan.) 1118.

Special findings to be returned by the jury may be submitted in divorce suit. (Mont.) 1.

Money raised on wife's own credit, and paid for expenses incurred, is not reimbursable pendente lite. (Cal.) 87.

Pleading.

A complaint in a divorce suit, with a verification that plaintiff believes it to be true, is sufficient. (Wash.) 415.

Though the complaint does not show that the last act of adultery was committed within one year, and is unforgiven, if proof is admitted a default judgment will not be reversed. (Wash.) 415.

Sufficiency of allegations of extreme cruelty. (Cal.) 637.

Evidence.

In suit grounded on continued drunkenness and violence, defendant's failure to support plaintiff, his wife, is admissible. (Mont.) 1.

Evidence bearing upon condonation by the wife of violence and continued drunkenness considered. (Mont.) 1.

Sufficiency of proof of extreme cruelty, consisting of a blow and abusive language, to the injury of plaintiff's health. (Cal.) 637.

Alimony.

A bond on appeal from an order providing for payment of a certain amount as alimony monthly, conditioned to satisfy the order appealed from, does not recover amount due after affirmation. (Colo. Sup.) 547.

Under an order allowing plaintiff the use of a certain house, defendant cannot have credit for money received by her as rent. (Colo. Sup.) 547.

Propriety of giving plaintiff wife, an invalid, the whole community house and lot, worth \$3,000, and subject to mortgage of \$2,500. (Cal.) 637.

A wife, whose husband has obtained a divorce in a foreign state, cannot maintain an action for alimony within the state, in the absence of a showing as to the law of the foreign state, though no alimony was given her by the foreign divorce. (Kan.) 808.

Documents.

See "Evidence."

Drunkenness.

Defense to crime, see "Homicide."

Due Process of Law.

See "Constitutional Law."

DURESS.

Evidence considered and held insufficient to show that the contract complained of was signed under duress. (Kan.) 1113.

Dying Declarations.

See "Homicide."

EASEMENTS.

Plaintiff, being entitled by deed to take gravel from defendant's land, cannot be confined to such places as defendant may select. (Wash.) 1074.

EJECTMENT.

See, also, "Adverse Possession."

An equitable defense may be set up and tried on principles of equity. (Nev.) 89.

In Utah, an equitable estoppel is a good defense. (Utah) 512.

The burden is on plaintiff to establish his title by a preponderance of the evidence. (Colo. Sup.) 736.

Will not lie where defendant put a ~~pressure~~ board in a ditch owned by plaintiff, and diverted the water in a flume, the remedy being trespass. (Cal.) 1007.

ELECTIONS AND VOTERS.

Registration at an election under Act March 8, 1893, to validate evidences of city debt, is not necessary. (Wash.) 1079.

ELISORS.

Appointment, see "Criminal Law."

Are entitled to the compensation allowed the sheriff for similar services. (Idaho) 704.

EMBEZZLEMENT.

Sufficiency of evidence to show "embezzlement by servant" by virtue of his employment. (Cal.) 80.

EMINENT DOMAIN.

A riparian owner who has built a wharf in the navigable part of a fresh-water river has rights therein which cannot be taken for public use without compensation. (Or.) 256.

Vacation of a highway established by statutory proceedings is not taking of property from abutting owner without making compensation. (Cal.) 569.

Where a street railway, under directions of the city, changes slightly the grade of a street, not destroying ingress to or egress from lots fronting on it, the owner of the lots is not entitled to damages from the company. (Kan.) 801.

Land condemned for a right of way cannot be sold to satisfy a pre-existing mortgage. (Kan.) 1105.

An abutting owner can recover from a railroad obstructing the street only for so much as is in front of his own premises. (Colo. Sup.) 542.

A mortgagor in possession, not the mortgagee, is the owner, for purposes of condemnation proceedings. (Kan.) 18.

In condemnation proceedings, no personal notice to the mortgagee need be given, nor need he be named in award. (Kan.) 1105.

EQUITY.

See, also, "Fraudulent Conveyances;" "Injunction;" "Mortgages;" "Partnership;" "Receivers;" "Specific Performance;" "Trusts."

Affirmative relief cannot be granted defendant in the absence of anything in the nature of a cross bill or counterclaim. (Wash.) 138.

A conveyance by a woman to her brother-in-law on his gross misrepresentations as to the value and title to the land will be set aside. (Mont.) 724.

In action to rescind a contract for fraud of defendants' agent the latter is a proper party. (Cal.) 767.

On rescission of a contract for fraud, plaintiff is entitled to recover all money paid under the contract. (Cal.) 767.

On rescission of a contract with defendant's agent for fraud, plaintiff properly tendered to defendant, the legal holder of the contract, the property received by him under it. (Cal.) 767.

A complaint in action to reform a deed is sufficient which alleges its necessity to conform to

the intent of the parties, though it falls to allege mutual mistake, or any contract as to the deed. (Or.) 972.

Evidence considered and held sufficient to require a decree reforming a deed to comply with the intent of parties. (Or.) 972.

Estates.

See "Deed;" "Homestead;" "Wills."

ESTOPPEL.

By deed.

Title which passes through one merely as a conduit does not inure to the benefit of one to whom he had previously made deed with warranty of title. (Colo. Sup.) 540.

Where a husband and wife join in a deed transferring complete title, and disavow interest in the land, they are estopped to claim a homestead as against the mortgagee of their grantee. (Kan.) 205.

In pais.

Levee district organized under void law may refuse to pay bonds, though it retained proceeds of sale thereof, and paid interest thereon. (Cal.) 562.

Where a national bank holds stock in a savings bank, and receives dividends therein, it is estopped, in an action to enforce its liability as stockholder, from claiming that such holding is illegal. (Cal.) 1039.

Act relied on as constituting the estoppel must have affected the other's position. (Wash.) 123.

By acts—What constitutes. (Kan.) 289.

By acts of party—What constitutes. (Utah) 512.

Materiality of evidence on issue as to whether defendant was estopped to deny that he belonged to firm which signed note sued on. (Wyo.) 774.

Where a building is erected projecting into a street, after an agent of the city has reported the city has no rights therein, the latter is estopped to claim the land. (Cal.) 1002.

Where a married woman admitted a signature forged by her husband to be her own, she was estopped from disputing it as against a bona fide purchaser. (Cal.) 1019.

EVIDENCE.

See, also, "Deposition;" "Homicide;" "Witness."

As to fraud, see "Fraudulent Conveyances."

Objections to, see "Trial."

Of establishment of highway, see "Highways."

Of insanity, see "Insanity."

The supreme court does not take judicial notice of adjournment of terms of district courts. (Idaho) 172.

In an action to recover premiums on insurance, the burden is on defendant to show that the policies were not as they purported. (Wash.) 1086.

Where insurance premiums are payable in English money, a witness may testify as to the equivalent in money of the United States. (Wash.) 1086.

Where defendant offers evidence that plaintiff was drunk at time of accident, plaintiff may show that he was not drunk, and that his character for sobriety was good. (Colo. App.) 269.

Declarations and admissions.

Plaintiff may offer a verified answer, though part of it has been withdrawn. (Colo. App.) 284.

Declarations of agent after the accident are inadmissible to show negligence of principal. (Idaho,) 39.

A party may introduce admissions of the opposite party without laying any foundation for impeachment. (Idaho) 715.

Statements made in special defenses in verified pleading are not evidence against defendant as to other defenses in same answer. (Cal.) 643.

Opinion evidence.

A witness, familiar with a ditch, injured by defendant's construction of a railroad, and who had observed how such road affected the ditch, can state the diminution in capacity of the ditch. (Colo. Sup.) 910.

Expert testimony is not necessary to explain the lowering of tiles from a car by rolling them down skids with the assistance of a rope wrapped around a post. (Or.) 653.

Where witnesses are giving their opinions as to what the brand on animal is, the number of such witnesses may be fixed by the court. (Colo. App.) 671.

Admission of evidence of expert's testimony that person might be unable to resist insane impulse to commit murder is not cause for reversal, though such impulse is not defense to charge of felony. (Cal.) 856.

A physician who has had a person in his care from the time of injury may give his opinion whether physical powers will ever be recovered. (Colo. App.) 209.

Competency of "intimate acquaintance" to give opinion of mental soundness. (Cal.) 317.

Documents.

Books of account are not competent, when the only person who testifies to them did not make the entries himself. (Colo. App.) 279.

A copy of the report of a railroad company to the board of railroad commissioners, certified by the secretary of the board, is admissible. (Kan.) 1114.

Letters received by mail, and purporting to come from a corporation in answer to letters sent, are prima facie evidence as coming from the corporation. (Kan.) 11.

Parol evidence.

In action on note, which defendant asserts plaintiff bought, proof of negotiations for loan for which it was given, and that defendant received proceeds, is admissible. (Cal.) 639.

Where return on warrant for sale of assessed lots shows that they were sold en masse, parol evidence is inadmissible to show that they were sold singly. (Or.) 26.

EXCEPTIONS, BILL OF.

See, also, "Appeal;" "Certiorari;" "New Trial;" "Review, Writ of."

The signature of a judge to a bill of exceptions must be attested by his own seal. (Colo. App.) 674.

An amendment cannot be made on parol evidence alone. (Okla.) 955.

Filed after expiration of time, will not be considered, when no notice of motion to extend time was served. (Colo. App.) 60.

Allowing bill to be filed year after settlement, by order reciting good cause, is not subject to review, when circumstances are not shown. (Cal.) 636.

Where a bill of exceptions is filed after the term at which judgment was rendered, it must show that it was presented within the time allowed. (Okl.) 955.

EXECUTION.

See, also, "Attachment;" Garnishment;" "Writs."

Sale of homestead, see "Homestead."

Judgment in United States court of Indian Territory cannot be enforced by execution in Oklahoma. (Okl.) 574.

Annual cultivated crops are, while growing crops, personalty, subject to levy. (Kan.) 8.

The sheriff, and not the plaintiff in execution, has the right to select the newspaper in which notice of sale shall be published. (Cal.) 557.

A petition to restrain the enforcement of an execution which fails to allege that petitioner had a valid defense to the action in which the execution issued is bad. (Kan.) 792.

EXECUTORS AND ADMINISTRATORS.

See, also, "Descent and Distribution;" "Wills."

Where an executor, who is a residuary legatee, executes a bond to pay all debts and legacies, he is liable to the extent of the bond, regardless of the value of the assets. (Kan.) 214.

A widow is entitled to an allowance for support during administration, though she has property of her own. (Cal.) 341.

"Return" of inventory — What constitutes. (Cal.) 341.

Appointment—Bond.

Letters of administration may be granted on the estate of a minor, who resided in the state, and owned property therein at the time of her decease. (Kan.) 1108.

An executor's bond which is signed only by the sureties is void. (Cal.) 567.

The probate court acquires jurisdiction of estate on administrator's appointment and qualification. (Wash.) 605.

Settlements and accounting.

An annual account of executors may be settled without an accounting between them and the surviving partner of decedent. (Cal.) 345.

An executor who has paid a widow more than is her due pending administration is entitled to a credit for the sum allowed. (Cal.) 345.

An executor, who, without an order, has paid the widow an allowance in excess of what the court afterwards allows, is liable for the interest on the excess. (Cal.) 345.

Sufficiency of evidence to support finding that certain sum came into hands of deceased executor while acting as such. (Cal.) 763.

An executor is not liable for amount rebated from the claim by way of compromise, when he has made diligent offers to collect it. (Mont.) 960.

Where the administration of an estate continues for several years, the executor is entitled, on annual accounting, to commissions on monies actually disbursed. (Mont.) 960.

Sales.

A sale of land by an administrator is void, where the petition and order of sale describe the land as located in a certain township and county, when there is no such township in that county. (Wash.) 602.

The legislature may validate previous acts which were made without complying with requirements that petition be filed and claims issued. (Wash.) 605.

Actions.

Complaint, in action against administrator, is not open to general demurrer because it fails to allege that the claim was presented within the prescribed time, if it alleges proper presentation and rejection. (Cal.) 158.

It was proper to refuse to allow plaintiff to state that paper introduced by him was in his possession at decedent's death, when he had already testified that it had been in his possession ever since decedent's death. (Cal.) 902.

On trial of claim against an estate, witness who stated that plaintiff said that decedent owed no debt could state that no exception was made by plaintiff in his own favor. (Cal.) 902.

Sufficiency of evidence to support finding that deceased was not indebted to plaintiff, his brother, though latter had in his possession paper stating such indebtedness. (Cal.) 902.

EXEMPTIONS.

From taxation, see "Taxation."

The fact that a debtor entitled to the exemption of two horses only claimed one at the time of levy will not estop him from claiming the other prior to the sale. (Kan.) 782.

FACTORS AND BROKERS.

A broker may recover of the assured an expense of telegrams sent at the latter's request without proof that they were received. (Wash.) 1086.

Where real-estate agents do not pay their license tax, they cannot recover commission on a sale made by them while unlawfully carrying on their business. (Kan.) 207.

Sufficiency of evidence to establish right of real-estate agent to commissions. (Colo. App.) 276; (Cal.) 310.

An agreement by real-estate agents to divide commissions with purchaser, without knowledge of their principal, does not affect their right to commission. (Colo. Sup.) 733.

That the land had been shown by other agents to the purchaser, and that the agents effected the sale by giving such share to the purchaser, does not relieve the principal from liability for commission. (Colo. Sup.) 733.

A real-estate agent, who offers to effect an exchange of goods for land, is not entitled to compensation where negotiations failed, because the alleged owner of the land had no title. (Colo. App.) 879.

FALSE PRETENSES.

Proof of obtaining credit on false pretenses, and of resulting harm to the giver of the credit, are necessary to conviction. (Colo. App.) 188.

Where defendant made a true statement as to his financial condition, and promised to give notice of any change therein, he was not guilty where his condition changed for the worse, and he purchased goods thereafter without giving notice thereof. (Colo. App.) 188.

Fees.

Of clerk, see "Clerk of Court."

Fellow Servant.

See "Master and Servant."

Firm.

See "Partnership."

Foreclosure.

See "Mortgages."

FORGERY.

A contract, though void as against public policy, may be the subject of forgery. (Cal.) 326.

FRAUDS, STATUTE OF.

An acceptance of goods sold under an oral contract takes the contract out of the statute. (Idaho) 715.

One who has promised to pay for goods furnished another cannot avail himself of the statute in an action for the price, where he has collected such price from the other. (Colo. App.) 927.

Must be pleaded to be available as a defense. (Colo. App.) 927.

FRAUDULENT CONVEYANCES.

What constitutes.

A conveyance by an insolvent, with the intention of using the proceeds in discharge of the claims of such creditors, need not be made for cash in hand. (Cal.) 323.

An insolvent, who has the right to prefer creditors, need not, in the exercise of that right, convey his property directly to such creditors. (Cal.) 323.

A corporation, though financially embarrassed, may mortgage its property in good faith to secure a debt. (Or.) 854.

A chattel mortgage to secure a bona fide indebtedness is good, as against creditors of the mortgagor, where the mortgagee takes possession before such creditors levy on the property secured. (Kan.) 777.

A mortgage on real property and machinery to secure money advanced for their purchase and a small debt assumed by the mortgagee is not fraudulent. (Wash.) 396.

A deed to a wife by a husband about a year before his failure is valid, where the debts due at the time of the conveyance were paid, and the deed was immediately recorded. (Wash.) 409.

The inclusion in a mortgage from a failing firm of a debt due from one not a member of the firm vitiates the mortgage as to creditors of the firm. (Kan.) 796.

A conveyance by an insolvent, to defraud his creditors, to a grantee having notice of such intention, is void as to subsequent creditors. (Colo. Sup.) 532.

Mortgage by insolvent corporation to secure debt is not void because of fraudulent intent of mortgagor, if mortgagee does not participate. (Or.) 848.

Instruction that purchaser is not affected by knowledge of seller's intent to defraud, if he took property in good faith to pay honest debt, is proper. (Wash.) 607.

The title of a bona fide purchaser of land of an insolvent is not affected by the fact that the debtor, in making the conveyance, intended to defraud creditors. (Cal.) 323.

Who may attack.

A foreign judgment does not make its owner a judgment creditor, within the rule permitting

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only judgment creditors to attack a conveyance for fraud. (Cal.) 433.

Evidence.

Admissions by the grantee that he held the property in trust for the grantor are admissible to show that he did not pay a valuable consideration therefor. (Cal.) 437.

Where a sale of cattle is attacked because there was no change of possession, the fact that the buyer was the owner and in possession of the land where the cattle always grazed and were bred must be considered. (Cal.) 772.

Finding that consideration of the sale equaled value of property will be set aside, when indisputable evidence of purchaser and seller shows the contrary. (Wash.) 607.

Sufficiency of evidence to support a bill of sale from husband to wife in satisfaction of alleged loan, as against subsequent attaching creditor. (Wash.) 1078.

Where the debtor testifies that his intention in transferring his property was to prefer creditors, and the grantee testifies that the debtor so said to him at the time, a finding to that effect will not be disturbed. (Cal.) 823.

GARNISHMENT.

See, also, "Attachment;" "Execution;" "Writs."

Equitable claim of vendee for part payment made by him on purchase of land is not subject to garnishment by his judgment creditor. (Cal.) 896.

Instructions on issue of truth of garnishee's answer. (Colo. App.) 277.

GOOD WILL.

Construction of contract not to engage in similar business for limited time and within a limited period. (Wash.) 595.

Governor.

Power to remove state officer, see "Office and Officer."

GUARANTY.

An instrument stating that its signers are bound for the full sum of the debt due by another should he fail to pay is an absolute guaranty. (Wash.) 127.

One who guaranties a note secured by a mortgage is not thereby an agent of the owner of the note and mortgage. (Wash.) 393.

GUARDIAN AND WARD.

A guardian cannot bring action in his own name to recover property of the ward. (Idaho) 698.

Where a guardian, also an executor of the estate of his ward's ancestor, confuses the funds of the two estates, the court is justified in concluding the expenses of the ward were paid from the estate. (Wash.) 1071.

A guardian is not entitled to any allowance for the support of a minor after she came of age, where it cannot be ascertained what portion of the expenses for support were contracted after such time. (Wash.) 1071.

HABEAS CORPUS.

On application for writ of habeas corpus for failure to bring petitioner to trial after revers-

al, orders recalling the remittitur and granting a rehearing cannot be impeached. (Cal.) 449.

HIGHWAYS.

Dedication of, see "Dedication."

Prosecution for obstructing, see "Nuisance."

The use of a passageway to plaintiff's wharf for 20 years does not show dedication, where plaintiff always claimed to own it, maintained a gate, part of the time, and kept it in repair. (Or.) 236.

The width of a highway created by use under an attempted establishment is that attempted to be established. (Wash.) 363.

Prescription is not shown by indefinite and indiscriminate use of open prairie and various wagon tracks thereon. (Colo. App.) 676.

An order laying out a new road and vacating an old one is not void because it fails to show connection between the two roads, if this is shown by surveys and descriptions. (Cal.) 569.

Where county records have been burned, the legal establishment of a highway cannot be shown by persons supposed to have participated in laying it out. (Colo. App.) 676.

HOMESTEAD.

Gen. Laws 1887, § 346, relating to homesteads, is repealed by Code 1881, § 342. (Wash.) 358.

An hotel is not a homestead, though the owner and his wife reside there in order to carry on the business. (Cal.) 1031.

A married man who has acquired a homestead does not lose it by the death of his wife, childless. (Wyo.) 1025.

Where a man, whose wife had never been in Kansas, abandoned his homestead therein, and executed a deed thereof, his wife has no interest in the land. (Kan.) 216.

Where a husband and wife convey a homestead in exchange for other land, on which there is a prior mortgage, and the husband, with consent of his wife, takes title in his own name, and assumes payment of the mortgage, the wife cannot defend against it on the ground that the land is a homestead. (Kan.) 201.

Wife can convey to her second husband part of land set apart to her and to her minor children by first husband, as homestead out of his land. (Cal.) 141.

The record of a receiver's certificate is recorded title, in margin of which "Homestead" may be written to secure benefit of homestead act. (Colo. App.) 679.

A quitclaim deed to homesteader, by one to whom he had conveyed homestead to secure debt, is not "recorded title," in the margin of which "Homestead" should be entered. (Colo. App.) 679.

Homesteader may sell undivided portions of his homestead, and claim a homestead in undivided residue, as against all persons except his cotenants. (Colo. App.) 679.

Lease of part or whole of homestead for definite period does not affect homestead rights. (Colo. App.) 679.

Rights of purchaser at execution sale.

Occupancy of land by the head of a family is notice to a purchaser at execution sale that it is "claimed" as a homestead. (Wash.) 358.

A purchaser of a homestead on execution sale is chargeable with notice whether the execution creditor has filed an affidavit that the homestead exceeds \$1,000 in value. (Wash.) 358.

HOMICIDE.

Evidence considered and *held* sufficient to show deliberation and premeditation. (Or.) 976.

Sufficiency of evidence to support conviction. (Wash.) 387.

Prosecution for manslaughter—Sufficiency of evidence. (Wash.) 417.

Defendant's notice of the location of his mining claim is not admissible in justification of his intent to kill a person coming upon the claim. (Mont.) 455.

The fact that a person thinks another is going to inflict bodily harm on him does not justify an attempt to take such other's life. (Cal.) 860.

That deceased consented to the performance of a surgical operation upon him is no defense in the prosecution against the surgeon for manslaughter. (Wash.) 417.

Insanity or intoxication as defense.

A charge that "if deliberation, premeditation, malice, or cool blood existed," and the killing is the result of them, intoxication is no defense, is proper. (Or.) 976.

On the defense of insanity caused by alcoholism, the sheriff's testimony that the day after the homicide accused had no symptoms of delirium tremens is admissible. (Or.) 976.

The defense being insanity induced by intoxication, the court properly waived question of motive, and directed the jury to consider the intent. (Or.) 976.

The finding of the jury on the question of insanity cannot be disturbed. (Or.) 976.

Indictment and information.

Sufficiency of indictment, where the conclusion fails to state the acts done, or that they were committed with malice aforethought. (Mont.) 228.

An information charging a surgeon with manslaughter need not set out the relations existing between defendant and deceased to entitle the state to show the manner in which the operation was performed. (Wash.) 417.

Evidence.

Evidence that money belonging to deceased was found on accused is admissible in corroboration of his confession, and to show motive for crime. (Or.) 976.

Admissibility of evidence. (Wash.) 382.

Evidence considered as bearing on question whether defendants shot deceased, and so killed him. (Wash.) 132.

Declarations of one who was with defendant before and after the murder, and was killed resisting arrest shortly before death, are inadmissible. (Colo. Sup.) 179.

The dying declaration of a person upon whom a surgical operation had been performed that he had been "butchered" by defendant surgeon is competent. (Wash.) 417.

Where defendant testified that, immediately before the assault, prosecutor threatened to kill him, a refusal to permit him to state his understanding of a threat a few days before to "fix" him was not prejudicial. (Cal.) 860.

Instructions.

There being no contention that the killing was in the commission of a felony, a charge that the first degree required other evidence of malice than the killing was proper. (Or.) 976.

Propriety of instruction as to whether defendant had time for deliberation and premeditation. (Or.) 655.

Error in omitting element of "malice aforethought" in charge is not cured by reading statutes defining murder. (Ariz.) 1059.

Correctness of charge as to guilt of deceased, based on his declarations, and omitting element of "malice aforethought." (Ariz.) 1059.

Verdict.

A direction to separate a verdict of guilty of murder in the first degree from the recommendation to mercy was cured by an instruction that the verdict was under the control of the jury, which, on being polled, affirmed such verdict. (Colo. Sup.) 179.

Execution of sentence.

Where the execution of a murderer is stayed on writ of error, the supreme court will fix the date in case of affirmance. (Colo. Sup.) 179.

HORSE AND STREET RAILROADS.

See, also, "Carriers."

Where ordinance granting franchise requires corporation grantee or its assigns to give bond to secure construction, a bond executed by individuals, and not by grantee, is insufficient. (Wash.) 1097.

A company operating cars by electricity is liable for slight negligence. (Colo. App.) 269.

In action for injuries resulting from shock caused by contact with car, evidence that the car was so charged as to injure a person by contact with any part establishes prima facie negligence. (Colo. App.) 269.

Failure of one driving in the street to notice the approach of an electric car going the same direction with himself, before crossing the track, bars recovery. (Colo. App.) 920.

HUSBAND AND WIFE.

See, also, "Divorce;" "Homestead."

Acknowledgment of married woman, see "Acknowledgment."

The conveyance to a husband and wife in Oregon creates an estate by entirety. (Or.) 248.

Where a married woman remains in Dakota after her husband's removal to Washington, his departure does not affect her residence as far as concerns her separate property. (Wash.) 64.

Where a wife binds her property for her husband's debts, it creates no liability beyond the property mortgaged. (Or.) 248.

Timber land acquired by a husband under Act Cong. June 3, 1878, is his separate property. (Wash.) 402.

Sale of community property to satisfy a judgment against the husband is void as against the children of the deceased wife. (Wash.) 358.

Before lessee can rescind lease of community property executed by husband alone, he must demand a lease executed by wife as well. (Wash.) 598.

Sufficiency of evidence to maintain action by wife against her husband's parents for causing him to abandon her. (Wash.) 592.

Impeachment.

Of witness, see "Witness."

Improvements.

Public, see "Municipal Corporations."

INDEMNITY.

In action by sheriff on bond, it is no defense that, after judgment against the sheriff for illegal seizure was satisfied by him, he sold the property by direction of plaintiff. (Wash.) 1099.

Indians.

Marriage of whites and Indians, see "Marriage."

INDICTMENT AND INFORMATION.

See, also, "Homicide."

The fact that the deputy clerk signs the jurat to the verification in the name of his principal, by himself as deputy, does not invalidate the information. (Wash.) 357.

An information charging manslaughter may be withdrawn before trial, and a new information charging the same offense filed. (Wash.) 417.

Sufficiency of indictment to charge assault with deadly weapon. (Wash.) 367.

An information need not charge the same crime as that named in the commitment. (Wash.) 580, 756.

Defendant may be found guilty under information charging him as principal if evidence prove him accessory before the fact. (Wash.) 117.

On complaint for an assault on one George McGinn, defendant cannot be tried on an indictment for an assault on one George Masino. (Cal.) 1043.

Sufficiency of indictment, under Hill's Code, § 4201, for issuing warehouse receipts for goods not in store, considered. (Or.) 32.

An information which charges two offenses cannot be amended, after the taking of defendant's plea, without a new arraignment and plea. (Cal.) 1022.

Infancy.

See "Guardian and Ward."

Information.

See "Indictment and Information."

INJUNCTION.

Against nuisance, see "Nuisance."

A court has jurisdiction to enjoin sale of property on an execution outside of jurisdiction of court rendering a judgment. (Okla.) 574.

The breach of a valid contract in restraint of trade may be enjoined, though nominal damages only can be proved. (Cal.) 995.

An emergency restraining order, granted without notice, is not a temporary injunction which can be kept in force, pending appeal, under Code Proc. § 1409. (Wash.) 1077.

May be granted on defendant's answer and cross complaint. (Okla.) 682, 886.

On proceeding by homestead claimant to enjoin one from interfering with his possession, the court may give injunction against plaintiff the effect of a writ of possession. (Okla.) 682, 886.

One who has notice of an injunctive order violates it at his peril. (Colo. Sup.) 731.

Where defendant dissolves preliminary injunction by recovering final judgment, he cannot recover attorney's fees in an action on a

bond given to obtain the preliminary injunction. (Cal.) 851.

Effect of appeal.

Where defendant was enjoined from interfering with plaintiff's connection with defendant's water conduit, an appeal stayed the operation of the judgment. (Cal.) 156.

When court expressly refuses to suspend injunction appealed from, it may punish for breach thereof pending appeal. (Utah) 524.

INSANITY.

As defense to crime, see "Homicide."

Persons not experts nor intimate friends can testify as to peculiar conduct and language of person alleged to be insane. (Cal.) 856.

On an issue as to whether the person who killed insured was sane, it was proper to refuse instruction intimating that the plea of insanity had been often abused, and must be examined with care. (Cal.) 856.

INSOLVENCY.

See, also, "Assignment for Benefit of Creditors;" "Fraudulent Conveyances;" "Insurance."

An assignee, with power to accept notes in payment for goods sold by him, may take a chattel mortgage to secure a note for goods sold. (Kan.) 777.

Instructions.

See "Trial."

INSURANCE.

Dissolution of company, appointment of receiver, see "Corporations."

If agent inserts false answers in application without applicant's consent, the company is liable. (Kan.) 15.

The fact that the policy misdescribes land on which insured house stands does not avoid it. (Kan.) 15.

A provision against further incumbrances is not broken by renewal of prior mortgage. (Kan.) 15.

If company denies liability because insured swore falsely in making proofs of loss, it cannot defend upon ground that arbitration provided for by policy was not carried out. (Wash.) 585.

Proofs furnished by plaintiff are admissible on issue as to whether sufficient proofs were furnished. (Wash.) 585.

Proofs of loss are relevant to a defense that plaintiff swore falsely in making them. (Wash.) 585.

A mortgagee, after foreclosure but before sale, is entitled to proceeds of insurance taken out by the mortgagor, if the mortgage contained a condition that the premises were to be kept insured for the benefit of the mortgagee. (Kan.) 1109.

Company cannot deny agency of one procuring application, when it reaps the benefit of his acts, and pays him as agent. (Kan.) 15.

An insurance corporation may be adjudicated an insolvent on petition of creditors under insolvent act. (Cal.) 549.

INTEREST.

Where a higher rate is reserved to be paid after maturity, it is recoverable if not usurious. (Kan.) 201.

INTERPLEADER.

A defendant that has disclaimed interest except as stakeholder, and has prayed interpleader, may pay a judgment rendered against it regardless of the irregularities in the interpleader suit. (Cal.) 315.

The assignee of a recorded mortgage should be permitted to interplead in action to foreclose a mechanic's lien on property mortgaged there; his assignment was not made of record. (Kan.) 800.

INTOXICATING LIQUORS.

An ordinance prescribing a fine of \$200 for the keeping of dramshop within the city limits without a license is valid. (Colo. Sup.) 533.

An application for the renewal of a license, accompanied by a deposit of the license fee, is no defense to a charge of keeping a dramshop without a license. (Colo. Sup.) 535.

Where the prosecution is required to elect between two alleged illegal sales of liquor, and elects one, it is error for the court, after the testimony is in, to set aside the election, and instruct the jury to consider only the evidence as to the other sale. (Kan.) 221.

IRRIGATION.

Rights of party interested in irrigating ditch to injunction against one unlawfully diverting the water. (Wyo.) 773.

JUDGMENT.

Against county, see "Counties."

Form in replevin, see "Replevin."

In action against firm, see "Partnership."

Modification by supreme court after remittitur, see "Appeal."

Motion in arrest before justice, see "Justices of the Peace."

Transcript of judgment of another state, duly authenticated, is admissible, though not showing that it was signed by presiding judge. (Okla.) 578.

Costs merged in a judgment are not subject to collateral attack. (Nev.) 300.

In an action on a judgment, the complaint which states that it was recovered in the superior court, and that an appeal was taken to the supreme court which gave plaintiff judgment for costs, is insufficient if it does not allege a remittitur to the superior court. (Or.) 975.

Where judgment is rendered for a deposit, with dividends, and later a decree is entered fixing the amount due, for which judgment is rendered, the first judgment is interlocutory, and payment of the second discharges both. (Cal.) 315.

A judgment for wages for a sum less than plaintiff claims, and defendant admits, cannot stand against plaintiff's objection. (Colo. App.) 880.

When informality in judgment does not render it void. (Kan.) 827.

Remission and entry.

The clerk may enter default though the court is in session. (Ariz.) 983.

Where default is taken against one of two defendants, it is error, on trial against the other, to render judgment in favor of both defendants against plaintiff. (Colo. App.) 193.

In action against two defendants, the judgment being against him as to both, plaintiff cannot complain that it was in favor of one defendant as against the other. (Cal.) 320.

Judgment on an attachment issued on a note not due cannot be entered before the last day of grace. (Kan.) 799.

Res judicata.

In action of forcible entry and detainer is not bar to action to quiet title. (Ariz.) 1059.

In suit to restrain issuance of writ of restitution under judgment in forcible entry and detainer does not bar action to quiet title. (Ariz.) 1059.

A judgment against a contractor, personally, for goods sold to men employed in grading a street, is no bar to an action on their bond after failure to collect the same. (Wash.) 1071.

Judgment of appellate court that complaint does not state cause of action constitutes a complete reversal of judgment of lower court for plaintiff, so that this latter cannot be pleaded as res judicata. (Mont.) 111.

A judgment for damages for breach of contract does not show a rescission of the contract. (Wash.) 65.

A final judgment in action for divorce is a bar to a subsequent action by the wife for alimony. (Kan.) 808.

A decree vacating an attachment obtained by creditors on the ground that a mortgage of the attached property was fraudulent as to them is not a bar to a subsequent action involving the same question. (Kan.) 796.

On an issue as to whether the person who killed insured was sane, the record of his conviction for murder is inadmissible. (Cal.) 856.

A creditor who splits a running account constituting a single cause of action cannot, after recovering upon a part, maintain an action for the remainder. (Kan.) 810.

Failure to file a verified denial in an action upon a verified account does not prevent defendant from setting up the plea of res judicata in a subsequent action on such account. (Kan.) 810.

A judgment is not a bar to a subsequent action between the same parties if the time for appeal from it has not expired. (Cal.) 433.

Where a case is dismissed on application of plaintiff on demurrer for failure to state the cause of action, it is no bar to another suit. (Colo. App.) 985.

A judgment on demurrer that a complaint does not state a cause of action is no bar to another suit on the same cause. (Colo. App.) 985.

Dismissal of an action against a railroad for damages caused by its negligence, on the ground that it abated on the injured party's death, is no bar to an action for the loss to his estate from failure to carry safely. (Colo. App.) 923.

When judgment binds a person not a party. (Cal.) 440.

A judgment against a corporation for an amount in excess of plaintiff's claim is not conclusive on the stockholders in an action brought against them to enforce their liability. (Utah) 488.

Estoppel by a former judgment must be pleaded. (Or.) 26.

Supreme court may consider a previous decision by it in case between same parties as establishing plaintiff's right to sue, though he failed to plead it, if he had no chance so to do. (Wash.) 611.

Where a demurrer setting up want of facts to constitute a cause of action and misjoinder of causes is sustained generally, and judgment

(Mont.) 460.

Lien.

Evidence considered and held that judgment lien on a leasehold was not superior to the lien of a mortgage. (Wash.) 1098.

The court cannot perpetuate the lien of a judgment which it has declared void. (Ariz.) 1057.

A money judgment for alimony cannot be made a specific lien on land, where the land was not brought before the court by pleadings. (Wash.) 358.

Rendered in Indian Territory must be reduced to judgment in Oklahoma before it is enforceable there. (Okla.) 574.

Correction.

Where a judge neglected to make a complete entry of allowance and payment of claim against decedent, his successor can correct the record after payment had been made. (Kan.) 215.

A judgment in action against an administrator, made immediately enforceable, may be corrected so as to make it payable in due course of administration. (Cal.) 306.

A judgment in action against an administrator that is entered against him personally may be corrected. (Cal.) 306.

A judgment in action on note for a sum larger than the principal and interest due may be corrected. (Cal.) 306.

Opening and vacating.

Will not be vacated for irregularity in entry because of an alleged agreement, when the weight of evidence is against the existence of such agreement. (Wash.) 115, 755.

Should not be vacated because rendered as a judgment at law in a suit in equity. (Mont.) 111.

In an action to vacate a judgment on the ground of a settlement, where the jury, in answer to interrogatories, find that no such settlement was made, a judgment for plaintiff will be reversed. (Mont.) 227.

Neglect arising from reliance upon assurances by opposing counsel as ground for relief from judgment. (Colo. App.) 985.

Default is properly vacated, where defendant was misled as to time for answering by plaintiff, a lawyer. (Cal.) 558.

Judicial Notice.

See "Evidence."

JUDICIAL SALES.

Where a third person buys in behalf of the judgment creditor, and the judgment is reversed on appeal, it defeats title of the purchaser. (Kan.) 204.

Where land on foreclosure is to be sold for cash, the acceptance by sheriff of a certified check, afterwards paid, will not avoid the sale. (Kan.) 204.

Jurisdiction.

See "Courts."

On appeal, see "Appeal."

JURY.

Disqualification as ground for new trial, see "Criminal Law;" "New Trial."

Competency of juror—Previously formed opinion. (Wash.) 417.

One who attends court when summoned on special venire is entitled to fees, though he does not serve. (Or.) 30.

Denial of challenge for cause is not prejudicial if juror is excluded on peremptory challenge, and peremptory challenges are not exhausted. (Wash.) 132.

The overruling of defendant's challenge to a juror for cause is not prejudicial, where defendant had not exhausted its peremptory challenges. (Colo. Sup.) 537.

A challenge to a panel summoned by special venire will not lie on the ground that the panel were nonresidents of the county. (Cal.) 862.

On trial of a civil cause before a justice, the jury may consist of any number the parties agree upon. (Colo. Sup.) 741.

An administrator alleging that the assignment by his intestate of a deposit was brought about by fraud is not entitled to a jury trial in an action to recover the deposit. (Cal.) 317.

Where a jury trial has been waived, and case referred, and judgment on referee's report reversed, and case re-referred, defendant is not entitled to a jury. (Wash.) 63.

JUSTICES OF THE PEACE.

Mandamus to compel entry of judgment, see "Mandamus."

A justice of the peace in a precinct entitled to two justices holds over where only one candidate, receives more votes, and another the same number as he. (Ariz.) 984.

Increase of emoluments after election—What constitutes. (Wyo.) 467.

A determination by commissioners that a precinct contained a certain population, as bearing on compensation of justice, will not be disturbed in the absence of proof that they erred. (Wyo.) 467.

Has no jurisdiction of issue whether land on which plaintiff was located by defendant was vacant government land. (Cal.) 633.

Has no authority to commit a person to the county hospital for the indigent sick, except those who come within Rev. St. tit. 11, c. 8. (Idaho) 691.

Have no authority to grant a motion in arrest of judgment. (Colo. Sup.) 741.

Sufficiency of date and signature on justice's docket to support judgment of conviction. (Wash.) 1100.

The successor of a justice can, under direction of the district court, supply omissions in a transcript of his predecessor. (Kan.) 211.

Justifiable Homicide.

See "Homicide."

LANDLORD AND TENANT.

Liability of landlord for torts of lessee, see "Torts."

Trover by tenant against landlord, see "Trover and Conversion."

A surviving partner in possession, and raising crops in behalf of the firm on land belonging to the deceased partner, is not a tenant at will. (Cal.) 1021.

In an action for rent under a lease, plaintiff, the lessor, need not prove ownership. (Wash.) 593.

If landlord renews lease, with nuisance thereon placed by tenant, he is liable. (Or.) 174.

A tenant is constructively evicted when landlord rents adjacent rooms to disreputable persons, and takes no steps to remove them on complaint of their offensive conduct. (Colo. App.) 748.

LARCENY.

If, by means of any trick, the owner of property is induced to part with its possession, still meaning to retain the right of property, taking by such means is larceny. (Utah) 498.

Legacies.

See "Wills."

LEVEE.

Act March 25, 1863, providing for the erection of levee district by county board, is unconstitutional. (Cal.) 562.

Levee district organized under void law may defeat action on bonds issued by it. (Cal.) 562.

LIBEL AND SLANDER.

Sufficiency of information charging criminal libel. (Kan.) 789.

A publication of libelous matter will be presumed to have been malicious. (Kan.) 789.

Where defendant has been permitted to testify that when he published the article he believed it to be true, it was not prejudicial to refuse to permit him to testify as to his motive in writing the article. (Kan.) 789.

License.

Necessity, see "Factors and Brokers."
Of liquor traffic, see "Intoxicating Liquors."

Liens.

See "Mechanics' Liens."

For work done on leased mining property, see "Mines and Mining."

Of judgment, see "Judgment."

Of mortgage, see "Mortgages."

Of vendor, see "Vendor and Purchaser."

Life Insurance.

See "Insurance."

LIMITATION OF ACTIONS.

See, also, "Adverse Possession."

When statute applicable.

"Patented mines" are within Gen. St. § 3632, providing for actions to recover mining claims. (Nev.) 89.

An action by a party in possession to have a deed declared a mortgage and canceled, where debt is paid, is not within the statute. (Colo. App.) 49.

Action to impose trust on assets of one who converted public funds must be brought in two years. (Kan.) 25.

An action upon the bond of a county clerk, to recover fees unaccounted for, is barred in three years. (Kan.) 299.

Running of statute.

A cause of action against a county clerk for fees unaccounted for accrues at the end of each quarter of his term of office. (Kan.) 299.

Right to bring bill to set aside assignment for creditors accrues when execution on plaintiff's judgment is returned unsatisfied. (Cal.) 646.

An action to have a deed declared a mortgage, and to compel a reconveyance, accrues from demand for reconveyance. (Colo. App.) 49.

The statute does not begin to run on a foreign judgment until a judgment is obtained in the state on the foreign judgment. (Cal.) 433.

The statute does not begin to run against an action to establish a resulting trust in land, until a cestui que trust, who has been in possession, is ousted. (Or.) 846.

Time of unnecessary delay by sheriff in making arrest is to be computed as part of period of limitation. (Kan.) 23.

Disabilities and exceptions.

When an action by trustee is barred, the rights of the beneficiaries are also barred, though they were infants. (Cal.) 73.

The time that one is out of the state after a cause of action has accrued against him cannot be computed as part of the period within which the action must be brought. (Kan.) 804.

Criminal prosecution.

Criminal prosecution is commenced when warrant is issued and placed in the hands of proper officer. (Kan.) 23.

Liquor Selling.

See "Intoxicating Liquors."

LIS PENDENS.

A purchaser during the pendency of a suit to determine adverse claims is bound by the result of the litigation. (Colo. Sup.) 731.

Lunacy.

See "Insanity."

Magistrate.

See "Justices of the Peace."

MANDAMUS.

Will not lie to determine the rights of parties where a complicated accounting must precede a judgment. (Kan.) 221.

Will not lie to try title to office. (Okla.) 951.

Where a public officer is removed by the governor under the statute, and a successor is appointed and qualifies, the court will not go behind the commission of the governor and try the title. (Okla.) 951.

Where relator shows prima facie title to office, he is entitled to mandamus to obtain possession of the books and records of the office. (Okla.) 951.

Will not lie to control the discretion of a district attorney as to prosecution to try title to office. (Or.) 178.

Will lie to compel a justice to enter judgment when there is nothing to be done but the clerical work of entry. (Colo. Sup.) 741.

Will not lie to compel a state auditor to issue warrants for the salary of the inspector of mines, where no appropriation has been made therefor. (Colo. Sup.) 911.

Where relator has been removed by the governor, and a commission has been lawfully issued for the same office to another, relator is not entitled to mandamus to obtain possession of the funds in the hands of the territorial treasurer. (Okla.) 951.

Mandamus will lie to compel an allowance by a county board of a claim based upon a judgment against the county. (Nev.) 300.

The proper remedy for action of county commissioners in rescinding previous order awarding county advertising to certain newspaper is not mandamus, but appeal. (Wash.) 600.

An answer by a city clerk to a mandamus requiring him to deliver a warrant, which alleges that petitioner was a city officer interested in the contract upon which the claim is based, without alleging the facts, is insufficient. (Cal.) 863.

On mandamus to a city clerk to countersign a warrant, an allegation by defendant, on information and belief, of insufficient funds to pay the warrant, is defective. (Cal.) 863.

Manslaughter.

See "Homicide."

MARINE INSURANCE.

Where it is a custom of brokers to buy the insurance and deliver policies on their own account, a broker can recover the premium though he has not paid it. (Wash.) 1086.

It is no defense to an action by a broker to recover premiums that the insurers are not authorized to do business in the state. (Wash.) 1086.

MARRIAGE.

See, also, "Divorce;" "Homestead;" "Husband and Wife."

Act 1866, p. 81, prohibiting marriage of white person with Indian, was in force on the Swinamish reservation. (Wash.) 407.

The fact that the territorial statute was repealed soon after the marriage did not render it valid. (Wash.) 407.

MARSHALING ASSETS AND SECURITIES.

A senior mortgagee, holding security on property other than that covered by a junior mortgage, may be compelled to exhaust such other property before proceeding against the property covered by the junior mortgage. (Kan.) 829.

MASTER AND SERVANT.

See, also, "Principal and Agent;" "Railroad Companies."

Evidence bearing on question whether plaintiff was discharged by employer, or left service voluntarily, considered. (Wash.) 136.

An order given to plaintiff for labor performed, directing another to pay him a certain amount, is not an evidence of indebtedness for wages payable otherwise than in lawful money. (Wash.) 370.

On issue as to whether servant was employed by defendant with knowledge of his habits of intoxication, evidence as to his reputation for sobriety is inadmissible. (Cal.) 165.

Negligence of master.

An express messenger who handles baggage on a train, and is required to act as the servant of the railroad in the movement of a train, may recover for injuries caused by negligence of brakeman. (Colo. App.) 923.

Employee injured by sudden starting of engine cannot recover if it was his duty to notify engineer that he was working near engine, and failed to do so. (Cal.) 165.

Employer is not liable for injuries caused by servant's habits of intoxication, of which it was ignorant. (Cal.) 165.

Sufficiency of evidence to charge a master with negligence in examination of appliances. (Kan.) 292.

Sufficiency of evidence to charge an employer with liability for injuries received by an employee. (Wash.) 372.

A master is liable only for defects in appliances which might be guarded against by the use of reasonable care. (Or.) 653.

Employer need not furnish appliances of a particular kind. (Or.) 653.

Fellow servants.

Steamboat engineer, who has power to discharge oiler working under him, is nevertheless his fellow servant. (Cal.) 165.

Assumption of risks.

Servant cannot recover for injuries caused by breaking of rope about which he had been employed for three months, and which was plainly in sight. (Wash.) 130.

An employee does not assume risk of injury from defect in machinery, unless he knows of the danger arising therefrom. (Cal.) 572.

An employee, who has knowledge of the services to be performed and of the dangers involved, assumes the risks of employment. (Kan.) 825.

Contributory negligence.

Where plaintiff was told that acid which he was using would rot the ropes of a staging on which he was at work, and they broke because he got the acid on them, he was guilty of contributory negligence. (Colo. Sup.) 47.

Sufficiency of evidence to establish contributory negligence in receiving injury. (Cal.) 332.

Material Men.

See "Mechanics' Liens."

Measure of Damages.

See "Damages."

MECHANICS' LIENS.

Effect of assignment for creditors, see "Assignment for Benefit of Creditors."

Where the owner leased an apartment for a saloon, and the lessee engaged a plumber to connect the bar with the water pipes of the building, the plumber is not entitled to a lien on the building. (Or.) 454.

Under statute giving a lien for work done for an entire structure, one who does part of work has a lien. (Colo. App.) 267.

One who serves notice on owner, of claim for materials furnished contractor, acquires right to funds due contractor, though the latter abandons the contract. (Cal.) 643.

A subcontractor is entitled to his pro rata share of the contract price though the owner has paid the full amount of such price to the contractor. (Kan.) 781.

A claim for work in constructing a railroad is not defective, in not alleging that the corporation had any interest in the land over which it was built. (Wash.) 306.

A lien claim which states that defendant promised to pay the prices set forth in annexed bill of particulars is sufficient. (Wash.) 413.

The judgment creditor of a railroad contractor, who has garnished the company, is entitled to priority over subcontractor who afterwards files his notice of lien. (Or.) 656.

Sufficiency of finding as to contract for work. (Cal.) 144.

In action to enforce lien, costs may be allowed, under Code Civil Proc. § 1195, without any averment of the amount thereof in complaint. (Cal.) 144.

Plaintiff, in action to enforce lien, cannot recover as costs payment for preparing claim. (Cal.) 144.

MINES AND MINING.

The validity of a prior location being admitted, the burden is on the relocater to show that defendant failed to do his assessment work. (Cal.) 1040.

In an action to try the right of possession, the admission of plaintiff's protest against defendant's relocation is harmless. (Cal.) 1040.

On abandonment of an application for a patent, no certificate of purchase having been obtained, the claim may be relocated. (Nev.) 81.

Persons in possession of a claim under the legal location can contest a patent made to another party. (Nev.) 89.

Where, after abandonment of application for a patent and of all work under it, the claim was relocated, and possession thereof held continuously, a patent fraudulently obtained by the first locator is held in trust for the second locator. (Nev.) 89.

Instructions on issue as to the doing of \$100 worth of work on mining claim considered. (Mont.) 111.

On issue as to possession of mining claim, plaintiff need not prove annual work on claim, if question is not raised by pleadings. (Mont.) 111.

The declaratory statement to be filed by locator of mining claim must be under oath. (Mont.) 111.

Contract giving option to purchase mine, by which vendors agree to sink a shaft a certain depth, imposes on them duty of so doing, though they find no evidence of valuable ore. (Cal.) 566.

Separate discovery, marking of boundaries, recording, and work are not necessary on each of the 20 acres in a 160-acre placer claim located by several persons. (Mont.) 663.

Rev. St. U. S. § 2322, giving locators of quartz claims exclusive possession of the surface within the location lines to the depth of all veins whose apex is within the surface lines, is not repealed by § 2336. (Cal.) 997.

Liens.

Gen. St. 1883, as amended by Laws 1889, giving lien on leased mining property for labor done thereon, unless owner records notice that property is leased, has no retrospective effect. (Colo. App.) 674.

Survey of mine.

A district court cannot authorize a survey of a mine located beyond the state, though the only means of access thereto is by a shaft within the state. (Kan.) 818.

MORTGAGES.

See, also, "Chattel Mortgages;" "Fraudulent Conveyances."

Rights of mortgagee where land has been condemned, see "Eminent Domain."

— to proceeds of insurance policy, see "Insurance."

A trust deed executed by a corporation is good as between the parties, though statute regulations were not complied with. (Wyo.) 475.

A trust deed purporting to convey the entire property of a company, and all property of like

A mortgage by a partner to secure a firm debt, in the absence of a personal covenant to pay, renders him liable as surety only. (Cal.) 1027.

A mortgage of land with the rents and issues, a lien on the growing crop at time of foreclosure superior to a junior chattel mortgage. (Cal.) 86.

An unrecorded mortgage takes precedence over attachment or judgment lien obtained after execution. (Cal.) 170.

Assignee of a mortgage may sue on the notes, though the mortgagee has taken possession of the mortgaged premises under the power. (Wash.) 393.

An assignment of a mortgage by an agent, on payment, conveys no title to the assignee with notice that agent had authority only to collect and release the mortgage. (Cal.) 765.

Payment.

When purchase constitutes payment. (Kan.) 11.

Foreclosure.

Demand for payment is unnecessary to foreclosure where there is a default in the interest. (Cal.) 1032.

The holder of a mortgage note, with an option to declare the principal due on default in interest, does not waive his right by a delay 59 days after default. (Cal.) 868.

On foreclosure, where the defense is that the mortgagor, a married woman, never appeared before the officer certifying to her acknowledgment, she need not prove bad faith on the part of the mortgagee. (Cal.) 1054.

Where a mortgage provided that unpaid interest should become a part of the principal, and so that principal should be due on default of interest payment, the mortgagor had no option to allow the interest to become a part of the principal. (Cal.) 1032.

Question whether, on foreclosure of mortgage for nonpayment of interest, the mortgagee could be allowed to retain from proceeds of sale the principal as well as interest. (Ariz.) 1058.

One transferring note on condition that transferee pay him interest then accrued, when collected on note and mortgage, is entitled to have proceeds of foreclosure first applied to such interest. (Cal.) 1035.

In a complaint in an action to foreclose a mortgage giving the holder an option to declare the principal payable on default in interest, an allegation that plaintiff "elected to declare, and I declare, the principal sum due and payable," is sufficient as an allegation of election. (Cal.) 868.

Where the answer in foreclosure denies the execution, the failure to use the word "delivery" is not a failure to deny the "delivery" thereof. (Cal.) 1054.

A description in a foreclosure decree need not show that of the complaint if it shows the same land. (Cal.) 766.

— Right to rents and profits.

Where mortgagee purchases premises at sale amount of debt and costs, rents and profits in hands of receiver at time of sale belong to mortgagor. (Cal.) 169.

Mortgagee who purchases at foreclosure sale not entitled to rents payable 10 days after sale. (Cal.) 169.

— Attorney's fees.

Where the mortgage secured the principal and interest only, attorney's fees for which the note provided could not be made a lien. (Cal.) 1032.

Where a mortgage secures only the principal and interest of a note, a lien cannot be had for attorney's fees therein provided for. (Cal.) 1033.

Attorney's fees cannot be recovered where the agreement to pay is not averred in the complaint. (Cal.) 1034.

Where a mortgage has a provision that the mortgagors will pay an attorney's fee in event of suit, a lien therefor cannot be obtained on foreclosure. (Cal.) 1034.

On foreclosure for default in interest, the judgment cannot include attorney's fees without proof of notice of option to claim the whole amount due, and demand of payment. (Cal.) 1032.

Redemption.

The mortgaged property included in a residuary devise is not "devised," within Code Proc. § 1035, providing that property not devised may be redeemed by the executor. (Wash.) 1073.

On petition of a mortgagee under Code Proc. § 1035, for redemption by the executor of the mortgagor, the court may order a sale to pay the mortgage. (Wash.) 1073.

MUNICIPAL CORPORATIONS.

See, also, "Counties;" "Irrigation;" "Schools and School Districts."

Mandamus to city clerk, see "Mandamus."

Regulation of liquor traffic, see "Intoxicating Liquors."

Where a city is permitted by the owner of land to occupy it as a park, it is not liable for injuries through the negligence of its officers improving such park. (Wash.) 605.

Under municipal government act, a city has no absolute right to construct a wharf on its water front, irrespective of the rights of others. (Cal.) 993.

Portland city charter construed as regards sales for nonpayment of special assessments. (Or.) 26.

The charter of a city may be amended by the legislature at any time. (Cal.) 162.

Ordinances.

An ordinance may be void in part, and valid as to other parts. (Idaho) 693.

A council can, by ordinance, impose a fine on boarding house keepers who refuse to furnish the street commissioner with the names of persons boarding in their houses liable to a poll tax. (Kan.) 819.

Contracts.

Power of city to take bond providing for payment of liquidated damages in case of breach. (Wash.) 1097.

A mayor may employ counsel to defeat a writ of mandamus requiring him to sign city bonds which he believes to be illegal, where the city attorney refuses to act. (Wash.) 415.

Where a mayor employs an attorney without authority to prosecute a suit, and the city council has knowledge thereof, and accepts the fruit of the service, it ratifies the employment. (Kan.) 1112.

A valid claim, improperly presented to the city trustees and allowed, is a binding contract. (Cal.) 863.

In the absence of fraud a taxpayer and competing bidder cannot sue to vacate a contract on a bid higher than his own, where it offered services not included in his. (Cal.) 1013.

Officers.

A mayor may fill a vacancy in the office of a city justice of the peace. (Cal.) 330.

A provision in a charter for filling vacancies in offices is valid. (Cal.) 330.

Police commissioners are not removable for neglect of duty by civil action. (Kan.) 455.

A charter provision that the compensation of officers shall in no case exceed the following amount, "City comptroller, \$4,000 per annum," does not fix the comptroller's salary, but limits it. (Wash.) 584.

The council of a city organized under Laws 1889-90 cannot fix the salary of the comptroller, but it must be fixed by the charter. (Wash.) 584.

Salary paid to overseer of public improvement cannot be assessed on abutting land, if neither charter nor ordinance so provides. (Or.) 665.

The decision of the trustees of a city as to a claim presented is binding on the city clerk. (Cal.) 863.

Defective streets.

One who crosses a plank walk on a windy day, knowing that the walk had been previously turned over by the wind, is not guilty of such negligence as will defeat a recovery for injuries caused by the walk being blown over on him. (Kan.) 1106.

Where a contractor, building a walk, leaves a pile of stones in the street from 3 to 12 days after completing his job, a presumption arises that the city had notice of the fact. (Utah) 509.

Public improvements.

In an action for injuries by negligent grading of a street, evidence as to price offered plaintiff for his land before the grading is inadmissible. (Wash.) 594.

City council committee cannot change terms of accepted bid for sewer construction, and collect extra expense caused thereby from property owners. (Or.) 665.

Assessments.

One claiming land in Portland under sale for special assessments must show compliance with all charter requirements. (Or.) 26.

A lot owner, who fails to object to an assessment and to proceed as provided by statute, cannot maintain an action to declare the assessment void. (Cal.) 321.

A collection of an assessment for improvements will be enjoined where there was no necessity for the improvement, and it will probably never be used. (Or.) 452.

An assessment for widening street cannot include the cost of grading and graveling. (Cal.) 988.

Taxation.

The legislature may authorize the assessment of city taxes on the basis of the county tax roll for the preceding year. (Wash.) 591.

Under a statutory requirement that a city council shall, 30 days after an assessment is certified to it, fix the rate of taxes, a slight delay will not invalidate the levy. (Wash.) 591.

Construction of Seattle city charter in regard to giving deeds of property sold for delinquent taxes. (Wash.) 595.

Murder.

See "Homicide."

NAME.

A complaint in an action on an appeal brought by "G. M. Allen" is not bad because the allegations are as to "Gains M. Allen," identity not being questioned. (Colo. App.) 1061.

NEGLIGENCE.

Defective streets, see "Municipal Corporation." Liability of street railroad, see "Horse and Street Railroads."

Of master, see "Master and Servant." Of recorder, see "Deed."

One who has been injured by a blast cannot recover, where he has been advised that the blast was going off. (Wash.) 377.

When company permits wire liable to be charged to hang onto sidewalk, it is bound to guard public from injury thereby. (Or.) 549.

Where, in tearing down a building for defendant, it falls before it is expected to, there is evidence of negligence on the part of the owner. (Wash.) 414.

Evidence that person was killed by rock hurled by a blast three times usual distance is prima facie evidence of negligence. (Wash.) 621.

Evidence bearing on question whether person killed by defendants' blast was trespasser, as against them. (Wash.) 621.

The negligence of the owner and driver of a private conveyance is imputable to one riding with him, and bars a recovery for an injury by an obstruction in a city street, when the negligence of the driver contributed thereto. (Mont.) 904.

A complaint alleging that defendant left a well uncovered on his lot, and the defendant, without fault, fell in, constitutes a cause of action. (Idaho.) 39.

In action for damages from fires caused by railway company, the defense of contributory negligence must be pleaded. (Colo. Sup.) 53.

In action for injuries alleged to be caused by negligence, a complaint averring negligence generally is sufficient. (Cal.) 308.

In an action for injuries sustained while tearing down defendant's building, statement of defendant's officer, made after injury, is inadmissible. (Wash.) 414.

It is not competent, in action for personal injuries by defective machinery, to show changes made since the accident. (Wash.) 405.

Evidence that defendant filled uncovered well causing the accident, after it occurred, is inadmissible. (Idaho.) 39.

NEGOTIABLE INSTRUMENTS.

See, also, "Nonnegotiable Instruments."

One who gives a new note after discovering that the representations which led him to sign the first note were false cannot plead want of consideration of the first note as a defense to the second. (Idaho) 697.

Where a note for \$1,000 provides for a reasonable attorney's fee, an allowance of \$100 is proper. (Wash.) 67.

Bona fide holders.

An indorsee is charged with notice of matters referred to in memorandum on note. (Kan.) 11.

In action on note by one to whom it was indorsed, it is for defendant to show that it was not perceived before maturity and bona fide. (Kan.) 213.

Question whether a finding that a certain person purchased and received the note in good faith, and without notice of facts stated in answer, were within the issues. (Cal.) 873.

A note executed by reason of threats of prosecution may be avoided by the maker, in the hands of an assignee with notice of these circumstances. (Kan.) 290.

Burden on indorser of showing that he is innocent holder of note obtained by fraud is discharged by showing that he purchased for value in the usual course of business. (Cal.) 373.

Payment.

When payment of collateral note constitutes payment of original note. (Wash.) 69.

Where the maker of a collateral note purchases with full knowledge, there is no question of innocent purchaser. (Wash.) 69.

Where one of two joint makers of a note pays the amount due, the note is satisfied though it is assigned to the payor. (Colo. Sup.) 734.

Actions on.

In action on note against the makers and an indorser, judgment by default against the makers did not cause a discontinuance as to the indorser. (Wash.) 67.

Where the owner of a note assigns it, he cannot maintain an action thereon without a reassignment to him. (Utah) 502.

A payee of a note who is described as a "guardian" may sue in his own name where there is no evidence of a ward. (Cal.) 1033.

In action on a note, an answer which, if true, sets up no defense, will be stricken from files. (Colo. App.) 199.

In action on note, evidence of a prior parol understanding that it did not represent the actual amount due is inadmissible. (Wash.) 385.

Sufficiency of complaint in action on note to show plaintiff's title thereto. (Cal.) 873.

NEW TRIAL.

In criminal cases, see "Criminal Law."

A notice of intention to move for new trial after time allowed, is insufficient. (Cal.) 158.

An appeal will not be dismissed because time for serving statement on motion for new trial was extended beyond statutory period, where respondent made no objection. (Mont.) 228.

Sufficiency of motion. (Cal.) 306.

Where verdict is based on a special finding that is not supported by evidence, new trial will be granted. (Kan.) 292.

A finding on motion for new trial that the verdict was not arrived at by resort to chance will not be disturbed. (Cal.) 1030.

That juror expressed opinion as to merits before trial is no ground for new trial, unless prejudice arose, and moving party did not have full knowledge of such fact when jury was impaneled, and opportunity to challenge juror. (Okla.) 578.

An affidavit for new trial, for newly-discovered evidence, must show that failure to produce it before the trial was not due to want of diligence. (Colo. App.) 284.

Will not be granted where a letter from plaintiff is discovered, showing a defense to the action. (Wash.) 404.

On motion for a new trial as to the whole case, the court may grant in part and deny in part. (Cal.) 437.

NONNEGOTIABLE INSTRUMENTS.

See, also, "Negotiable Instruments."

Question whether demand on maker of non-negotiable note indorsed in blank by payee is necessary to entitle immediate indorsee to recover against payee. (Cal.) 1035.

As against indorser of note it is no excuse for failure to make demand on maker that he could not be found in city in which note was executed. (Cal.) 1035.

Notes.

See "Negotiable Instruments;" "Nonnegotiable Instruments."

Notice.

From record, see "Deed."

Of appeal, see "Appeal."

NOVATION.

That a firm which had contracted with a member to deliver lumber continued to do so after he had assigned his interest in the contract does not show an acceptance of the assignee for the assignor's obligation. (Cal.) 1051.

NUISANCE.

Liability of landlord, see "Landlord and Tenant."

In an action by the people, on relation of an abutting owner, to abate an obstruction in a public street, where the street was never dedicated, plaintiff cannot invoke an estoppel on the ground of an agreement with defendant to open the street. (Cal.) 867.

A right to maintain private nuisance can be acquired by prescription. (Cal.) 563.

Where water from defendant's premises penetrates plaintiff's cellar, so as to render it unfit for occupancy, the nuisance will be enjoined. (Or.) 174.

Equity court may enjoin a nuisance, and, as an incident thereto, award damages. (Or.) 174.

OFFICE AND OFFICER.

See, also, "Clerk of Court;" "Justices of the Peace;" "Receivers;" "Sheriffs and Constables;" "States and State Officers."

City officers, see "Municipal Corporations."

Corporate officers, see "Corporations."

County officers, see "Counties."

Mandamus to try title, see "Mandamus."

Person appointed state examiner by the governor, to fill vacancy, will continue in office till the governor makes appointment with consent of the senate. (Wyo.) 517.

Fees allowed an officer may be changed during his term of office. (Wash.) 361.

De facto officers—Who are. (Wash.) 389.

The health officer of the district of Puget sound is removable at the pleasure of the district board of health. (Wash.) 389.

The governor cannot arbitrarily remove a trustee of the state charitable institutions. (Kan.) 817.

A proceeding to try title to office, under Hill's Code, § 357, is a public prosecution. (Or.) 178.

Ordinance.

See "Municipal Corporations."

Parent and Child.

Child omitted from will, see "Descent and Distribution."

Parol Evidence.

See "Evidence."

PARTIES.

Accounting between partners, see "Partnership."

The surviving partner is not a necessary party to an action on a mortgage given by a deceased partner to secure a firm debt. (Cal.) 1027.

Where railroad commissioners have granted a railroad the right to cross the roads of other companies, and have granted a rehearing on the application of the roads whose lines were to be crossed, these latter companies are necessary parties to an action to enjoin the railroad commissioners from further hearing on the application. (Kan.) 224.

A plaintiff in a pending suit, who assigns his interest before obtaining judgment, cannot maintain an action in his own name on the judgment. (Utah) 488.

A complaint cannot be amended to substitute the proper party where a different issue will be presented by the change of plaintiffs. (Utah) 488.

PARTITION.

Where defendant claims title to the whole, and to other parcels, under an agreement with plaintiff's grantor, the rights of the parties as to all the lands may be adjudicated. (Kan.) 1107.

PARTNERSHIP.

Evidence that four persons associated together to divide the profits of a certain business shows a partnership between them. (Cal.) 1051.

A mortgage to a firm is not void where the names of the partners appear in the firm name. (Cal.) 1016.

In an accounting on a contract between a firm and one of the members, one to whom such member had assigned the contract, without the consent of the firm, is not a necessary party. (Cal.) 1051.

Where a firm creditor does not know that one of the firm, on its dissolution, has assumed its debts, an extension granted the firm does not release the copartner. (Colo. App.) 193.

In an action by a copartner, the failure of plaintiff to publish a certificate stating the names and places of residence of the copartners is a matter of defense. (Cal.) 431.

The individual property of a partner is liable to execution to satisfy a judgment against the firm. (Colo. Sup.) 532.

In action against a firm, where one party consents to judgment, the judgment should direct execution against the several property of the partner and the joint property of the firm. (Wash.) 411.

Passengers.

See "Carriers."

PAYMENT.

Of negotiable instrument, see "Negotiable Instruments."

What constitutes, see "Mortgages."

Where a note is payable on payment of another note, the discharge of the latter note in any manner, with the consent of the parties, constitutes payment. (Or.) 1066.

Where purchaser of a printing establishment contracts to pay in printing, the seller cannot enforce collection of amount in cash. (Wash.) 65.

A debtor cannot discharge a debt of whose assignment by his creditor he has notice, by answering as garnishee, and paying the judgment rendered against him. (Colo. App.) 278.

A complaint to recover money paid on a public assessment must show the nature of the proceedings to collect. (Cal.) 1017.

Where plaintiff paid the assessment 33 days before sale, and he does not allege that any sale had been threatened when he paid, the payment was not involuntary. (Cal.) 1017.

Where one, with knowledge of the facts makes a contract, and for three years makes payments thereunder, he cannot recover the sums paid, on the ground that he was entitled to what he received without payment. (Colo. App.) 919.

A corporation cannot, as against sureties on bond of officer, apply payments by latter after date of bond upon his indebtedness prior thereto. (Cal.) 1048.

A debtor cannot apply to a particular debt a payment made by him unless he does so at the time. (Wash.) 427.

Competency of evidence to show application. (Wash.) 427.

Personal Injuries.

See "Damages;" "Negligence."

PLEADING.

Amending complaint by substituting proper plaintiff, see "Parties."

In assumpsit, see "Assumpsit."

In divorce, see "Divorce."

Statute, see "Frauds, Statute of."

The rule that all pleadings will be construed most strongly against the pleader has been abolished. (Wyo.) 933.

A denial of an indebtedness, without denying the facts, is simply a denial of a conclusion of law. (Cal.) 863.

Complaint construed to be for breach of covenant, and not for deceit, in absence of demurrer for misjoinder of causes, or motion to compel election. (Or.) 658.

In action by a purchaser at sheriff's sale to cancel a former deed, the complaint need not allege the issuance of execution in the original suit, nor that plaintiff is in possession. (Colo. Sup.) 532.

Sufficiency of complaint in action on bond, as against general demurrer. (Cal.) 160.

Where complaint shows plaintiff only entitled to nominal damages, and no costs, a demurrer is properly sustained. (Cal.) 75.

A complaint is not demurrable because a person was not a party who is not a necessary party. (Cal.) 160.

Defendant cannot, on the ground that he has no information or belief, deny a public record to which he has access, and of which he knows. (Cal.) 144.

Complaint against irrigation officer considered and held not to aver sufficiently the incorporation of the irrigation district. (Cal.) 1017.

Action against partnership; consistency with complaint of reply alleging defendant's estoppel to deny his membership of firm. (Wyo.) 774.

In an action to enforce lien, averment that assignee of owner's insolvent estate claims interest in the property does not make such estate party. (Wash.) 116.

supplemental complaint.

Matters changing the relations of the parties to a suit, and which have transpired since the filing of the original complaint, are proper matters for supplemental complaint. (Idaho) 698.

amendment.

Where evidence of defendant's prescriptive right to maintain nuisance has been admitted without objection, an amendment to his answer, alleging such right, should be allowed. (Cal.) 563.

An amendment to an answer may be allowed, though it is to correct a mistake of law made by defendant's attorney. (Cal.) 429.

Discretion of court in allowing an amendment of an answer after remand considered. (Cal.) 429.

Pleading and proof.

Under a complaint alleging a statutory dedication of a street on a certain day, a dedication by subsequent acts cannot be shown. (Wash.) 583.

Variance between the complaint and proof is harmless, where such variance does not mislead the opposite party. (Idaho) 711.

Variance between pleading and proof will be disregarded on appeal if it was not shown by evidence aliunde in trial court that adverse party was misled to his prejudice. (Wyo.) 774.

Objections waived.

An objection for defect of parties defendant is waived if not raised by demurrer or answer. (Utah) 495.

An exception to the overruling of a demurrer to the complaint for failure to state a cause of action is not waived by answering over. (Utah) 495.

PLEDGE.

Payee of nonnegotiable note who transfers it to secure debt is not liable for deficiency on foreclosure of mortgage securing the note. (Cal.) 1035.

POOR AND POOR LAWS.

Commitment of indigent sick by justices, see "Justices of the Peace."

One who contracts to maintain the county poor cannot recover for the support of a person not within his contract, though such person was committed to his care under the certificate of a justice. (Idaho) 691.

Possession.

See "Adverse Possession."

POWERS.

A power of attorney to purchase lands, "with full power of substitution or revocation," does not give attorney power to bind his principal by submission to arbitration as to price of lots to be bought. (Cal.) 1000.

PRACTICE IN CIVIL CASES.

See, also, "Appeal;" "Appearance;" "Certiorari;" "Costs;" "Courts;" "Deposition;" "Equity;" "Evidence;" "Judgment;" "Jury;" "New Trial;" "Pleading;" "Review, Writ of;" "Trial;" "Venue in Civil Cases;" "Witness;" "Writs."

Plaintiff has an absolute right to dismiss the action. (Wash.) 130.

It is within the sound discretion of the lower court to dismiss an action for inexcusable delay in failing to serve process for two years. (Cal.) 1035.

It is error to dismiss an action because summons was not served within one year after suit brought. (Cal.) 88.

It is within the court's discretion to dismiss for failure to file a complaint in time. (Colo. Sup.) 730.

The fact that notice of motion and statement on motion for new trial were not served on all the attorneys of certain respondents is no ground for dismissal, where some of the attorneys representing all the respondents were served. (Mont.) 226.

A stipulation by a guardian to dismiss an appeal must be respected, though against the interests of the minors. (Wash.) 64.

An answer filed after default must show an excuse consistent with due diligence. (Ariz.) 983.

Preliminary Hearing.

See "Criminal Law."

Prescription.

See "Adverse Possession;" "Highways;" "Limitation of Actions;" "Nuisance."

PRINCIPAL AND AGENT.

See, also, "Attorney and Client;" "Factors and Brokers;" "Master and Servant."

Insurance agents, see "Insurance."

On issue as to whether certain person was agent of defendant corporation, contract signed by all defendant stockholders is admissible to show that he was merely lessee. (Wash.) 126.

Sufficiency of evidence to show defendant, in action for goods sold, an undisclosed principal. (Wash.) 61.

Possession by M. of assignment of contract by plaintiff to defendant competent to show that M. was defendant's agent. (Cal.) 559.

An agent of a nonresident corporation, having charge of its local business, has no implied authority to collect debts due his principal by a contract for his own board. (Kan.) 785.

Evidence to show ratification of contract of agent. (Kan.) 785.

Principal may recover money obtained from him by agent through false representation. (Cal.) 151.

PRINCIPAL AND SURETY.

See, also, "Bonds."

When relation exists, see "Mortgages."

Sureties on an official bond are not liable for defaults committed by the principal before execution of bond, unless this is expressly retrospective. (Cal.) 1048.

Sureties on bond of officer of corporation are not released by failure of latter to inform them of his failure to pay over funds, there being no actual intent to conceal the culpable negligence. (Cal.) 1048.

Surety on official bond is not discharged by the obligee by failure to present his claim to the officer's executor in due time. (Cal.) 153.

A surety may be released without the knowledge of the principal. (Wash.) 133.

To enforce surety's liability on bond not signed by principal, express understanding by surety that bond should have effect, without principal's signature, need not be shown. (Mont.) 958.

On the death of a partner who had mortgaged his land for a firm debt, the mortgagee may enforce the mortgage without exhausting his remedies against the surviving partner. (Cal.) 1027.

In an action against a surety, an answer alleging that defendant's co-surety was the real principal, and that plaintiff had compromised with such co-surety, and had released him, is no defense. (Mont.) 458.

The sureties on a bond to pay damages recovered are not released by an agreement between the parties to action, after judgment, that further proceedings shall be stayed pending appeal to be taken in a suit between other parties, involving the same principles. (Wash.) 424.

Process.

See "Writs."

PROHIBITION, WRIT OF.

Does not lie to arrest the action of a district court from proceeding with the consideration of a pleading. (Idaho) 692.

Will not issue where there is an adequate remedy by appeal. (Ariz.) 982.

A court will not be prohibited from proceeding in a case, where petition fails to show the action the lower court contemplated, or that petitioner would be injured thereby, or any objection to the jurisdiction. (Wash.) 599.

Promissory Notes.

See "Negotiable Instruments."

Public Improvements.

See "Municipal Corporations."

PUBLIC LANDS.

Settlement on land covered by existing entry which is relinquished as the result of contest begun before such settlement confers no settlement right. (Okl.) 682, 886.

Lessee of school lands need not surrender possession before suing purchaser thereon for value of his improvements. (Wash.) 611.

Receiver's certificate of the entry and purchase of the land described therein is entitled to record. (Colo. App.) 679.

Commissioner of land office, and secretary of interior may decide questions as to right of pre-emption, raised on evidence, which were not decided by the district register and receiver. (Cal.) 141.

Purchase of settler's improvements confers no settlement right on purchaser, such right not being transferable. (Okl.) 682, 886.

Quantum Meruit.

See "Assumpsit."

QUO WARRANTO.

In quo warranto by a claimant of an office, complaint need not show title in relator. (Cal.) 163.

RAILROAD COMPANIES.

See, also, "Carriers;" "Master and Servant;" "Negligence."

Effect of deed of right of way, see "Deed."

A railroad company is liable to an abutting owner for the construction for permanent location of its road along a certain street, where access to such abutting lot is completely obstructed. (Kan.) 787.

A railroad company that grades the street of a city as directed by the city engineer is liable to abutting owner for injuries caused thereby. (Kan.) 780.

Right of way.

A city cannot enjoin the use of a right of way granted under the permit from the surveyor general because of a trespass to public lands, or under claim of forfeiture of the corporate privilege by delay. (Cal.) 993.

A delay in the construction of a railroad over a right of way on public lands, under a permit from the surveyor general, will not forfeit the permit. (Cal.) 993.

A permit to a railroad company to use public lands for its right of way, given under C. Code, § 478, continues until such use is prohibited. (Cal.) 993.

Liability for negligence.

One who attempts to crawl under a car to which an engine is attached, obstructing a street, cannot recover for resulting injuries caused by the car starting up, though the whistle of the engine was not sounded. (Idaho) 700.

Stock killing.

In action for stock killing, the question whether defendant's negligence was the proximate cause is for the jury. (Utah) 505.

RAPE.

On trial for assault with intent to rape, it is not error to charge that if the evidence establishes the facts which usually accompany the crime, and the assault is made out, it is fair to presume that the assault was accompanied with the intent. (Or.) 450.

Real-Estate Brokers.

See "Factors and Brokers."

RECEIVERS.

A receiver may be appointed at the instance of a stockholder, where the business and affairs of the corporation have been so mismanaged that it has become insolvent. (Kan.) 287.

A receiver of a corporation appointed in a suit by a stockholder has no right to property attached prior thereto by creditor. (Wash.) 1087.

An order of court is not necessary to authorize receivers of a railroad to contract with reference to freight. (Colo. Sup.) 744.

The receiver of a railroad company can contract for freight from points beyond the terminus of its road to a point on such road. (Colo. Sup.) 744.

A receiver of a railroad company is not bound by a contract made by his predecessors for rebate of freight charges unless he ratifies it. (Colo. Sup.) 744.

The general freight agent of a railroad company has power to bind receivers afterwards appointed, by a contract for freight. (Colo. Sup.) 744.

RECEIVING STOLEN GOODS.

inefficiency of evidence. (Kan.) 780.

Recognizance.

"Bail."

Records.

deeds, see "Deed."
appeal, see "Appeal."

Redemption.

from foreclosure sale, see "Mortgages."
- tax sale, see "Taxation."

REFERENCE.

Where judgment on referee's report has been reversed for failure to state the items allowed, cause should be re-referred for such purpose the same referee. (Wash.) 63.

Reformation.

see "Equity."

Regulation of Commerce.

see "Constitutional Law."

Release and Discharge.

see "Payment."

Remand.

by appellate court, see "Appeal."

REPLEVIN.

After recovery of land by plaintiff, replevin will not lie as to crops grown and harvested by defendant while in possession under claim of interest. (Cal.) 1021.

Where goods replevied are delivered to plaintiff, and defendant defaults, a judgment against intervenor, who never had possession, or possession or the value, is erroneous. (Colo. App.) 879.

A sheriff who has seized goods under execution away, under plea of general denial in replevin against him, show that the mortgage under which plaintiff's claim was fraudulent as to the execution creditors. (Kan.) 796.

Where the affidavit, bond, and sheriff's return, describing the property as in the complaint, are filed, and the return recites taking and delivery to plaintiff, the court will take judicial notice of them as showing plaintiff's possession. (Cal.) 872.

Where plaintiff claims property levied on as that of a third person, a judgment should show whether plaintiff was the owner, and whether the bill of sale under which she claimed was void for want of change of possession. (Cal.) 772.

A judgment for return of the property to defendant cannot stand where the answer fails to demand it. (Cal.) 772.

A complaint in an action on a replevin bond is insufficient which alleges that plaintiff owns the cause of action, but does not allege the assignment of the bond. (Colo. App.) 985.

Rescission.

Of contract, see "Contracts;" "Equity."

Res Judicata.

See "Judgment."

Revenue.

See "Taxation."

REVIEW, WRIT OF.

Does not bring up questions as to the admissibility of evidence. (Or.) 665.

RIPARIAN RIGHTS.

See, also, "Irrigation;" "Waters and Water Courses."

Where the waters of a stream percolate through the sand, and find their way to a lake, a riparian owner at the outlet has no right to have such underground flow protected. (Wash.) 601.

Rivers.

See "Waters and Water Courses."

SALE.

See, also, "Vendor and Purchaser."

By executor, see "Executors and Administrators."

Oral contract, see "Frauds, Statute of."

What constitutes. (Cal.) 442.

On sale of buildings on land of the buyer, entry of the seller as buyer's tenant constitutes a sufficient delivery. (Wash.) 1075.

Though sale is on condition that title remain in vendor till price is paid, by subsequently taking mortgage for price vendor vests title in vendee. (Kan.) 12.

An action on a purchase-money note against the purchaser under a conditional contract of sale is a confirmation of the sale. (Cal.) 442.

A sale of a fully-matured crop by the mortgagor of the land on which it was grown passes a good title to the purchaser, though the crop was not severed at sale. (Kan.) 814.

Where a father conveyed land to his son, and put him in possession of his personalty,—the latter to belong to the son at the father's death, in consideration of support for life,—the father has no title in the chattels which he can convey by bill of sale. (Wash.) 395.

Action for price.

Nonpresentation of an account for goods sold is no defense to an action for price. (Ariz.) 983.

In action for price evidence of custom to sell for cash, where defendants claim sale was on time, is harmless. (Colo. App.) 987.

Amount of judgment proper in action for price, where goods were not as represented, and had to be repaired before use, but they were shown to be of some value. (Colo. App.) 670.

SCHOOLS AND SCHOOL DISTRICTS.

A school district cannot enjoin the collection of taxes on lands detached from its territory, and included in a newly-formed district. (Kan.) 222.

Sufficiency of contractor's bond for erection of schoolhouse. (Wash.) 371.

The fact that a bond given by a schoolhouse contractor was made payable to the school district, instead of to the state, does not render it void. (Wash.) 371.

Under a contract to act as "supply teacher" at \$70 per month, the price paid regular teachers, a supply teacher was entitled to pay only for the days she taught. (Mont.) 906.

SEDUCTION.

A man who has intercourse with a woman on a promise of marriage if she becomes pregnant does not "seduce her under promise of marriage." (Or.) 36.

SET-OFF AND COUNTER-CLAIM.

"Set-off," as used in Code Civ. Proc. § 368, applies to demands not arising out of the contract sued on. (Cal.) 876.

Damages sustained by the owner from defects in the architect's plans may be set up as counterclaim in action by architect for services as superintendent. (Wash.) 380.

Defendant may counterclaim for goods sold and delivered to partnership on credit of plaintiff, a partner. (Cal.) 639.

In action by assignee of nonnegotiable written contract, defendant may avail himself of set-off acquired before notice of assignment. (Cal.) 876.

To constitute a set-off against an assigned claim, the set-off need not be actually due at the time of notice of assignment. (Cal.) 876.

Settlement.

See "Payment."

SHERIFFS AND CONSTABLES.

See, also, "Indemnity."

Officer is not liable for killing one resisting him in attempt to obtain possession of building because writ wrongfully described land. (Cal.) 627.

The sheriff is not entitled to compensation for services as jailer. (Colo. App.) 750.

A sheriff, who has attached a stock in trade, and taken possession of the books, is liable for failure to garnish those who appear therein as debtors, without written notice from plaintiff or his attorney. (Mont.) 908.

A sheriff is not liable to a mortgagor of chattels for the seizure of the property which the mortgagor claimed as exempt, if it was at the time in possession of the mortgagee, because of default of the mortgagor. (Colo. App.) 186.

An action to recover treble damages for illegal seizure need not allege that it is brought to recover the statutory penalty. (Colo. App.) 52.

Right of action for treble damages for illegal seizure does not accrue until refusal of officer to return property. (Colo. App.) 52.

Officer executing writ is not trespasser because the judgment is fraudulently obtained. (Cal.) 627.

Special Legislation.

See "Constitutional Law."

SPECIFIC PERFORMANCE.

A delay of two years after the last installment of the price of land is due, where time is the essence, will preclude the specific performance of the contract. (Wash.) 399.

A vendor, who, on default, does not tender deed or proceed to enforce the contract, cannot two years later, sue for specific performance. (Wash.) 399.

Where complainant is unable to comply with the conditions of the contract, its performance by defendant will not be enforced. (Wash.) 197.

Where one obtains decree for specific performance of contract to make lease, he cannot eject property under lease made accordingly, and demand accounting for the term lease was withheld. (Colo. App.) 752.

STATE LEGISLATURE.

The legislature in special session cannot go beyond the limits of the business specially named in the executive proclamation. (Colo. Sup.) 530.

STATES AND STATE OFFICERS.

Mandamus to state auditor, see "Mandamus." Power of governor to remove officer, see "Officer and Officer."

The wagon-road commission cannot contract for the construction of a section of the road until a survey of the same has been completed. (Idaho) 842.

Statute of Frauds.

See "Frauds, Statute of."

Statute of Limitations.

See "Limitation of Actions."

STATUTES.

See, also, "Constitutional Law."

The reading of a bill may be dispensed with by resolution expressly naming the bill. (Cal.) 302.

Where a legislature is called to reduce the penalties on delinquent taxes, and the house for that purpose passes a bill to amend a certain section, the title can be amended in the senate so as to attain the same object by amending that and other sections. (Colo. Sup.) 917.

The act regulating warehousemen, and making it a crime to issue receipts for goods not in store does not embrace subjects not named in title. (Or.) 32.

A recital in the preamble of an act that an appropriation for the salary of an officer was made in another certain act is not conclusive that such latter act constituted an appropriation, within the constitution. (Colo. Sup.) 911.

Laws 1893, c. 109, § 27, relating to the commission of sheriffs upon the sale of real estate, is void as containing matter not germane to the title of the act. (Kan.) 792.

Where the statute of another state is adopted, its judicial construction is also adopted. (Or.) 178.

A legislator's motive in voting for a resolution declaring a bill a case of urgency cannot be inquired into. (Cal.) 302.

The repeal of penal statute, pending appeal, deprives appellate court of power to render judgment enforcing such statute. (Cal.) 899.

An act requiring the partnership assets to be applied to payment of firm debts alike except as to lienholders, does not affect attachments levied before its passage. (Mont.) 515.

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See "Practice in Civil Cases."

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SUBROGATION.

Where no steps are taken, for over a year, to have a deed signed through duress, set aside, the grantor who has paid a mortgage is entitled, upon the cancellation of the deed, to be subrogated to the rights of the mortgagee. (Kan.) 808.

Summons.

See "Writs."

SUNDAY.

A note executed on Sunday is valid. (Wis.) 67.

Supreme Court.

See "Courts."

Surety.

See "Principal and Surety."

SURFACE WATER.

Land is not subject to flow of water from high land, which is turned on by channels from upper owners. (Cal.) 563.

TAXATION.

In cities, see "Municipal Corporations."

Payment of taxes as bearing on adverse possession, see "Adverse Possession."

Only so much of the property of a public charity institution is exempt as is exclusively used for charity. (Mont.) 2.

All improvements upon public lands upon which final proof has not been made excepting "breaking, wells and fertilizing" are subject to taxation under St. 1893, c. 70. (Okl.) 882.

The annual settlements of county treasurers with state officers are not so conclusive as to prevent a subsequent certification of "double or erroneous assessments." (Wyo.) 929.

The law at the time land is sold for taxes, and not that in force at the time the deed is made, governs the execution of the latter. (Wash.) 1082.

To redeem from land sold in 1892 for the taxes of 1891, the amount for which the land was sold, and of subsequent taxes paid by the purchaser, with interest at 24 per cent. on taxes and charges from date of the sale, and the same interest on subsequent taxes, must be paid. (Kan.) 223.

A tax deed is void on its face where it fails to describe the property. (Kan.) 1117.

TELEGRAPH COMPANIES.

Damages for failure to deliver a message, by reason of which plaintiff failed to receive an appointment as deputy assessor, are too speculative. (Cal.) 75.

TIME.

For appeal, see "Appeal."

Where order extends time for doing any act in court practice "to" a specified day, that day is part of time within which act may be done. (Mont.) 878.

TORTS.

See, also, "Assault and Battery;" "Death by Wrongful Act;" "Deceit;" "Libel and Slander;" "Negligence;" "Nuisance;" "Replevin;" "Trespass;" "Trover and Conversion."

Defendant is not liable for tort by his lessee because latter ran business so as to lead people to suppose that he was defendant's agent. (Wash.) 126.

TOWNS.

See "Municipal Corporations;" "Schools and School Districts."

TRADE-MARKS AND TRADE-NAMES.

A person is not entitled to exclusive use of generic terms because they do not indicate the quality or character of the article on which they are used as a trade-mark. (Cal.) 623.

The words "Sarsaparilla and Iron" cannot be appropriated as a trade-mark. (Cal.) 623.

A person who intentionally imitates another's label in order to divert business is liable in damages, and may be enjoined. (Cal.) 623.

A case in which two years was not considered unreasonable delay in bringing action for damages for infringement. (Cal.) 623.

Plaintiffs are not entitled to damages or injunction, when labels used by defendant resemble plaintiffs' only in containing the words "Sarsaparilla and Iron." (Cal.) 626.

TRESPASS.

An allegation of acts done before suit brought will not admit evidence of trespasses since that time. (Wash.) 1074.

Sufficiency of evidence to show plaintiff's title. (Colo. App.) 283.

Treble damages will not be allowed for the cutting and conversion of timber, unless it was willful and malicious. (Mont.) 668.

Action for damage to irrigation ditch through defendant's construction of railroad and bridge over and along it; recovery of temporary or special damages. (Colo. Sup.) 910.

In trespass against one who broke down a fence, and allowed his cattle to enter plaintiff's land, error in charging that a lawful fence was of the kind that the statute prescribed is not prejudicial. (Colo. App.) 283.

TRIAL.

See, also, "Appeal;" "Evidence;" "Judgment;" "Jury;" "New Trial;" "Pleading;" "Practice in Civil Cases;" "Witness."

Trial in the absence of plaintiff's attorney, plaintiff being present and given the opportunity to introduce his evidence, *held* proper. (Cal.) 1014.

Discretion of court in refusing to open case to allow further testimony considered. (Cal.) 306.

It is not ground for reversal that plaintiff was allowed to show on rebuttal what he might have shown on examination in chief, unless there was abuse of discretion, and prejudice caused thereby. (Colo. App.) 672.

Objections to evidence.

The admission of incompetent evidence is harmless where there is other evidence to sustain verdict. (Colo. App.) 53.

Evidence admissible only for impeachment should be restricted in the charge to that purpose. (Colo. Sup.) 47.

Where no objection was made to the admission of a note on the ground of alteration, it was properly considered as evidence. (Cal.) 306.

It is proper to deny motion to strike out plaintiff's evidence as to conversations with another until plaintiff's evidence is in, as such other may be shown to have represented defendant. (Cal.) 559.

Where there is any evidence fairly sustaining the facts necessary to recovery, the demurrer to the evidence should not be sustained. (Kan.) 200.

A party offering a witness cannot, after discovering that his testimony militates against him, have it stricken out. (Cal.) 317.

Instructions.

It is not error to refuse an instruction which has been already substantially given. (Cal.) 309.

A judgment will be reversed for inconsistent instructions. (Idaho.) 39.

Where the instructions on the law are correct, but the court gives a slightly contradictory instruction, which, from the findings, cannot have misled the jury, the judgment will not be reversed. (Kan.) 200.

A statute providing that the court shall give necessary instructions does not require a giving of them in an action tried in the absence of defendant to recover balance due on account. (Colo. App.) 927.

Where an attempt was made to show a partnership, and there was no evidence to establish

the same, the court properly ruled that there was no partnership. (Idaho) 715.

A modification of a requested charge, which does not alter the meaning thereof, is not ground for reversal. (Wash.) 133.

An exception which reads, "To the refusal of the court to give instruction requested by defendant, numbers 1-10, defendant duly excepted," is sufficient. (Wash.) 405.

An instruction assuming that to be a fact as to which there is conflicting evidence is properly refused. (Wash.) 405.

Instruction that fact that defendant paid expenses of witnesses did not affect their credibility was properly refused, when their credibility was not attacked. (Wash.) 621.

Where instruction is not excepted to, it is proper to overrule a motion for new trial based on error therein. (Okla.) 576.

A general exception is sufficient if an instruction is challenged as not the law as applied to the facts of the case. (Or.) 31.

Where series of instructions contain but one legal proposition, an exception need not name particular portion. (Or.) 31.

Verdict and findings.

A finding that plaintiff did not rescind certain sales is one of fact, and not a conclusion of law. (Cal.) 872.

Pertinent questions of fact, stated in writing, and handed to the court at the conclusion of the testimony, must be submitted to the jury. (Kan.) 818.

In action to recover deposit alleged to have been assigned through undue influence, a finding that there was no undue influence is sufficient. (Cal.) 320.

A finding that all averments of a complaint, down to a certain averment, are true, is sufficiently explicit. (Cal.) 320.

Additional findings of fact cannot be made after entry of final judgment. (Cal.) 153.

The court may direct the attorney of the successful party to write out the findings of fact in accordance with the decision as announced orally. (Kan.) 1107.

Findings by the court will be reconciled if possible. (Cal.) 1005.

TROVER AND CONVERSION.

Action by mortgagee, see "Chattel Mortgages."

Tenant in common may bring trover against cotenant when latter claims exclusive ownership of property, and applies it to his exclusive use. (Or.) 844.

If landlord converts movable fixtures of tenant during term, latter may bring trover unless he has abandoned the term. (Or.) 844.

One who instigates a conversion is as much a principal as the one performing the act of conversion. (Wyo.) 933.

A bank that assists its mortgagor in selling the mortgaged property, and receives the proceeds thereof, is liable as for a conversion to a first mortgagee of this property. (Kan.) 805.

Mortgagees under mortgages delivered and filed at the same time may join in an action for the conversion of the mortgaged property. (Kan.) 794.

Demand before suit need not be shown when defendant denies plaintiff's title, and alleges ownership and right of possession in himself or another. (Or.) 844.

Right to amend answer in conversion considered. (Colo. App.) 284.

Sufficiency of complaint by chattel mortgage to show tortious conversion by defendant, which induced the mortgagor to dispose of the mortgaged property. (Wyo.) 933.

Where evidence is introduced by both parties as to the defense of limitations it will be considered, though not set out in the pleading. (Kan.) 804.

In action against a sheriff for conversion, a writ in an attachment suit showing a levy on realty only is not competent. (Colo. App.) 284.

Evidence admissible to prove amount of goods converted. (Colo. App.) 58.

Measure of damages in action by chattel mortgagee for conversion of mortgaged property. (Wyo.) 933.

On conversion by broker, plaintiff can recover value of goods consigned to defendant, in absence of proof of accounting by defendant for any part thereof. (Colo. App.) 58.

Trustee Process.

See "Garnishment."

TRUSTS.

Where, in an action by a mother to establish a trust in land, the evidence is conflicting as to whether the land was bought with the mother's money or the son's, and at her request, though the bond for a deed was taken in her name, it was never recorded, but the deed was made to her son, and she delayed 20 years before she demanded a deed, the trust is not established. (Or.) 846.

Sufficiency of evidence to establish. (Or.) 45.

Sufficiency of evidence to establish trust. (Wash.) 364.

Where land is conveyed on parol trust to reconvey to grantor's wife, it will be treated as his property, as regards his creditors. (Kan.) 8.

Where a trustee retains trust funds after directions by the court to loan same, the beneficiaries cannot complain where he pays a larger amount of interest than would have been received from the loan. (Mont.) 960.

Where a trustee uses trust funds to buy land and afterwards accounts for the fund, with compound interest, the land is not impressed with a resulting trust. (Mont.) 960.

A bill filed after the probate jurisdiction is exhausted, in the matter of the accounting of an estate, will be treated as a bill in equity. (Cal.) 991.

A decree on accounting should not provide for the charge of 10 per cent. compound interest on the trust funds in the future. (Cal.) 991.

Compensation to a trustee, though allowed by will, is properly refused, where he has been negligent. (Cal.) 991.

Where a trustee uses the trust funds in a business which pays him 11 per cent. per annum, there is no error in charging him 10 per cent. compound interest. (Cal.) 991.

Beneficiaries under a will cannot maintain a suit against the executor and trustees to enforce performance of the trust before the final settlement of the accounts of the trustees. (Cal.) 431.

Variance.

See "Pleading."

VENDOR AND PURCHASER.

See, also, "Deed;" "Frauds, Statute of;" "Fraudulent Conveyances;" "Sale;" "Specific Performance."

Where notes were taken in payment of land secured by mortgage, and, in consideration a reconveyance and an order for a certain amount, the notes are discharged, it constitutes a rescission of the sale. (Or.) 6.

Vendor who knows that holder of legal title out of state cannot, when last payment is made, at once tender it and demand deed, without giving vendor time to get title. (Wash.) 138.

Vendor who waits until the last installment the price is due cannot sue for the balance without proof of performance or readiness to perform. (Wash.) 399.

A grantor may enforce a condition in the deed that the grantee should pay a mortgage thereon. (Colo. App.) 275.

Action on bond given for the purchase price of land—Sufficiency of complaint. (Wash.) 127.

Action to recover part of purchase price paid on account of deficiency in quantity of land conveyed—Evidence as to what land was intended to be conveyed considered. (Wash.) 123.

In an action by a vendor for breach of contract, the measure of damages is the difference between the contract price and the price for which the land could have been sold at the time of the breach. (Wash.) 399.

Action by purchaser to rescind contract of sale, and recover price paid—Sufficiency and relevancy of allegations of answer as to fraud and bad faith. (Wash.) 138, 1119.

Action by purchaser to rescind contract of sale, and recover price paid, is a suit in equity, and not in assumpsit. (Wash.) 138.

Purchaser in possession under general warranty deed cannot defend action for price on ground that plaintiffs falsely represented their title. (Wash.) 127.

Evidence to establish assumption by purchaser of mortgage. (Kan.) 816.

Where the vendee defaults in payment, and the deed is forfeited under the contract, the vendee is not entitled to a lien on the land for the amount of money paid on the contract. (Cal.) 68.

A deed signed by G., individually, and as attorney in fact of plaintiff, carries notice of the latter's interest. (Cal.) 1004.

Notice of an option for the purchase of a homestead claim before final entry does not bind a subsequent purchaser after entry with knowledge of the option. (Colo. Sup.) 544.

A judgment creditor before sale under execution on his judgment is not a subsequent purchaser, within the statute protecting such a purchaser from a prior unrecorded conveyance. (Wyo.) 475.

VENUE IN CIVIL CASES.

In transitory actions, any county where service of summons can be had is a proper county. (Or.) 177.

An action against a railroad for injury to property on its line may be brought in any county through which the road passes. (Kan.) 210.

Cause of action for breach of executory contract of employment during the life and after the death of the promisor is transitory. (Cal.) 158.

Entry that court on its own motion ordered case transferred to another court, not the nearest, raises presumption that parties did not agree as to removal, and that judge had good cause for so moving it. (Utah) 524.

Party in suit not triable by jury is not entitled to change on account of local prejudice. (Okla.) 578.

Verdict:

See "Criminal Law;" "Trial."

Voters.

See "Elections and Voters."

WAREHOUSEMEN.

Are criminally liable for issuing receipts, not negotiable in form, for goods not in store. (Or.) 32.

WATERS AND WATER COURSES.

See, also, "Irrigation;" "Surface Water."

The right to the use of water for the irrigation of land passes by a conveyance of the land. (Wyo.) 475.

The right to the use of water flowing in a stream may be acquired by actual appropriation. (Cal.) 432.

An appropriator of water, who constructs a dam across a stream in public lands, does not acquire exclusive rights in the banks of the stream. (Cal.) 334.

Liability of a riparian owner for diversion by his tenants considered. (Cal.) 429.

Where defendant diverted a water course above plaintiff's land for more than five years adversely and openly it acquired a prescriptive right to such water. (Cal.) 770.

WILLS.

See, also, "Descent and Distribution;" "Executors and Administrators."

A provision whereby decedent selects one as the attorney of his estate, and directs that his executrix consult him, is merely advisory on the executrix. (Cal.) 900.

Such provision gives no power to the attorney to act as executor. (Cal.) 900.

WITNESS.

See, also, "Deposition;" "Evidence."

Plaintiff cannot testify that the paper showing the debt of decedent to him was unpaid at the latter's death. (Cal.) 902.

Where a witness has testified as to certain facts, it is prejudicial error to refuse a cross-examination as to circumstances surrounding those facts. (Or.) 254.

What constitutes proper cross-examination of accused. (Cal.) 80.

Defendant in criminal action may be cross-examined as to his having fled after commission of crime. (Wash.) 117.

A witness who has testified that electricity could not be transmitted to a trail car so as to cause injury may be asked whether the metal railings around all cars were not blistered by leakage of electricity. (Colo. App.) 269.

What constitutes a leading question. (Cal.) 317.

On trial before the court, where witness testifies from a memorandum, and his evidence is immaterial, the error is harmless. (Wash.) 67.

Evidence of plaintiff's reputation is not admissible, where it has not been attacked. (Or.) 250.

A party that calls a witness as an expert cannot object, when such witness is called by the

opposite party, that he is not an expert. (Cal.) 317.

In a criminal cause, the defense cannot impeach the credibility of one not a witness for the people. (Colo. Sup.) 44.

Laying foundation for impeachment. (Cal.) 83.

An accused on cross-examination may be asked if he has been convicted of a felony. (Cal.) 84.

Defendant may be cross-examined as to flight after commission of crime. (Wash.) 117.

The jury are judges of the credibility of a witness. (Kan.) 1108.

A stenographer may testify as to statements made by a party in taking his deposition. (Cal.) 444.

A complaint not verified or signed by plaintiff is not admissible against him in another action to contradict his testimony. (Cal.) 1004.

Witnesses, when discharging duties under territorial laws, should be compensated according to the territorial fee bill. (Utah) 501.

Stenographer may read notes taken by him on former trial to impeach witness, though, apart from notes, he does not recollect what witness said. (Wash.) 621.

WRITS.

See, also, "Attachment;" "Certiorari;" "Execution;" "Garnishment;" "Habeas Corpus;" "Injunction;" "Mandamus;" "Prohibition, Writ of;" "Replevin;" "Review, Writ of."

A summons is not void because of a defective statement of the relief sought, if the statement is not manifestly misleading. (Colo. Sup.) 130.

A statement that the action is for money due on a certain note, to foreclose a mortgage securing the same, is sufficient statement of nature of action. (Wash.) 72.

Compliance of summons with requirement that it contained notice that plaintiff will take judgment for specified sum if defendant fails to answer. (Nev.) 514.

A summons in an action against a railroad company may be issued to any county of the state, and served on the president of the company. (Kan.) 210.

Service of a writ in the form prescribed for use, where a copy of the complaint is served, together with a copy of the complaint, is good. (Colo. Sup.) 734.

A personal service out of the state on a non-resident in action to foreclose a mortgage is sufficient. (Cal.) 765.

In transitory actions, service on a defendant within the county where action is brought is necessary to jurisdiction. (Or.) 177.

An affidavit that defendant is a nonresident is sufficient, without alleging that he cannot be found in the state. (Wash.) 72, 1072.

To authorize publication, it is not necessary that all of the grounds should exist in one case. (Wash.) 72.

An insurance company may be summoned in any county in which it has an agency by serving upon the chief officer of such agency. (Kan.) 807.

